NORTH CAROLINA COURT OF APPEALS REPORTS

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[1]Died 2 February 1970. Succeeded by Joshua S. James 28 February 1970.
[2]Appointed effective 1 January 1970.
[3]Died 5 April 1970.
[4]Died 16 December 1969. Succeeded by Charles M. Neaves who resigned 13 February 1970 and was succeeded by James M. Long 16 February 1970.

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[1]Appointed 9 March 1970 to succeed William S. Privott who died 18 February 1970.
[2]Appointed Chief Judge of the Fifth Judicial District 25 February 1970.
[3]Appointed 1 January 1970 to succeed Bradford Tillery.
[4]Appointed 25 February 1970 to succeed H. Winfield Smith who died 14 February 1970.

ATTORNEY GENERAL OF NORTH CAROLINA

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21	ALLEN DENNY IVEY, JR.[2]	Eden

[1]Resigned 1 April 1970. Succeeded by Jerry W. Whitley.
[2]Appointed 19 January 1970 to succeed Charles M. Neaves.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1969

STATE OF NORTH CAROLINA v. WILLIAM BRUCE LAWSON
No. 6917SC438

(Filed 27 August 1969)

1. Homicide § 21— sufficiency of circumstantial evidence

In this prosecution for second degree murder or manslaughter, the trial court properly submitted the case to the jury where the State's evidence tended to show that sounds of cursing and shots came from the direction of an automobile which had stopped in front of a residence, that the automobile drove down a private road near the residence and more shots were heard, that shortly thereafter deceased was found lying on the ground behind the automobile and defendant was found standing near the automobile with a rifle under his arm, that cartridges fired from the rifle were found at the crime scene, that deceased had been shot in the back of the head at close range and had fallen over the trunk of the car to the ground, that the direction of the bullet was from the back of the neck toward the rear of the mouth, with a furrow cut along the top of the tongue, and that defendant stated that if deceased was dead defendant's life was over.

2. Homicide § 21— circumstantial evidence

Circumstantial evidence may be used in homicide cases to establish the cause of death and the criminal agency.

3. Homicide § 21— general motion for nonsuit — evidence sufficient for conviction of any one degree of homicide

Where the evidence is sufficient to support conviction of any one of the degrees of homicide, a general motion to nonsuit is properly overruled.

4. Homicide § 21— sufficiency of circumstantial evidence as to cause of death

In this homicide prosecution, there was ample circumstantial evidence

for the jury to find that deceased died as the result of a bullet wound in the back of his neck.

5. Criminal Law § 118; Homicide § 23— instructions — contention that State's witnesses ought not to be believed

In this homicide prosecution, statement in the charge that defendant contended "that you ought not to believe what the State's witnesses say about him" *is held* not erroneous when read in context.

6. Homicide § 30— failure to submit issue of involuntary manslaughter

In this prosecution for second degree murder or manslaughter, the trial court did not err in failing to instruct the jury that they could return a verdict of guilty of involuntary manslaughter, where all of the evidence tended to show an intentional shooting of deceased by defendant, and there was no evidence tending to show that the death of deceased was caused by culpable negligence or was the result of misadventure.

APPEAL by defendant from *Collier, J.*, 5 May 1969 Criminal Session of Superior Court held in SURRY County.

Defendant was tried upon a bill of indictment charging him with the murder of Wesley Slaughter Cook (Cook). The solicitor announced upon calling the case for trial that he would try the defendant for murder in the second degree or manslaughter.

Upon defendant's plea of not guilty, trial was by jury. The verdict was "guilty of manslaughter." Judgment of the court was that the defendant be imprisoned in the State Prison for not less than sixteen (16) nor more than twenty (20) years.

From the judgment imposed, the defendant appealed assigning error.

Attorney General Robert Morgan and Assistant Attorney General Bernard A. Harrell for the State.

Badgett & Calaway by Richard G. Badgett for the defendant appellant.

MALLARD, C.J.

The defendant offered no evidence. The State's evidence is summarized as follows, except where quoted. On 16 November 1968 Mr. and Mrs. Willie Baker lived on their farm situated at the end of an unpaved road in Surry County. Mr. Baker was sick. After dark that night a car drove up in their yard. Mrs. Baker went to the front door, turned on lights, saw a dark car with somebody standing on the right side and heard some bad language being used. After going back in the house, she heard two shots. Shortly thereafter the car

drove down a private drive to their chicken house. Mrs. Baker called Allen Lane, who operated a store about three miles from the Baker residence, and told him "somebody was down here drunk and shooting and cussing and asked him to come up." Mrs. Baker heard more shots "out by the chicken house." The chicken house was about seven hundred feet from the Baker home.

Mr. Lane, after talking with Mrs. Baker, called the sheriff's department at approximately 9:00 p.m. and then went to the Baker farm where he met Deputy Sheriff Manuel fifteen or twenty minutes later. It had been raining, the ground was wet. The deputy sheriff, accompanied by Lane and Wayne Baker, a nephew of Mr. and Mrs. Willie Baker, went to the top of the hill where the chicken house was and saw the defendant standing there fifteen or thirty feet from a black Chevrolet automobile. The automobile was mired in the mud and its motor was running. Cook, bleeding from the mouth and a wound in the back of his head, was on the ground behind the automobile with his face ten to twelve inches from one of the automobile's two exhaust pipes. There was a slight smoke circle in the hair of the deceased. The coroner testified:

> "He (Cook) was lying on his left side, his body twisted, face downward. There was blood covering the back of his head and the back portion of the shoulders. There was a bullet hole in the back of his head near the base of his skull. On the trunk of the car there was blood and moisture. There was an upper central incisor denture tooth. There were smears in the moisture and blood from the top of the lid back down toward the ground. I had the body moved to the funeral home. I further examined the body at Moody Funeral Home and found that he had been wearing an upper acrylic denture which was shattered into several pieces. He had partly swallowed some of the fragments. There was a furrow cut along the top of the tongue and there was a cut place on the lower lip just right of center. Mr. Beal took some forceps and brought out the denture from the deceased throat. I probed the wound to determine the direction of the bullet. The direction from the back of the neck was toward the rear of the mouth. The wound was between the second and third cervical vertebrae. I found no bullet in the body. There was blood in the mouth, blood on the trunk lid, the exhaust pipe of the car, and on the body and on the ground where the body was found."

David Beal testified that:

"On November of last year he was special agent for the SBI.

He examined the body of Wesley Cook at the funeral home. The body and head were extremely bloody. He sponged it off. He found three-quarters of an inch laceration at the base of the skull on the left-hand side. There were around and in the wound fragments of unburned powder. He found a laceration along the upper portion of the tongue that extended from one and one half to two inches in a furrow and a laceration from the right side of the lower lip which protruded outward. He found part of a plate that had been broken into pieces in the throat below the tongue level. He found small fragments of lead located in the plate. These fragments were too small to use for comparison."

Cook, who was 55 years of age, had been in good health at about 6:00 p.m. on that date when he told his wife before she left home to go to Mount Airy that Bruce Lawson wanted him to go hunting in order to try out a dog Lawson had.

The defendant, who had the odor of alcohol on him, had a .22 calibre automatic riflle under his arm and "a yellow cat buttoned up in his shirt, and the cat's head was sticking out between the buttons." At the request of the deputy sheriff, the defendant gave him the rifle which had "two live bullets in it."

The defendant told the deputy sheriff that they were coon hunting. There was a dog in the trunk of the car, but it "was not a coon dog."

The next morning in the area of five or ten feet from where the rear of the car was the deputy sheriff found four or five cartridges that had been fired by the automatic rifle the defendant had under his arm when arrested.

Wayne Baker testified:

"The Sheriff asked the defendant to see the gun, and he handed it to him. He asked him if he had anything else on him, and he said, 'Yes, I have got the knife, the same one that you took before.' We all walked to the car, and the defendant said, 'Why, he can't be dead; he can't be dead,' and he said that probably half a dozen times. Then after a short period, the defendant said, 'Well, if he is dead, I guess my life is over with.' There was blood and a tooth on the trunk lid of the car. The blood was about two-thirds of the way up the trunk lid, and it looked to me like the fellow slumped forward on the trunk lid and just slid down. I remained until the doctor arrived. The Sheriff told the fellow, 'I am going to have to hold you.' "

Deputy Sheriff Manuel testified:

> "I put the handcuffs on the defendant and told him I would have to take him to jail. Doctor Thomas came to the scene. We put the defendant in jail that night in Mount Airy and searched him. I asked him if he had a knife and he said the one I took from him before. I searched him twice and found no other weapons."

The next morning on 17 November 1968, acting upon information given to them, the officers searched the defendant again there in the jail and found a fully loaded 22 revolver in a holster under his belt. The defendant told them that he had obtained possession of the gun that day.

[1] Defendant contends that the court committed error in overruling his motion for nonsuit. The applicable rule is stated in *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969), as follows:

> "On such a motion the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom."

[2] The evidence in the case is circumstantial. However, the rule is that circumstantial evidence is satisfactory in proof of matters of the gravest moment. The correct rule in respect to the sufficiency of circumstantial evidence is set forth in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1955). This rule has been quoted with approval in many cases, among which are *State v. Lowther,* 265 N.C. 315, 144 S.E. 2d 64 (1965), and *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967). Circumstantial evidence may be used in homicide cases to establish the cause of death and the criminal agency. 41 C.J.S., Homicide, § 312; 4 Strong, N.C. Index 2d, Homicide, § 21.

[3] There is another rule which provides that:

> "Where the evidence is sufficient to support conviction of any one of the degrees of homicide, a general motion to nonsuit is properly refused." 4 Strong, N.C. Index 2d, Homicide, § 21; *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402 (1956).

There are many circumstances in this case which tend reasonably to show that the deceased was intentionally shot by the defendant with the .22 calibre rifle he gave to the officer. Among these is the circumstance of the lapse of several minutes from the time the shots were heard by Mrs. Baker at the chicken house until the officers arrived during which the defendant apparently made no effort to as-

sist the deceased while he was lying there on the wet ground near the exhaust pipe.

[1] Considering all the State's evidence in the light most favorable to it, and, as required, giving it the benefit of every reasonable and legitimate inference to be drawn therefrom, we are of the opinion and so hold that there was sufficient evidence of the defendant's guilt of murder in the second degree and manslaughter to require the submission of the case to the jury. The trial judge did not commit error in overruling the motion for nonsuit.

[4] We do not agree with defendant's contention that the cause of death was not shown because the deceased may have been asphyxiated, strangled to death, died from a heart attack or other cause. The evidence shows that the deceased was a 55-year old man in good health. There was ample circumstantial evidence for the jury to find, as they did, that the deceased died as the result of the bullet wound in the back of his neck.

[5] Defendant assigns as error a portion of the charge of the court with respect to the contentions of the defendant. In his brief the words complained of are "that you ought not to believe what the State's witnesses say about him." The defendant thus complains of a portion of a sentence. The entire sentence in which these words appear is:

> "On the other hand the defendant says and contends that you ought not to find him guilty from all of the evidence in the case and that you ought not to believe what the State's witnesses say about him and that at the very least you ought to have a reasonable doubt in your minds as to his guilt and that you ought to acquit him."

Defendant cites no authority in support of this contention. There is nothing in the record to indicate that the defendant made any objection to this statement of contentions before the case was submitted to the jury. In *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876 (1957), Justice Higgins speaking for the Court said:

> "As a general rule, objections to the statement of the contentions and to the review of the evidence must be made before the jury retires or they are deemed to have been waived."

See also *State v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608 (1950), and *State v. Shackleford,* 232 N.C. 299, 59 S.E. 2d 825 (1950). When read in context, we do not think the challenged portion of the charge relating to the contentions is erroneous, and if it was error, we do not think it was prejudicial to the defendant.

[6] The defendant also assigns as error the failure of the court to instruct the jury they could return a verdict of guilty of involuntary manslaughter.

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

There is no evidence in the record tending to show that the death of the deceased was caused by culpable negligence or was the result of misadventure. The facts all point the other way. The cursing, the shooting of the rifle, the location of the automobile on the private road at night, the location of the wound on the back of the neck, the unburned powder in and around the wound and slight smoke circle in the hair, together with the size and the angle or range of the wound in the body, the empty cartridges found near the body that had been fired by the rifle that the witness saw in the defendant's hand, the tooth and blood on the trunk of the car, the blood on the body of the deceased and on the ground nearby, the position of the deceased behind the automobile, the failure of the defendant to offer any assistance to the deceased, and the spontaneous statement of the defendant that the deceased was not dead but that if he was dead his (defendant's) life was "over with" all tend reasonably to show an intentional shooting of the deceased at close range by the defendant with the rifle while the rifle was held to his shoulder in a horizontal or shooting position.

We have considered all assignments of error presented on this record. No prejudicial error is made to appear.

No error.

MORRIS and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLIE WADE POWELL

No. 6921SC416

(Filed 27 August 1969)

1. Constitutional Law § 36— cruel and unusual punishment

Punishment not exceeding the statutory limit cannot be considered cruel and unusual in the constitutional sense.

2. Robbery § 6— attempted armed robbery — sentence — cruel and unusual punishment

A judgment of confinement for not less than fifteen nor more than twenty-five years upon conviction of attempted armed robbery is within the statutory maximum and cannot be considered cruel and unusual in the constitutional sense. G.S. 14-87.

3. Criminal Law § 138— determination of punishment — role of trial judge

Trial judge is in the best position to determine appropriate punishment for the protection of society and rehabilitation of defendant, and of necessity the judge must be allowed to exercise wide discretion within the statutory limits.

4. Criminal Law § 106— sufficiency of evidence to overrule nonsuit

If there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt.

5. Robbery § 4— attempted armed robbery — overt act — sufficiency of evidence

In prosecution for attempted armed robbery, there was sufficient evidence of an overt act by defendant to justify submission of the case to the jury, where State's evidence tended to show that defendant, who had disguised himself by use of a woman's wig, lipstick and pocketbook and by wearing gloves and dark glasses, went into an ABC store three to four minutes before closing time and delayed his purchase by ordering three bottles of whiskey one at a time, that defendant had no money on him, and that, when told the amount of the purchases, defendant pulled a .38 caliber pistol out of the pocketbook and was only prevented from pointing the pistol at the store employee by the latter's action in pinning defendant's wrist against the counter.

6. Criminal Law § 116— instructions — right of defendants not to testify

The trial judge in his discretion may instruct the jury upon the right of defendant not to testify and as to how his failure to testify is to be considered, but, absent a proper request from defendant, he is not required to do so.

7. Criminal Law § 118— instructions — contentions of defendant — fundamental misconstruction by judge

In stating defendant's contentions in a prosecution for attempted armed

robbery, a statement by the trial judge that defendant "admits he's guilty of carrying a concealed weapon, guilty perhaps of an assault" *is held* a fundamental misconstruction of defendant's contentions, where defendant offered no evidence nor did he judicially admit or stipulate that he was guilty of anything.

8. Robbery § 1— robbery ex vi termini — element of assault

The crime of robbery *ex vi termini* includes an assault on the person.

9. Criminal Law § 114— instructions — erroneous assumption as to facts proven

The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error.

10. Criminal Law § 114— instructions — inadvertent expression of opinion

The fact that the expression of opinion in the charge was unintentional or inadvertent does not make it less prejudicial.

11. Criminal Law §§ 114, 163— instructions — expression of opinion — review on appeal

Where the court expresses an opinion upon the evidence while stating the contentions, defendant is not required to bring it to the attention of the trial judge before verdict but the question can be considered for the first time on appeal upon exception duly noted.

APPEAL by defendant from *Burgwyn, J.*, 5 May 1969 Session, FORSYTH Superior Court.

Defendant was charged in a bill of indictment with the felony of attempted robbery with firearms. Upon his plea of not guilty he was tried by a jury.

The State's evidence tended to show that about three to four minutes before nine o'clock in the evening of 4 January 1969, defendant entered the Winston-Salem A.B.C. Store No. 5, on the Old Lexington Road. The assistant manager, Mr. Foil, and two employees, Messrs. Simo and Sapp, were on duty in the store, and four customers were preparing to leave. Closing time for the store was nine o'clock and Mr. Foil was going to the front door preparatory to locking the premises for the night. Messrs. Simo and Sapp were behind the counter.

When defendant entered the store he was wearing a woman's wig and lipstick, a black jacket, black leather gloves, dark glasses, and was carrying a woman's black leather pocketbook. Defendant first went to the price list posted on one side of the store and then crossed over to the price list posted on the other side of the store. Two of the former customers had left the premises by this time but

the other two former customers were standing at the front entrance engaged in conversation with Mr. Foil. Defendant kept glancing back at these two customers and Mr. Foil.

Defendant then went to the counter and ordered a fifth of whiskey from Mr. Simo. This was rung up and the ticket pasted to the bottle. During this time defendant was looking back at Mr. Foil at the entrance door. Mr. Simo asked defendant if he wanted anything else and he (defendant) looked back towards the entrance and then ordered a pint of whiskey, looked back towards the entrance again and then ordered another pint. Mr. Simo totaled the cost of the three bottles and advised defendant of the total. Defendant took off the leather gloves, placed the woman's pocketbook on the counter, opened it, and pulled a .38 caliber automatic pistol out of the pocketbook. Mr. Simo grabbed defendant's wrist and held it and the pistol down on the counter while Mr. Sapp pointed another pistol at defendant and Mr. Foil called the police. Defendant had no money in the woman's pocketbook nor upon his person. The .38 caliber pistol had one bullet in the chamber and the clip was full.

Defendant offered no evidence.

From a verdict of guilty as charged and from judgment of confinement for a period of not less than fifteen nor more than twenty-five years, defendant appealed.

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

H. Glenn Davis for defendant.

BROCK, J.

[1, 2] Defendant assigns as error that the judgment of the court imposed cruel and ununsual punishment upon defendant. G.S. 14-87, under which defendant was charged and convicted, provides for a sentence of up to thirty years. The sentence imposed upon defendant is well within this limit. Since the year 1838 the Supreme Court of North Carolina has held in an unbroken line of decisions that punishment not exceeding the statutory limit cannot be considered cruel and unusual in the constitutional sense. *State v. Manuel,* 20 N.C. 144; *State v. Pettie,* 80 N.C. 367; *State v. Farrington,* 141 N.C. 844, 53 S.E. 954; *State v. Dowdy,* 145 N.C. 432, 58 S.E. 1002; *State v. Daniels,* 197 N.C. 285, 148 S.E. 244; *State v. Smith,* 238 N.C. 82, 76 S.E. 2d 363; *State v. Lee,* 247 N.C. 230, 100 S.E. 2d 372; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Bruce,* 268 N.C. 174,

150 S.E. 2d 216; *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875; *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854; *State v. Lovelace,* 271 N.C. 593, 157 S.E. 2d 81; *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Foster,* 271 N.C. 727, 157 S.E. 2d 542; *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698; *State v. Wright,* 272 N.C. 264, 158 S.E. 2d 50; *State v. Bethea,* 272 N.C. 521, 158 S.E. 2d 591; *State v. McCall,* 273 N.C. 135, 159 S.E. 2d 316; *State v. Weston,* 273 N.C. 275, 159 S.E. 2d 883.

[3] Also, since this Court entered into its first session it has invariably adhered to the same principle. *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105; *State v. Chapman,* 1 N.C. App. 622, 162 S.E. 2d 142; *State v. Abernathy,* 1 N.C. App. 625, 162 S.E. 2d 114; *State v. Morris,* 2 N.C. App. 611, 163 S.E. 2d 539; *State v. Mosteller,* 3 N.C. App. 67, 164 S.E. 2d 27; *State v. Jones,* 3 N.C. App. 69, 163 S.E. 2d 910; *State v. Mitchell,* 3 N.C. App. 70, 164 S.E. 2d 62; *State v. Kelly,* 3 N.C. App. 72, 164 S.E. 2d 22; *State v. McKinney,* 4 N.C. App. 107, 165 S.E. 2d 689; *State v. Reed,* 4 N.C. App. 109, 165 S.E. 2d 674; *State v. Stewart,* 4 N.C. App. 249, 166 S.E. 2d 458; *State v. Kotofsky,* 4 N.C. App. 302, 166 S.E. 2d 484; *State v. Cleaves,* 4 N.C. App. 506, 166 S.E. 2d 861; *State v. Perryman,* 4 N.C. App. 684, 167 S.E. 2d 517. The reasons for this principle are clear and sound. The trial judge is in position to observe the conduct and attitude of the defendant; he can observe defendant's prior record; he can cause investigations into defendant's past and present circumstances. In these and other ways the trial judge is in the best position to determine appropriate punishment for the protection of society and rehabilitation of the defendant. Of necessity the trial judge must be allowed to exercise wide discretion within the statutory limits. To this principle of law we apply the rule of *stare decisis et non quieta movere.* This assignment of error is overruled.

[4, 5] Defendant next assigns as error that the trial judge overruled his motions for nonsuit. Defendant asserts that there can be no attempt to commit robbery in the absence of an overt act in part execution of the intent to commit the crime. This principle of law is sound and enjoys wide acceptance by the courts of this country. The problem generally facing the courts is whether there is evidence of an overt act sufficient to submit the case to the jury. Concerning this, the rule is well-established in this state that "[i]f there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable

doubt of the fact of guilt." 2 Strong, N.C. Index 2d, Criminal Law, § 106, p. 654. "In determining whether a person has been guilty of the offense of attempting to commit robbery, the courts are guided by the peculiar facts of each case, in order to decide whether the acts of the defendant have advanced beyond the stage of mere preparation, to the point where it can be said that an attempt to commit the crime has been made. The question is one of degree, and cannot be controlled by exact definition." Annot., 55 A.L.R. 714.

In this case the State's evidence tends to show that the defendant undertook to disguise himself by the use of a woman's wig, lipstick and pocketbook; and by wearing dark glasses and gloves. The evidence tends to show that he also armed himself with a .38 caliber automatic pistol, fully loaded and ready for use. He went into the A.B.C. Store three to four minutes before closing time and delayed his purchase by looking over duplicate price lists and ordering the three bottles of whiskey one at a time, and the clear inference from this delaying conduct is that he was waiting for all customers to leave the store and for the door to be locked. Then, when he was told the amount of the three purchases, he reached into the pocketbook and pulled out the pistol.

The fact that he had no money, coupled with his actions is clearly sufficient evidence from which the jury could find that he *intended* to commit the offense of armed robbery. The only question remaining is whether there was sufficient evidence of an *overt act* to justify submission of the case to the jury.

Defendant argues that because he never pointed the pistol at anyone, never demanded that the employees do anything, and never demanded or tried to take money or property, his conduct at most was merely preparatory and does not constitute an overt act towards the commission of the crime.

Defendant's actions all but completed the crime of armed robbery itself. It was only the alert and overpowering action of the employee, Mr. Simo, in grabbing defendant's wrist and holding it, and consequently the pistol, pinned against the counter, that prevented the actual consummation of the offense of armed robbery. Only a second beyond this point, defendant would have had the employees at his mercy. It would be a travesty upon justice to permit defendant to escape punishment for his carefully planned robbery, which was only frustrated by the surprise action of the employee. If defendant was not attempting to commit the crime charged, it is difficult to see what more he could have done short of actually committing the robbery.

[5] The act of reaching into the pocketbook, and pulling out the pistol was sufficient evidence of an *overt act* which went beyond mere acts of preparation, and justified submission of the case to the jury. This assignment of error is overruled.

[6] Defendant assigns as error that the trial court failed to instruct the jury upon the right of defendant not to testify, and as to how his failure to testify was to be considered. Defendant made no request for such an instruction. The trial judge in his discretion may give such an instruction, but, absent a proper request, is not required to do so. *State v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156; *State v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533. This assignment of error is overruled.

[7] Defendant assigns as error that the trial judge expressed an opinion upon the evidence. In stating defendant's contentions the trial judge stated: "He admits that he's guilty of carrying a concealed weapon, guilty perhaps of an assault. . . ."

Defendant offered no evidence in this case, nor did he judicially admit or stipulate that he was guilty of anything. Such a statement by the trial judge was a fundamental misconstruction of defendant's contentions, although His Honor may have been led into this error by argument of counsel to the jury.

[8-11] The crime of robbery *ex vi termini* includes an assault on the person. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545. "The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error." *State v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99. "The fact that the expression of opinion was unintentional or inadvertent does not make it less prejudicial." *State v. Swaringen, supra.* "Nor does the manner in which counsel examines the witnesses or argues the case to the jury justify the court in assuming the existence of an essential fact." *State v. Swaringen, supra.* And, where the court expresses an opinion upon the evidence while stating contentions it is not required that it must be brought to the attention of the trial judge before verdict; this question can be considered for the first time on appeal upon exception duly noted. *State v. Beamon,* 2 N.C. App. 583, 163 S.E. 2d 544; *State v. Watson,* 1 N.C. App. 250, 161 S.E. 2d 159.

For the error in the fundamental misconstruction of defendant's contentions and the consequent prejudicial expression of opinion by the trial judge there must be a

New trial.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. THEODIS WILLIAMS

No. 6912SC369

(Filed 27 August 1969)

Criminal Law § 66— in-court identification of defendant — prior police station identification — competency of evidence

Testimony by assault victim relating to her identification of defendant at a police station at a time when defendant was not in a line-up and did not have counsel present and had not waived counsel, *held* properly admitted, where (1) the victim had recognized defendant at the time of the assault and was able to identify him prior to arrest from a photograph obtained by the police with the aid of the victim's description, (2) the victim was well acquainted with defendant but knew him only by his nickname, and (3) the only purpose of the victim's presence at the station was to assure the officers that the person they had arrested was the person she had been endeavoring to tell them about.

APPEAL by defendant from *Canaday, J.*, 14 April 1969, Regular Criminal Session, CUMBERLAND County Superior Court.

The defendant was charged in a bill of indictment, proper in form, with murder of Johnny L. Williams on 30 July 1968, and in a second bill of indictment, proper in form, with a felonious assault on Mary McGhee on 30 July 1968.

Both charges were consolidated for purposes of trial. The defendant entered a plea of not guilty in each case.

The Solicitor on behalf of the State at the commencement of the trial announced that the State would not ask for a verdict of murder in the first degree, but for a verdict of murder in the second degree or manslaughter, as the evidence might warrant.

At the close of the evidence on behalf of the State, the defendant, through counsel, moved for a directed verdict of not guilty as to the felonious assault on Mary McGhee. This motion was allowed, and the trial court submitted the lesser offense of an assault with the intent to kill inflicting serious injuries.

The jury found the defendant guilty of murder in the second degree and guilty of an assault with intent to kill inflicting serious injuries. From judgments of imprisonment for a term of not less than 20 years and not more than 25 years in the murder case and two years in the assault case to run consecutively, the defendant appealed to this Court.

The evidence on behalf of the State tended to show that in the early morning hours of 30 July 1968 Johnny Lee Williams and Mary McGhee registered in the Plaza Hotel on Hillsboro Street in

the City of Fayetteville. They registered as Mr. & Mrs. Charles M. McGhee. Charles M. McGhee, who had been killed in Viet Nam, was the husband of Mary McGhee.

After registering they were assigned to Room No. 2.

The defendant was likewise a registered guest in this hotel. The defendant and Mary McGhee were acquainted and had known each other for several months.

Mary McGhee was employed as a go-go girl at the Friendly Tavern. On the evening of 29 July 1968 between the hours of 5:00 and 6:00 p.m., Mary had seen the defendant on Hillsboro Street in front of the Action (a poolroom). She said that he stopped her and in her words, "Well, he said something about getting together and making some money, or something like that, wanted me to work for him." She further testified that he suggested that she "get on the block", and she later explained that as meaning that the defendant desired her to work as a prostitute which she refused to do. She testified, "I told him he must be crazy, I not going on a block for no man."

It was after midnight and during the early morning hours of 30 July 1968 that Mary and Johnny Lee Williams registered in the Plaza Hotel, and were assigned to Room No. 2.

After being in the room several hours, Mary left the room and went out in the lobby where she engaged the night clerk in a conversation and also endeavored to get a taxicab. She was unsuccessful in getting a taxicab, and after visiting the ladies restroom which was located in the lobby, she returned to Room No. 2 where she had left Johnny Lee Williams asleep on the bed.

When she entered the room and started to get back in the bed, she discovered that Johnny Lee Williams was covered with blood. She screamed and then observed the defendant in the room. The defendant struck her with his fist and knocked her down. The defendant fell on top of her, and after a short struggle, she knew nothing. About 1:30 p.m. on 30 July 1968, a boy who was engaged to clean up the halls and bathrooms of the hotel accidentally pushed open the door to Room No. 2 and observed Mary lying on the floor and Johnny Lee Williams covered with blood on the bed. He notified the hotel manager who in turn notified the police authorities.

Johnny Lee Williams was dead as a result of multiple skull fractures and a crushed skull.

A broken board with blood on it was found in a nearby lot and

splinters from the board were found on the bed and floor in Room No. 2.

Mary was taken to the hospital where she remained unconscious for 17 days with a fractured skull.

On regaining consciousness Mary did not remember anything for several days. She did not recognize or know her mother or her brothers or sisters or any member of her family for several days after regaining consciousness.

Sometime in September 1968, Mary informed her mother and the police authorities that the man who had assaulted her in Room No. 2 in the Plaza Hotel was known to her by the name of Jabbo. She did not know what his actual name was, but had only known him by the name of Jabbo. She also described him as having a moustache and goatee and a very high hairdo.

With this description one of the detectives with the Fayetteville Police Department obtained a picture of the defendant which he took to the home of Mary, and Mary identified the picture as being the picture of Jabbo whom she knew and who had committed the assault on her. After the defendant was arrested, Mary went to the police station and identified the defendant as being the person she knew as Jabbo and who had been her assailant.

Attorney General Robert Morgan by Assistant Attorney General George A. Goodwyn for the State.

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

CAMPBELL, J.

The defendant assigns as error that police officer, R. A. Studer and Lorraine Smith, the mother of Mary, were permitted to testify for the purpose of corroborating Mary that she had told each of them that she knew the person who had assaulted her and that she knew him only by his nickname, Jabbo. The defendant stresses that this purported corroborating testimony did not corroborate Mary.

When we look at the record, we find that none of this testimony was objected to, nor any exception taken thereto.

> "The jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court." 1 Strong, N.C. Index 2d, Appeal and Error, § 1, p. 103.

"The Supreme Court ordinarily will not consider questions not properly presented by objections duly made and exceptions duly entered, and assignments of error properly set out, though it may do so in exceptional instances in the exercise of its supervisory jurisdiction. . . .

. . . Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered. . . ." 1 Strong, N.C. Index 2d, Appeal and Error, § 24, p. 145.

The defendant next assigns as error that the trial court permitted Mary to testify that she identified the defendant at the police station by looking through a glass into another room at a time when the defendant was not in a lineup and did not have counsel present and had not waived counsel. The defendant again fails to have any objections or exceptions in the record and, therefore, the question which the defendant seeks to raise is not properly presented. Nevertheless, there was no improper identification in the instant case. Mary was well acquainted with the defendant prior to the alleged assault. She did not know the full name of the defendant and only knew him by his nickname of Jabbo. She had known him for several months and was well acquainted with him. She was taken to the police station merely for the purpose of informing the police officers as to whether or not the person they had in custody was the person she had been trying to identify to them. As a result of the severe injuries which she had received, she had had a case of amnesia which had lasted over a period of several weeks. Both the identification of the picture of the defendant and the identification of the defendant himself at the police station were merely for the purpose of assuring the police officers that the person they had apprehended and arrested and accused of the offense was the person she had been endeavoring to tell them about. The defendant seeks to rely upon the cases of *United States 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; *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967; and *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581, in support of his argument.

As stated by Brock, J., in *State v. Hunsucker,* 3 N.C. App. 281, 164 S.E. 2d 507, (certiorari denied, 31 January 1969, 275 N.C. 138):

"The rationale underlying the decisions in the cases relied upon by defendant is that unfairness in the 'lineup' or other arranged identification process may arise by exhibiting the accused so as to suggest his identity to the witness and thereby obtain a positive identification from the witness which the witness will

not later admit was indefinite or mistaken; and that the absence of counsel at this stage of the proceeding would prevent any effective cross-examination of the witness relative to the identification process. . . ."

In the case *sub judice* there was no effort being made to have Mary identify the defendant. She already knew the defendant and the only purpose for her going to the jail was to assure the police officers that the person whom she knew and whom she had attempted to identify for their benefit was the person they had arrested.

Despite the failure of objections and exceptions in the record, we have nevertheless reviewed all of the testimony in this case, and it was ample and sufficient to submit the cases to the jury. The jury, as the trier of the facts, has found the facts against the defendant. The charge of the trial court was not excepted to and no errors are claimed in that regard. The defendant has had a fair and impartial trial free of prejudicial error.

No error.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT COX AND EARL COX

No. 6911SC277

(Filed 27 August 1969)

1. Criminal Law § 88; Witnesses § 8— repetitious questions — duty of trial judge

It is the duty of the trial judge to protect a witness from repetitious questions, and he may order a witness to stand aside if counsel disregards repeated warnings to refrain from repetitious and irrelevant questions.

2. Criminal Law § 88; Witnesses § 8— colors worn by counsel — exclusion of repetitious cross-examination

In this prosecution for kidnapping, the trial court properly sustained the solicitor's objection to a question asked the prosecutrix by defense counsel, while the prosecutrix stood facing the wall, as to what color tie counsel was wearing, where counsel had already been permitted to ask prosecutrix numerous questions concerning colors worn by the two defense attorneys and the solicitor at the trial in an attempt to impeach her ability to recall the color of shirt worn by defendant.

3. Constitutional Law § 30— right to trial before impartial judge and jury

Every person charged with crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.

4. Criminal Law § 99— expression of opinion by trial court

The trial judge is expressly forbidden to convey to the jury in any manner at any stage of the trial his opinion as to whether a fact is fully or sufficiently proven. G.S. 1-180.

5. Criminal Law § 99— applicability of G.S. 1-180

G.S. 1-180 does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness.

6. Criminal Law §§ 99, 170— comments by trial court — criterion for determining prejudice

The criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury, and in applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made.

7. Criminal Law § 99— comments by trial court during colloquy with defense counsel

In this prosecution for kidnapping wherein defense counsel questioned the prosecutrix at length about the color of shirts being worn by the solicitor and defense attorneys while the prosecutrix stood facing the wall, comments by the trial court during a lengthy colloquy with defense counsel in the presence of the jury which reflected the court's impatience with defense counsel's reluctance to abide by the court's ruling which sustained an objection to a question as to what color tie counsel was wearing, *are held* not to constitute an expression of opinion on the evidence or the credibility of the witness, although such exchange should have taken place, if at all, outside the presence of the jury.

8. Criminal Law §§ 99, 170— comment by court in ruling on admission of evidence

A remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial.

9. Criminal Law § 99— request by court that defendants be identified by their counsel

In this prosecution for kidnapping, defendants were not prejudiced by fact that on two occasions during the trial the court asked that defendants be identified by their counsel after having been pointed out in open court by the prosecutrix.

10. Criminal Law § 99— questions by court — clarification of testimony

In this prosecution for kidnapping, questions asked of witnesses by the

court during the trial were for purposes of clarification and did not amount to an expression of opinion by the court.

APPEAL by defendants from *Bowman, J.,* 17 April 1969 Criminal Session of JOHNSTON Superior Court.

Defendants were charged in separate bills of indictment with having kidnapped one Alice Pollard on 3 August 1968. The cases were consolidated for trial without objection and both defendants pleaded not guilty.

The only evidence was that offered by the State, which tended to show: During the pre-dawn hours of 3 August 1968, Mrs. Alice Pollard was assisting her young son with a newspaper route in Selma, N. C. While riding her bicycle alone and delivering newspapers along Sharpe Street, she noticed a car following behind her at a slow rate of speed. The car passed her and in order not to follow in the same direction she made a left turn onto Railroad Street. When she had gone about a block and a half, the car again approached from the rear, this time at a "fast rate of speed," and it pulled up beside her and stopped. It was being driven by the defendant Robert Cox. The defendant Earl Cox "jumped" from the car, "snatched" Mrs. Pollard from her bicycle and physically forced her into the rear seat of the car. As Earl Cox got out of the car Mrs. Pollard reached for a .25 automatic pistol which she carried on top of her newspapers in the basket of the bicycle. As she was being shoved into the car she fired the pistol. One pellet struck Earl Cox in the nose but apparently did not injure him seriously. Another shattered the left rear car window. Robert Cox reached into the rear seat and choked Mrs. Pollard until she released the pistol. While Robert Cox drove the car Earl Cox remained in the back seat holding Mrs. Pollard down as she cried and struggled to free herself. He told her they wanted to have sexual relations with her and bit her on the right side of her face and chin. Robert Cox stopped the car after having driven about a mile. When the car stopped, Mrs. Pollard managed to pull herself free, grab the door handle and jump from the car. She was followed by Robert Cox who threw her to the ground and proceeded to beat her until Earl Cox called him, at which time he returned to the car. Mrs. Pollard ran away from the car, went to a nearby house for help, and immediately sought medical attention at the Johnston County Memorial Hospital.

Mrs. Pollard described her assailants and the car they were driving to the police chief of Zebulon. She also furnished a description and color of Earl Cox's shirt.

A car was located corresponding to the description given by Mrs. Pollard. The left rear window was shattered and on and about the rear seat various items were found and were identified by Mrs. Pollard. These included the holster in which she kept her pistol, a hair piece she had been wearing, her scarf, and a charm with her name on it. Robert Cox was shown to have been in possession of the car on the date when the assault occurred. Mrs. Pollard had never seen the defendants before the date of the assault but she identified them at the trial as her assailants.

The jury found each defendant guilty of kidnapping as charged in the bills of indictment and from sentences imposed the defendants appealed.

Attorney General Robert Morgan and Staff Attorney Sidney S. Eagles, Jr., for the State.

T. Yates Dobson for defendant appellant Robert Cox.

Albert A. Corbett for defendant appellant Earl Cox.

PARKER, J.

The defendants' assignments of error relate solely to the question of whether the trial judge violated his duty under G.S. 1-180 and expressed an opinion on the evidence through certain comments and questioning of witnesses during the trial.

On cross-examination of the prosecuting witness, Mrs. Pollard, the attorney for the defendant Earl Cox requested the witness to stand and face the wall. He then proceeded to cross-examine her at length about the color of shirts being worn by the solicitor and defense attorneys. After she had given her opinion about this the following transpired:

"Q. Mrs. Pollard, what color necktie do I have on?

Objection by Solicitor Taylor.

COURT: Objection sustained. I don't even know that.

ATTORNEY CORBETT: Now, if your Honor pleases.

COURT: All right. She is supposed to look at your face while you are talking to her, so am I. Now that I look at your necktie, I can't tell whether it is black or blue, but it looks like it has some type of diagonal stripes across it and I can't tell whether that is gold or yellow. Now, maybe I need glasses, I don't know. I wear glasses, but I think we are getting just a —

it is a little bit in the realm of what might be considered frivolous cross examination —

ATTORNEY CORBETT: — now, if your Honor please —

COURT: — I will let you proceed in any manner you wish as to what happened on this particular occasion and you may continue to do so as far as to anything that she might remember about the clothes or anything else regarding the description of her attackers, but as to point out people here in the courtroom and start asking questions of that sort, sir, I am not going to permit any more of it. Now, you may have an objection.

* * * * *

ATTORNEY CORBETT: If your Honor pleases, one of the main defenses in this case —

COURT: — all right. I don't want you to start making a speech here in front of this jury. Now, if you got anything you want to say, then you better let me let the jury go out —

ATTORNEY CORBETT: — is the question of identity and I submit —

COURT: — yes I know, but they are not identifying you and they are not identifying the solicitor and they are not identifying Mr. Dobson. The identity as far — is the identities concerns the defendants here on trial, not you three gentlemen.

ATTORNEY CORBETT: Your Honor, I submit that it goes to her ability to identify a person in the nighttime . . .

COURT: All right —

ATTORNEY CORBETT: — and that I should be permitted to ask further questions about it, but I will abide by the court —

COURT: Well, how many more questions do you intend to ask along these lines? I have already told you you could ask any questions you wish to ask about identification of these two defendants, but I see no need of having her identify the solicitor and what he happens to be wearing, you and the color of your tie or the color of your eyes or any of the rest of questions of that nature. I am looking at you right now, and I can't tell what the color of your eyes are.

ATTORNEY CORBETT: Well, sir; I haven't asked the witness about the color of the defendant's eyes or mine either.

COURT: I know, but you asked her about the color of your tie and the color of your shirt. Let's draw this to a conclusion as soon as possible please."

[1, 2] The trial judge is responsible for the orderly conduct of a trial. It is his duty to protect a witness from repetitious questions and he may even order a witness to stand aside if counsel disregards repeated warnings to refrain from repetitious and irrelevant questions. *McPhail v. Johnson,* 115 N.C. 298, 20 S.E. 373. Here counsel had been permitted broad latitude in his cross-examination of the prosecuting witness. The extremes he went to in an effort to impeach her ability to recall the color of his client's shirt was unreasonable and the judge properly sustained an objection to it. Even so the colloquy that followed between the judge and counsel would best have been engaged in, if at all, outside the presence of the jury.

[3-6] Every person charged with crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481. To accord this right the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. He is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to whether a fact is fully or sufficiently proven. G.S. 1-180. Our Supreme Court has said many times that G.S. 1-180 does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. *Galloway v. Lawrence,* 266 N.C. 250, 145 S.E. 2d 861, and cases cited therein. The criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9.

[7] While we do not approve of the exchange that occurred between the court and counsel, we are of the opinion that under the circumstances it was not prejudicial to the defendants. The comments of the trial judge were directed to a matter of procedure in the conduct of the trial and do not leave the impression that he was expressing an opinion on the evidence or the credibility of the witness. It must be remembered that the trial judge had already permitted numerous questions concerning colors worn by the two defense attorneys and the solicitor at the trial and there had to be reasonable limits placed on such lines of questioning. The challenged comments at most reflect the court's impatience with counsel's reluctance to abide by his ruling.

[8] It has been held that a remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. *State v. Hooks,* 228 N.C. 689, 47 S.E. 2d 234; 2 Strong, N.C. Index 2d, Criminal Law, § 99. Admonitions of the court to counsel upon improper questioning of witnesses has repeatedly been held not prejudicial. *State v. Davis,* 266 N.C. 633, 146 S.E. 2d 646; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *State v. Carter, supra.*

[9] On two occasions during the trial the court asked that the defendants be identified by their counsel after having been pointed out in open court by the prosecuting witness. This was for purposes of the record and it has not been shown where any prejudice resulted to either defendant from this action.

[10] The defendants' remaining exceptions are to various questions asked of witnesses by the court during the course of the trial. We have carefully reviewed these exceptions and are of the opinion that the questions in each instance were for purposes of clarification and did not amount to an expression of opinion by the court. The assignment of error embracing these exceptions is overruled. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376; *State v. Carter, supra.*

A review of the entire record discloses that both defendants have had a fair trial free of any prejudicial error.

No error.

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

FRANKIE SURRETT BALLARD, GUARDIAN OF LINDA LANCE AND DOUGLAS LANCE v. FRANK LANCE, CALVIN LANCE, MARY LACY BYRD, GUARDIAN OF FRANK LANCE AND CALVIN LANCE; MICHAEL LANCE, JACKIE LANCE, MARY LACY BYRD, GUARDIAN OF MICHAEL LANCE AND JACKIE LANCE; DAWN LANCE AND MARY LACY BYRD, GUARDIAN OF DAWN LANCE

No. 6928SC354

(Filed 27 August 1969)

1. Evidence § 11— transactions with decedent — disposition of life insurance proceeds

In declaratory judgment action to distribute the proceeds of an airline accident life insurance policy, testimony of insured's daughter that prior to

the death of her mother in an airline crash the mother instructed her that the mother's two grandchildren named in the policy were to share the proceeds thereof with her remaining grandchildren *is held* not barred by G.S. 8-51, where daughter was not testifying in her own interest.

2. Trusts § 14— creation of constructive trust — life insurance proceeds

In declaratory judgment action to distribute the proceeds of an airline accident life insurance policy, insured's statement to her daughter at the time the policy was issued that there was not enough room on the policy to name all of her grandchildren as beneficiaries and that if anything happened to her the two grandchildren named thereon were to share the proceeds of the policy with her remaining grandchildren *is held* to create a constructive trust in the policy proceeds in favor of the grandchildren not named in the policy.

3. Trusts § 14— creation of constructive trust — minor trustees

The fact that the trustees are under 21 years of age does not affect a constructive trust, and the trust remains enforceable despite their minority.

4. Wills § 1— testamentary disposition — life insurance trust

The mere fact that the proceeds of a life insurance policy subject to a constructive trust are not payable until the death of the insured does not make the disposition testamentary, and the insurance trust will be upheld even though it has not been executed with the formality necessary to constitute a will. G.S. 36-53.

APPEAL by plaintiff from *Martin, J.*, 27 January 1969 Session, BUNCOMBE County Superior Court.

A jury trial was waived and the parties consented and agreed that the Court could hear the evidence, consider the pleadings and stipulations of the parties and make findings of fact and conclusions of law and enter judgment thereon.

The Court found the following facts:

Beulah Lance died 19 July 1967 as a result of an airplane crash in Henderson County, North Carolina; she left surviving her seven infant grandchildren, namely, Michael Lance, Jackie Lance, Linda Lance, Douglas Lance, Frank Lance, Calvin Lance and Dawn Lance; prior to boarding the aircraft, Beulah purchased a contract of insurance with Mutual of Omaha Insurance Company in the amount of $40,000.00; proof of claim has been made and said $40,000.00 has been paid to the plaintiff, Frankie Surrett Ballard, as guardian of Linda Lance and Douglas Lance; at the time of purchase of the insurance, Beulah Lance was in the presence of her daughter, Blanche Shuler, and stated, "there is not enough room to put all of the grandchildren on the insurance policy, and I'll just put on Linda and

Doug. If anything happens to me, be sure and tell Frankie that half of it is to be for Linda and Doug and the rest of it is to be divided between the grandchildren"; that "Frankie" was the plaintiff, Frankie Surrett Ballard, and that Linda and Doug are the infant plaintiffs; after the policy was issued and the above statements made, Beulah Lance put the policy in an envelope and gave it to Blanche Shuler, who thereafter took the policy and gave it to Frankie Surrett Ballard. Beulah Lance had another grandchild, Martin Shuler, who accompanied her on the aircraft and came to his death in the air crash. He was the only child of Blanche Shuler, daughter of Beulah Lance.

The trial court made conclusions of law to the effect that the testimony of Blanche Shuler was competent; by virtue of the oral statement of Beulah Lance and her relationship to the parties to the action, a trust arose by operation of law and the two named beneficiaries in the insurance policy hold the proceeds of said policy as trustees for themselves and the other five minor defendants in the action in accordance with the terms of the oral statement. The court further concluded that the plaintiff, Frankie Surrett Ballard, as guardian of Linda Lance and Douglas Lance, holds the $40,000.00 proceeds of the insurance policy as trustee for her two children Linda Lance and Douglas Lance to the extent of 50% of the balance remaining after payment of the court costs, including reasonable counsel fees; that the remaining 50% of said balance should be paid to the other grandchildren (children of other children of Beulah Lance) as follows: 10% to Mary Lacy Byrd, Guardian of Frank Lance; 10% to Mary Lacy Byrd, Guardian of Calvin Lance; 10% to Mary Lacy Byrd, Guardian of Michael Lance; 10% to Mary Lacy Byrd, Guardian of Jackie Lance; 10% to Mary Lacy Byrd, Guardian of Dawn Lance.

The plaintiff filed exceptions to various findings of fact and conclusions of law and appealed to this Court.

Gudger and Erwin by Samuel J. Crow for plaintiff appellant.

Giezentanner, Willson & Brock by Floyd D. Brock for defendant appellees.

CAMPBELL, J.

[1] The first question presented by this appeal is whether the testimony of Blanche Shuler concerning the oral statements made by Beulah Lance at the time she purchased the contract of insur-

ance was competent. The plaintiff had objected to this testimony and preserved an exception to the introduction thereof.

Blanche Shuler testified that she went to the airport with her mother and her son Martin Shuler. At the airport and before boarding the plane, Beulah Lance procured from a machine located at the airport an application for Mutual of Omaha non-renewable scheduled airline trip accident life insurance policy. Blanche Shuler testified, "She filled it out. Well, she started to fill it out, and she was laughing and she said, 'Well, which one am I going to put on this time?' And she looked at my little boy, and she said, 'I can't put you on, because,' she said, 'You're going with me.' And then she said, 'Why, there's not enough room to put 'em all on here, I'll just put Linda and Doug,' and she said, 'If anything happens to me, be sure and tell Frankie that half of it's to be for Linda and Doug and the rest of it will be divided between the grandchildren.' And next thing she said, she'd like — she said, 'Of course, you'll have to bury me.' She said, 'nothing will happen,' then she just kept on, 'Don't worry about it. Nothing will happen.' "

The plaintiff bases her objection to the admission of this evidence upon the statute G.S. 8-51.

This statute has been construed numerous times under varying situations. *Wilder v. Medlin,* 215 N.C. 542, 2 S.E. 2d 549; *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468.

In *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542, Ervin, J., for the court stated:

> "This statute does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer:
>
> 1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title?
>
> 2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?
>
> 3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?
>
> 4. Does the testimony of the witness concern a personal

transaction or communication between the witness and the deceased person or lunatic?

* * *

Somewhat similar analyses of the statute appear in the following authorities: *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043; Stansbury on the North Carolina Law of Evidence, section 66.

A personal transaction or communication within the purview of the statute is anything done or said between the witness and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through or under the deceased person or lunatic. *Davis v. Pearson,* 220 N.C. 163, 16 S.E. 2d 655; *Boyd v. Williams,* 207 N.C. 30, 175 S.E. 832."

In the instant case the testimony of Blanche Shuler would not require an affirmative answer to any of the questions. She was not testifying in her own interest, and we hold that her testimony was not barred by the statute. Compare with *Sanderson v. Paul,* 235 N.C. 56, 69 S.E. 2d 156.

[2] The second question presented by this appeal is whether the oral statement made by Beulah Lance at the time she filled out the application for the insurance policy created a trust in favor of the grandchildren who were not specifically named in the application and who were children of Beulah Lance's other children.

Judge Martin found as a fact, upon competent evidence, "that Beulah Lance stated at the time the insurance policy was issued that 'there was not enough room to put all of the grandchildren on the insurance policy, and I'll just put on Linda and Doug. If anything happens to me, be sure and tell Frankie that half of it is to be for Linda and Doug and the rest of it is to be divided between the Grandchildren.' "

[3] A trust may be created although there is no mention of a trust in the policy. The fact that the trustees, namely, Linda and Doug, are under age does not affect the trust, and it remains enforceable despite their minority. *Levin v. Ritz,* 17 Misc. 737, 41 N.Y.S. 405.

[4] The mere fact that the proceeds are not payable until the death of the insured does not make the disposition testamentary. An insurance trust will be upheld even though it has not been executed with the formality necessary to constitute a will. G.S. 36-53 provides:

"Interest of trustee as beneficiary of policy sufficient to support inter vivos trust. — The interest of a trustee as the beneficiary of a life insurance policy is a sufficient property interest or res to support the creation of an inter vivos trust notwithstanding the fact that the insured or any other person or persons reserves or has the right or power to exercise any one or more of the following rights or powers:

(1) To change the beneficiary,

(2) To surrender the policy and receive the cash surrender value,

(3) To borrow from the insurance company issuing the said policy or elsewhere using the said policy as collateral security,

(4) To assign the said policy, or

(5) To exercise any other right in connection with the said policy commonly known as an incident of ownership thereof. (1957, c. 1444, s. 1.)"

In *Cooney v. Montana,* 347 Mass. 29, 196 N.E. 2d 202, a man took out a policy of life insurance for $10,000.00 with a double indemnity feature in case of death by accident. The policy named his sister as beneficiary. The sister agreed to pay $5,000.00 to one child, $2,500.00 to another, and the balance after paying the funeral expenses to a third child. The insured was accidentally killed. The court held that the entire $20,000.00 should be divided proportionately among the three children. The sister was not allowed to keep any of the proceeds, and there was not a resulting trust of the extra $10,000.00.

In the case of *In re Koziell's Trust,* 412 Pa. 348, 194 A. 2d 230, the insured had an insurance policy naming his wife as beneficiary. He and his wife separated, and the insured changed the beneficiary in the policy from the wife to his sister without telling his sister. At the time of making the change, he stated that his reason for doing so was that he did not wish his wife to have the proceeds from the policy, and that his sister would take care of his two minor children. After the death and the collection of the proceeds of the policy, the sister claimed the money personally. The Pennsylvania Court held that a parol trust of personal property was perfectly all right, and that the insurance proceeds were impressed with the trust even though the new beneficiary did not know about the trust. To the same effect, see *Ballard v. Ballard,* 296 S.W. 2d 811 where the

Texas court held that a parol trust of an insurance policy proceeds was perfectly valid.

In the case *sub judice,* we have a situation where the trust relationship is created at the inception of the policy. Only two of the beneficiaries could be named in the space provided, and accordingly Beulah Lance at that time stated that all of her grandchildren were to share in the proceeds. This case is therefore distinguishable from *Union Central Life Ins. Co. v. MacBrair,* 66 Ohio App. 144, 31 N.E. 2d 172, where the policy was in existence with a named beneficiary and the insured wrote a letter advising the beneficiary how to divide the proceeds when collected but never advised the beneficiary about the letter and simply attached it to the policy itself. We do not face that situation, and this decision is not to be construed as following or opposing the view expressed by the Ohio court.

If Linda Lance and Douglas Lance were to retain all of the proceeds of the insurance policy as contended for by the plaintiff, the result would be contrary to the wishes of their grandmother, Beulah Lance, at the time she took out the insurance policy, and they would be unjustly enriched. In *Bogert, Trusts and Trustees,* 2d Ed., § 471, p. 8, we find this quotation from Cardozo, C.J.:

> "'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. * * * A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.'"

Bogert goes on to quote from Dean Roscoe Pound as follows:

> "Another learned writer has referred to this trust as 'specific restitution of a received benefit in order to prevent unjust enrichment.'"

For a general discussion see Scott on Trusts, 3d Ed., § 57.3.

We think the findings of fact of Judge Martin are supported by the evidence and the conclusions of law based thereon are correct.

Affirmed.

BROCK and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. GROVER CLEVELAND NORMAN (2 CASES: 68-7587 AND 68-7588 HEARD TOGETHER)

No. 6925SC298

(Filed 27 August 1969)

1. Constitutional Law §§ 29, 37— criminal prosecution — necessity for jury trial

The courts of this State have no power, even by consent, to try a defendant in a criminal prosecution for a felony and determine his guilt or innocence without a jury. Article I, § 13, N. C. Constitution.

2. Criminal Law § 23— plea of guilty

A plea of guilty to a valid warrant or indictment, if voluntarily and understandingly entered, is equivalent to conviction, no other proof of guilt being required, and the court has power to impose sentence thereon.

3. Criminal Law § 25— plea of nolo contendere

A voluntary plea of nolo contendere, when accepted by the court, is equivalent to a plea of guilty insofar as the court's authority to impose sentence is concerned.

4. Criminal Law §§ 23, 25— conditional plea of guilty or nolo contendere

A valid sentence may not be imposed upon a conditional plea of guilty or nolo contendere.

5. Criminal Law § 25— pleas of nolo contendere — whether pleas conditionally accepted — authority of court to pronounce judgment

Although the record discloses that upon defendant's tender of pleas of nolo contendere through counsel the trial court questioned defendant as to whether he wanted to enter "a plea of nolo contendere to all of these charges and permit the judge to try the case, to hear the facts and to determine whether or not you are guilty or not guilty," and that the court proceeded to hear the evidence and pronounce judgment, the trial court had authority to render judgment for the crimes charged where the record as a whole shows that the court heard evidence, not for the purpose of determining defendant's guilt or innocence, but for the purpose of fixing punishment, and that judgment was entered and sentence was imposed on defendant's pleas of nolo contendere, not on any finding of guilt by the court.

6. Criminal Law § 25— pleas of nolo contendere — consideration of evidence — punishment

Defendant's pleas of nolo contendere establish his guilt of the offenses charged in the indictments and relieve the prosecution of the burden of making out a case against him, evidence heard by the court being considered only in fixing punishment.

APPEAL by defendant from *Burgwyn, J.*, March 1969 Session of BURKE Superior Court.

Criminal prosecutions on indictments consolidated for trial charg-

ing defendant with (1) felonious breaking and entering and felonious larceny and (2) armed robbery. Upon arraignment, the following occurred:

> Defendant's counsel: "If the Court please, I have talked with Mr. Norman and we will agree that the Court hear this and dispense with a jury trial."
>
> The court: "What kind of plea are you giving me, nolo contendere?"
>
> Defendant's counsel: "Nolo contendere, if the Court will accept it, sir."
>
> The court: "All right, sir."

The record and transcript show that defendant thereupon entered a plea of nolo contendere to all charges against him. The court then addressed the defendant as follows:

> The court: "You hear what your lawyer said? You wanted to enter what is known as a plea of nolo contendere to all of these charges and permit the judge to try the case, to hear the facts and determine whether or not you are guilty or not guilty. You do that freely and voluntarily of your own free will and accord without any coercion on his part or part of anyone?"

The defendant answered "Yes." Evidence was then introduced which indicated that the defendant, while not having himself broken and entered and not having himself physically committed the armed robbery, had advised and procured two young men to do these acts, had taken them to the scenes of the respective crimes in his automobile, and had later picked them up. During introduction of this evidence defendant's counsel objected to a question asked of a witness by the solicitor, whereupon the court said: "He is showing the disposition of the man on a plea. Go ahead."

At the conclusion of the evidence the court entered judgment finding that defendant through counsel had "announced that he desired to enter a plea of nolo contendere to the charge of breaking and entering and larceny, and also to the charge of armed robbery. . . ." and "(t)he Court finds as a fact that the said plea was voluntarily made without fear or compulsion. . . ." The court then proceeded to make detailed findings of fact relative to defendant's activities in advising and procuring the two young men to commit the crimes and relative to the part defendant had played in the actual commission of the offenses, at the conclusion of which the court found as a fact that defendant was guilty of the crimes charged and "that he is

equally guilty with them, as principals, in that he suggested, also that he participated in it. . . ." The court then imposed sentence in each case. Defendant's motions in arrest of judgment and to set the judgment aside were overruled, and defendant excepted and appealed, assigning error.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorney J. Bruce Morton, for the State.

C. David Swift for defendant appellant.

PARKER, J.

Article I, § 13, of the Constitution of North Carolina provides:

> "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal."

[1-4] By virtue of this constitutional provision the courts of this State have no power, even by consent, to try a defendant in a criminal prosecution for felony and determine his guilt or innocence without a jury. *State v. Stewart,* 89 N.C. 563. This is so even where the facts may be agreed to by the defendant and the State. *State v. Holt,* 90 N.C. 749. Of course, a plea of guilty to a valid warrant or indictment, if voluntarily and understandingly entered, is equivalent to conviction, no other proof of guilt being required, and the court has power to impose sentence thereon. *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591; *State v. Wilson,* 251 N.C. 174, 110 S.E. 2d 813. Similarly, a voluntary plea of nolo contendere, when accepted by the court, is equivalent to a plea of guilty insofar as the court's authority to impose sentence in that particular case is concerned. *State v. Worley,* 268 N.C. 687, 151 S.E. 2d 618; *State v. Ayers,* 226 N.C. 579, 39 S.E. 2d 607. But a valid sentence may not be imposed upon a conditional plea of guilty or of nolo contendere, and a statute purporting to authorize entry of such a plea and granting the court power thereupon to hear and determine the matter without a jury has been held unconstitutional as contravening Article I, § 13, of our State Constitution. *State v. Camby,* 209 N.C. 50, 182 S.E. 715.

[5] Appellant contends that the record in the present case is such as to compel the conclusion that his plea of nolo contendere was accepted only conditionally by the trial judge, who thereupon proceeded to act as both jury and judge in finding defendant guilty and entering judgment upon that finding. Had that been the case, certainly the court would have exceeded its powers. *State v. Barbour,*

243 N.C. 265, 90 S.E. 2d 388; *State v. Horne,* 234 N.C. 115, 66 S.E. 2d 665. We do not, however, so read the record. While we must concede that the court's question directed to the defendant immediately after entry of his plea would, standing alone, support appellant's contention, the record as a whole clearly indicates that the court in hearing evidence did so, not for the purpose of determining defendant's guilt or innocence, but solely to aid the judge in fixing punishment. The plea had already been unconditionally tendered and accepted before the question was asked. During the course of hearing evidence the court brushed aside an objection interposed by defendant's counsel, stating: "He (the solicitor) is showing the disposition of the man on a plea," thus clearly indicating that the judge was applying the evidence solely to the matter of sentencing. The judgment itself referred explicitly to the entry of the plea of nolo contendere by the defendant through his counsel prior to the selection of a jury, and while the judgment did contain a finding that the defendant was guilty, this finding came after detailed findings as to the defendant's activities in inducing two young men to enter upon a course of crime and is included in a finding "that he is equally guilty with them." And, finally, nothing in the judgment imposing sentence as it appears in the record indicates that it was being entered upon a finding of guilt by the court rather than upon defendant's plea. Indeed the record more nearly supports the opposite conclusion, since the court in the opening paragraph of the judgment took care to recite the voluntary entry of the plea by defendant's counsel. What was said by Stacy, C.J. in *State v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79, is pertinent here: "Thus, the case pivots on an interpretation of the record with something to be said on both sides and the defendant required to show error against a presumption of regularity." That case, like the present one, presented the question of the sufficiency of the record to support the judgment when the court, following a plea of nolo contendere, had heard evidence and had then announced the defendant guilty. The Supreme Court, in the face of some contradictions in the record as to the intent and purpose of the hearing before the trial judge, affirmed the judgment.

In *State v. Jamieson,* 232 N.C. 731, 62 S.E. 2d 52, the minute docket of the trial showed that defendant, through counsel, tendered a plea of nolo contendere, which plea was accepted by the State and thereupon the court entered judgment imposing sentence. On the other hand the case on appeal stated that "the defendant entered a plea of nolo contendere and agreed that the judge should hear the evidence, find the facts, and render such verdict as the tes-

timony indicated." In the face of these contradictions the Supreme Court affirmed the judgment imposing sentence, citing *State v. Shepherd, supra.*

In *State v. McIntyre,* 238 N.C. 305, 77 S.E. 2d 698, also a case in which defendant had pleaded nolo contendere, the defendant on appeal contended that on the face of the record it appeared that the trial court did not accept his plea, but proceeded to hear evidence and to pass upon the question of his guilt or innocence. The Supreme Court, affirming the judgment against defendant, said:

> "True, the record does say that 'upon hearing the evidence the court adjudged the defendant guilty.' But in the light of the facts as found by the court, appearing in the record, as above set forth, it means no more than that, after defendant tendered the plea of *nolo contendere,* the court heard evidence before determining that the plea be accepted. No rule of procedure is prescribed by law governing the judge in making such determination."

State v. Barbour and *State v. Horne, supra,* are distinguishable from the present case. In *Horne* the defendant was not represented by counsel and the record disclosed that the defendant seemed to have been under the constant impression that his plea of nolo contendere was a conditional one. In *Barbour* the record disclosed that judgment had been imposed on the verdict of guilty found by the judge, not upon the plea of nolo contendere. In both cases the judgment was reversed. The record in the present case in our opinion brings it more nearly within the situations presented in *State v. McIntyre, State v. Jamieson,* and *State v. Shepherd, supra.*

[6] Appellant finally contends he is entitled to a reversal for that the indictments charged him with commission of different crimes than the offenses for which the court in its judgment found him guilty and imposed sentence. As stated above, however, the judgment was entered and sentence was imposed on defendant's plea, not on any finding of guilt by the judge. The defendant's guilt of the offenses charged in the indictments was not at issue; his plea settled that matter and relieved the prosecution of the burden of making out a case against him. *State v. Beasley,* 226 N.C. 580, 39 S.E. 2d 607. The only matter at stake at the hearing was the question of punishment, and the court properly heard evidence to aid it in fixing punishment.

The judgment appealed from is
Affirmed.

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

STATE OF NORTH CAROLINA v. CHARLES WILLIAM LETTERLOUGH

No. 6919SC157

(Filed 27 August 1969)

1. Automobiles § 3— driving while license revoked — validity of warrant

Defendant was tried upon a warrant entitled North Carolina Uniform Traffic Ticket, which charged that defendant "did unlawfully and willfully operate the above-described vehicle on a street or highway . . . [by] . . . (X) Driving while Lic Permanent Revoked — 20-28." *Held:* Although the charge should have been more grammatically and precisely stated, the warrant was sufficient to charge defendant with driving a motor vehicle while his license was permanently revoked in violation of G.S. 20-28.

2. Indictment and Warrant § 7— requisite of a warrant — Uniform Traffic Ticket

The use of the Uniform Traffic Ticket as a warrant should not be encouraged, since it lacks that degree of clarity desirable in a warrant which should "express the charge against the defendant in a plain, intelligible, and explicit manner." G.S. 15-153.

3. Indictment and Warrant § 9— charge of crime — minimum standards

A warrant meets the minimum standards for validity if it (1) informs the defendant of the charge against him, (2) enables him to prepare his defense, and (3) enables the court to proceed to judgment and thereby bars another prosecution for the same offense.

4. Indictment and Warrant § 9; Automobiles § 3— charge of crime — use of abbreviations

While the use of abbreviations in warrants and indictments is not to be encouraged, the use of the word "lic" in a warrant charging the offense of driving a motor vehicle while license was permanently revoked is not fatal, the word "lic" being a recognized abbreviation for the word "license."

5. Indictment and Warrant § 12— amendment to warrant — discretion of court

Where amendment to the warrant does not change the offense with which defendant is charged, the trial court has discretionary authority to allow the amendment.

6. Automobiles § 3— driving while license revoked — admissibility of driving record

In prosecution charging defendant with driving a motor vehicle while his license was permanently revoked, the copy of defendant's driving record under seal and certification from the Department of Motor Vehicles was properly admitted in evidence G.S. 20-42(*b*).

7. Criminal Law §§ 80, 166; Witnesses § 8— exclusion of evidence — affidavit — cross-examination

Trial court properly refused to admit in evidence an affidavit offered by defendant, where the person who made the affidavit was not available

for cross-examination, the solicitor's cross-examination concerning the affidavit did not touch upon its contents, and the record does not contain the affidavit or reveal its contents.

8. Criminal Law § 162— exception to exclusion of evidence — appeal

An exception to the exclusion of evidence will not be considered on appeal when it is not made to appear what the excluded evidence would have been.

9. Criminal Law § 162— objection to evidence — waiver

Failure to object in apt time to incompetent testimony will be regarded as a waiver of objection and its admission is not assignable as error unless the evidence is forbidden by statute.

10. Criminal Law § 162— objection to evidence — motion to strike — waiver

Defendant waived any right to have alleged prejudicial portion of State witness' answer stricken where record indicated that defendant made no immediate objection to the answer but waited until an additional question had been asked and answered before making a motion to strike and for a mistrial.

11. Criminal Law § 102— argument to jury — discretion of judge

The argument of counsel must be left largely to the discretion of the presiding judge who is familiar with all the surrounding circumstances of the trial of the particular case.

12. Criminal Law § 102; Automobiles § 3— driving while license revoked — solicitor's argument to jury

In prosecution charging defendant with the offense of driving a motor vehicle while license was permanently revoked, G.S. 20-28, defendant was not prejudiced by solicitor's argument to the jury that "defendant has been driving while license revoked for three or more offenses" and "you are not to believe the defendant with the record he had and turn him aloose," where three or more offenses are in fact required for permanent revocation of license under G.S. 20-19(e), and where competent evidence was presented to show defendant's license had been permanently revoked.

13. Criminal Law § 102— solicitor's argument to jury

Trial court did not abuse its discretion in permitting solicitor to argue to the jury that they were not to believe defendant's girl friend that "he is living in sin with," where defendant's witness had testified that defendant "sometimes" lived in the home where she and her mother lived.

14. Criminal Law § 114— instructions — expression of opinion — introductory remarks

The fact that trial judge began his charge to his jury by saying that defendant "is brought into this Court by means of a warrant and comes to this Court by appeal" does not entitle defendant to a new trial, the statement being nothing more than a preliminary statement accurately depicting how the matter got to the superior court from the recorder's court.

STATE *v.* LETTERLOUGH

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

Defendant was tried in Randolph County Recorder's Court on a warrant charging him with driving a motor vehicle while his license was permanently revoked in violation of G.S. 20-28. He pleaded not guilty, was found guilty, and from sentence imposed he appealed to the superior court, where he again pleaded not guilty. At the trial in superior court the State presented testimony of two highway patrolmen who testified that at about 12:10 a.m. on 21 August 1966, they saw the defendant driving a black Pontiac automobile on Watkins Street in or near Asheboro, North Carolina. When they were five to ten feet from the defendant, he jumped from the car and ran, disappearing into some woods. He was not located until the following day. Both patrolmen testified that they had known the defendant for some time and that the person they saw driving on the night in question was definitely the defendant. The State introduced in evidence a certified copy of defendant's driving record from the Department of Motor Vehicles, which indicated that the defendant's driver's license had been permanently revoked effective January 1966.

The defendant did not testify but offered the testimony of three witnesses. James Ledwell testified that he had worked for the defendant and that it was he and not the defendant who was driving on the night in question. He admitted that twice before he had sworn he was driving when the defendant was in trouble. Mary Ingram, the defendant's girl friend, and her daughter Katherine Ingram sought to establish an alibi for the defendant by testifying that he was not in Asheboro but was in a motel near Cheraw, South Carolina, on the night in question.

From a verdict of guilty and a sentence of imprisonment the defendant appealed.

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

Ottway Burton for defendant appellant.

PARKER, J.

[1] The warrant upon which the defendant was tried was entitled *North Carolina Uniform Traffic Ticket.* It charged that on or about 21 August 1966, on RPR-2183 in the vicinity of Asheboro, in Ran-

dolph County, the defendant ". . . did unlawfully and willfully operate the above-described motor vehicle on a street or highway of North Carolina." It continues as follows:

"(Check applicable box.)

1. ( ) By speeding.....M P H in a.....M P H public zone Within city limits ( ) Yes ( ) No
2. ( ) By failing to stop at a duly erected stop sign
3. ( ) By disobeying a duly installed stop signal
4. ( ) By failing to see before (starting) (stopping) (turning from a direct line) that such movement could be made in safety
5. ( ) While under the influence of intoxicating liquor
6. ( ) By failing to yield right-of-way in obedience to a duly erected (yield sign) (stop sign)
7. (X) Driving while Lic Permanent Revoked — 20-28

* * * * *

( ) In violation of city ordinance(s) Chap.....Sec..... In violation of, and contrary to, the form of the statute in such cases made and provided and against the peace and dignity of the State."

Over the objection of the defendant the State was allowed to amend the warrant in superior court by adding, immediately following line No. 7, the words: "While and during the period his driver's license was permanently revoked." The defendant contends that the court erred in denying his motion to quash the warrant and in permitting the amendment.

[1-5] We have no quarrel with the uniform traffic ticket as a citation form, which is apparently the primary purpose for which it is intended. Its use as a warrant, however, should not be encouraged. This form lacks that degree of clarity desirable in a warrant which should "express the charge against the defendant in a plain, intelligible, and explicit manner." G.S. 15-153. The long list of possible violations could prove confusing to defendants in some instances. The State concedes that the warrant in this case is not the best of legal documents but contends that it is sufficient to withstand defendant's challenge. We agree. While the charge against the defendant as contained in the original warrant should certainly have been more grammatically and precisely stated, we hold that the warrant did meet minimum standards for validity in that it (1) informed the

defendant of the charge against him, (2) enabled him to prepare his defense, and (3) enabled the court to proceed to judgment and thereby barred another prosecution for the same offense. G.S. 15-153; *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263; *State v. Sumner,* 232 N.C. 386, 61 S.E. 2d 84. While the use of abbreviations in warrants and indictments is not to be encouraged, we note that the word "lic" appears in Webster's Third New International Dictionary, 1968 edition, as a recognized abbreviation for the word "license." Since the amendment to the warrant which was allowed in the superior court did not change the offense with which defendant was charged, the court had discretionary authority to allow the amendment. *State v. Wilson,* 237 N.C. 746, 75 S.E. 2d 924. For other cases in which somewhat similar "form" type warrants have been considered, see: *State v. Blacknell,* 270 N.C. 103, 153 S.E. 2d 789; *State v. Wells,* 259 N.C. 173, 130 S.E. 2d 299; *State v. Tripp,* 236 N.C. 320, 72 S.E. 2d 660; *State v. Daughtry,* 236 N.C. 316, 72 S.E. 2d 658.

[6-8] The defendant contends the court committed error in the admission and exclusion of some of the testimony and exhibits offered. In this connection, we find no error. The copy of defendant's driving record under seal and certification from the Department of Motor Vehicles was properly admitted in evidence. G.S. 20-42(b); *State v. Blacknell, supra; State v. Ball,* 255 N.C. 351, 121 S.E. 2d 604. Defendant excepts to the court's refusal to admit in evidence an affidavit offered by him, but this ruling was clearly correct since the person who made the affidavit was not available for cross-examination. While the solicitor questioned one of defendant's witnesses concerning the date she obtained the affidavit which the defendant had attempted to introduce, his cross-examination did not touch on the contents of the affidavit and did not render this hearsay evidence admissible. Furthermore, the record before us does not contain the affidavit or reveal its contents, and an exception to the exclusion of evidence will not be considered 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.

[9, 10] Defendant further contends that he was prejudiced by the court's refusal to strike a portion of a State's witness's response to a question by the solicitor concerning the witness's prior contact with the defendant. The witness stated:

> "I stopped a car he was riding in at one time for improper mufflers, and he got out and we talked for quite a while. And, I stopped him on another occasion riding with Mr. Faigler for carrying a concealed weapon."

The record indicates that the defendant made no immediate objection but waited until an additional question had been asked and answered before making a motion to strike and for a mistrial. Failure to object in apt time to incompetent testimony will be regarded as a waiver of objection and its admission is not assignable as error unless the evidence is forbidden by statute. *Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E. 2d 17. Any right to have the alleged prejudicial portion of the witness's answer stricken was waived by the defendant's failure to interpose a timely objection. Stansbury, N.C. Evidence 2d, § 27.

[11-13] Defendant urges as error the court's overruling of his objection to the following comments made by the solicitor during argument to the jury: "This defendant has been driving while license revoked for three or more offenses," and "(y)ou are not to believe the defendant with the record he had and turn him aloose nor are you to believe his girl friend that he is living in sin with." The argument of counsel must be left largely to the discretion of the presiding judge who is familiar with all the surrounding circumstances of the trial of the particular case. *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424.

> "Counsel must be allowed wide latitude in the argument of hotly contested cases. But what is an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge, and we 'will not review his discretion, unless the impropriety of counsel was gross and well calculated to prejudice the jury.'" *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466.

In this case three or more offenses are in fact required for permanent revocation of license under G.S. 20-19(e), and competent evidence had been presented to show defendant's license had been permanently revoked. The solicitor's comment concerning the defendant's girl friend was undoubtedly prompted by the testimony of Katherine Ingram that the defendant "sometimes" lived in the home where she and her mother lived. The solicitor's comments here do not, as defendant suggests, compare with those excepted to in *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335, or *State v. Foster,* 2 N.C. App. 109, 162 S.E. 2d 583, where the solicitor's jury arguments were found to be grossly unfair and prejudicial. In the present case the judge did not abuse his discretion in permitting the arguments complained of by the defendant.

[14] Defendant's final assignments of error relate to various portions of the charge and in particular to the court's beginning the charge by saying "he is brought into this Court by means of a war-

rant . . . and comes to this Court by appeal." No authority is cited in defendant's brief to support his position that this was error sufficient to warrant a new trial. The statement was nothing more than a preliminary statement accurately depicting how the matter got to the superior court. The defendant is also critical of the court's charge concerning his defense of alibi, but when the charge is considered in its entirety we find no prejudicial error.

Finally, the defendant contends that the court violated G.S. 1-180 by overstressing the State's contentions. A careful review of the entire charge fails to establish any merit in this contention.

In the trial below, we find

No error.

Mallard, C.J., and Britt, J., concur.

NEVA McEACHERN, Administratrix of Estate of OSCAR McEACHERN v. DR. W. H. MILLER, JASPER JONES and WAYNE COUNTY MEMORIAL HOSPITAL

No. 698SC148

(Filed 27 August 1969)

1. Hospitals § 3; Charities and Foundations § 3— doctrine of charitable immunity

Judgment of nonsuit was properly allowed in wrongful death action against defendant hospital where the cause of action arose on 4 August 1963, the rule of charitable immunity having been overruled in North Carolina only as to cause of action arising after 20 January 1967, the date of filing the opinion in *Rabon v. Hospital*, 269 N.C. 1.

2. Physicians and Surgeons § 19— malpractice — failure to provide proper treatment — sufficiency of evidence

In this action for wrongful death against a physician for failure to provide proper medical treatment to plaintiff's husband who had suffered a gunshot wound, defendant's motion for nonsuit was properly allowed where plaintiff's evidence tended to show that on the basis of defendant's experience as a surgeon it was his judgment that the best course of action was to keep the patient under observation and rely upon the body's own healing process rather than to operate, and that death was caused by a heart attack which was unrelated to the gunshot wound, there being no evidence that defendant failed in any way to exercise reasonable care and diligence in the application of his knowledge and skill to his patient's case or that anything which defendant did or failed to do was the cause of the patient's death.

Appeal by plaintiff from *Bowman, J.*, October 1968 Session of Wayne Superior Court.

This is a civil action to recover for wrongful death. In substance plaintiff alleged in her complaint that on 3 August 1963 her intestate, Oscar McEachern, was shot in the abdomen by defendant Jasper Jones; that shortly thereafter he was taken to the defendant hospital and became the patient of the hospital and of its staff physician, the defendant Dr. W. H. Miller; and that he died on 4 August 1963 as a result of the joint and concurrent negligence of both the doctor and the hospital in failing to provide proper medical treatment. The hospital and the doctor each separately demurred to the complaint for misjoinder of parties and causes. Before the hearing on these demurrers the plaintiff took a voluntary nonsuit as to defendant Jones. The superior court sustained the demurrers and on a previous appeal, reported in *McEachern v. Miller,* 268 N.C. 591, 151 S.E. 2d 209, the North Carolina Supreme Court reversed the judgment sustaining the demurrers, holding there was no misjoinder.

Upon trial of the action and at close of plaintiff's evidence motions of nonsuit made by defendant hospital and defendant doctor were allowed, and from judgment dismissing the action as to both defendants, plaintiff appealed.

Samuel S. Mitchell and Earl Whitted for plaintiff appellant.

Smith, Leach, Anderson & Dorsett, by John H. Anderson, for Dr. W. H. Miller, defendant appellee.

Dupree, Weaver, Horton, Cockman & Alvis, by Jerry S. Alvis, for Wayne County Memorial Hospital, defendant appellee.

Parker, J.

[1] Appellant's brief concedes there was no error in the judgment of nonsuit as to the defendant hospital, since the rule of charitable immunity was overruled in North Carolina only as to causes of action arising after 20 January 1967, the date of filing the opinion in *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485, and the cause of action in the present case arose 4 August 1963. Moreover, a careful review of the record reveals a total absence of any evidence of negligence on the part of the hospital and judgment of nonsuit as to it would in any event have been proper.

The sole assignments of error brought forward and argued in appellant's brief relate to the allowance of motion of nonsuit made by the defendant doctor and entry of judgment dismissing plaintiff's

action. At the trial of the case plaintiff introduced the following evidence: Plaintiff, who was wife of the deceased, testified she saw her husband in the emergency room of the hospital at 3:30 p.m. on 3 August 1963; that he stayed in the emergency room until approximately 6:40 p.m. before he was admitted in the hospital; that she left the hospital at approximately 6:45 p.m. and returned approximately 7:00 p.m.; that she remained at the hospital approximately 30 minutes, after which she left and did not return until the next morning; that at no time did she see the defendant doctor at the hospital; that she returned the following morning at approximately 10:00 a.m., at which time her husband seemed to be in fair condition; that she did not see the doctor at the hospital that morning, and the first time she saw the doctor was at his office some days after her husband died; that the doctor had then talked to her about her husband's death and had told her that he had been to see her husband at about 10:00 o'clock on Saturday night and then didn't go back until about 11:00 o'clock Sunday; that he told her he didn't do anything but let nature take its course, and further told her how he had gone into some people in surgery and they had died. Mrs. McEachern also testified that prior to his admission in the hospital her husband had never been sick except for a couple of days.

Plaintiff offered the evidence of Dr. Nathaniel F. Rodman, Jr., a pathologist on the faculty of the School of Medicine at the University of North Carolina, who was stipulated to be a medical expert specializing in the field of pathology, and who testified that he had performed an autopsy on the body of the deceased by permission of the plaintiff; he testified concerning the location of the bullet wound in the deceased's body; and further testified that the deceased had an enlarged heart and an old scar in the back wall of the heart muscle, indicating an old heart attack; that the deceased had severe arteriosclerosis; that he observed generalized acute peritonitis in the abdominal cavity, which in his opinion was directly caused by the perforations made by the bullet wound; that in his opinion the deceased had died as a result of a heart attack and he had so stated in the autopsy report; that he saw no evidence that there was any connection between the peritonitis and the heart attack; that from his experience as a pathologist he knew of no cause and effect relationship between peritonitis and the coronary artery occlusion which he thought had been the cause of death.

Plaintiff also examined the defendant, Dr. W. H. Miller, as an adverse witness. Dr. Miller testified that he had been notified at 4:00 o'clock in the afternoon that Oscar McEachern was in the hospital; that he directed the nurse at the hospital to make immediate

blood count, urine analysis, x-rays, and test blood pressure, pulse and respiration; that these tests were made; that he arrived at the hospital at approximately 8:00 p.m. when he examined McEachern, finding that he then had stable blood pressure, and stable pulse, and at that time his patient showed no signs of any imminent shock or loss of blood; that he determined that the patient should be treated for his pain and should be carefully observed; that from his experience in the treatment of gunshot wounds, nature had its own mechanism of defense and uncontrolled hemorrhaging might result if the body was disturbed unduly; that therefore in many cases of gunshot wounds the doctor will watch it in hopes that nature will exert her barrier; that he had exercised his best judgment in arriving at that decision and that judgment was in accord with accepted and approved medical and surgical practice in this State. Dr. Miller further testified he had examined Oscar McEachern again between 8:30 and 9:00 a.m. the following morning at which time he had checked his pulse, and did not like the quality of his pulse; that for that reason he again examined McEachern about 10:30 a.m., at which time McEachern talked with him; that it was his judgment at that time that there should be no change in the course of treatment.

There was evidence that at approximately 12:00 noon Oscar McEachern very suddenly went into profound shock and died. There was also evidence that the defendant doctor had signed the death certificate in which he had listed as cause of death "hemorrhage, abdominal, due to gunshot wound of abdomen." Dr. Miller testified that to make an accurate diagnosis as to cause of death one needs an autopsy, and that he did not have access to the autopsy report at the time he signed the death certificate.

[2] In ruling on motion for nonsuit we are required to take as true all of the plaintiff's evidence which tends to support her claim, to consider it in the light most favorable to her, to give her the benefit of every reasonable inference which may legitimately be drawn therefrom, and to resolve any contradictions and discrepancies therein in her favor. *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783. Even when so considered, plaintiff's evidence in the present case fails to make out a case for the jury. The standard of care required of a physician or surgeon was well stated by Higgins, J. in *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E. 2d 762, 765, as follows:

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must

possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. (Citing cases.) If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

In the present case there was no evidence, and plaintiff does not contend, that Dr. Miller was in any way deficient in professional learning, skill or ability. On the contrary plaintiff stipulated that the doctor was a medical expert in the field of general surgery. There was no evidence that he failed in any way to exercise reasonable care and diligence in the application of his knowledge and skill to his patient's case or that he failed in any respect to use his best judgment in the treatment and care of his patient. Dr. Miller himself testified that on the basis of his experience as a surgeon it was his judgment that the best course of action for his patient was to keep him under observation and to rely upon the body's own healing processes rather than to operate, and that indeed an operation might have been extremely dangerous. There was no evidence, by opinion evidence or otherwise, that good medical treatment would require any affirmative action that was not here performed, or that anything which the doctor did prescribe was improper.

Furthermore, there is no evidence that anything which the doctor did or failed to do in this case was the cause of the patient's death. The pathologist who performed the autopsy testified that in his opinion death was caused by a heart attack which was unrelated to the bullet wound. The only evidence to the contrary was contained in the death certificate, which was prepared by the defendant doctor himself without benefit of an autopsy and which indicated death was due to hemorrhaging from a gunshot wound. Even resolving this conflict in the evidence in plaintiff's favor, there is simply no evidence that anything which the doctor did or failed to do in this case was the proximate cause of the patient's death.

In the judgment of nonsuit dismissing plaintiff's action there was

No error.

Mallard, C.J., and Britt, J., concur.

IN THE MATTER OF SAUNDRA LyNEISE MORRISON AGE: 1 BORN: MAY 27, 1967

No. 6921DC408

(Filed 27 August 1969)

1. Infants § 9; Parent and Child § 6— custody proceedings — welfare of child

The welfare of the child is the principal consideration in determining custody matters.

2. Infants § 9; Parent and Child § 6— award of custody to grandparents — sufficiency of findings

In this proceeding to determine custody of a child, findings of fact by the trial court to the effect that the parents are separated, that the mother, a nonresident, voluntarily gave custody of the child to the paternal grandparents, and that the father supports the child, *are held* sufficient to support the court's order awarding custody of the child to the paternal grandparents.

APPEAL by petitioner from *Alexander, J.*, 31 March 1969 Civil Session, District Court, FORSYTH Division.

The record in this case discloses that Erma J. Morrison filed a petition in the District Court of Forsyth County dated 18 January 1969, alleging that she was a resident of the State of Texas and that she was the natural mother of Saundra LyNeise Morrison, born 27 May 1967, of the marriage union between herself and her husband, Benjamin Morrison, Jr., and that in May, 1968, a marital dispute arose between the petitioner and her husband which resulted in a further dispute between them as to who would have the custody of said child, and that the petitioner permitted the paternal grandmother, Ardelia L. Morrison, to take and keep the child until the dispute was settled. The petitioner further alleged that in September, 1968, she left Texas to come to Forsyth County, North Carolina, to get her child and take her back to the State of Texas, but that the paternal grandparents refused to release the child to her. The petitioner further alleged that on 9 January 1969 she learned that the Domestic Relations Court of Forsyth County on 14 August 1968 issued an order placing the custody of Saundra LyNeise Morrison in the paternal grandparents and the child was made a ward of the court. The petitioner further alleged that she was never served with any process regarding the petition filed by the paternal grandparents and that she had no notice whatsoever of either the petition or order until 9 January 1969, and that said order was void because the court had no jurisdiction to enter the order, and that there had been no compliance with G.S. 110-28. The petitioner further alleged

that she was in all respects a fit and proper person to have the custody of her child. The petitioner prayed that the order of the Domestic Relations Court dated 14 August 1968 be vacated, and that she be awarded the custody of her child. The record does not disclose that the paternal grandparents filed any answer to the petition.

On 21 April 1969 Judge Abner Alexander of the District Court of Forsyth County entered an order in this cause which recites in part that the matter came on for hearing before him on 31 March 1969 upon the petition of Erma Morrison and that petitioner and respondents and their respective attorneys were all present at said hearing along with Benjamin Morrison, Jr., father of the child, and that the court heard evidence of the petitioner and the respondents and argument of counsel whereupon the trial court proceeded to make the following findings of fact:

"(1) That a court order was issued on the 14th day of August, 1968, by E. S. Heefner, Jr., Judge of Forsyth County Domestic Relations Court, declaring that Saundra LyNeise Morrison be made a ward of this court and awarding custody of said child to the paternal grandparents, Mr. Benjamin Morrison and his wife, Ardelia L. Morrison. It appears to this court that said order was proper in every respect and that the Domestic Relations Court had jurisdiction of the matter of Saundra LyNeise Morrison.

"(2) That Saundra LyNeise Morrison has resided in the home of her paternal grandparents, Benjamin Morrison and his wife, Ardelia L. Morrison, since May, 1968, when petitioner, Erma J. Morrison, the minor child's mother, left the State of North Carolina and returned to Texas.

"(3) The petitioner is a resident and citizen of Texas and has resided there since May, 1968; the respondents are citizens and residents of North Carolina and the minor child's father, Benjamin Morrison, Jr., is a citizen and resident of North Carolina, but is presently a member of the Armed Forces stationed overseas. That Benjamin Morrison, Jr., attended this hearing and gave evidence in this matter.

"(4) That petitioner had knowledge of the court order of August 14, 1968, since September, 1968.

"(5) That the paternal grandparents, Benjamin Morrison, Sr., and Ardelia L. Morrison, are fit and proper persons to have custody of the aforesaid minor child, and that said child is now and has been at all times supported by her father, Benjamin Mor-

rison, Jr. That it is in the best interests of said child that she remain a ward of this court and that she remain in the custody of her paternal grandparents."

Based upon its findings of fact the court refused to vacate the order dated 14 August 1968 and awarded the custody of Saundra LyNeise Morrison to the paternal grandparents. To the entry of the order the petitioner excepted and gave notice of appeal to this Court.

Richard C. Erwin for the petitioner-appellant.

Barbara C. Westmoreland for the respondent-appellee.

HEDRICK, J.

The appellee filed a motion in this Court to dismiss the appeal for that the appellant failed to comply with the provisions of Rule 19(f) of the Rules of Practice in the Court of Appeals of North Carolina. The motion to dismiss was denied and the Court proceeded to decide the case on its merits.

The appellant's sole assignment of error, based on the single exception in the entire record, challenges the entry of the order of Judge Alexander of the District Court of Forsyth County dated 21 April 1969. In *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d. 363, Parker, C.J., said:

"This sole assignment of error to the signing of the judgment presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form."

[1] The only question before this Court is whether Judge Alexander's findings of fact support his judgment. G.S. 50-13.2(a) provides that the court shall award custody of a minor 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." Our courts have consistently held that the child's welfare is the principal consideration in determining custody matters. *Greer v. Greer,* 5 N.C. App. 160, 167 S.E. 2d. 782; *In re Custody of Owenby,* 3 N.C. App. 53, 164 S.E. 2d. 55; *In re Custody of Pitts,* 2 N.C. App. 211, 162 S.E. 2d. 524; *Holmes v. Sanders,* 243 N.C. 171, 90 S.E. 2d. 382; *Holmes v. Sanders,* 246 N.C. 200, 97 S.E. 2d. 683; *In re Coston,* 187 N.C. 509, 122 S.E. 183.

[2] In the instant case the mother and father gave the child to the

paternal grandmother in May, 1968, pending settlement of their marital difficulties. The record does not disclose that these difficulties have been settled; moreover, the findings of fact indicate that the mother and father are living in a state of separation, and that the mother is a resident of the State of Texas, and that the child has been at all times supported by the father. Since the mother voluntarily gave the child to the grandparents in May, 1968, it can be assumed that she has never and does not now question their fitness to have the custody of the child, or their ability to provide for her. Because the father supports the child and remains a resident of North Carolina, and appeared and participated in the hearing, it may be assumed that he is satisfied that the best interests of the child will be served if she remains in the custody of the grandparents.

In *Greer v. Greer, supra,* Morris, J., speaking for the Court said:

> "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 an abuse of discretion."

In the case before us there is no showing that the trial judge abused his discretion. Judge Alexander's findings of fact are sufficient to support his order.

Since there was no exception to the finding of fact with respect to the order dated 14 August 1968 of the Domestic Relations Court of Forsyth County, the question of the jurisdiction of that court to enter its order is not before this Court. The order of the District Court of Forsyth County dated 21 April 1969 is

Affirmed.

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

J. H. PATRICK AND WACHOVIA BANK & TRUST COMPANY, EXECUTORS OF THE WILL OF P. P. GREGORY, DECEASED v. JOE L. HURDLE

No. 691SC367

(Filed 27 August 1969)

1. Venue § 8— removal for convenience of witnesses — sufficiency of findings to support order

Allegations in plaintiff's affidavit in support of motion to remove cause to another county that the parties risk losing the testimony of witnesses through death or disability if there is a long delay in trial and, further, that knowledge of the transactions between the parties are so well known and discussed in the county that it would be difficult to obtain a fair trial therein, *are held* insufficient to support finding and conclusion of trial judge that "the convenience of witnesses and the ends of justice would be promoted by the change," and order of removal based on such finding exceeded trial judge's discretionary authority.

2. Venue § 8.5— removal for fair trial

A motion to remove cause for prejudice under G.S. 1-84 is addressed to the sound discretion of the trial judge.

3. Venue § 8— removal for convenience of witnesses

A motion to remove a cause when the convenience of witnesses and ends of justice would be promoted is addressed to the sound discretion of the trial judge. G.S. 1-83(2).

4. Venue § 8— motion for removal of cause — prerequisite

When a motion to remove a cause is made, facts must be stated particularly and in detail in the affidavit, or judicially admitted, showing the grounds for such removal. G.S. 1-85.

APPEAL by defendant from *Parker (Joseph W.), J.*, 17 March 1969 Session, PASQUOTANK Superior Court.

The order from which this appeal is taken was entered after a hearing conducted by consent in Pasquotank County concerning an action pending in Currituck County. Pasquotank and Currituck Counties lie within the First Judicial District and during the period 1 January 1969 through 30 June 1969 Judge Parker was regularly assigned to hold the courts in the First Judicial District.

Plaintiffs instituted this action in Currituck County, the residence of the defendant, alleging that defendant is indebted to the estate of P. P. Gregory. Defendant filed answer denying the indebtedness, and alleging by way of counter-claim, that the estate is indebted to defendant.

On 28 February 1969 plaintiffs filed a motion and affidavit for removal of the cause from Currituck County to Pasquotank County

or another county for trial. This is the motion that by consent was heard by Judge Parker in Pasquotank County. At the conclusion of the hearing Judge Parker entered his order, dated 20 March 1969, removing the case to Pasquotank County for trial. Defendant appealed.

Leroy, Wells, Shaw & Hornthal, by L. P. Hornthal, Jr., for plaintiffs-appellees.

John T. Chaffin and Gerald F. White for defendant-appellant.

BROCK, J.

Removal of a case for a "fair trial" under the provisions of G.S. 1-84 is limited to removal to an adjoining county. Removal of a case "when the convenience of witnesses and ends of justice would be promoted" under the provisions of G.S. 1-83(2) is not limited to removal to an adjoining county.

Appellees state in their brief: "In any event, as far as the geography of the matter is concerned, Currituck and Pasquotank Counties seemingly adjoin in the Albemarle Sound." However, it seems from Judge Parker's order that plaintiffs and the Judge were doubtful that the two counties do adjoin, because the order concludes ". . . that the convenience of witnesses and the ends of justice would be promoted by the change. . . ." This appears to be an attempt to order removal under G.S. 1-83(2) which allows removal to a non-adjoining county.

[1] A determination of whether Currituck and Pasquotank Counties adjoin in the Albemarle Sound is not necessary to a disposition of this appeal. The main problem presented here is whether the finding by the trial judge is supported by the evidence. The only evidence in the record is the affidavit of counsel for plaintiffs. There are only two paragraphs of facts alleged under oath in the affidavit. The two paragraphs of the affidavit are as follows:

> "1. Without a special session of court this case cannot in all probability be tried in Currituck County until December 1969 or January 1970. The plaintiffs and, on information and belief, the defendant risk losing the testimony of witnesses through death or disability if there is a long delay in trial. The plaintiffs particularly would be prejudiced by the death of the defendant since plaintiffs would in that event be unable to offer certain evidence of transactions with him, and plaintiffs are informed and believe that the defendant's health is poor.

Trial in Pasquotank County would be little or no inconvenience to witnesses and all attorneys have offices in and, a number of witnesses reside in, Pasquotank County. The plaintiffs are administering an estate of substantial size and all parties affected by it are prejudiced by the delay in the conclusion of this litigation since death taxes, bequests, and real property titles will not be completely settled until this litigation is terminated. Plaintiffs aver on information and belief that this case can be tried in Pasquotank County at the May 1969 Session.

"2. The plaintiffs are informed and believe that the defendant and his activities generally and particularly his transactions with the late P. P. Gregory, have been known to many people and generally discussed in Currituck County for a long period of time, and it would be difficult to obtain a jury completely free of and uninfluenced by such knowledge and discussion. Such knowledge of the transactions between said parties are not well known and have not generally been discussed in Pasquotank County, and it is necessary in the interest of obtaining a fair trial that this cause be removed to Pasquotank or some other county."

The allegations of the first paragraph of the affidavit appear to allege grounds for removal for the purpose of obtaining a speedy trial, if such were authorized; but certainly they do not support a finding and conclusion "that the convenience of witnesses and the ends of justice would be promoted by the change." The allegations in the second paragraph are addressed entirely to an inability to obtain a fair trial in Currituck County, and they give no support to a finding and conclusion "that the convenience of witnesses and the ends of justice would be promoted by the change."

The only finding and conclusion by the trial judge was as follows: ". . . it appearing to the Court after considering the affidavits submitted by the parties and arguments of counsel that the convenience of witnesses and the ends of justice would be promoted by the change and that said motion should be allowed, in the discretion of the Court." The order then directs the removal to Pasquotank County and peremptorily sets the case for trial at the May 1969 Session.

The affidavit might well give support to a finding and conclusion that a fair and impartial trial could not be obtained in Currituck County, but the trial judge made no such finding. So far as this record is concerned the trial judge did not base his finding and con-

clusion on facts in the record, and, therefore, the order exceeds the trial judge's discretionary authority.

[2-4] A motion to remove for prejudice under G.S. 1-84 is addressed to the sound discretion of the trial judge. *Gilliken v. Norcom,* 193 N.C. 352, 137 S.E. 136; *Phillips v. Lentz,* 83 N.C. 240. Likewise, a motion to remove when the convenience of witnesses and ends of justice would be promoted is addressed to the sound discretion of the trial judge. *Gilliken v. Norcom, supra.* However, when a motion to remove is made, facts must be stated particularly and in detail in the affidavit, or judicially admitted, showing the grounds for such removal. G.S. 1-85; See, *Gilliken v. Norcom, supra; Emery v. Hardee,* 94 N.C. 787.

In *Gilliken v. Norcom, supra,* it was stated thus: "The rule of law governing motions for removal for the causes specified, is thus declared in *Phillips v. Lentz,* 83 N.C. 240: 'The distinction seems to be where there are no facts stated in the affidavit as grounds for the removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final.' Citing cases."

For the failure of the evidence to support the findings and order of the trial judge, the order removing this cause from Currituck to Pasquotank must be

Reversed.

CAMPBELL and MORRIS, JJ., concur.

BRUNSWICK COUNTY, A MUNICIPAL CORPORATION v. CHARLES HARPER VITOU, ERNEST VITOU, MARGARET SWAN HOOD, CHARLES VITOU, JR., AND JEANETTE K. VITOU, BY HER GUARDIAN AD LITEM, MARY VITOU

No. 6913SC247

(Filed 27 August 1969)

1. Executors and Administrators § 13— primary liability for decedent's debts — personalty

Personalty is primarily liable for the payment of a decedent's debts, including judgments and obligations secured by mortgages, and the real estate is secondarily liable and may be resorted to only in the event that the personalty is insufficient to pay all debts in full.

2. Public Welfare; Executors and Administrators § 20— satisfaction of old age assistance lien — necessity for exhaustion of estate personalty before resorting to realty

When old age assistance is terminated by death of the recipient, the county's claim against the recipient's estate under G.S. 108-30.1 must be satisfied out of the personal property of the estate to the extent it is sufficient to pay claims of the sixth class under G.S. 28-105 before resorting to the real property for satisfaction of the debt.

APPEAL by defendant from *Bailey, J.*, 21 October 1968 Session, BRUNSWICK Superior Court.

This action was instituted to enforce an old age assistance lien against the estate of Annie K. Vitou, deceased. Until her death in October 1967, Annie K. Vitou was a recipient of old age assistance from the Department of Public Welfare of Brunswick County amounting to $8,637.20, by virtue of her application therefor under Chapter 108 of the General Statutes of North Carolina. Pursuant to the provisions of G.S. 108-30.1 and G.S. 108-30.2, the plaintiff, Brunswick County, sought to enforce its lien in the amount of $8,637.20 against certain real estate owned by decedent at the time of her death. The defendants are Charles Harper Vitou, who is a son of the deceased and administrator C.T.A. of her estate; Ernest Vitou, who is the other son of the deceased; Margaret Swan Hood, who was devised the real estate in question by the deceased; and Charles Vitou, Jr. and Jeanette K. Vitou, who are grandchildren of the deceased and the beneficiaries under the residuary clause of her will.

Plaintiff and defendants waived trial by jury and agreed that the court might hear the evidence, find the facts and render judgment. Upon finding facts substantially as above, the court concluded that plaintiff was entitled to enforce its lien for $8,637.20 against the estate of Annie K. Vitou, "first by selling the real estate and then should there then be a yet unpaid balance on the lien to require its payment under Class Six of claims, G.S. 28-105." Defendant, Margaret Swan Hood, excepted to the entry of this judgment and appealed to the Court of Appeals.

Kirby Sullivan for defendant appellant.

E. J. Prevatte, for plaintiff appellee, Brunswick County.

Henry & Henry, by Everett L. Henry, for defendant appellees.

BROCK, J.

Defendant assigns as error the judgment of the trial court that the real property of the estate of Annie K. Vitou be sold to pay the

old age assistance lien before resort is had to the personal property of the estate.

G.S. 108-30.1 provides in pertinent part: "There is hereby created a general lien, enforceable as hereinafter provided, upon the real property of any person who is receiving or who has received old age assistance, to the extent of the total amount of such assistance paid to such recipient from and after October 1, 1951. Before any application for old age assistance is approved under the provisions of this article, the applicant shall agree that all such assistance paid to him shall constitute a claim against him AND AGAINST HIS ESTATE, ENFORCEABLE ACCORDING TO LAW by any county paying all or part of such assistance." (Emphasis added.)

Then G.S. 108-30.2 sets forth the action to be taken upon termination of old age assistance. When it appears that the recipient of old age assistance has owned any realty at the time of or since the date of the filing of the lien or the estate consists of over $100.00 in personal property, or a personal representative has been appointed, then "the county attorney shall take such steps as he may determine to be necessary to enforce the claim or lien herein provided." G.S. 108-30.2. In addition it provides that "[T]he claim against the estate of a recipient herein provided for shall have equal priority in order of payment with the sixth class under § 28-105 of the General Statutes."

Plaintiff appellee contends that the provisions of these statutes authorize the county attorney to make an election as to whether to proceed against the personal property of the estate or go directly to the real property of the estate in order to satisfy the old age assistance lien. Defendant appellees, on the other hand, contend that the statutes empower the personal representative of the deceased to make the election as to what assets are to be used to satisfy the old age assistance lien. We disagree with both of these contentions.

G.S. 108-30.1 provides: "Each county department of public welfare shall notify all persons shown of record to be recipients of old age assistance as of the date of notice that all old age assistance grants paid from and after October 1, 1951, shall constitute a lien against the real property and a claim against the estate of each recipient. The notice may be given by letter mailed to the last known address of each recipient, but failure to give such notice shall not affect the validity of the lien." The trial court made findings of fact that prior to October 1951, Annie K. Vitou, deceased, was receiving old age assistance from plaintiff county and that the notice of a lien

and a claim against her estate was given on 1 August 1951 as required by the Statute.

[1] Since the assistance was terminated by death of the recipient in this case, the claim must be enforced according to the law pertaining to administration of estates. The well established rule in administering an estate in North Carolina is that the personalty is primarily liable for the payment of a decedent's debts, including judgments and obligations secured by mortgages, and the real estate is secondarily liable and may be resorted to only in the event that the personalty is insufficient to pay all debts in full. Wiggins, Wills and Administration of Estates in North Carolina, § 235, p. 710. "When a debtor dies his real estate descends to his heirs or vests in his devisees, and possession of his personal estate vests in his executor or administrator. The personalty is primarily liable for the payment of his debts, including judgments and obligations secured by mortgages for, though secured, they are nonetheless debts, and heirs and devisees are entitled to have them paid out of the personal estate to the exoneration of the security." *Moore v. Jones*, 226 N.C. 149, 36 S.E. 2d 920.

We have not overlooked the fact that G.S. 108-30.1 does create a general lien against the real estate owned by a recipient of old age assistance. However, the legislature, by creating the lien, did not intend that the county attorney, or any other person, should have the option of electing what assets of the estate to proceed against to enforce the lien. The primary intent in creating the general lien was to secure the county against a third party's acquiring a superior interest in the real estate of the recipient.

[2] For the reasons indicated, we hold that when old age assistance is terminated by death of the recipient, that the county's claim against the recipient's estate under G.S. 108-30.1 must be satisfied out of the personal property in the estate to the extent it is sufficient to pay claims of the sixth class (under G.S. 28-105) before resorting to the real property for satisfaction of the debt. Therefore, the judgment of the trial court must be reversed.

Reversed.

CAMPBELL and MORRIS, JJ., concur.

FRANKLIN DEWITT CARRIKER v. CHARLES PARKER MILLER

No. 6926SC315

(Filed 27 August 1969)

Process § 2; Pleadings § 1— copy of order extending time for filing complaint — omission of date

Where the copy of the order extending time for filing complaint was incomplete as delivered to defendant in that it did not show the particular day of the month to which time for filing complaint had been extended, such omission was a harmless irregularity and did not mislead or prejudice defendant nor affect the jurisdiction of the court. G.S. 1-121.

APPEAL by defendant from *Anglin, J.*, 3 February 1969 Schedule "A" Civil Session of MECKLENBURG Superior Court.

This is a civil action to recover damages resulting from a motor vehicle collision which occurred on 26 April 1965. Summons was issued on 25 April 1968. At the time of issuing summons, plaintiff did not file complaint but applied for and obtained an order from the assistant clerk of superior court extending the time for filing the complaint to 15 May 1968. The originals of the summons, application for extension of time, and order extending time for filing the complaint were complete in all respects. Summons was served and a copy of the application and order were delivered to defendant on 1 May 1968. The copy of the order extending time for filing complaint as delivered to defendant was incomplete in that it did not show the particular day in May to which time for filing complaint had been extended, the copy showing that the time for filing complaint was extended "to the ..... day of May, 1968." The complaint was filed on 15 May 1968 and was served on defendant on 16 May 1968. On 3 June 1968 defendant entered a special appearance and moved to dismiss the plaintiff's action on the grounds that plaintiff had failed to comply with G.S. 1-121 in that no copy of the order extending time in which to file complaint had been served on defendant since the purported copy as served upon him did not show the date upon which the complaint was to be filed.

From an order denying defendant's motion to dismiss upon his special appearance and allowing defendant 30 days in which to file answer, defendant appealed.

Thomas M. Mullen for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman, by Hugh L. Lobdell for defendant appellant.

PARKER, J.

G.S. 1-121 provides that the complaint must be filed in the clerk's office at or before the time of the issuance of summons, "provided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint. . . ."

Defendant appellant contends that the critical word in the above-quoted portion of the statute is the word "copy," that this word means an exact duplicate of the original, and that since the purported copy of the order extending time for filing the complaint as served upon him was not an exact duplicate of the original in that the day in May 1968 to which the time for filing complaint was extended was left blank, the service upon him was fatally defective. In *Washington County v. Blount,* 224 N.C. 438, 31 S.E. 2d 374, the North Carolina Supreme Court, speaking through Denny, J., (later C.J.) 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 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 (citing authorities).'"

In that case the copies of the summons delivered to the defendants were not dated or signed by the clerk. The Supreme Court held that the defendants, in contending that the service of summons upon them was defective, were "relying upon mere irregularities or technicalities, which in no wise misled them," and accordingly held that the omissions in the copies of the summons delivered to defendants were harmless irregularities and did not affect the jurisdiction of the court.

In the case presently before us the defendant could not have been misled by the omission from the copy of the order extending

time for filing complaint of the exact day in May to which time for filing the complaint had been extended. He knew from the service of the summons upon him that civil action had been instituted against him. He knew from the copy of the application for extension of time as served upon him the exact nature of the suit which had been brought against him. The complaint was actually filed within the time permitted by the extension order, and copy of the complaint was served upon defendant in apt time and more than two weeks prior to the time defendant entered his special appearance and filed motion to dismiss.

The present case is clearly distinguishable from the situation which was presented in the case of *Brantley v. Sawyer,* 5 N.C. App. 557, 169 S.E. 2d 55, and from the case of *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283. In each of those cases the copy of the summons which was delivered to the defendant directed him to appear in a county other than that in which the suit was pending. The Supreme Court in *Washington County v. Blount, supra,* cited and distinguished the *Harrell case,* characterizing the defects in *Harrell* as "a fatal variance between the place where the defendant was commanded to appear and file its answer and the place where the suit was actually pending."

We hold that the omission in the copy of the extension order which was delivered to appellant was a harmless irregularity and did not mislead or prejudice appellant nor affect the jurisdiction of the court.

The judgment appealed from is

Affirmed.

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

LAFAYETTE BARNES, OSPY J. BARNES, THURMAN BARNES, PEARL WADDELL STONE, PEARL BLALOCK, FLORENCE WADDELL, PERRY LAMM, RALPH BARNES, MILTON BARNES, CAREY BARNES AND ROBERT WADDELL v. MALLIE G. BARNES, BILLIE MOORE, WILSON SAVINGS AND LOAN ASSOCIATION, FIRST UNION NATIONAL BANK OF NORTH CAROLINA, AND MALLIE G. BARNES AND BILLIE MOORE AS CO-EXECUTORS OF THE ESTATE OF GEORGE W. BARNES, DECEASED

No. 697SC195

(Filed 27 August 1969)

1. Fraud § 9; Trusts § 16— action to impose trust upon savings account — joinder of defendants — fraudulent conduct

In an action by plaintiff beneficiaries under a will to have certain savings accounts declared to be held in trust by the individual defendants and to be distributed according to the will of testator, the plaintiffs alleging that the accounts are assets of the estate in which they would share but for the fraudulent acts of the defendants who had occupied a position of trust toward testator, the plaintiffs should be allowed to join as defendants all who participated in the alleged fraudulent acts as well as all who, with knowledge, received benefits from such acts.

2. Trusts § 16— action to impose trust upon savings accounts — joinder of defendants — mutual mistake

In an action by plaintiff beneficiaries under a will to have certain savings accounts declared to be held in trust by the individual defendants and to be distributed according to the will of testator, the plaintiffs alleging that the accounts are assets of the estate in which they would share but for the mutual mistake of the deceased and the two defendants as to the legal consequences of signing the signature cards furnished by the savings and loan institutions, joinder of the two defendants, who allegedly occupied position of trust toward deceased, *held* proper.

APPEAL by defendants from *May, J.*, 18 November 1968 Session, WILSON Superior Court.

Plaintiffs filed complaint in substance alleging: All of the plaintiffs and the individual defendants, Mallie G. Barnes and Billie Moore, are nieces and nephews of George W. Barnes, who died leaving a last will bequeathing all of his estate, except for a few items of personal property, to the plaintiffs and to the individual defendants. At the time of his death the sole assets of his estate, except for a few personal possessions which were specifically bequeathed, consisted of savings and loan stock and savings accounts in the Wilson Savings & Loan Association and the First Union National Bank of North Carolina. At the time each of these accounts was established George W. Barnes signed signature cards furnished by each institution at which he established the account. The signature cards at the Savings & Loan Association were signed by George W. Barnes, Mallie

Barnes and Billie Moore. The card at the Bank was signed by George W. Barnes and Billie Moore. All of these cards provided for joint accounts and provided that the assets of the account would pass to the survivor whose name appeared on the card at the death of either party. George W. Barnes was 88 years of age when he signed the card at the Bank and was 80 and 87 years of age respectively at the time he signed the cards at the Savings & Loan Association. He was infirm, did not have a complete grasp of business affairs, and did not fully understand the significance of the cards he signed.

Plaintiffs further allege that George W. Barnes, Mallie G. Barnes and Billie Moore were mistaken as to the legal consequences of signing the cards, or if Mallie G. Barnes and Billie Moore were cognizant of said consequences, they fraudulently and by inequitable conduct concealed from George W. Barnes the legal consequences of his actions; that it was the intention of George W. Barnes to leave a part of his savings and loan stock and savings accounts to the plaintiffs as indicated by Item Six of his will, and he was prevented from doing so by his own mistake and by the mutual mistake of Mallie G. Barnes and Billie Moore, or by the fraud and inequitable conduct of Mallie G. Barnes and Billie Moore in concealing from George W. Barnes the legal consequences of his action; that George W. Barnes was an elderly man in poor health at the time he signed the cards; and that Mallie G. Barnes and Billie Moore were helping him with his business affairs and he relied on them for advice; that they were in a position of trust toward him; and that all of the funds were deposited by George W. Barnes.

Plaintiffs prayed that these accounts be declared to be held in trust by the individual defendants, Mallie G. Barnes and Billie Moore, to be distributed according to the will of George W. Barnes, deceased; and that the signature cards be reformed to provide that at the death of George W. Barnes the accounts shall be part of his estate.

The defendants, Mallie G. Barnes and Billie Moore, individually and as co-executors of the estate of George W. Barnes, deceased, filed a joint demurrer to the complaint and moved to dismiss on the grounds of misjoinder of parties and causes of action, which demurrer was overruled.

To the order overruling the demurrer, the demurring defendants excepted and appealed.

Kirby, Webb & Hunt, by James B. Hunt, Jr., for plaintiff appellees.

Lucas, Rand, Rose, Meyer & Jones, by William R. Rand, for defendant appellants.

PARKER, J.

[1] The sole question presented is whether the trial court erred in overruling the demurrer interposed for misjoinder of parties and causes. The plaintiffs allege that certain accounts, some claimed jointly by Mallie G. Barnes and Billie Moore, and one claimed individually by Billie Moore, are in fact assets of the estate of George W. Barnes, deceased, in which plaintiffs would share but for the wrongful actions of the defendants. Although the plaintiffs allege that these funds were deposited on separate occasions and in different accounts, they also name both Mallie G. Barnes and Billie Moore as having participated in all of the transactions. Plaintiffs allege the same conduct as to each defendant as to all accounts.

The alleged fraud of Mallie Barnes and Billie Moore is one of the grounds for the plaintiffs' complaint. In such case, the plaintiffs should be allowed to join as defendants all who participated in the alleged fraudulent acts as well as all who, with knowledge, received benefits from such acts. *Lee v. Thornton*, 171 N.C. 209, 88 S.E. 232; *Fisher v. Trust Co.*, 138 N.C. 224, 50 S.E. 659.

[2] In the alternative, the plaintiffs allege that George W. Barnes was prevented from leaving a part of these funds for distribution to them under the terms of his will by reason of his own mistake and the mutual mistake of Mallie G. Barnes and Billie Moore. The complaint alleges that the name of Billie Moore appears on the signature cards on all of the accounts in question and that the name of Mallie G. Barnes appears with Billie Moore on all except one account. All of these funds were deposited by George W. Barnes. The plaintiffs allege that but for the mutual mistake of the deceased and the two defendants, all of these funds would now be a part of the funds of the estate of George W. Barnes in which they would share under the terms of his will.

"Joinder is proper when plaintiffs are heirs or legatees or next of kin, as long as all the relief sought is directly connected with obtaining plaintiff's shares of the estate assets, and as long as there is some central, unifying thread — such as the provisions of a trust agreement or will, or a misapplication of funds by the principal defendant with which the other defendants are somehow connected."

1 McIntosh, N.C. Practice 2d, § 650; *McDaniel v. Fordham,* 261 N.C. 423, 135 S.E. 2d 22; *Ezzell v. Merritt,* 224 N.C. 602, 31 S.E. 2d 751; *Bellman v. Bissette,* 222 N.C. 72, 21 S.E. 2d 896.

In the present case the alleged joint conduct of the two individual defendants, who, so plaintiffs allege, occupied a position of trust toward the deceased, furnishes a sufficient "unifying thread," and joinder was proper.

The order overruling the demurrer is

Affirmed.

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

STATE OF NORTH CAROLINA v. SAMMIE LEWIS THOMPSON

No. 6926SC326

(Filed 27 August 1969)

Larceny § 4; Indictment and Warrant § 11— sufficiency of warrant — ownership of stolen property — "Belk's Department Store"

A warrant for the larceny of property from "Belk's Department Store" is fatally defective in failing to allege sufficiently that the owner of the property allegedly stolen is either a natural person or a legal entity capable of owning property.

APPEAL by defendant from *Thornburg, J.,* 3 February 1969 Schedule "D" Criminal Session, MECKLENBURG Superior Court.

Defendant was charged with the larceny of three dresses of the value of $56.00 from "Belk's Department Store" in Charlotte. He was tried in the city recorder's court, found guilty, and appealed. On his trial in the superior court, he was represented by counsel, but the record is silent as to whether counsel was privately retained or court appointed. He entered a plea of not guilty. From a verdict of guilty and judgment entered thereon, he appealed. Upon a finding of defendant's indigency, counsel was appointed to perfect his appeal, and Mecklenburg County was ordered to pay the costs of preparation of transcript and printing the record on appeal and brief.

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

Peter H. Gerns for defendant appellant.

PARKER, J.

Defendant, as he had a right to do, filed in this Court a written motion in arrest of judgment on the ground that the warrant under which he was tried, convicted, and sentenced is fatally defective in that it fails to allege sufficiently that the owner of the property allegedly stolen is either a natural person or a legal entity capable of owning property. The warrant charges theft of three dresses from "Belk's Department Store, 113 E. Trade Street." The record is silent as to whether the owner of the property is, in fact, a corporation, a sole proprietorship, or a partnership.

Defendant relies on *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901. There defendant was charged with embezzlement from "The Chuck Wagon." Parker, J. (now C.J.) discussed the two lines of authorities in respect to the necessity of allegation in the warrant or indictment in a prosecution for "larceny or embezzlement":

> "One line of authorities holds to the proposition that, in a prosecution for larceny or embezzlement, it is necessary to allege in the indictment that the owner of the property, if not a natural person, is a corporation or otherwise a legal entity capable of owning property. Another line of authorities is cited, where in some jurisdictions the foregoing rule has been relaxed, and which holds that where the name of the company alleged in the indictment imports an association or a corporation capable of owning property as a legal entity, it is not necessary to allege specifically that it is a corporation. See 18 Am. Jur., Section 45."

The Court noted the statutory requirement that the corporate name must contain the word "corporation," "incorporated," "limited," or "company," or an abbreviation of one of these words. G.S. 55-12. The only change in the requirement of the 1955 Business Corporation Act and the prior Act was the addition of the word "limited." (See § 55-2 former Chapter 55, General Statutes of North Carolina). In the *Thornton* case, the court held that there was no allegation that "The Chuck Wagon" is a corporation and the words "The Chuck Wagon" do not import a corporation; and, therefore, the indictment was fatally defective.

In the later case of *State v. Biller,* 252 N.C. 783, 114 S.E. 2d 659, the defendants were prosecuted under warrants charging theft of property of "U-Wash-It, in Chapel Hill." The defendant moved in the Supreme Court in arrest of judgment for failure of the warrant to allege ownership in a natural person or legal entity capable of

owning property. The Court, on authority of *State v. Thornton, supra,* held the warrant to be fatally defective and arrested judgment.

Here, we cannot say that "Belk's Department Store" imports a corporation, there is no allegation that it is a corporation, nor is there any allegation that it is a proprietorship or a partnership. The name "Belk's Department Store" certainly does not suggest a natural person. As in *Thornton* and *Biller,* we are compelled to hold the warrant is fatally defective. The State, of course, if it so desires, may proceed against the defendant upon a sufficient warrant.

Judgment arrested.

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

STATE OF NORTH CAROLINA v. WILES BLACKMON AND HAROLD LEE BLACKMON

No. 6920SC81

(Filed 17 September 1969)

1. Criminal Law § 104— motion for nonsuit — consideration of evidence

Upon motion for judgment of nonsuit in a criminal action, the evidence must be interpreted in the light most favorable to the State and all reasonable inferences favorable to the State must be drawn from it.

2. Criminal Law § 106— motion for nonsuit — sufficiency of evidence

To withstand motion for judgment of nonsuit in a criminal action, there must be substantial evidence of all material elements of the offense, and it is immaterial whether the substantial evidence be circumstantial, direct or both.

3. Criminal Law §§ 60, 106; Burglary and Unlawful Breakings § 5; Larceny § 7— nonsuit — sufficiency of fingerprint evidence

In this prosecution for felonious breaking and entering and felonious larceny, evidence that the fingerprints of both defendants were found on broken window glass at the point of the illegal entry *is held* sufficient to take the case to the jury, where there was no evidence that either defendant had ever lawfully been in or around the place of business before, and the fingerprints were found at a location where lawful entry or exit would not normally be made and customers or other members of the public would not have lawful occasion to be.

4. Criminal Law § 113— instructions — misstatement of evidence — necessity for objection

While a slight inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford an opportunity for correction, an instruction containing a statement of a material fact not shown in evidence must be held prejudicial, even though not called to the court's attention at the time.

5. Criminal Law §§ 113, 163— misstatement of evidence — slight inaccuracy — necessity for objection

In this prosecution for breaking and entering and larceny in which an SBI agent testified that the lower portion of a window glass had been removed and was thrown into a ditch near the window, statement by the court in the charge to the effect that the agent had testified that the piece of glass found in the ditch, on which defendants' fingerprints were found, "fit the place where the window was broken," *is held* merely a slight inaccuracy in stating the evidence which should have been called to the court's attention in time for correction.

6. Criminal Law § 114— instructions — expert testimony — expression of opinion

In this prosecution for breaking and entering and larceny in which the State relied upon expert fingerprint testimony, statement by the trial court in the charge that the opinions of expert witnesses were "not necessarily conclusive" *is held* not to constitute an expression of opinion on the evidence, the portion of the charge relating to the weight the jury was to give to the testimony of expert witnesses being correct when considered as a whole.

7. Criminal Law § 114— recapitulation of evidence — expression of opinion

In this prosecution for breaking and entering and larceny, trial court's statement of the evidence relating to the circumstances of the arrest of one defendant was a correct recapitulation of the evidence and did not constitute a powerful summing-up against defendants which amounted to an expression of opinion by the court.

8. Burglary and Unlawful Breakings § 5; Larceny § 5— doctrine of possession of recently stolen property — presumptions

Where there is sufficient evidence that a building has been broken into and entered and that property has been stolen therefrom by such breaking and entering, the possession of such stolen property recently after the larceny raises presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering.

9. Burglary and Unlawful Breakings § 5; Larceny § 5— recent possession doctrine — possession of one of several articles stolen — presumptions

Where it is shown that a number of articles of property were stolen at the same time and as a result of the same breaking and entering of the same premises, evidence that a defendant charged with the crimes has possession of one of such articles tends to prove not only that he stole

that particular article, but also that he participated in the breaking and entering and in the larceny of the remaining property.

10. Burglary and Unlawful Breakings § 5; Larceny § 5— recent possession doctrine — property not listed in indictment

Even though property found in defendant's possession is not listed in the bill of indictment and is not owned by the same person whose property defendant is charged in the indictment with stealing, a presumption that defendant stole the property listed in the indictment arises if the property found in defendant's possession was recently stolen at the same time and place as the property listed in the indictment.

11. Burglary and Unlawful Breakings § 5; Larceny § 5— doctrine of recent possession — elapse of time from theft

Whether the time elapsed between the theft and the moment when defendant is found in the possession of stolen goods is too great for the doctrine of recently stolen property to apply depends upon the facts and circumstances of each case, and the question is ordinarily a question of fact for the jury.

12. Burglary and Unlawful Breakings § 5; Larceny § 5— doctrine of recent possession — elapse of time from theft — nature of stolen article

If the stolen article is of a type normally and frequently traded in lawful channels, only a relatively brief interval of time between the theft and finding a defendant in possession may be sufficient to cause the inference of guilt to fade away entirely; if the stolen article is of a type not normally or frequently traded, the inference of guilt would survive a longer time interval.

13. Burglary and Unlawful Breakings § 6; Larceny § 8— instructions — doctrine of recent possession — elapse of 27 days

In this prosecution for breaking and entering and larceny, the trial court did not err in instructing the jury on the doctrine of possession of recently stolen property where the evidence showed that, approximately 27 days after the crimes were committed, defendant was found in possession of a handmade special-purpose tool not normally available in the community which had been stolen on the occasion in question, and fingerprint evidence tended to establish that defendant had been present at the time and place this unusual and unique tool had been stolen.

APPEAL by defendants from *McConnell, J.*, 22 January 1968 Criminal Session of MOORE Superior Court.

Defendants were tried on their pleas of not guilty to a single bill of indictment charging them with felonious breaking and entering and of larceny of property valued in excess of $200.00. Ralph Leach, a partner of Moore Motor Company, a partnership engaged in the business of automobile sales and service, testified that on 11 December 1967 the building housing this business was broken into and entered sometime between "6:00 o'clock closing and 8:00 o'clock

the next morning." A window located in the rear of the building which leads to the basement was broken out and unlatched. An acetylene torch had been used to cut the hinges from the door leading from the basement to the upstairs. He described this window and the condition in which he found it as follows:

> "The window is located in the back of the building. It is six feet tall, hinged, and comes to within about two or three feet off the ground. There are small panes in the window, which are four by twelve or five by twelve inches. The window was open the next morning when I got there. Pieces of glass were lying on the ground outside with a few fragments inside."

He also testified that certain property, which was listed in the bill of indictment, had been taken and further testified that some hand tools belonging to a mechanic, Abraham Van Boskerck, had been taken, but these tools were not listed in the bill of indictment.

A State Bureau of Investigation agent testified that he went to the Moore Motor Company building on 12 December 1967. He described what he found as follows:

> "I looked at the window which had been broken during the night. The window at the rear of the building, where the point of entry was made, consisted of two sections of glass, where it had been broken before and pieced back together. The upper portion had been broken and splintered. The lower portion apparently was removed just by pulling it out and was thrown in the ditch beside the window. The piece of glass was eight to ten inches in height and six inches in width. I processed the piece of glass that was removed from the ditch for latent fingerprints and did obtain several and submitted to the laboratory in Raleigh. There were other pieces of glass lying on the ground outside and a majority of them lying on the inside of the building on the floor. Four latent prints were found on the piece of glass from the ditch."

He further testified that another latent fingerprint was found on ". . . the window itself where it was entered. From the glass at the window, the windows adjoining the broken one. It was not on the same piece of broken glass found in the ditch, but was still in a window in its proper place. Right near the broken piece."

An expert witness testified and identified two of the latent fingerprints on the piece of glass found lying in the ditch as having been made by the right and middle index fingers of the defendant Harold Blackmon and another as having been made by the left

index finger of the defendant Wiles Blackmon. He also identified the latent fingerprint found on the piece of glass remaining in the window as having been impressed by the left index finger of the defendant Wiles Blackmon.

A police officer testified that he arrested the defendant Wiles Blackmon at 1:30 a.m. on 7 January 1968, after he had observed Wiles driving alone in his car between two old warehouse buildings near the railroad, and that he found a toolbox with assorted tools in the trunk of the car, which Wiles Blackmon had voluntarily opened for his inspection.

Van Boskerck, who was employed as a mechanic at Moore Motor Company, testified and positively identified a wrench found in the toolbox in the defendant Wiles Blackmon's car as being an "Allen set screw wrench brazed into a socket"; that he had brazed it into the socket himself; that he had made this tool several years previously and had used it one time, and had never seen a tool exactly like this one before or since; and that this particular tool was in his tool cabinet at Moore Motor Company on the night of 11 December 1967 and was missing therefrom on the morning of 12 December 1967.

The defendant Wiles Blackmon testified that he had bought some of the tools found in the trunk of his car at a store in Winston-Salem and some from pawnshops in Winston-Salem and Greensboro. The defendant Harold Blackmon did not testify.

The jury found each of the defendants guilty as charged in the bill of indictment. Separate judgments were rendered against each defendant from which they appealed, assigning errors.

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

P. H. Wilson for defendant appellant Wiles Blackmon.

E. O. Brogden, Jr., for defendant appellant Harold Blackmon.

PARKER, J.

Defendants assign as error the failure of the court to grant their motions for judgment of nonsuit.

[1, 2] It is well established that upon a motion for judgment of nonsuit in a criminal action, the evidence must be interpreted in the light most favorable to the State and all reasonable inference favorable to the State must be drawn from it. *State v. Miller,* 270

N.C. 726, 154 S.E. 2d 902, and cases cited therein. To withstand the motion there must be substantial evidence of all material elements of the offense, and it is immaterial whether the substantial evidence be circumstantial or direct, or both. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. In the present case there was ample direct evidence that the crimes with which defendants were charged had been committed by someone. The question presented is whether the fingerprint evidence was, under the circumstances of this case, sufficiently substantial evidence that defendants were the perpetrators to justify submitting the matter of their guilt to the jury.

The question as to the sufficiency of fingerprint evidence to overcome a defendant's motion for judgment of nonsuit has been discussed by our Supreme Court in several cases. In State v. Helms, 218 N.C. 592, 12 S.E. 2d 243, the defendant was charged with breaking and entering and larceny. Entry into a house had been gained through a porch window and a fingerprint identified as the defendant's was found on the window. The court held the evidence was sufficient to take the case to the jury, stating:

> "Evidence of fingerprint identification, that is, proof of fingerprints corresponding to those of the accused, found in a place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed, may be sufficient to support a conviction in a criminal prosecution. 20 Am. Jur., pp. 329 and 1076, Evidence, secs. 357 and 1223."

The court further stated that the question as to whether ". . . under the circumstances of the case, as the jury found them to be, the fingerprints so found could only have been impressed on the window at the time when the crime was committed, is a matter for the jury."

In *State v. Minton,* 228 N.C. 518, 46 S.E. 2d 296, the defendant was also charged with breaking and entering and larceny. His thumbprint was found on the outer side of a piece of broken glass which came from a door where entry was gained into the building and which was lying on the inside of the building. The court stated:

> "The fact that fingerprints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the fingerprints could have been impressed only at the time when the crime was perpetrated. 20 Am. Jur., Evidence, section 358; 16 A.L.R., Annotation, 370; 63 A.L.R., Annotation, 1324."

In *State v. Reid,* 230 N.C. 561, 53 S.E. 2d 849, cert. denied, 338 U.S. 876, 94 L. Ed. 537, 70 S. Ct. 138, where the defendant was charged with first-degree burglary, his fingerprint was found on the inside of a windowsill where entry had been gained into the building. The court distinguished *State v. Minton, supra,* factually on the ground that in *Minton* the defendant had been in the store lawfully in the afternoon of the day on which the crime was committed and could have impressed his fingerprint at that time. The court stated:

> "We must keep in mind that a motion for judgment as of nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of a bill of indictment; and all the evidence tending to sustain the allegations in the bill of indictment upon which a defendant is being tried, will be considered in a light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. (Citing cases). Here the defendant was never lawfully in the apartment of the prosecutrix, and the presence of his fingerprint on the inside of the windowsill in the sleeping quarters of the prosecutrix, when considered with other evidence, was sufficient to carry the case to the jury."

In *State v. Tew,* 234 N.C. 612, 68 S.E. 2d 291, the defendant was charged with breaking and entering and larceny. His fingerprints were found on pieces of broken glass from the front door of a service station which was the point of entry. In addition the prosecutrix testified she had never seen the defendant in the service station before. Other fingerprints were found on the broken pieces of glass but it was not determined by whom they had been made. After noting with approval the principles stated in *State v. Huffman,* 209 N.C. 10, 182 S.E. 705, and in *State v. Helms, supra,* the court stated:

> "In the light of these principles the testimony of the fingerprint expert tending to show that fingerprints found at the scene of the crime correspond with those of defendant, taken after his arrest in this action, coupled with the testimony of Mrs. George tending to show that, though she personally attended her service station, she did not know, and had not seen defendant before the date of the crime, is sufficient to take the case to the jury and to support a finding by the jury that defendant was present when the crime was committed and that he, at least, participated in its commission. *S. v. Huffman, supra.*"

[3] In the case before us fingerprints of both defendants were

found on rear window glass at the point the illegal entry had been made into the building. This was not at a location where lawful entry or exit would normally be made or at a point where customers or other members of the public would normally have lawful occasion to be. There was no evidence that either defendant had ever lawfully been in or around the place of business before, as was the case in *Minton*. Under these circumstances we hold that the fingerprint evidence, when viewed in the light most favorable to the State and when every reasonable inference is drawn therefrom, was sufficiently substantial evidence to take the case to the jury and to support a finding by the jury that both defendants were present at the scene when the crimes were committed and participated therein. The motions for nonsuit were properly denied.

[5] Defendants also assign as error certain portions of the court's charge to the jury. The first of these relates to a portion of the charge regarding the testimony of the SBI agent. After stating that the agent had testified that a piece of glass had been thrown or was found in the ditch near the window, the judge stated that the agent testified that he examined the window ". . . and the glass that was found in the ditch that fit the place where the window was broken . . ." The defendants contend the judge in this quoted portion of his charge was in effect saying that the glass found in the ditch, on which fingerprints were found, fitted the place where the window was broken, and that this was an expression of opinion in violation of G.S. 1-180 and a material misstatement of the evidence, citing *State v. Revis,* 253 N.C. 50, 116 S.E. 2d 171. The SBI agent had testified that upon arriving at the scene of the crime, ". . . I looked at the window which had been broken during the night. The window at the rear of the building, where the point of entry was made, consisted of two sections of glass, where it had been broken before and pieced back together. The upper portion had been broken and splintered. The lower portion apparently was removed just by pulling it out and was thrown in the ditch beside the window."

[4] It is well settled that a slight inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford an opportunity for correction; on the other hand, an instruction containing a statement of a material fact not shown in evidence must be held prejudicial, even though not called to the court's attention at the time. 3 Strong, N.C. Index 2d, Criminal Law, § 113, p. 15, and cases cited. The question here presented is whether the judge's statement to the effect that the piece of glass found in the ditch "fit the place where

the window had been broken" was merely a slight inaccuracy in stating the evidence or was a statement of a material fact not shown in evidence.

[5] The material fact in relation to the piece of glass found in the ditch was whether it had come from the broken window at the point of entry into the building, and not whether it exactly fitted the jagged edges of the piece of glass left in the window. The SBI agent testified that the lower portion of the window was removed and was thrown in the ditch near the window. There was evidence, therefore, that the piece of glass found in the ditch came from the broken window. He further testified that the glass had been broken before and the two sections of glass had been pieced back together. Although he did not specifically testify that the piece of glass found in the ditch fit the place where the window was broken, the misstatement of his testimony by the judge in his charge was merely a slight inaccuracy. Since it was not called to the court's attention in apt time to afford him an opportunity for correction, there was no reversible error. *State v. Hoyle,* 3 N.C. App. 109, 164 S.E. 2d 83.

[6] Defendants' second assignment of error relating to the charge is to the statement of the trial judge that the opinions of expert witnesses were "not *necessarily* conclusive," but defendants cite no authority that such a statement is error, other than reference to G.S. 1-180. The portion of the charge relating to the weight the jury was to give to the testimony of expert witnesses, when considered as a whole, was correct. See 31 Am. Jur. 2d, Expert and Opinion Evidence, §§ 181 and 183, pp. 744 and 748.

[7] Defendants' third assignment of error with respect to the charge is to the manner in which the judge recapitulated the evidence relating to the circumstances of the arrest of Wiles Blackmon. They contend that in some way the State was made to have an advantage over this defendant within the principles set out in *State v. Benton,* 226 N.C. 745, 40 S.E. 2d 617, in that the judge in this portion of the charge appeared to be stating that Wiles was the sort of person who would break, enter and steal. Defendants contend that this constituted a powerful summing-up against them. This portion of the charge, however, was a correct recapitulation of the evidence and did not constitute prejudicial error as to the defendants under the principles of *State v. Benton, supra.*

The defendants assign as error the portion of the charge relating to the application of the doctrine of possession of recently stolen property. They contend this also constituted an expression of opinion in violation of G.S. 1-180 on the grounds that (1) the property

found in Wiles' possession upon his arrest was not identified as the property described in the indictment, (2) the property in Wiles' possession was not owned by the persons whose property he had been charged in the bill of indictment with having stolen, and (3) the time elapsed from the date of the alleged breaking and entering and larceny until the date of Wiles' arrest was too great for the doctrine to arise.

[8] Chief Justice Parker in *State v. Foster,* 268 N.C. 480, 485, 151 S.E. 2d 62, 66, sets out the conditions for application of the doctrine of possession of recently stolen property as follows:

> "(1) That the property described in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt. (Citing cases)."

If these conditions are met, and where, as in the present case, there is sufficient evidence that the building has been broken into and entered and that property has been stolen therefrom by such breaking and entering, then a presumption of fact arises that the possessor of the stolen property is guilty both of the larceny and of the breaking and entering. *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369; *State v. Parker,* 268 N.C. 258, 150 S.E. 2d 428; *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578.

[9, 10] The question which arises in the present case is as follows: Does the doctrine apply if the defendant is found in possession of goods he had not been charged in the bill of indictment with stealing, but which had been stolen from the same place and at the same time as the property listed in the bill of indictment? Where it is shown that a number of articles of property have been stolen at the same time and as a result of the same breaking and entering of the same premises, evidence that a defendant charged with the crimes has possession of one of such articles tends to prove, not only that he stole that particular article, but also that he participated in the breaking and entering and in the larceny of the remaining property. See *State v. Hullen,* 133 N.C. 656, 45 S.E. 513. Therefore, even though the property found in the defendant's possession was not listed in the bill of indictment, a presumption that the defendant stole the property listed in the bill of indictment arises if the property found in his possession had been stolen at the same time and place as the property listed in the bill of indictment and if the con-

ditions of *State v. Foster, supra,* are met, that is: (1) if the property found in his possession had been stolen, (2) if this property is the same property which was stolen at the time and place that the property listed in the bill of indictment was stolen, and (3) if this property was found in his possession sufficiently soon after the theft to give rise to the presumption. If the above conditions are met, it is immaterial that the property found in the defendant's possession was not owned by the same person whose property he was charged with having stolen in the bill of indictment.

The question remains in the present case, however, whether the time which elapsed from the date of the alleged theft until the date the property was found in the defendant Wiles Blackmon's possession was too great for the doctrine of possession of recently stolen property to apply.

Justice Higgins in *State v. Jackson, supra,* stated:

> "Evidence or inference of guilt arising from the unexplained possession of recently stolen property is strong, or weak, or fades out entirely, on the basis of the time interval between the theft and the possession. The inference arising from the possession of recently stolen property is described as 'the recent possession doctrine'. Possession may be recent, but the theft may have occurred long before. In that event, no inference of guilt whatever arises. Actually, the possession of *recently stolen goods* gives rise to the inference. The possession, in point of time, should be so close to the theft as to render it unlikely that the possessor could have acquired the property honestly. (Citing cases)."

[11, 12] Whether the time elapsed between the theft and the moment when the defendant is found in possession of the stolen goods is too great for the doctrine to apply depends upon the facts and circumstances of each case. Among the relevant circumstances to be considered is the nature of the particular property involved. Obviously if the stolen article is of a type normally and frequently traded in lawful channels, then only a relatively brief interval of time between the theft and finding a defendant in possession may be sufficient to cause the inference of guilt to fade away entirely. On the other hand, if the stolen article is of a type not normally or frequently traded, then the inference of guilt would survive a longer time interval. In either case the circumstances must be such as to manifest a substantial probability that the stolen goods could only have come into the defendant's possession by his own act, to exclude the intervening agency of others between the theft and the defend-

ant's possession, and to give reasonable assurance that possession could not have been obtained unless the defendant was the thief. *State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *State v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725. The question is ordinarily a question of fact for the jury. *State v. White,* 196 N.C. 1, 144 S.E. 299.

[13] In *State v. Holbrook, supra,* an elapsed time of eleven days was held to have been too great for the doctrine to apply. In *State v. Jones,* 227 N.C. 47, 40 S.E. 2d 458, an elapsed time of from sixteen to twenty days was held too long. In the present case, approximately twenty-seven days had elapsed from the date of the theft to the date the stolen wrench was found in the possession of the defendant, Wiles Blackmon. There was, however, in the present case the additional factor that the stolen article found in his possession was of a most unusual nature. It was a handmade tool, the like of which the mechanic who made it had never seen before or since and which over a period of years he had used only once. It was not the type of tool in common use nor one which a person would normally have occasion to acquire. The presumption that the possessor of recently stolen property is the thief "is a factual presumption and is strong or weak depending on circumstances — the time between the theft and the possession, *the type of property involved, and its legitimate availability in the community.*" *State v. Raynes,* 272 N.C. 488, 491, 158 S.E. 2d 351, 354. (Emphasis added.) In the present case defendant Wiles Blackmon was found in possession of a handmade special-purpose tool not normally available in the community. There was also in the present case the fingerprint evidence, which tended to establish that Wiles Blackmon had been present at the very time and place this unusual and unique tool had been stolen. Under the circumstances of this case, therefore, we do not believe it was prejudicial error for the court to have instructed the jury on the doctrine of possession of recently stolen property.

We have examined the remaining assignments of error and find them without merit. In the trial of both defendants we find no prejudicial error.

No error.

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

ADAMS-MILLIS CORPORATION v. TOWN OF KERNERSVILLE, NORTH CAROLINA

No. 6921SC357

(Filed 17 September 1969)

1. Municipal Corporations § 2— petition to review annexation ordinance — failure to allege injury

Petition to review annexation ordinance under G.S. 160-453.6 is not fatally defective in failing to allege specifically that petitioner will suffer material injury by alleged failure of municipality to comply with statutory procedures, particularly where the petition contains allegations from which material injury can be implied.

2. Municipal Corporations § 2— annexation — municipality of less than 5000 — prerequisites

In order for an area to be subject to annexation by a municipality under provisions of G.S. 160-453.4(c), not less than 60% of the lots and tracts in the area must be in actual use other than for agriculture, and not less than 60% of the acreage which is in residential use or is vacant must consist of lots and tracts of five acres or less in size.

3. Municipal Corporations § 2— residential lots — lots with pond adjoining dwelling lots

Lots containing a pond which were owned jointly by the owners of adjoining dwelling lots and were used as an accessory to the adjoining lots were properly classified as residential in determining whether an area met the 60% "use" test provided in G.S. 160-453.4(c).

4. Municipal Corporations § 2— annexation — use test — consideration of landlocked lot and fronting lot as single lot

Municipality properly classified a landlocked lot with its fronting lot in single ownership as a single lot in determining whether an area met the 60% "use" test provided in G.S. 160-453.4(c), such method being calculated to provide reasonably accurate results as required by G.S. 160-453.10.

5. Municipal Corporations § 2— annexation — property in industrial use — land containing holding basin for industrial waste

In a proceeding to annex territory pursuant to G.S. 160-453.1 *et seq.*, respondent municipality properly classified as in industrial use a 14.8 acre tract adjoining the parking lot at petitioner's industrial plant, where the tract has been graded and grassed, and the tract contains a holding basin for industrial waste from petitioner's plant and underground sewer lines running to and from the basin.

6. Municipal Corporations § 2— annexation report — plans for services — failure to call for significant increase in personnel

In a proceeding to annex territory pursuant to G.S. 160-453.1 *et seq.*, plans in the annexation report for extending garbage collection, fire protection, police protection and street maintenance services to the area to be annexed *are held* to comply substantially with G.S. 160-453.3, the plans

not being defective in failing to call for any significant increase in personnel where the record is devoid of evidence showing any need for increased personnel.

7. Municipal Corporations § 2— annexation — irregularity in procedure — prejudice to petitioner

Petitioner, a property owner in one area to be annexed, was not prejudiced by irregularity in the annexation procedure whereby an amendment to the annexation report was not submitted to the public 14 days prior to the public hearing, but was read at the outset of the public hearing, where the amendment related to annexation of an area which did not include petitioner's property and to plans for provision of water and sewer services, and petitioner did not except to the plans for such services.

8. Municipal Corporations § 2— simultaneous annexation of areas contiguous to each other

G.S. 160-453.5(g) does not exclude the simultaneous annexation of separate areas contiguous to the municipality which are also contiguous to each other, and if the areas to be annexed meet the standards prescribed by statute, it does not matter that they are contiguous.

9. Municipal Corporations § 2— annexation ordinance — findings that area is developed for urban purposes

Requirement of G.S. 160-453.5(e) that annexation ordinance contain specific findings that the area to be annexed is developed for urban purposes is met by statement in the ordinance that 64.2 percent of the total number of lots in said area are used for residential purposes, and 71.3 percent of the total residential and undeveloped acreage consists of lots and tracts five acres or less in size.

APPEAL by petitioner from *Seay, J.*, 27 January 1969, Civil Session FORSYTH Superior Court.

This is a proceeding for the extension of the corporate limits of the Town of Kernersville, North Carolina, pursuant to the provisions of G.S. 160-453.1 through G.S. 160-453.12. The population of the Town of Kernersville as of the census of 1960 was 2942.

Annexation of seven individual areas was proposed. Petitioner is the owner of 38.844 acres of land located in Study Area No. Four, and it is this area which is the subject of this appeal.

At a meeting held on 7 May 1968, continued to 9 May 1968, respondent's Board of Aldermen adopted a resolution stating the intent of respondent to extend its corporate limits to include certain designated areas, among which was Study Area No. Four. The resolution stated that a public hearing on the proposed annexation would be held on 10 June 1968, at which time annexation plans would be explained and property owners would be given the opportunity to be heard. On 21 May 1968, the Board of Aldermen ap-

proved an annexation report and ordered that it be filed with the Town Clerk for availability to the public.

Public hearing was held on 10 June 1968. At the beginning of the hearing, the Mayor read certain recommended amendments to the annexation report. On 6 August 1968, an annexation ordinance was adopted which included Study Area No. Four. Effective date of the ordinance was 15 May 1969.

On 5 September 1968, petitioner filed petition for review pursuant to G.S. 160-453.6.

On 19 September 1968, the Board of Aldermen adopted a resolution that the amendments to the annexation report which were read before the public hearing of 10 June 1968 be "held approved upon said date (10 June 1968)."

By its petition, petitioner, *inter alia,* alleged that it owns 38.844 acres of land in Study Area No. Four, of which no more than 24.048 acres are used for an industrial facility and that at least 14.796 acres are unused except for a one-acre holding basin operated by respondent and that these acres are held for possible future development. The petitioner took the following exceptions to the annexation ordinance:

"(a) The statutory procedure for annexation, as provided in North Carolina General Statutes, Section 160-453.5, was not followed, in that Section (g) thereof authorizes simultaneous annexation proceedings of two or more areas only where all areas are adjacent to the municipal boundary but are not adjacent to one another. Since Study Area No. Four is adjacent to Study Area No. Three, it is the position of the Petitioner that the proceedings to annex each of these two areas cannot be undertaken simultaneously.

(b) The prerequisites to annexation specified in GS 160-453.3 are not met, in that the number of people to be employed by the Town of Kernersville for the purpose of providing police protection, fire protection, garbage collection, and street maintenance service is to remain essentially unchanged according to the plans for extension and financing services into annexation areas, as provided in the Annexation Report. Without substantial increases in personnel, the Town of Kernersville will not be able to provide for extending police protection, fire protection, garbage collection, and street maintenance service to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services

are provided within the rest of the municipality prior to annexation, as required by GS 160-453.3(3).

(c) The provisions of GS 160-453.4(c), requiring that the area to be annexed be developed for urban purposes, have not been met, in that only 55.1% of the total number of lots and tracts in said area are used for residential, commercial, and industrial purposes, and only 56.8% of the total of residential and undeveloped acreage consists of lots and tracts five acres or less in size . . . (the schedule showing alleged number of lots and tracts, their alleged use, acreage, percentage of total residential and undeveloped acreage in lots and tracts 5 acres or less, etc., omitted).

(d) The Petitioner is informed and believes, and, therefore, alleges that the Town of Kernersville has applied to the United States Government for funds to provide some of the services to be rendered by the Town of Kernersville in the areas to be annexed, and because of fiscal restraint being imposed by the United States Congress, it is questionable whether the money applied for will become available."

The petitioner prayed "that the ordinance relating to the annexation of Study Area No. Four be declared null and void, that the Town of Kernersville be enjoined from annexing the Petitioner's lands, as described herein, until July 1, 1971, and that the Court take such further action and grant such other and further relief as may be proper."

Respondent answered admitting petitioner's ownership of 38.844 acres of land in Study Area No. Four, admitting the adoption of the ordinance, denying all other material allegations, and praying that the appeal be dismissed for that "the law does not provide that the Superior Court may declare the Annexation Ordinance null and void; that the law does not provide that the Town of Kernersville may be enjoined from annexing the petitioner's land until July 1, 1971, but only during the pendency of this appeal;" and further that the Town has complied with the applicable law and "the petitioner has not or will it (sic) not suffer any injury by reason of the matters and things set forth in its petition." Attached to the answer are the documents required by statute.

By leave of court petitioner amended its petition to allege that amendments were made to the annexation report dated 21 May 1968, which were not made available to the public for 14 days prior to the public hearing as required by law; that petitioner and

other interested residents had no notice of changes and were without full facts upon which to base a decision as to whether to appear at the hearing and what position to take. It prayed that an order issue staying the effectiveness of the ordinance as to Study Area No. Four pending the outcome of judicial review of the ordinance; that an order issue remanding the proceedings to the Board of Aldermen to make the annexation report as amended available to the public and that another public hearing be held pursuant to the provisions of G.S. 160-453.5. By leave of court the petition was further amended to pray "that the annexation ordinance be remanded to the Board of Aldermen of the Town of Kernersville for compliance with the annexation statute and, if necessary, amendment of boundaries."

The matter was heard by Judge Seay without a jury. He found facts, made conclusions of law, and affirmed the annexation ordinance without change. Petitioner appealed. The order was entered 6 February 1969. On 1 May 1969, petitioner filed application for the entry of an order staying the operation of the ordinance as to Study Area No. Four pending the final determination of the cause by this Court, or until further order of the Superior Court. From an order entered denying the application, petitioner excepted and appealed.

Womble, Carlyle, Sandridge & Rice, by E. Lawrence Davis, for petitioner appellant.

R. Kason Keiger for respondent appellee.

MORRIS, J.

[1] Respondent, as is its right, has filed in this Court a *demurrer ore tenus* asserting that the petition as originally filed and as amended does not state a cause of action in that there is no allegation that petitioner will suffer or believes it will suffer material injury by reason of the alleged failure of respondent to comply with the statutory procedure.

G.S. 160-453.6(a) provides that "[w]ithin thirty days following the passage of an annexation ordinance under authority of this part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this part or to meet the requirements set forth in § 160-453.4 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board." Subsection (b)

provides "Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks." The original petition as amended clearly sets out petitioner's exceptions and the prayer for relief as amended brings the relief requested within the relief allowed by the statute. G.S. 160-453.6(g).

While it may be conceded that the better practice would be to allege specifically that petitioner will suffer material injury by reason of the failure of respondent to comply with the statutory procedures, we do not believe that failure to do so in this case is fatal, particularly since the petition contains allegations from which material injury can be implied. See *Rheinhardt v. Yancey*, 241 N.C. 184, 84 S.E. 2d 655. It is obvious that respondent has not been prejudicially misled by the failure of petitioner to allege specifically that it will suffer material injury. Indeed in its answer, respondent categorically denies material injury by averring "the petitioner has not or will it (sic) not suffer any injury by reason of the matters and things set forth in its petition." See 1 McIntosh, N.C. Practice 2d, (1969 Supp.) § 1194. We think the original petition as amended is sufficient to withstand demurrer. Demurrer is overruled.

Petitioner has brought forward 14 assignments of error covering some 57 exceptions.

Twenty-seven exceptions, embraced in assignments of error Nos. 9 and 10, are directed to the contention that Study Area No. Four does not meet the requirements of G.S. 160-453.4(c) which requires that the area to be annexed be developed for urban purposes. This section of the statute defines an area developed for urban purposes as "any area which is so developed that at lease sixty per cent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty per cent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size."

[2] The statutory standard consists of two tests for determining availability of an area for annexation: (1) the *use* test, which requires that not less than 60% of lots and tracts in the area must be in actual use, other than for agriculture; and (2) the *subdivision* test, which requires that not less than 60% of the acreage which is in residential use, if any, and is vacant must consist of lots and tracts of five acres or less in size. Both tests must be met in order

for an area to meet the statutory standard. *Lithium Corp. v. Bessemer City,* 261 N.C. 532, 135 S.E. 2d 574.

[3, 4] Petitioner earnestly contends that the court erred in finding as a fact that Study Area No. Four is developed for urban purposes. It contends that the use test is not met because certain lots were erroneously classified as in use for residential purposes which should have been classified as vacant and not in use. It appears from the evidence that the respondent used county tax maps and records and aerial photographs as approved by G.S. 160-453.10. The expert witness who testified for respondent testified that there are several methods which can be used in determining what is a lot in making an appraisal of an area to be annexed. One is to count each numbered lot separately. Another is to consider a landlocked lot as part of the lot in front of it and group the two lots — the landlocked lot and the one providing it with access to a street — as being a single lot. A third method would be to consider a group of lots in single ownership and used for a single purpose as being a tract within the meaning of the statute, and count tracts rather than lots. The evidence tended to show that the area qualified under any of the above methods but that the method, the results of which were actually used, was the method by which a landlocked lot was considered as part of its fronting lot and all other lots counted separately. It appears to us that any one of the methods would be "calculated to provide reasonably accurate results" as required by G.S. 160-453.10. Petitioner contends that a lot cannot be classified as being in residential use unless it contains a habitable dwelling unit. G.S. 160-453.9(2) defines "[u]sed for residential purposes" as meaning "any lot or tract five acres or less in size on which is constructed a habitable dwelling unit." Lots 5, 6, 7, 8, 9, 10, 11 and 12 in Tax Block 2122 were classified as in residential use. It appears from the evidence that these lots contain a pond and that the pond is in the rear of lots 1, 2, 3 and 4. The pond lots are owned jointly by the owners of lots 1, 2, 3 and 4. They were considered as being an accessory use to the dwellings on lots 1 and 2 and 3 and 4 as "being sort of like a fish pond, or a lily pond beside somebody's house." We do not deem this an unreasonable result nor a result not within the intent of the legislature in its definition. To adopt the interpretation contended for by petitioner would result in unreasonable and absurd applications. For example: If A owned two lots, each having a 75-foot frontage, and he constructed his residence on one lot and landscaped the other with a pond, shrubbery, etc., surely it would be less than reasonable to classify the lot containing the dwelling as in residential use and the other lot as not in residential use. Nor do

we think it unreasonable and beyond the statutory definition to classify a landlocked lot and its fronting lot in single ownership as a single lot in residential use.

Respondent concedes that it erroneously classified lot 13R in Tax Block 5409 as in residential use. There is nothing in the record indicating, nor do the exhibits disclose, the area of lot 13R, nor does petitioner contend that this lot, standing alone, if reclassified correctly as not in use would render the area ineligible for annexation.

[5] Petitioner further contends that the 14.796-acre tract owned by it was erroneously classified as in industrial use. According to the annexation report, the total residential and undeveloped acreage in Study Area No. Four was 57.7 acres, that the acreage in lots and tracts five acres or less in size was 41.2 acres, and that the percentage in lots and tracts five acres or less in size was 71.3%. Respondent concedes that if the 14.796-acre tract located south of petitioner's plant and parking lot were classified as not in use, the percentage of acreage in residential use and vacant use in lots and tracts five acres or less in size would be reduced to 41.2%, thus clearly making Study Area No. Four ineligible for annexation.

Petitioner owns approximately 38 acres in Study Area No. Four. It does not question the classification as in industrial use of any of the acreage other than the 14.796 acres which it claims should be classified as not in use for industrial purpose.

Petitioner's witness testified that the 14.796 acres were not used for industrial purposes. However, he further testified that that particular portion of petitioner's property lies south of and adjoins the parking lot which itself lies immediately south of petitioner's finishing plant. He testified that that portion of petitioner's property is not landscaped as is the area immediately surrounding the plant; that the 14.796-acre tract has been graded and that grass has been planted and it is mowed occasionally. On the 14.796-acre portion is a holding basin which receives the industrial waste from the plant. (On cross-examination.) The industrial waste gets to the basin by gravity through underground sewer lines. The holding basin is between one-half and three-quarters of an acre and there is a concrete ditch surrounding it. The holding basin is located in the proximity of the center of the 14.796-acre tract. A sewer line leads from underneath the parking lot across a portion of the area in controversy to the holding basin. Another underground line runs from the basin across another portion of the 14.796-acre tract to connect with the city sewer system.

Respondent's witness testified that immediately to the south of

the holding basin is a wooded section containing approximately 3.65 acres and that if that portion of the 14.796 acres were classified as not in industrial use, the area would still qualify for annexation.

Appellant relies on *R. R. v. Hook,* 261 N.C. 517, 135 S.E. 2d 562. There the crucial question was the proper classification of a 13.747-acre tract owned by Ideal Industries, Inc. About one-tenth (1.4 acres) of the tract was used for parking. It had no buildings or structures of any kind on it. Although the plant and buildings of Ideal Industries were located in the area to be annexed, they were on tracts and lots which did not adjoin the 13.747-acre tract and, apparently from the evidence, were across the road. At the time of the adoption of the ordinance it had not been graded and was used for a "cow pasture". At the time of the adoption of the ordinance there was no use whatever being made of the land by Ideal Industries. This case is clearly factually distinguishable.

We think the court's finding that Study Area No. Four was developed for urban purposes is sufficiently supported by the evidence and does not constitute error.

[6] Petitioner, by assignment of error No. 11, next contends that the annexation report does not comply with G.S. 160-453.3 in that it does not contain adequate plans for extending garbage collection, fire protection, police protection, and street maintenance service to the area to be annexed on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

The portions of the annexation report questioned by this assignment of error are set out verbatim:

"B. POLICE SERVICE

1. EXTENSION. Police protection will be extended immediately upon the effective date of annexation into all areas annexed.

The present police force was recently increased to six men operating two radio-equipped patrol cars and a three-wheeled cycle which is also radio equipped. Approximately 23 miles of streets are patrolled 24 hours a day with patrol cars dispatched by a base radio station which is manned also around the clock. The six proposed annexation areas will add approximately 10 miles of new streets which are largely residential in character. The present police force will be able to patrol and provide police protection in the six proposed annexation areas at the same level now provided inside the Town.

2. FINANCING. The only additional cost anticipated as a direct result of annexation will be increased vehicle operating expense. Since patrol activity is necessarily most intensely provided in the commercial areas, the increase in operating expense will not be directly proportional to the additional street mileage in the annexation areas. It is estimated that present vehicle operating costs of approximately $4,000.00 (including depreciation) will be increased by 20 percent or $800.00. This additional expense will be financed from additional ad valorem tax revenue from the six proposed annexation areas.

C. FIRE PROTECTION SERVICE

1. EXTENSION. All areas to be annexed will begin to receive fire protection from the Town fire department immediately on the effective date of annexation. The present fire insurance rating classification for the Town is NB7 and all residential property annexed will come under this classification. Fire protection is provided by a volunteer fire department manned by two full time paid firemen and sixteen volunteers and equipped with one 1,000 gpm pumper engine and two smaller standby pumpers. Specifications have been prepared and bids will be invited for a new additional pumper engine immediately following the adoption of the 1968-69 budget. A mutual aid contract now exists with the Beeson's Crossroads Fire District in areas outside the Town where hydrants are available.

Planned improvements in the Town water system, primarily increased elevated storage and larger trunk mains, will also improve the Town's overall fire protection status. It is anticipated that these improvements will allow an improvement in fire insurance classification from NB7 to NB6.

2. FINANCING. The new pumper engine will cost approximately $20,000.00. This expense will be met in part from reserves in the Equipment Trust Fund and in part from ad valorem taxes. No significant increase in annual operating cost is anticipated directly related to annexation.

D. STREET MAINTENANCE

1. EXTENSION. Town maintenance of all streets falling under its responsibility in the areas to be annexed will begin immediately upon the effective date of annexation. An additional 4.7 miles of streets are involved; 16.5 miles are now maintained inside the Town. Street maintenance is performed by the General Public Works crew which includes one foreman, one

equipment operator and five general laborers. Equipment available for street maintenance includes a grader, a front end loader, a backhoe with front end loader, a tar machine, a roller, and two dump trucks. An additional dump truck, costing approximately $4,500.00 will be required to properly maintain the additional strect mileage.

2. FINANCING. Funds for increased street maintenance costs will come from ad valorem taxes in the annexation areas and increased Powell Bill revenue as a result of annexation. The additional cost for street maintenance is estimated at approximately $6,000.00 based upon the amount of additional street mileage compared to the present mileagge for which the Town is responsible.

* * *

F. GARBAGE COLLECTION

1. EXTENSION. Collection of garbage in the annexation areas will begin immediately on the effective date of annexation. The Town garbage collection service is provided by two three-man crews operating MB type packer trucks. Residential pickups are made twice weekly, either Mondays and Thursdays or Tuesdays and Fridays. In addition, limbs and other bulky refuse brought to the street are picked up Wednesdays and Saturday mornings as requested. Commercial and industrial establishments receive pickup service as required. An additional, more efficient type, packer will be needed leaving one of the present units available as a standby unit and for possible use as a leaf collector. One additional man will be needed as a standby helper and as an assistant at the landfill operation.

The landfill is available for use by Town residents at no charge when a permit has been obtained from the Town office.

2. FINANCING. It is estimated that 10 miles of additional street mileage in the annexation areas will increase vehicle operating costs by approximataly 50 percent over the present cost of $3,300.00, or by approximately $1,650.00. The new packer truck will cost approximately $13,000.00 and the additional man about $4,00.00. The increased operating cost of $5,650.00 and the new packer will be financed from ad valorem taxes in the six annexation areas."

We are of the opinion that these plans are in substantial compliance with the statute and are adequate. Petitioner contends that the plans are defestive in that they do not call for any significant increase in personnel. The record is devoid of any evidence showing

any need for increased personnel. This assignment of error is overruled.

[7] Assignments of error Nos. 8, 12 and 16 are directed to the failure of the annexation proceedings completely and substantially to comply with statutory requirements.

G.S. 160-453.3 requires that a municipality desiring to annex areas pursuant to the authority given by the statute, shall, prior to the public hearing, prepare a report setting forth plans for extending services to the areas to be annexed. G.S. 160-453.5(c) provides that "[a]t least fourteen days before the date of the public hearing, the governing board shall approve the report provided for in § 160-453.3, and shall make it available to the public at the office of the municipal clerk. In addition, the municipality may prepare a summary of the full report for public distribution." Here the annexation report was prepared, approved, and made available to the public, all in accordance with the statute. The petitioner contends, however, that the procedure is fatally defective for that the report was amended and the amendment was not submitted to the public 14 days prior to the hearing. G.S. 160-453.5(e) provides that "[t]he municipal governing board shall take into consideration facts presented at the public hearing and shall have authority to amend the report required by § 160-453.3 to make changes in the plans for serving the area proposed to be annexed so long as such changes meet the requirements of § 160-453.3." Nowhere does the statute require a second public hearing after amendment. While it may be that the statute does not contemplate amendment to the annexation report after filing for public use and prior to the hearing, we do not perceive how petitioner has been prejudiced. The amended report was read at the outset of the public hearing. The record discloses that the major changes were the deletion of Study Area No. Two and changes with respect to providing water and sewer services. The original petition and amendments thereto do not take exception to the furnishing of water and sewer services. We are of the opinion that this irregularity in procedure, if any it is, did not constitute prejudicial error against the appellant in this case.

[8] Petitioner presented evidence which was not contradicted that Study Area No. Four and Study Area No. Three are contiguous and that they were being annexed simultaneously. We assume, although the record is silent as to this, that no property owner in Study Area No. Three has petitioned the Superior Court for review. G.S. 160-453.5(g) provides: "Simultaneous Annexation Proceedings. — If a municipality is considering the annexation of two or more areas

which are all adjacent to the municipal boundary but are not adjacent to one another, it may undertake simultaneous proceedings under authority of this part for the annexation of such areas."

Petitioner argues that this section of the statute must be interpreted to exclude annexation of areas contiguous to the municipality which are also contiguous to each other. We do not agree. G.S. 160-453.4 is entitled "Character of area to be annexed" and provides

> "(a) A municipal governing board may extend the municipal corporate limits to include any area which meets the general standards of subsection (b), and which meets the requirements of subsection (c).
>
> (b) The total area to be annexed must meet the following standards:
>
> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation is begun.
>
> (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
>
> (3) No part of the area shall be included within the boundary of another incorporated municipality.
>
> (c) (requires that the area must be developed for urban purposes.)
>
> (d) (not applicable.)"

We are of the opinion that if the areas to be annexed meet the standards prescribed, it does not matter whether they be contiguous. G.S. 160-453.5(g) simply alleviates the necessity for separate annexation proceedings where areas to be annexed are adjacent to the municipality but not adjacent to each other and specifically provides that annexation procedures may be simultaneously instituted and carried forward. We note that the evidence here was that had Area 3 and Area 4 been consolidated as one area, it still would have qualified for annexation. The reason for two separate areas is not apparent from the record, nor do we think the motive therefor material.

[9] Petitioner further contends that the ordinance contains no specific findings that the area to be annexed is developed for urban purposes as required by G.S. 160-453.5(e). The section of the ordinance attached states "d. The area to be annexed is developed for

urban purposes in that 64.2 percent of the total number of lots and tracts in said area are used for residential purposes, and 71.3 percent of the total of residential and undeveloped acreage consists of lots and tracts five acres or less in size." In addition, the ordinance specifically stated that the annexation report was on file in the office of the Clerk for public inspection. We are not unmindful of *Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681. There the annexation report and the ordinance merely stated, in identical phraseology, ". . . the area to be annexed is in the process of being developed for urban purposes and, as such, more than 60% of same is in use for residential, commercial, industrial, institutional or governmental purposes and that at least 60% of the total acreage, not counting the acreage used on the aforementioned date for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five (5) acres or less in size." The Court noted that the record contained no other finding as to whether the area was developed for urban purposes, but that it merely adopted the definition as the only showing relative to the nature of the area. The map in the record did not show on what lots or tracts houses or buildings were located, nor was the method of calculation shown, nor were the actual percentages of development shown. Here these objections are not present. We think the ordinance in this case sufficiently complies with the statute.

The annexation proceedings, in our opinion, substantially complied with the statutory requirements, and these assignments of error are overruled.

We do not deem it necessary or practical to discuss each of the remaining assignments of error *in seriatim.* We have carefully examined the pleadings, the documentary and oral evidence introduced in the Superior Court and we find no prejudicial error in the proceedings in the Superior Court which would justify disturbing the result thereof.

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

AMY ALEXANDER, WIDOW, LELIA SMITH AND HUSBAND, J. A. SMITH, LESTER ALEXANDER AND WIFE, AMERICA ALEXANDER, CLOYD ALEXANDER AND WIFE, VICTORIA ALEXANDER, EVA MILLER AND HUSBAND, J. H. MILLER, MADIE BRUNER AND HUSBAND, G. B. BRUNER, ROBENIA STEVENSON AND HUSBAND, JULIUS STEVENSON, MAGGIE WOOD, WIDOW, DORA DAVIS AND HUSBAND, J. C. DAVIS, ETHEL CAMPBELL AND HUSBAND, L. A. CAMPBELL, RANDOLPH ALEXANDER AND WIFE, ELVIE ALEXANDER, H. C. LITTLE AND LELIA ALEXANDER (KNOWN AS LELIA PHIFER) AND MONROE LITTLE, AMAY LITTLE, MAGGIE LITTLE, MALINDA LITTLE, JOHNSIE LITTLE, MARGARET ALEXANDER, QUAY ALEXANDER, MINNIE ALEXANDER, ELIZABETH ALEXANDER BY THEIR NEXT FRIEND, HESSIE BLANKENSHIP AND EDNA MURDOCK, MOTHER OF THE INFANT MARGARET ALEXANDER, AND COSTIN MURDOCK, AND HER HUSBAND. EX PARTE v. IREDELL COUNTY BOARD OF EDUCATION

No. 6922SC457

(Filed 17 September 1969)

1. Partition § 10— action to void clerk's order of sale — fraud by attorney — evidence

In a hearing to declare void clerk's order of sale in a partition proceeding, movants' evidence was insufficient to support a finding that the order of sale was fraudulent on the ground that the attorney who purported to represent the selling petitioners actually represented the purchaser, a county board of education, there being no evidence that the attorney represented the board at the time it became the purchaser, or that the attorney or any individual member of the board profited by the transaction, or that the price paid was less than the full value of the property sold.

2. Judgments § 30— attack on judgments — fraud — motion in the cause or independent action

If there has been fraud in obtaining a judgment, the court may set it aside upon motion if the action is still pending; but if the action is ended by a final judgment, an independent action to impeach the judgment must be instituted.

3. Partition § 10— action to void clerk's order of sale — fraud — motion in the cause

Trial court properly dismissed motion in the cause made in 1967 to set aside for fraud clerk's order of sale of land in partition proceedings which had been terminated in 1923 by the order of sale, since the statutory exception which permitted an attack for fraud in such case by motion in the cause was repealed by Ch. 719, § 2, of the Session Laws of 1949, effective 1 January 1950.

4. Partition § 10; Judgments § 17— action to void clerk's order of sale — attorney's lack of authority to file partition proceedings — jurisdiction — void judgment

If the attorney who purported to represent petitioners in filing *ex parte* partition proceedings actually had no authority to do so, and if the petitioners had done nothing to ratify the proceedings, the clerk's order

of sale and the deed executed pursuant thereto would be subject to attack by motion in the cause, and the jurisdiction apparently acquired over petitioners by the filing of the petition would have been in fact lacking and the judgment rendered thereon a nullity.

5. Judgments § 30— attack for fraud — void judgment

If a fraud is perpetrated on the court whereby jurisdiction is apparently acquired when jurisdiction is in fact lacking, judgment rendered by the court is a nullity and may be vacated on motion in the cause.

6. Partition § 10— attack on clerk's order of sale — attorney's lack of authority to file partition proceedings — evidence

In a hearing upon motion in the cause to declare void clerk's order of sale in a partition proceeding on the ground that the attorney who purported to represent the movants in filing the *ex parte* partition proceedings in 1923 had no authority to act, trial court properly found the clerk's order of sale to be regular, where the testimony of the movants that they had not authorized the attorney to file the proceedings in their behalf was contradicted by notations on the record that each of the movants in 1924 and 1931 respectively had received from the clerk her proportionate share of the sale proceeds.

7. Attorney and Client § 3— scope of attorney's authority — presumption

There is a presumption in favor of an attorney's authority to act for any client whom he professes to represent.

8. Judicial Sales § 6— validity of sale — duty of purchaser

In the absence of fraud or the knowledge of fraud, the purchaser at a judicial sale is required only to look at the proceeding to see if the court had jurisdiction of the parties and of the subject matter and if the judgment on its face authorized the sale.

9. Partition § 10; Judicial Sales § 6— action to void clerk's order of sale — rights of purchaser — fraud

In a hearing upon motion in the cause to declare void clerk's order of sale in a partition proceeding on ground that the attorney who purported to represent the movants at the proceeding had no authority to act, the rights of the purchaser at the sale will be protected against direct or collateral attack in the absence of fraud or knowledge of fraud on his part, and this is so even though movants are able to establish the attorney's lack of authority.

APPEAL by movants from *Ervin, J.*, May 1968 Session of IREDELL Superior Court.

This is an appeal from an order of the Superior Court dated 6 May 1969 overruling a motion in the cause to declare void an order of sale signed by the clerk of Superior Court of Iredell County, N. C., in a special proceeding for sale of land on petition for parti-

tion, dated 13 September 1923 and approved by the resident judge on 14 September 1923.

On 13 September 1923 Hessie Blankenship filed a petition with the clerk of Superior Court of Iredell County to be appointed next friend for nine named infant owners of undivided interests in a described two-acre tract of land. The petition alleged that a sale of the land was desirable and a special proceeding was necessary for that purpose, that persons closely connected with the infants were interested in the results of the special proceeding and for that reason the petitioner had been requested to apply for appointment as next friend, and that the petitioner had no interest whatever in the result of the special proceeding except to see that the rights of the infants were protected in the event of her appointment as their next friend. On this petition the clerk of Superior Court signed an order on 13 September 1923 finding the petitioner to be a fit and suitable person to act as next friend of the infants. On the same date an *ex parte* petition to sell the two-acre tract for partition was filed in the office of the clerk on behalf of the nine infants, acting by their next friend, and on behalf of a large number of other named persons. In substance the petition alleged: That nineteen of the petitioners, designated by name and including the nine infants, owned remainder interests in the land in question as tenants in common, subject to the dower rights of one of the petitioners; that said nineteen persons each owned fractional shares as set forth in the petition; that the petitioners desired to hold their interests in said land, or the proceeds thereof, in severalty; that actual partition could not be made without injury because of the smallness of the tract and the number of tenants in common and that a sale would be more advantageous to all parties; that the County Board of Education of Iredell County desired to purchase the land for the purpose of erecting a school building thereon, which would be of advantage to petitioners as they owned other lands in the vicinity; that the County Board of Education had offered to purchase said land at private sale for the sum of $100.00 and the petitioners considered this to be a fair and reasonable price and all the land was reasonably worth and "more probably than it would bring if offered for sale at public auction." The petition was signed by John A. Scott, Jr., attorney for petitioners.

On 13 September 1923 the clerk of Superior Court entered an order reciting that the petition came on to be heard before him upon evidence offered; that it appeared to the court that all parties necessary and proper to the action were legally before the court;

that the land described in the petition could not be actually divided without injury to the parties interested and a sale would be more advantageous to all parties; that the County Board of Education of Iredell County had offered to purchase the land for the purpose of acquiring a school site and had offered to pay the sum of $100.00 in cash and the costs of procuring title; and that the petitioners considered this offer a fair and reasonable price for the land and recommended that the same be accepted. The order found as a fact that the price offered was "as much or more than said land would bring if sold at public auction," and thereupon ordered that the sale to the County Board of Education at private sale for the sum of $100.00 cash be approved and confirmed and appointed John A. Scott, Jr., commissioner to execute and deliver deed.

On 14 September 1923, B. F. Long, resident judge of Superior Court, signed an order ratifying and confirming the order of the clerk. As authorized in the order, John A. Scott, Jr., as commissioner, executed and delivered deed conveying the two-acre tract of land to the Board of Education of Iredell County, and filed his settlement with the clerk of Superior Court, showing receipt by him from the County Board of Education of the sum of $100.00 to be distributed in certain stated amounts among the petitioners. Notations on this settlement indicate that disbursement of the purchase price was made among the petitioners in the amounts stated on various dates from 19 January 1924 to 22 July 1931, except for certain portions totaling $20.70, which were noted to have escheated to the University of North Carolina in 1945 and 1965.

On 9 November 1967 a motion in the cause was filed by attorneys representing certain of the original petitioners and other persons alleged to have succeeded as heirs at law or as purchaser to the interests of certain of the original petitioners. This motion referred to the 1923 proceedings and alleged that none of the parties having an interest in the land had been summoned or notified of the petition filed therein for the sale of their land; that a school building known as "Chestnut Grove Public School" was situated on the land; that on 9 October 1967 the Iredell Board of Education posted a notice to sell the school property, and only after this notice was posted did the moving parties know that the Board of Education purported to have any interest in the land "except the use of the same for school purposes"; that the purported parties to the special proceeding had at no time given attorney John A. Scott, Jr., permission to file a petition for sale of their property; and that a sale of the property under the facts and circumstances set forth constituted a taking of their property without notice as prohibited by the

due process clause of the Federal Constitution. The motion prayed that the order of sale which had been entered by the clerk of Superior Court dated 13 September 1923 be declared null and void and that the Iredell County Board of Education be restrained from selling the land. Notice of the filing of this motion was served on the County Board of Education on 13 November 1967.

On 6 December 1967 attorneys for the movants filed a motion to be permitted to amend their previous motion, alleging that since the filing of the same they had discovered two facts pertinent to their motion, to wit: That Hessie Blankenship, the next friend of the minor petitioners, was the secretary for attorney John A. Scott, Jr., and at the time of filing the petition in 1923 the said John A. Scott, Jr., was acting as attorney for the Iredell County School Board and also as attorney for the petitioners. Pursuant to an order allowing their motion to amend, an amended motion was filed on 29 December 1967, in which it was alleged that at the time the petition for partition was filed in 1923 John A. Scott, Jr., was attorney for the Iredell County Board of Education and purported to act on behalf of the petitioners, when in fact he had no authority to represent the petitioners; that the fact that he held himself out as attorney for petitioners and for the Iredell County School Board constituted a conflict of interest which was known by the Iredell County Board of Education; that the whole transaction was known by the clerk of Superior Court of Iredell County, by John A. Scott, Jr., and his staff, and by the Iredell County Board of Education; and that Hessie Blankenship, the next friend appointed to protect the interests of the minor children, was secretary for John A. Scott, Jr. The amended motion prayed that the order of sale dated 13 September 1923 be declared null and void and that the Board of Education be restrained from selling the land.

The motion came on for hearing at the May 1968 Session of Iredell Superior Court. At this hearing two of the movants, who were among the parties named as petitioners in the 1923 proceedings, testified they had not authorized attorney Scott to file any petition in their behalf for division of the land in question and had never received any money for their respective interests in the land. This evidence was contradicted by the record in the clerk's office showing the commissioner's settlement of the proceeds from the partition sale, which indicated that one of these witnesses had been paid her share of the sales proceeds on 8 March 1924 and the other had been paid her share on 22 July 1931.

The movants also called as a witness Hessie Blankenship, who

testified that in 1923 she was secretary for attorney Scott, who had died in 1950; that she did not remember whether in 1923 he performed any services for the Iredell County Board of Education, but she recalled he did do some work for the Board some years later.

Evidence was also introduced to show that Charles Alexander, father of the petitioners in the 1923 proceedings, had formerly been owner of a large tract of land of which the two acres in question were a part; that together with other local citizens he had had the site in question "stepped off for a school"; that the parents in the community raised money and paid $75.00 for an old building, and the school was started when the old building was moved on the land about 1923; that Charles Alexander died prior to the filing of the 1923 partition proceedings; that subsequently, about 1925 or 1926, a new frame schoolhouse was built on the site; and that in 1951 or 1952 the school board erected a brick building on the land. One of the movants testified that the school board got control of the property "by wanting somewhere to build a school and my folks just let them use it as long as it was used for school purposes; when it was not used for school purposes it was to go back to the Alexander estate."

The parties stipulated that the court might enter an order out of term and out of district, and on 6 March 1969 the judge entered an order finding as facts that the order of sale entered in the partition proceedings on 13 September 1923 was regular and had been duly confirmed by the resident superior court judge; that there was no evidence of fraud on the part of any of the parties concerned, particularly no evidence on the part of attorney Scott, the Iredell County Board of Education, or any of its agents, or any others; that the Iredell County Board of Education obtained a deed to the property which was regular on its face and thereafter improved, used and maintained the property for school purposes continuously for many years; that the deed contained no reversionary clause nor any other reservations pertaining to title. On these findings of fact the court denied the motion. Subsequently, the court amended its order denying the motion in order to change the date thereof to read "6 May 1969." From the order as amended, movants appealed.

Nivens & Brown, by W. B. Nivens, for movants.

Chamblee & Nash, by Fred G. Chamblee, for respondent, Iredell County Board of Education.

PARKER, J.

[1] By their amended motion in the cause filed 29 December 1967 movants attack the order of sale entered in the 1923 partition proceedings and the deed executed pursuant thereto on two grounds: First, that the attorney who purported to represent the petitioners in the 1923 *ex parte* proceedings had no authority to do so; and second, that even if the attorney had been authorized to bring the proceedings, the order of sale obtained thereby was fraudulent in that the attorney purported to represent the selling petitioners but actually represented the purchaser. The court, after hearing movants' evidence, found the 1923 proceedings regular and found no evidence of any fraud. These findings of the trial court are supported by the record before us.

Movants alleged fraud but were not able to support their allegation by evidence. There was evidence the attorney did do some work for the County Board of Education some years later, but there was no evidence that he represented the Board at the time it became the purchaser in the 1923 proceedings. The purchaser was a public body acquiring the land for public purposes beneficial to all residents of the community, including the sellers. There was no evidence the attorney or any individual member of the purchasing board profited in any way by the transaction. There was no evidence that the price paid was less than the full value of the property sold. The order approving the sale found as a fact that the price offered was as much or more than the land would bring if sold at public auction. There was no evidence to the contrary. In the year 1923 a price of $50.00 per acre for rural land in Iredell County would not appear inadequate. The burden was on movants to produce evidence to prove their allegations of fraud. They produced none. Their attack on that ground must in any event fail for lack of proof.

[2] There is, however, another reason why their motion, insofar as it was based on allegations of fraud, would have to be dismissed: "If there has been fraud in obtaining a judgment, the court may set it aside upon motion *if the action is still pending; but if the action is ended by a final judgment, relief may be had only by an independent action to impeach the judgment.*" (Emphasis added.) 2 McIntosh, N.C. Practice 2d, § 1718. The reason for this rule was aptly stated by Clark, C.J., in *Simmons v. Box Co.*, 148 N.C. 344, 345, 62 S.E. 435, 435:

> "When it is sought to set aside a judgment for fraud, that must be done by an independent action, because it depends upon extraneous facts, which the parties are entitled to have

found by a jury. The judgment is not void for fraud, but voidable. On the face of the record it is regular. But when it is sought to set aside a judgment for irregularity, in that there has been no service of summons, it is for the court to find the facts and correct the record to speak the truth, and if in fact there was no service of summons or appearance by the defendant (which would waive service of summons), the judgment is void."

[3] This rule, that a final judgment cannot be attacked for fraud by a motion in the cause, was formerly subject to a statutory exception in the case of orders directing sales of land on petition for partition. C.S. 3243, which was in effect at the time of the 1923 proceedings, contained the following:

"Any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collussion, by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby."

This statute was brought forward in the General Statutes of 1943 as G.S. 46-32, and remained in effect until repealed by Chapter 719, § 2, of the 1949 Session Laws, effective 1 January 1950.

The special proceeding with which we are here concerned was terminated by the clerk's order of sale approved by the judge on 14 September 1923. From that date it was no longer pending. More than 44 years thereafter movants filed their motion in the cause seeking to set it aside. The statutory exception permitting an attack for fraud by means of a petition in the cause was no longer in effect. Therefore, while we agree with the trial judge's conclusion that there was here no evidence of fraud on the part of any of the parties concerned, the motion should in any event have been dismissed insofar as it was based on fraud, since under the circumstances relief on that ground could have been obtained only by an independent action to impeach the judgment.

[4, 5] The motion would not necessarily fail, however, merely because it included allegations of fraud. These may be treated as surplusage, and the motion then be considered on the basis of the remaining ground on which it was made. *Carter v. Rountree,* 109 N.C. 29, 13 S.E. 716. Movants contend that the attorney who purported to represent them in filing the *ex parte* partition proceedings actually had no authority to do so and that they were thereby made parties without their knowledge or consent. Should these allegations be established and if movants have done nothing to ratify the proceedings, the order of sale and the deed executed pursuant thereto

would be subject to attack by motion in the cause. *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897; *Simmons v. Box Co., supra; Hargrove v. Wilson,* 148 N.C. 439, 62 S.E. 520; Annotation, 88 A.L.R. 12. In such case, while jurisdiction would apparently have been acquired over petitioners by the filing of the *ex parte* petition in their name, jurisdiction would have been in fact lacking and the judgment rendered thereon would be a nullity. The situation in such case would be similar to those cases in which some fraud is perpetrated on the court whereby jurisdiction is apparently acquired but is in fact lacking. "The rule is that if a fraud is perpetrated on the court whereby jurisdiction is apparently acquired when jurisdiction is in fact lacking, the judgment rendered thereon is a nullity and may be vacated on motion in the cause." *McLean v. McLean,* 233 N.C. 139, 145, 63 S.E. 2d 138, 143.

[6, 7] In the case before us the evidence was conflicting on the question of the attorney's authority to represent the petitioners in filing the 1923 proceedings. Two of the movants, who had been named with a large number of other persons as original petitioners in those proceedings, testified they had not authorized the attorney to file the proceedings in their behalf and were not aware any such proceedings had been filed. At the time of testifying, one of these witnesses was 78 and the other was 83 years of age. They were testifying concerning events occurring more than 44 years previously. Their testimony was contradicted by the face of the record itself, which included notations that many years ago each of them had actually received from the clerk's office her proportionate share of the sales proceeds. The trial judge, after hearing these witnesses testify and observing them in person, apparently concluded that the face of the record was more persuasive. He found the order of sale by the clerk to be regular and to have been duly confirmed by the resident judge. "There is a presumption in favor of an attorney's authority to act for any client whom he professes to represent." *Bank v. Penland,* 206 N.C. 323, 173 S.E. 345. The burden was on the movants to convince the trial judge to the contrary. Faced with conflicting evidence, he ruled against them. In this we find no error.

[8, 9] Finally, there is an additional reason the movants cannot prevail. The trial judge has expressly found no evidence of fraud on the part of the Iredell County Board of Education or any of its agents. None was presented. "It is well settled that, in the absence of fraud or the knowledge of fraud, one who purchases at a judicial sale, or who purchased from one who purchased at such sale, is required only to look to the proceeding to see if the court had juris-

diction of the parties and of the subject matter of the proceeding, and that the judgment on its face authorized the sale." *Graham v. Floyd,* 214 N.C. 77, 83, 197 S.E. 873, 876; See also, *Menzel v. Menzel,* 254 N.C. 353, 119 S.E. 2d 147. "When the record shows both service and appearance, it is clear that the rights of good faith purchasers at execution sale or good faith purchasers of the judgment will be protected against direct or collateral attack, even though there was in fact no service and *the appearance by an attorney was unauthorized.* The party injured may, of course, sue the attorney and anyone else sharing responsibility for the unauthorized appearance." (Emphasis added.) 1 McIntosh, N.C. Practice 2d, § 933, p. 488. Therefore, even though movants had been able to establish that the appearance by the attorney in the partition proceedings had been unauthorized, when the Iredell County Board of Education became purchaser at the court-ordered sale, in the absence of any evidence of fraud or knowledge of fraud on its part, its rights as a good faith purchaser will be protected against direct or collateral attack. *Rackley v. Roberts,* 147 N.C. 201, 60 S.E. 975; *Hatcher v. Faison,* 142 N.C. 364, 55 S.E. 284; *Williams v. Johnson,* 112 N.C. 424, 17 S.E. 496; *England v. Garner,* 90 N.C. 197.

Since in any event the movants cannot prevail, it is not necessary for us to consider whether their motion was barred by laches or estoppel in permitting the County Board of Education to remain in undisturbed possession of the land for a period of more than 44 years, during which period the movants observed the Board erect substantial improvements on the property.

In the trial court's order denying appellants' motion, we find

No error.

CAMPBELL and GRAHAM, JJ., concur.

CHARLES F. DECKER, MARGARET C. DECKER, MRS. RALPH T. MIDDLETON, DEWEY M. RAMSEY, NAVODA B. RAMSEY, JANIE H. WILLARD, JOHN E. WILLARD, JR., LARRY FRANCIS McCRACKEN, MADGE M. McCRACKEN, REX W. MOSELEY, SYLVIE Y. MOSELEY, F. E. LONG, LAWRENCE C. STOKER, JACQUELINE W. STOKER, BETTY JOAN WALKER, MAMIE RUTH PRITCHARD, MILDRED G. CALL, JOHN S. YERMACK, ALICE R. YERMACK, LARRY SILVER, BETTY MARTIN, LAURA ANN GARLAND, LENOID WENNINGHAM, SAMMY S. WENNINGHAM, NELL B. ROBINSON, ELLSWORTH R. RECTOR, LUCILLE R. RECTOR, WILLIAM A. NORTON, NANCY S. NORTON, MARY H. EISENHAUER, LARRY N. VAUGHN, FREDA G. VAUGHN, HENRY V. BLANTON, ANN P. BLANTON, DAVID M. WEAVER, ISABEL S. WEAVER, v. RICHARD L. COLEMAN AND WIFE, BETTY B. COLEMAN

No. 6928SC39

(Filed 17 September 1969)

1. Appeal and Error § 6— appeal from interlocutory injunction

Appeal from an interlocutory injunction is not premature where the order appealed from adversely affects a substantial right of appellants.

2. Municipal Corporations § 30— zoning ordinance — interpretation of language

The law is disposed to interpret language in a zoning ordinance in the light of surrounding circumstances and to give to such words their ordinary meaning and significance.

3. Municipal Corporations § 30— zoning ordinance — interpretation of language

Proviso of a city zoning ordinance requiring defendants to maintain "inviolate" a 50-foot buffer zone was properly interpreted by the trial court to prohibit defendants from "engaging in any activities in the cutting of timber, making of excavations, or in any manner altering or changing" the 50-foot buffer zone.

4. Municipal Corporations § 30— power to zone — State

The power to zone is the power of the State and rests initially in the General Assembly.

5. Municipal Corporations § 30— power of municipality to zone

While a municipal corporation has no inherent power to zone its territory and restrict to specified purposes the use of private property in each such zone, such power has been delegated to the cities and incorporated towns of this State by the General Assembly. G.S. 160-172 *et seq.*

6. Municipal Corporations § 30— municipal zoning power — limitations

Exercise of the zoning power by a city is subject to the limitations imposed by the Constitution upon the legislative power of the State forbidding arbitrary and unduly discriminatory interference with the rights of property owners, and to the limitations in the statutes by which the power was delegated.

7. Municipal Corporations § 30— zoning ordinance — uniform restrictions in each class

While the law does not require all areas of a defined class in a zoning ordinance to be contiguous, all areas in each class must be subject to the same restrictions. G.S. 160-173.

8. Municipal Corporations § 30— zoning classification — restriction applicable to defendants' property

Proviso of a municipal zoning ordinance requiring defendants "to maintain inviolate a 50-foot buffer zone" between their property zoned "Roadside Business Property" and an adjacent residential area, which proviso by its express terms applied only to property owned by defendants and not to property with the same zoning classification owned by other persons, *is held* void, since all areas zoned "Roadside Business Property" are not subject to the same restrictions.

9. Municipal Corporations § 30; Statutes § 4— zoning ordinance — portion invalid — validity of remainder

Invalidity of a proviso of a municipal zoning ordinance does not affect the validity of the remaining provisions of the ordinance, where the remaining provisions are separable from the invalid proviso and the City Council expressly declared its intention that the valid portions be given full effect if any portion should be held invalid.

10. Injunctions § 4— interlocutory injunction — restraining violation of ordinance

The trial court erred in restraining defendants *pendente lite* from making excavations on their property without first obtaining a permit as required by city ordinance, and from commencing construction of a Group Development upon their property without first complying with requirements of a city ordinance, where plaintiffs failed to allege and offered no proof that defendants have in fact violated such ordinances.

APPEAL by defendants from *Braswell, J.*, 5 August 1968 Non-Jury Civil Session of BUNCOMBE Superior Court.

This is a civil action in which plaintiffs seek a permanent injunction restraining defendants from: (1) cutting timber on, excavating, or in any manner altering a 50-foot "buffer" strip of land owned by defendants bordering residential lots owned by plaintiffs, in alleged violation of a city ordinance; (2) making excavations on defendants' remaining property adjacent to the "buffer" strip without first obtaining a permit as required by city ordinance; and (3) commencing construction of a "group development" on defendants' property without first complying with provisions of a city zoning ordinance dealing with group developments.

Defendants are owners of a 62-acre tract of land fronting on U.S. Highway No. 74 near its intersection with Tunnell Road in the City of Asheville, N. C., on which they plan to construct a shopping

center. Plaintiffs are owners of adjacent residential lots, which are zoned "RA-6 Residential" under the City Zoning Ordinance. Defendants' 62-acre tract is comprised of a large number of lots, including a lot designated as Lot 2½, Sheet 21, Ward 8. Prior to 26 August 1965 this lot was also zoned "RA-6 Residential," while the remainder of the 62-acre tract was and is zoned "Roadside Business Area." On 26 August 1965 the Asheville City Council, pursuant to application for rezoning made by defendants, adopted Ordinance No. 525 as an amendment to the City Zoning Ordinance, by which the zoning classification of Lot 2½, Sheet 21, Ward 8 was changed from RA-6 Residential to Roadside Business Area, subject to the following proviso:

> "PROVIDED, that the developers and owners of the property involved, including that property heretofore zoned Roadside Business Area belonging to the same developers and/or owners, be required to maintain *inviolate* a 50-foot buffer zone adjacent to the residential area for the entire length of said Roadside Business Area, and PROVIDED FURTHER that no access road, street or alley, or any type of access, be permitted over the said 50-foot buffer zone from the Parkway Plaza site into the abutting residentially zoned property, and PROVIDED FURTHER that the developer comply with the requirements of the Asheville Zoning Ordinance having to do with, or in respect to group developments, and also providing that the developer comply with existing ordinances regulating excavation of land."

The 50-foot buffer zone described in the proviso in Ordinance No. 525 lies not only along the boundary line of the Lot 2½, Sheet 21, Ward 8, which was the lot being rezoned by that ordinance, but also along the entire boundary line of defendants' 62-acre tract lying adjacent to the residential area.

Preparatory to constructing their planned shopping center, defendants began clearing their entire tract, including the 50-foot strip along the boundary adjacent to the residential area. On 1 August 1968 plaintiffs instituted this suit in the Superior Court of Buncombe County, seeking a temporary restraining order and a permanent injunction. On the same date the resident superior court judge entered an order upon the complaint used as an affidavit, restraining defendants from, among other things, "engaging in any activities in the cutting of timber, making of excavations, or in any manner altering or changing the 50-foot inviolate buffer provided for in Ordinance #525," and ordering the defendants to appear before the

judge assigned to hold the Buncombe Superior Court on 7 August 1968 to show cause why the restraining order should not be continued in effect until the final determination of this action. Upon the hearing, the temporary restraining order was ordered continued in effect until the final determination, and from this order defendants appealed.

No counsel for plaintiff appellees.

Bennett, Kelly & Long, by George Ward Hendon, for defendant appellants.

PARKER, J.

[1] The order appealed from adversely affects a substantial right of the appellants and the appeal is, therefore, not premature. G.S. 1-277; *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545; *Cablevision v. Winston-Salem,* 3 N.C. App. 252, 164 S.E. 2d 737.

[2, 3] Appellants' first contention is that the trial court erred in its interpretation of the proviso in City Ordinance No. 525; that the language therein that the defendants "be required to maintain *inviolate* a 50-foot buffer zone," should not be interpreted, as was done by the trial court, so as to prohibit defendants from "engaging in any activities in the cutting of timber, making of excavations, or in any manner altering or changing the 50-foot inviolate buffer." With reference to zoning, however, "the law is disposed to interpret language in the light of surrounding circumstances and to give to words their ordinary meaning and significance." *Penny v. Durham,* 249 N.C. 596, 107 S.E. 2d 72. The word "inviolate" is defined in Webster's Third New International Dictionary (1966) as "free from change or blemish, pure, unbroken, free from assault or trespass, untouched, intact." The word has also been defined as meaning "unbroken, unhurt, uninjured, unpolluted." 48 C.J.S. 762. Therefore, we think that the trial court did give to the word its ordinary meaning when it interpreted the ordinance by restraining defendants from "engaging in any activities in the cutting of timber, making of excavations, or in any manner altering or changing" the 50-foot buffer zone. The question arises whether, so interpreted, the proviso in the ordinance is valid.

[4-6] The power to zone is the power of the State and rests initially in the General Assembly. *Schloss v. Jamison,* 262 N.C. 108, 136 S.E. 2d 691. "A municipal corporation has no inherent power to zone its territory and restrict to specified purposes the use of pri-

vate property in each such zone. Such power has, however, been delegated to the cities and incorporated towns of this State by the General Assembly. G.S. 160-172, *et seq.*" *Zopfi v. City of Wilmington,* 273 N.C. 430, 434, 160 S.E. 2d 325, 330. Exercise by a city of this delegated power is subject both to limitations imposed by the Constitution upon the legislative power of the State itself, forbidding arbitrary and unduly discriminatory interference with the rights of property owners, and is also subject to the limitations in the statutes by which the power was delegated. *Zopfi v. City of Wilmington, supra; Schloss v. Jamison, supra; Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880.

In the present case appellants contend that the proviso to the Asheville City Ordinance No. 525, as the language of that proviso has been interpreted and applied by the trial court's order, imposes unconstitutional limitations upon the use of their property. We do not, however, find it necessary to decide the constitutional question sought to be raised. In our view the proviso to the ordinance is clearly invalid as contravening the provisions of the enabling statutes which are the sole source from which the city derives its delegated power to zone.

G.S. 160-172 in pertinent part provides:

> "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

G.S. 160-173 in pertinent part provides:

> "For any or all said purposes it may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts."

[7] Our Supreme Court has construed G.S. 160-173 to impose the following limitation on a city's power to zone:

> "When a city adopts a zoning ordinance restrictions on use

must be uniform in all areas in a defined class or district. Different areas in a municipality may be put in the same class. The law does not require all areas of a defined class to be contiguous, *but when the classification has been made, all areas in each class must be subject to the same restrictions.*" *Walker v. Elkin,* 254 N.C. 85, 87; 118 S.E. 2d 1, 3.

[8] In the present case defendants' property has been classified under the Asheville Zoning Ordinance as "Roadside Business Area." As such, it is subject to all of the same restrictions imposed on other properties given this same classification throughout the City. The proviso to Ordinance 525, however, purports to impose an additional restriction, applicable only to defendants' property and not imposed on land zoned "Roadside Business Area" as it lies adjacent to a residential area in any other location in the City. In fact on no other property within the City does the Asheville Zoning Ordinance place similar restrictions on the use of property. Section 7A of the Ordinance, which creates a zoning classification for a "Restricted Business District," does provide in Subsection E, under the heading "Buffering," for a greenbelt planting strip not less than 15-feet wide along the side and rear lot lines abutting or lying across the street from property zoned for residential use. However, the 15-foot buffer strip provided for by this subsection is far different from the 50-foot buffer zone which the proviso to Ordinance 525 creates on defendants' property and requires them to maintain "inviolate." Subsection E of Section 7A of the City Zoning Ordinance not only permits clearing and planting of the 15-foot greenbelt planting strip described therein, but even contemplates that this be done by providing in considerable detail for the type, number, and spacing of trees and shrubs to be planted thereon. It is certainly not to be maintained *inviolate;* it is less than one-third the width of the buffer zone created by the proviso to Ordinance 525; and in any event it applies only to property zoned as "Restricted Business District," not to property zoned, as was the defendants' property, as "Roadside Business Area." In addition, it should be noted that the proviso to Ordinance 525 purports to place a restriction only upon "the developers and owners of the property involved, including that property heretofore zoned Roadside Business Area *belonging to the same developers and/or owners.*" (Emphasis added.) Thus, by its express terms, the proviso is made to apply only to property owned by the defendants in this action, and not to property owned by any other persons anywhere else in the City of Asheville.

[9] Since the proviso to Ordinance 525 exceeded statutory limitations imposed by the General Assembly when it enacted the stat-

utes delegating to cities power to enact zoning ordinances, the proviso is void. However, this holding does not affect the validity of the remaining portions of Ordinance 525, the City Council having expressly declared in Section 3 its intention that if any portion of the Ordinance is for any reason held to be invalid, such decision should not affect the validity of the remaining portions of the Ordinance. "It is well settled that if valid provisions of a statute, or ordinance, are separable from invalid provisions therein, so that if the invalid provisions be stricken the remainder can stand alone, the valid portions will be given full effect if that was the legislative intent." *Jackson v. Board of Adjustment,* 275 N.C. 155, 168, 166 S.E. 2d 78, 87. Here, the Asheville City Council has expressly declared such an intent.

[10] The restraining order issued in this case, which was continued in effect pendente lite, also restrained defendants "from making any excavations upon the property of the defendants adjacent to said 50-foot buffer without first obtaining an excavation permit as required by Ordinance #427 of the City of Asheville as amended by Ordinance #435 of the City of Asheville. . . ." In the order continuing the restraining order in effect pendente lite, the court found as a fact that the defendants were "engaged in the excavation of land adjacent to the 50-foot buffer zone and this excavation is being carried on without the issuance of a permit for this operation as required by Ordinance No. 427 as amended by Ordinance No. 435." We have carefully examined the record and find no evidence whatsoever to support this finding of fact. The plaintiffs' complaint, even considered as an affidavit, merely alleged that the plaintiffs were "informed and believed" that the defendants were engaged in the excavation of their land in violation of the ordinances referred to. The plaintiffs offered no evidence to support the finding that defendants were actually engaged in such excavations, and the male defendant testified at the hearing that he had done no excavations on his property, including the 50-foot buffer zone. Ordinance No. 427 as amended by Ordinance No. 435 provides that no excavation or filling operation may be started within the City until an appropriate permit is issued. Since there was neither proper allegation nor any proof that defendants were engaged in violating those ordinances, the order continuing the restraining order in effect restraining violation of those ordinances was error.

Defendants were further restrained from "commencing any construction of a Group Development upon the real property of the defendants adjacent to said 50-foot buffer without first complying with the requirements of Section 9 C of Ordinance #322 of the City of

Asheville dealing with Group Developments. . . ." Plaintiffs in their complaint alleged that they were informed and believed "that the defendants are preparing to commence construction of buildings in a Group Development" upon their lands and "that the plaintiffs are apprehensive less the defendants undertake said construction without complying with the requirements of Section 9 C of Ordinance # 322 of the City of Asheville having to do with group developments." Plaintiffs have failed to allege, and have offered no evidence to show, that the defendants have in fact violated Section 9 C of Ordinance No. 322, and therefore the order restraining defendants from violation of such ordinance pendente lite was error.

For the reasons stated herein the order continuing the restraining order in effect pendente lite was error, and this cause is remanded to the Superior Court of Buncombe County for entry of an order in accordance with this opinion.

Reversed and remanded.

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

TOMMY JOHNSON v. ROBERT EUGENE DOUGLAS
AND
LACY FERGUSON AND HOMER CARLTON, JR., T/A D/B/A FERGUSON & CARLTON v. ROBERT EUGENE DOUGLAS

No. 6923SC290

(Filed 17 September 1969)

1. Automobiles §§ 58, 80— accident involving turning automobile — negligence — contributory negligence — nonsuit

In an action for damages arising out of a collision between plaintiff's truck, which was making a left turn across defendant's lane of travel, and defendant's oncoming automobile, there was ample evidence of defendant's negligence and plaintiff's contributory negligence to require submission of the issues to the jury.

2. Automobiles § 46— opinion testimony as to speed — admissibility

It is competent for a person of ordinary intelligence and experience to testify as to his opinion as to the speed of a vehicle when he has had reasonable opportunity to observe the vehicle and judge its speed; but where the evidence affirmatively discloses that the witness had no reasonable opportunity to judge the speed of the car, his testimony in that regard is incompetent.

3. Automobiles § 46— opinion testimony as to speed — reasonable opportunity to observe car

What is a reasonable opportunity to observe the vehicle and judge its speed is a question that must be determined by the trial judge in each case from the facts as they appear in the evidence.

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

Testimony of a witness as to the speed of an oncoming car was properly excluded, where witness stated that he first saw the car when it was fifty to seventy-five feet away and that he did not see the car continuously thereafter.

5. Automobiles § 90— action for negligent operation — instructions — speeding

An instruction that plaintiff would be guilty of negligence if he drove at an excessive rate of speed constitutes prejudicial error where there is neither allegation nor proof that plaintiff was operating his automobile at an excessive rate of speed at the time of the accident.

6. Trial § 32— purpose of instructions

One of the primary purposes of the charge is to assist the jury by eliminating irrelevant matters and bringing into focus the evidence and law that are material and essential for a proper determination of the issues in the case.

7. Automobiles § 90— instructions — law relating to oncoming and turning vehicles

In an action for damages arising out of a collision between plaintiff's truck, which was making a left turn across the defendant's lane of travel, and defendant's oncoming automobile, trial court's instructions with respect to the rights of the oncoming vehicle or the turning vehicle *held* erroneous in failing to explain what the parties could assume under the circumstances with respect to the operation of their respective vehicles. G.S. 1-180.

8. Automobiles § 17— motorist proceeding on right side of highway — assumptiton

A motorist proceeding on his right side of the highway may properly assume that an automobile approaching from the opposite direction will remain on its own side of the road until the vehicles meet and pass in safety.

9. Automobiles § 9— motorist turning left — assumptions

A motorist making a left turn in front of an approaching motorist has the right to assume in the absence of notice to the contrary that the approaching motorist will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care to avoid collision with the turning vehicle.

10. Automobiles § 9— motorist turning left — duties

G.S. 20-154 requires a motorist intending to turn from a direct line (1) to see that the movement can be made in safety and (2) to give the required signal when the operation of any other vehicle may be affected.

11. Automobiles § 90; Trial § 33— instructions on negligence not supported by pleadings

Instructions which would permit the jury to find the parties guilty of aspects of negligence in the operation of an automobile, whether or not such negligence had been alleged in the pleadings, are erroneous.

APPEAL by plaintiffs and the defendant from *Johnston, J.*, Regular January 1969 Civil Session of Superior Court held in WILKES County.

Plaintiff Tommy Johnson (Johnson) seeks to recover of defendant, Robert Eugene Douglas (Douglas), for personal injuries alleged to have been sustained on 5 April 1968 as a result of a collision between a Chevrolet truck he was operating and a Pontiac automobile being operated by Douglas. Plaintiffs Lacy Ferguson and Homer Carlton, Jr., trading and doing business as Ferguson & Carlton (Ferguson & Carlton) seek to recover of Douglas for damage to their truck alleged to have been sustained on 5 April 1968 as a result of a collision between their Chevrolet truck which was being operated by Johnson and the Pontiac automobile being operated by Douglas.

Each plaintiff asserts that the collision was proximately caused by the negligence of Douglas. Douglas denies negligence, alleges contributory negligence, and asserts a counterclaim against each plaintiff for personal injuries and property damage he sustained in the collision.

The court submitted issues of negligence, contributory negligence and damages. The jury by its answer to the issues found that Douglas was negligent and that Johnson was contributorily negligent. From the entry of the judgment that plaintiffs recover nothing, the defendant recover nothing, and that the costs be taxed against the plaintiffs, both plaintiffs and the defendant appeal.

McElwee & Hall by John E. Hall, and Moore & Rousseau by Julius A. Rousseau, Jr., for plaintiffs.

Ferree & Osborne by Samuel L. Osborne for defendant.

MALLARD, C.J.

[1] The evidence tends to show that the collision occurred on the morning of 5 April 1968 on Highway #18 approximately five miles north of North Wilkesboro. Johnson was traveling North. Douglas was proceeding South. Johnson testified that when he could see that the road was clear of approaching traffic for a distance of

150 to 175 feet, he began turning to his left across the highway for the purpose of entering a private drive to deliver milk. Douglas testified that Johnson started to make the turn when he (Douglas) was approximately 100 feet away. The automobile operated by Douglas collided with the right side of the truck operated by Johnson before it got off the road. After a careful review of the evidence, we are of the opinion and so hold that there was ample evidence of the negligence of Douglas and the contributory negligence of Johnson to require submission of the issues to the jury. Since there must be a new trial, we do not set forth all the evidence in detail. Defendant's motion for judgment as of nonsuit was properly overruled. See *Lemons v. Vaughn and Vaughn v. Lemons*, 255 N.C. 186, 120 S.E. 2d 527 (1961).

[4] Plaintiffs contend that the court committed error in excluding the testimony of Johnson as to the speed of the automobile being operated by Douglas. The evidence tended to show that at the place where the collision occurred the maximum speed limit was 55 miles per hour. Johnson testified:

> "When I looked to my right there was a 1959 Pontiac. It was the one driven by Mr. Douglas. When I looked and saw the vehicle, it was fifty to seventy-five feet away, I would say in my opinion."

Johnson also testified that "from the time I first saw the vehicle, I did not look at it continuously until the crash." If Johnson had been permitted to testify about the speed, he would have said, "In my opinion, the speed of the Douglas vehicle was approximately 65 to 60 miles per hour."

[2] The correct rule is stated in 1 Strong, N.C. Index 2d, Automobiles, § 46, as follows:

> "It is competent for a person of ordinary intelligence and experience to testify as to his opinion as to the speed of a vehicle when he has had reasonable opportunity to observe the vehicle and judge its speed."
>
> * * *
>
> "Where, however, the evidence affirmatively discloses that the witness had no reasonable opportunity to judge the car's speed, his testimony in that regard is without probative force and is incompetent."

[3] What is a reasonable opportunity to observe the vehicle and judge its speed is a question that must be determined by the trial judge, if it arises, in each case from the facts as they appear in the

evidence. The testimony is incompetent if the witness had not had reasonable opportunity to observe the vehicle and judge its speed.

The case of *Ray v. Membership Corp.*, 252 N.C. 380, 113 S.E. 2d 806 (1960), relied on by plaintiffs, is distinguishable. There the witness testified he saw the vehicle fifty feet east of the intersection; the two vehicles collided in "about the center of the intersection." The Court said:

> "In our opinion, it cannot be held as a matter of law that John Ollis, a police officer of the town of Burnsville standing at the intersection with nothing to obstruct his view of defendant Woody's approaching truck, and under the circumstances as shown by his testimony, did not have a reasonable opportunity to form an intelligent opinion as to the speed of Woody's truck, which was sufficiently reliable to be admissible in evidence for the consideration of the jury. That the question as to the opportunity of Ollis to estimate, under the particular circumstances shown by his testimony, the speed of Woody's truck goes to the weight of his testimony rather than to its admissibility."

[4] In this case we are of the opinion that the observation of the Douglas vehicle by Johnson for the first time when it was "fifty to seventy-five feet away," under the circumstances revealed by his testimony that he did not see it continuously after that, did not afford him the opportunity to judge its speed. We think the trial judge was correct in excluding the opinion of Johnson.

[5] Plaintiffs' fourth assignment of error is to the court's charge to the jury. The judge instructed the jury, in part:

> "[A]nd if the plaintiff drove his vehicle on the public highways at a greater rate of speed than that which was reasonable and prudent under the circumstances as they existed there, then the plaintiff would be guilty of negligence."

There was no allegation in the pleadings that Johnson drove the vehicle he was operating at a speed greater than was reasonable and prudent. There was no evidence offered which tended to show that Johnson operated the truck at a speed that was greater than reasonable and prudent.

[6] One of the primary purposes of the charge is to assist the jury by eliminating irrelevant matters and bringing into focus the evidence and law that are material and essential for a proper determination of the issues in the case. *Irvin v. R. R.*, 164 N.C. 6, 80 S.E. 78 (1913). In the case of *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d

62 (1962), the rule relating to abstract principles of law is stated thus:

> "An instruction about a material matter not based on sufficient evidence is erroneous. In other words, it is error to charge on an abstract principle of law not raised by proper pleading and not supported by any view of the evidence." See also *Vann v. Hayes,* 266 N.C. 713, 147 S.E. 2d 186 (1966), and *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558 (1952).

[5] In this case the defendant Douglas concedes that the foregoing instruction was error. We think that under the circumstances of this case it was prejudicial error. *Powell v. Clark,* 255 N.C. 707, 122 S.E. 2d 706 (1961).

[7] Plaintiffs also contend that the judge committed error in his instructions to the jury relative to G.S. 20-146. This statute sets forth certain rules with respect to driving on the right side of the roadway. Plaintiffs assert that this instruction was erroneous and in effect informed the jury that Johnson would be negligent by simply turning to his left and crossing the left side of the roadway for the purpose of entering a private drive. We do not agree with this contention. However, each plaintiff's case was based in part upon allegation that the roadway was free of oncoming traffic for a sufficient distance to permit Johnson safely to make his left turn into the private drive. Defendant's case was based in part upon his allegation that Johnson turned to the left in front of him at a time when defendant's vehicle was so close to Johnson that he could not avoid the collision. We do not think that the judge properly instructed the jury with respect to the rights of the oncoming vehicle or the turning vehicle in that he failed to explain the law to the jury as to what the parties could assume under the circumstances with respect to the operation of their respective vehicles. In this respect the trial judge did not comply with the provisions of G.S. 1-180 by stating as contentions what one of the parties assumed.

[8] The rule with respect to what the operator of the oncoming vehicle may assume when in his correct lane of travel is stated in *Jenkins v. Coach Co.,* 231 N.C. 208, 56 S.E. 2d 571 (1949), as follows:

> "A motorist, who is proceeding on his right side of the highway, is not required to anticipate that an automobile, which is coming from the opposite direction on its own side of the road, will suddenly leave its side of the road and turn into his path. He has the right to assume under such circumstances that

the approaching automobile will remain on its own side of the road until the vehicles meet and pass in safety."

[9] The rule with respect to what the operator of the turning vehicle may assume in making a left turn is stated in *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115 (1950), as follows:

"In considering whether he can turn with safety and whether he should give a statutory signal of his purpose, the driver of a motor vehicle, who undertakes to make a left turn in front of an approaching motorist, has the right to take it for granted in the absence of notice to the contrary that the oncoming motorist will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care to avoid collision with the turning vehicle."

[10] The rule with respect to the duty of the operator of the turning vehicle is set forth in *Clarke v. Holman,* 274 N.C. 425, 163 S.E. 2d 783 (1968), as follows:

"This safety statute [G.S. 20-154] requires a motorist intending to turn from a direct line (1) to see that the movement can be made in safety, and (2) to give the required signal *when the operation of any other vehicle may be affected. Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754; *Farmers Oil Co. v. Miller,* 264 N.C. 101, 141 S.E. 2d 41. The first requirement does not mean that a motorist may not make a left turn unless the circumstances are absolutely free from danger. It means that a motorist must exercise reasonable care under existing conditions to ascertain that such movement can be made with safety."

[11] Although no exception was taken by either party thereto, we deem it proper to mention the instruction the judge gave in explaining to the jury how they were to consider and answer the first and second issues. These instructions would permit the jury to find that both Douglas and Johnson were negligent, regardless of whether such negligence had been alleged in the pleadings. As to Douglas, the court said:

"Now, members of the jury, the court instructs you that if the plaintiff has satisfied you by the greater weight of the evidence, the burden being on the plaintiff to so satisfy you, that on this occasion the defendant, Robert Eugene Douglas, was negligent and that such negligence was the proximate cause, or a proximate cause, of the injury and damage of which the plaintiff complained, then it would be your duty to answer this first

issue 'Yes.' If the plaintiffs have failed to so satisfy you, it will be your duty to answer the first issue 'No' . . . ."

As to Johnson, the court said:

"Now, members of the jury, the court instructs you that if you come to answer the second issue, and the defendant has satisfied you by the greater weight of the evidence that the plaintiff on the occasion of which he complained was negligent and that such negligence was a proximate cause or one of the proximate causes of the collision and damages of which it is complained, then the court instructs you if the defendant has so satisfied you, it would be your duty to answer the second issue 'Yes,' otherwise it would be your duty to answer it 'No.'"

The vice in these instructions is that the judge did not require the jury to find the party whose conduct was under investigation guilty of the negligence *as alleged* in the pleadings. The rule is that there must be both allegation and proof of negligence for it to be considered by the jury. *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885 (1961); *Fox v. Hollar,* 257 N.C. 65, 125 S.E. 2d 334 (1962).

Plaintiffs have other assignments of error which may have some merit but which may not recur on a new trial, and therefore we do not deem it necessary to discuss them.

We are of the opinion that the ends of justice require that there be a new trial on all the issues raised by the pleadings. *Paris v. Aggregates, Inc.,* 271 N.C. 471, 157 S.E. 2d 131 (1967). In our discretion, the judgment of the Superior Court is vacated and the cause is remanded in order that there may be a new trial on all the issues raised by the pleadings.

Error and remanded.

BRITT and PARKER, JJ., concur.

ALICE LUCILLE CRAVEN BRITT AND HUSBAND, OSSIE GERMAN BRITT, AND IDA LEOLA BEANE CRAVEN BRISTOW v. ARCHIE L. SMITH, TRUSTEE FOR PEOPLES SAVINGS AND LOAN ASSOCIATION; PEOPLES SAVINGS AND LOAN ASSOCIATION; JAMES I. FRAZIER AND WIFE, IRENE B. FRAZIER; C. T. BURGESS AND WIFE, ELIZABETH C. BURGESS; AND R. E. SILLMON AND WIFE, MILDRED J. SILLMON

No. 6919SC446

(Filed 17 September 1969)

1. Pleadings § 42— motion to strike — voluntary nonsuit as to one defendant — allegations relating to such defendant

Where plaintiffs submitted to judgment of voluntary nonsuit as to one defendant prior to the trial, allegations relating to that defendant and transactions with him were properly stricken as irrelevant.

2. Mortgages and Deeds of Trust § 40; Pleadings § 42— action to set aside foreclosure — motion to strike pleadings

In this action to set aside a trustee's deed, the trial court did not err in striking from plaintiff's complaint allegations of business relationships among certain defendants which attempt by innuendo to associate those defendants in a conspiracy, a conclusion not supported by factual allegations that the trustee failed to advertise properly and legally the subject property, and an allegation that the trustee knew that the sale price was inadequate.

3. Mortgages and Deeds of Trust § 40— setting aside foreclosure — inadequacy of purchase price

Inadequacy of price alone is not sufficient to set aside a trustee's deed.

4. Mortgages and Deeds of Trust § 40; Husband and Wife § 5— action to set aside foreclosure — deed of trust executed by married woman — allegations of "free trader"

In this action to set aside a trustee's deed and the deed of trust which was foreclosed, the trial court did not err in refusing to strike from defendants' answers allegations that because of a deed of separation plaintiff was a "free trader" when she executed the deed of trust, although that term no longer has legal significance, such characterization of plaintiff being, in effect, a shorthand description of her freedom to convey realty under G.S. 39-13.4.

5. Pleadings § 32— motion to amend after trial has begun

A motion to amend after the beginning of trial is addressed to the discretion of the court and is not appealable.

6. Mortgages and Deeds of Trust § 31— confirmation of sale — notice to trustor

In this action to set aside a trustee's deed, the trial court did not err in excluding evidence as to whether the clerk of court had notified plaintiffs of confirmation of the sale and in commenting that the clerk was under no obligation to do so, the evidence being irrelevant and the court's statement being appropriate since there is as a matter of law no duty to so notify the trustor.

7. Mortgages and Deeds of Trust § 31— necessity for confirmation of foreclosure sale

Where no upset bid is filed, confirmation of the sale is not required.

8. Evidence § 45— opinion evidence as to value — foundation

In this action to set aside a trustee's deed, the trial court did not err in the exclusion of opinion testimony as to the reasonable market value of the property, where proper foundation for such testimony was not laid by showing (1) that the witness was familiar with the property on which he professed to put a value, and (2) that he had such knowledge and experience as to enable him intelligently to place a value on it.

9. Evidence § 25— exclusion of photographs — substantive evidence

In this action to set aside a trustee's deed, the trial court did not err in the exclusion of a photograph offered "to show the premises and also other matters it might tend to show," where the photographs did not illustrate the testimony of any witness, photographs not being admissible as substantive evidence but only for illustrative purposes.

10. Mortgages and Deeds of Trust § 40; Husband and Wife § 5— action to set aside foreclosure sale — deed of trust by married woman — sufficiency of evidence

In this action to set aside a foreclosure sale and the underlying deed of trust, which had been executed by a married woman but not by her husband, the trial court properly allowed defendants' motions for nonsuit where all the evidence showed that plaintiff wife and her husband had executed a deed of separation which was recorded prior to the execution of the deed of trust by the wife, that the deed of separation had not been cancelled pursuant to G.S. 39-13.4, that at least one payment was in default for over 30 days when foreclosure proceedings were instituted, that under the terms of the deed of trust the entire balance could be declared due and foreclosure had, and plaintiffs failed to show any legal defect in the foreclosure proceedings.

APPEAL by plaintiffs from *Crissman, J.*, at the 7 April 1969 Civil Session of RANDOLPH Superior Court.

Plaintiffs brought this action to set aside a trustee's deed and the deed of trust upon which the foreclosure sale was based; also for $2,000 for "illegal and unlawful activities" of the defendants. In their complaint, plaintiffs generally assert that the defendants "acting in conspiracy and concert have attempted to deprive these plaintiffs of their homeplace." The trustee and holder of the deed of trust, together with the grantees in the trustee's deed, are defendants on appeal. Garland W. Allen was an original defendant, but approximately one year prior to the trial, plaintiffs caused judgment of voluntary nonsuit to be entered as to him.

The evidence tended to show: On 20 July 1961, plaintiffs Lucille Britt and Ida Bristow, widow, executed the deed of trust in question

to defendant Archie L. Smith, trustee, said deed of trust being in favor of Peoples Savings and Loan Association (Association). The deed of trust was to secure a loan of $3,000 which was to be repaid at $29.50 a month and embraced lands owned by plaintiff Lucille Britt, subject to life estate of plaintiff Ida Bristow. On 13 August 1958, plaintiffs Ossie and Lucille Britt entered into a deed of separation, and there was intermittent separation and reconciliation during the period 1958 through 1961. On 26 October 1966, Mrs. Britt received notice of a decision by the Board of Directors of defendant Association made on 21 October 1966 to exercise its right under the terms of the deed of trust to declare the entire balance of the loan due and payable. On 24 October 1966, acting through an agent, Mrs. Britt tendered $59.00, but tender was refused by the Association because of the decision to accelerate payment. Considering the evidence in the light most favorable to the plaintiffs, however, on 21 October 1969 the payment due 10 September 1969 was over thirty days in arrears. It is unclear whether the August payment was wholly in arrears or only partially so. The notice from the Association to plaintiffs stated that "[t]his action is being taken as a result of previous experience." The previous experience was that on 5 September 1964 Trustee Smith advertised and conducted a sale because payment was three to five months in arrears. The sale was dismissed in a special proceeding when plaintiffs persuaded defendant Association to accept the payments in arrears.

After the decision of the Board of Directors on 21 October 1966 to exercise its right to declare the entire balance due, the matter was turned over to defendant Smith, trustee, for the purpose of foreclosing the deed of trust. Smith advertised as required by law and proceeded to conduct public sales, the first of which was held 25 November 1966; a resale was held on 27 December 1966 by virtue of a raised bid and pursuant to an order of resale entered by the Clerk of the Superior Court of Randolph County. On 11 January 1967, said clerk confirmed the highest bid received at the resale, and the trustee executed and delivered deed to the assignees of the purchaser.

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

Ottway Burton for plaintiff appellants.

Smith & Casper by Charlie B. Casper for defendant appellees Archie L. Smith, trustee, and Peoples Savings and Loan Association.

H. Wade Yates for defendant appellees James I. Frazier, Irene B. Frazier, C. T. Burgess, Elizabeth C. Burgess, R. E. Sillmon and Mildred J. Sillmon.

BRITT, J.

Plaintiffs' first assignment of error relates to the orders of the court allowing defendants' motion to strike certain allegations in the complaint. The portions of the complaint ordered stricken are summarized as follows:

1. (From paragraph 2 of the complaint.) Defendant Smith's law firm had been sole attorneys for defendant Association for twenty-two years and he is also the attorney for State Farm Mutual Automobile Insurance Company, "the largest automobile liability insurance carrier in the United States." Defendant James Frazier is a full-time insurance agent representing the aforesaid insurance company. Defendant C. T. Burgess is engaged in various business activities. Defendant R. E. Sillmon is a director in the Farmers Mutual Insurance Association. (Then followed allegations regarding the position and holdings of original defendant Allen.)

2. (From paragraph 8 of the complaint.) "[N]otwithstanding the failure of the defendant Archie L. Smith to properly and legally advertise as by law required to foreclose real estate under the laws of the State of North Carolina, if he had foreclosed with a legal and lawful deed of trust signed by all of the owners of the property * * *." (Then followed details of certain dealings between plaintiffs and original defendant Allen.)

3. (From paragraph 9 of the complaint.) The money paid by defendant purchasers came from defendant Allen's bank.

4. (From paragraph 10 of the complaint.) Knowledge on the part of defendant Smith that the sale price of plaintiffs' homeplace was less than one-fifth of its true value.

[1-3] Inasmuch as plaintiffs submitted to judgment of voluntary nonsuit as to defendant Allen prior to the trial, all allegations relating to Allen and transactions with him were clearly irrelevant and, therefore, were properly stricken. The allegations in paragraph 2 ordered stricken constituted a vague but futile attempt by plaintiffs to associate certain of the defendants in a conspiracy. It is not error for the court to require relevant facts rather than mere innuendos; a weak assertion of "conspiracy" does not abrogate the requirement of relevance. The first portion of paragraph 8 ordered stricken was clearly conclusory without any allegation as to how defendant Smith failed to properly and legally advertise the subject property. It was not error to strike the allegation that the trustee knew the sale price was inadequate, for the reason that such allegation was irrelevant. There is no duty on the trustee in a deed of

trust to obtain what the trustor considers an "adequate" price. Inadequacy of price alone is not sufficient to set aside the deed. *In Re Register,* 5 N.C. App. 29, 167 S.E. 2d 802; *Foust v. Loan Asso.,* 233 N.C. 35, 62 S.E. 2d 521; *Products Corp. v. Sanders,* 264 N.C. 234, 141 S.E. 2d 329. Plaintiffs' first assignment of error is overruled.

[4] Plaintiffs assign as error the order denying their motion to strike from the answers the legal conclusion that "by virtue of said deed of separation agreement, the plaintiff Alice Lucille Craven Britt was a free trader on the 20th day of July 1961" when she executed the note and deed of trust. The term "free trader" is derived from practice under the old statutes before the 1965 rewriting of Chapter 52 of the General Statutes following the 1964 amendment to Article X, section 6 of the State Constitution. The former statute provided that "every woman who is living separate from her husband * * * under a deed of separation executed by said husband and wife * * * shall be deemed and held * * * a free trader, and may convey her real estate without the consent of her husband." G.S. 52-5 repealed and rewritten by section 1 of Chapter 878, N.C. Session Laws 1965. This allegation could have been stricken for irrelevance because the term is currently devoid of legal significance. Such an allegation is not prejudicial, however, because characterization of the plaintiff Lucille Britt as a "free trader" is, in effect, no more than a shorthand description of her freedom to convey realty under G.S. 39-13.4, which provides in part:

> "Any conveyance of real property, or any interest therein, by the husband or wife who have previously executed a valid and lawful deed of separation * * * shall be valid to pass such title as the husband or wife may have to his or her grantee, unless the deed of separation so recorded and registered * * * is cancelled of record by both parties * * * or unless an instrument in writing cancelling the deed of separation and properly executed and acknowledged by said husband and wife is recorded in the office of said register of deeds." (1959, c. 512)

The assignment of error is overruled.

[5] When the case was called for trial, plaintiffs sought to amend the complaint to show that in the Summer of 1964 plaintiff Lucille Britt obtained the sum of $400.00 from her employer to pay to defendant Association in order to stop a foreclosure proceeding then in progress and that the only notation she saw as a result of this payment was that $147.00 was credited to her account. It is well settled in this jurisdiction that a motion to amend after the beginning of trial is addressed to the discretion of the trial court and

is not appealable. *Chappel v. Winslow,* 258 N.C. 617, 129 S.E. 2d 101 (1963). The assignment of error is overruled.

[6] Plaintiffs assign as error several rulings sustaining objections to evidence offered by plaintiffs. In one instance, the court sustained the objection to the following question put to the clerk of court regarding the special proceeding in 1964 to dismiss the trustee's sale: "Was there any hearing set by you on what the fees and expenses were in that S. P. 1237?" The question was clearly irrelevant, as there is no duty on the clerk to hold such a hearing. Plaintiffs' counsel also asked the clerk, "Now, did you notify any of the plaintiffs in this lawsuit that confirmation was presented to you for signing?" The question was answered for the record, "No, sir," after which the court said, "And the court will add that he was under no obligation to do so." Plaintiffs assign as error both the exclusion of the evidence and the statement of the court. The question was irrelevant and the court's statement appropriate because there is as a matter of law no duty to so notify the trustor.

[7] The foreclosure of deeds of trust is governed by statutes and there is no statutory duty for the trustee or the clerk of court to give notice of confirmation. There is no statute setting out the nature of a confirmation. The statute now provides that "[n]o confirmation of sales of real property made pursuant to this article shall be required except as provided * * * for resales. * * *" G.S. 45-21.29a (1 October 1967). Where no upset bid is filed, confirmation of the sale is not required. *Products Corp. v. Sanders, supra.* The court was correct to clarify this as a matter of law because of the implications following the question. Furthermore, since judgment of nonsuit was properly entered, the court's remark was harmless. The assignments of error relating to the exclusion of evidence are overruled.

[9] The court refused to allow Ossie Boyd Britt (Lucille Britt's son) to testify as to the reasonable market value of the land. The witness had testified, "I have an opinion satisfactory to myself as to the reasonable market value of this property as of October 26, 1966." His whispered answer for the record was essentially the same valuation as that made by an earlier witness. To place into evidence a valuation requires a proper foundation. The minimal foundation is (1) that the witness is familiar with the thing on which the witness professes to put a value and (2) that he has such knowledge and experience as to enable him intelligently to place a value on it. Stansbury, N.C. Evidence 2d, § 128. The evidence was properly excluded for failure of the witness to qualify to give an opinion.

[10] The court sustained defendants' objection to an attempt by plaintiffs to offer into evidence as exhibit "J" pictures taken by the witness "to show the premises and also other matters it might tend to show." Although a photograph may be admissible, it is admitted not as substantive evidence but only to illustrate and explain the witness' testimony. Stansbury, N.C. Evidence 2d, § 34. In the instant case, there was no testimony for the pictures to illustrate. The evidence was properly excluded.

[11] The court did not err in granting defendants' motion for involuntary nonsuit interposed at the close of all the evidence and entering judgment accordingly. We deem it unnecessary to summarize all the testimony justifying nonsuit but will mention a few of the more important facts arising from the testimony.

Plaintiffs' own evidence disclosed that at least one payment was in default for a period of thirty days and that defendant Association was authorized under the terms of the deed of trust to declare the entire outstanding balance due and payable and to proceed with foreclosure. The foreclosure was not invalid for lack of a valid deed of trust; the evidence disclosed that plaintiffs Lucille Britt and her husband entered into a deed of separation in August of 1958, that the deed of separation was recorded a day or two after it was executed, and no cancellation of the agreement was effectuated as provided by G.S. 39-13.4 to indicate any change of status. Plaintiffs failed to show any legal defects in the foreclosure proceeding. Inadequacy of price alone is not a sufficient ground upon which to set aside a foreclosure sale. *Products Corp. v. Sanders, supra; Weir v. Weir,* 196 N.C. 268, 145 S.E. 281.

Plaintiff Lucille Britt's testimony disclosed that she received a copy of the notice of sale but did not attend the sale; that she arranged with original defendant Allen to raise the bid; that she saw the notice of resale published in the newspaper but did not attend the resale because she was depending on Mr. Allen to take care of it; that she raised no objection to either sale. Situations arise that justify the courts' intervening to see that justice is done between the parties, but the facts in this case do not warrant such intervention.

We have carefully considered each assignment of error brought forward and discussed in plaintiffs' brief, but finding them without merit, they are all overruled.

The judgment of the superior court is

Affirmed.

BROCK and VAUGHN, JJ., concur.

CITY OF STATESVILLE, A MUNICIPAL CORPORATION, PETITIONER v. LOUIS G. BOWLES AND WIFE, EUGENIA W. BOWLES, HOWARD HOLDERNESS AND THE JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION, RESPONDENTS

No. 6922SC391

(Filed 17 September 1969)

1. Eminent Domain § 6— sewer line easement — evidence of value — expert testimony

In a proceeding instituted by a municipality to establish a sanitary sewer line easement through two tracts of land owned by respondents, witnesses who had been qualified as expert real estate appraisers were competent to express the opinion that the location of the sewer line would prohibit grading to the depth necessary to prepare the property for commercial building.

2. Eminent Domain § 6— evidence of value — basis of expert opinion

It was proper and in fact desirable that expert real estate appraisers gave the reasons on which they based their opinion of the fair market value of property immediately before and immediately after a taking for a sanitary sewer line easement.

3. Eminent Domain § 6— sewer line easement — evidence of highest use

In a proceeding instituted by a municipality to establish a sanitary sewer line easement through respondents' land, it was proper to permit respondents' witness to testify that in his opinion the highest use of a portion of the land would be for the extension of a shopping center which was located on an adjacent tract or for a new shopping center, notwithstanding objection by the municipality on the grounds that the shopping center was not owned by respondents and that no plans for its expansion were shown.

4. Eminent Domain § 5— determination of damages — possibility that tracts may be unified

Ordinarily, valuations cannot be considered as a basis for awarding damages under the theory that numerous types of land may be brought together, unless it is shown there is a reasonable possibility that they can be unified in a single owner and that such unification is feasible and practical.

5. Eminent Domain § 5— determination of compensation — combination of land with other property

The use of property in combination with other property may be considered on the issue of damages if the possibility of combination is so reasonably sufficient and the use so reasonably probable as to affect the market value.

6. Evidence § 3; Eminent Domain § 6— matters of common knowledge — value of land — adjoining businesses

It is common knowledge that in determining the value of a tract of land buyers and sellers give substantial weight to the fact it is bordered by successful business ventures.

7. Eminent Domain § 6— sewer line easement — evidence of alternate location — prejudicial effect

In a proceeding instituted by a municipality to establish a sanitary sewer line easement through respondents' land, testimony elicited on cross-examination of the municipality's consulting engineer concerning a proposed alternate location for the sewer line was not prejudicial to the municipality, since the evidence resulted from a map introduced by the municipality showing the alternate location as a dashed line, and since the municipality had introduced the testimony of the engineer concerning his care in recommending the final location.

8. Eminent Domain § 5— sewer line easement — determination of compensation — fee remaining in landowner — instructions

In a proceeding on petition by a municipality to establish a sewer line easement through respondents' land, where the petition did not specify the nature and extent of the easement, the municipality acquired only such rights as were incidental to constructing, maintaining and operating the sewer line — which included the right to go on the property whenever necessary to inspect, repair or replace the line — and it was prejudicial error for the trial judge to refuse instructions tendered by the municipality that in awarding compensation for the taking of the easement the jury must consider that the fee remained in the landowners subject to the prior rights incident to the easement.

9. Eminent Domain § 5— determination of compensation — difference between fee and easement

Whether there is any substantial difference in the easement condemned and a fee simple estate in the land depends upon the nature and extent of the easement acquired.

10. Eminent Domain § 5— determination of compensation — easement — fee remaining in owner — instructions

If the nature of the easement is such that the owner of the fee is not totally excluded from the property, it is prejudicial error for the court to instruct the jury not to consider the fact that only an easement is being taken and to fail to give instructions as to the respective rights of the parties and what use each is entitled to make of the property condemned.

11. Eminent Domain § 14— sanitary sewer line easement — what law governs

Where the respective rights of the parties were not defined by the petition seeking the condemnation of a sanitary sewer line easement, or by statute or by stipulation, the general law regarding easements prevailed.

12. Easements § 8; Eminent Domain § 14— rights acquired in easement — rights of landowner

An easement extends to all uses directly or incidentally conducive to the advancement of the purpose for which the land was acquired, and to no others; and the owner retains title to the land in fee and the right to make any use of it that does not interfere with the full and free exercise of the public easement.

APPEAL from *Thornburg, J.*, 17 March 1969 Session of IREDELL County Superior Court.

The petitioner instituted this proceeding pursuant to Chapter 40 of the General Statutes and certain provisions of its municipal charter for the purpose of obtaining a sanitary sewer line easement through two tracts of land owned by the respondents. The land lies along Old Mocksville Road in Statesville Township of Iredell County.

The easement sought was to extend for a distance of approximately 2800 feet over respondents' land and it is described in the petition as "a permanent sanitary sewer line easement, said easement being twenty (20) feet in width, ten (10) feet on each side of the center line and a construction or temporary easement twenty (20) feet on each side of the center line." The petition alleged that the permanent easement was for the purpose of constructing and maintaining a sanitary sewer system and the temporary easement was for construction purposes only.

All issues (except the issue of damages) were disposed of by stipulations and pretrial orders and petitioner proceeded in accordance with its statutory authority to construct and operate the sewer line before trial on that issue.

At the trial respondents introduced evidence that they had sustained damages of from $40,000.00 to $46,650.00 as a result of the taking of the easement. The petitioner's evidence was that the property had been benefited by from $6,000.00 to $10,000.00 on account of the location of the sewer line across it. The jury answered the single issue of damages in favor of respondents and in the amount of $19,000.00. Judgment was entered declaring that petitioner owned the easement described in the petition and ordering that the respondents recover as complete and final damages the sum fixed by the jury as compensation. Petitioner excepted and appealed.

Sowers, Avery & Crosswhite by William E. Crosswhite for petitioner appellant.

McElwee & Hall by Jerome C. Herring for respondent appellee.

GRAHAM, J.

The petitioner assigns as error the admission of various evidence over its objection.

[1, 2] All of respondents' witnesses testified that in their opinion the highest and best use of 21 of the 90 acres respondents contend was affected by the easement was for commercial purposes. The

other 69 acres were best suited for residential purposes. The petitioner challenges their further testimony which described the accessibility of the 21 acre parcel and expressed the opinion that the location of the sewer line would prohibit grading to the depth needed in order to prepare the property for commercial building. We do not agree with the petitioner's contention that only an engineer is qualified to make such observations. All of the witnesses whose testimony is questioned were qualified as expert real estate appraisers and each of them stated his opinion as to the fair market value of the property immediately before and immediately after the taking of the easement. It was proper and in fact desirable that they give the reasons upon which they based their opinion. 31 Am. Jur. 2d, Expert and Opinion Evidence, § 36. *Service Co. v. Sales Co.*, 259 N.C. 400, 414, 131 S.E. 2d 9. Matters such as the accessibility of property, its slope and elevation, and costs that will be involved for necessary grading and filling are often important factors to be considered in arriving at an opinion as to its value. The petitioner's assignments of error directed at the admission of this testimony are overruled.

[3] One of respondents' witnesses was permitted to testify over objection that in his opinion the highest use of a portion of the land in question would be for the extension of a shopping center located on an adjacent tract or for a new shopping center. The petitioner contends that this testimony was speculative because the shopping center referred to is not owned by respondents and no plans for its expansion were shown.

[4, 5] Ordinarily, valuations cannot be considered as a basis for awarding damages under the theory that numerous types of land may be brought together, unless shown that there is a reasonable probability that they can be unified in a single owner and that such unification is feasible and practical. *Light Co. v. Moss*, 220 N.C. 200, 17 S.E. 2d 10; *R. R. v. Gahagan*, 161 N.C. 190, 76 S.E. 696. But the use of property in combination with other property may be considered if the possibility of combination is so reasonably sufficient and the use so reasonably probable as to affect the market value. *Light Co. v. Moss, supra; N. Y. City v. Sage*, 239 U.S. 57, 60 L. Ed. 143.

[3, 6] It is common knowledge that in determining the value of a tract of land buyers and sellers give substantial weight to the fact it is bordered by successful business ventures. We do not find it unreasonable or speculative for the respondents' witnesses to have considered the proximity of the shopping center as an element of

value or to have expressed an opinion that respondents' property would be suitable for a similar use. In estimating the fair market value of property acquired by eminent domain, "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner." Barnhill, J. (later C.J.) in *Light Co. v. Moss, supra,* at 205, 17 S.E. 2d 10, 13. See also *Gallimore v. Highway Commission,* 241 N.C. 350, 85 S.E. 2d 392. We hold that this testimony was competent and could be considered by the jury.

[7] The petitioner further contends that it was prejudiced by testimony elicited on the cross-examination of its consulting engineer concerning a proposed alternate location for the sewer line. Such evidence was irrelevant as the proper location of the sewer line was not a matter to be considered by the jury. *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600. However, the questions here were directed to a dashed line representing the proposed alternate location and appearing on a map that had been introduced by the petitioner. Having left the line on the map for the jury to see the petitioner cannot now complain that its witness was asked to explain to the jury what it represented. Moreover, the petitioner had questioned this witness at length on direct examination concerning his care in recommending the final location as the most advantageous, economical and efficient place for the sewer line. Under the circumstances the challenged testimony was harmless to the petitioner.

[8] The petitioner's final assignments of error relate to the judge's charge to the jury and must be sustained. The petitioner requested the court in writing that the jury be charged in part as follows:

> "When an easement is obtained under the power of eminent domain the acquiring governmental agent acquires only an easement in the land so taken and the fee to the property remains in the landowner who may subject the land to any use which is not inconsistent with its use for the purpose for which it is taken, but the easement confers upon the City of Statesville authority to occupy and use the entire easement for sanitary sewer purposes whenever it deems such action conducive to the interest of the public. In other words, when an easement is acquired in land the fee remains in the original owner burdened by the use for which the easement is acquired. . . . Hence, in awarding compensation to the owner of land for an easement acquired due consideration is to be given to the fact

that the fee remains in the owner subject to the prior rights incident to the easement."

The court refused the tendered instructions and gave the following instructions to which the petitioner excepted:

"Now, in arriving at the fair market value of the tract of land immediately after the taking, you will not consider the fact that the City of Statesville is taking only an easement in part of the land appropriated, rather than the fee simple title, for the remote and uncertain possibility that the City of Statesville may someday abandon the use of the appropriated right of way for sewer line purposes, and thus permit all the rights in it to revert to the owners in fee should not enter into your consideration."

This instruction correctly charges the duty of a jury in assessing damages where the value of the easement taken is for all practical purposes the value of the fee. Such a charge is applicable in cases involving highway and railroad rights-of-way and in other instances where the easement taken gives the condemning authority the complete and perpetual right to occupy and use the land to the total exclusion of the owner of the fee. *Power Co. v. Rogers,* 271 N.C. 318, 156 S.E. 2d 244; *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778; *R. R. v. Armfield,* 167 N.C. 464, 83 S.E. 809; *Light Co. v. Clark,* 243 N.C. 577, 91 S.E. 2d 569; *Gas Co. v. Hyder,* 241 N.C. 639, 86 S.E. 2d 458. The reason for such a rule is that in such cases the remaining bare fee has no practical value to the landowner and the possibility the easement may some day be abandoned is too remote and improbable a contingency to be considered by the jury. *Highway Commission v. Black, supra.*

[9, 10] "Whether there is any substantial difference in the easement condemned and a fee simple estate in the land depends upon the nature and extent of the easement acquired." *Power Co. v. Rogers, supra,* at 321, 156 S.E. 2d 244, 247. If the nature of the easement is such that the owner of the fee is not totally excluded from the property, it is prejudicial error for the court to instruct the jury not to consider the fact that only an easement is being taken and to fail to give instructions as to the respective rights of the parties and what use each is entitled to make of the property condemned. *Power Co. v. Rogers, supra; Sanitary District v. Canoy,* 252 N.C. 749, 114 S.E. 2d 577; *Light Co. v. Clark, supra.* Here, the respondents are clearly not totally and perpetually excluded from the property which is subject to the temporary construction easement. *Davidson v. Stough,* 258 N.C. 23, 127 S.E. 2d 762. Nor, in our

opinion, are they totally excluded from the property encumbered with the permanent easement. See *Sanitary District v. Canoy, supra,* where the taking of a sewer line easement was likewise involved.

The respondents strongly contend that the decision in *Gas Co. v. Hyder, supra,* supports the charge given by the court here. There the gas company condemned an easement over respondent's land for a gas pipeline. The petition and stipulations between the parties gave the petitioner free, full, and unlimited right of ingress and egress over the property, not only when needed to carry out its purposes, but at any time. The effect was to grant to petitioner complete dominion over the property involved to the virtual exclusion of petitioner. In the instant case, the petitioner has not attempted to acquire such extensive rights, and in fact has not acquired such rights.

[11, 12] The respondents further contend that since the petition here does not specify the nature and extent of the easement being taken, the court was under no duty to give instructions similar to those requested and was free to give the instructions to which exception is taken. Such is not the case. When the respective rights of the parties are not defined by the petition, statute, or stipulation the general law regarding easements prevails. It is well settled that an easement ". . . extends to all uses directly or incidentally conducive to the advancement of the purpose for which the land was acquired, *and to no others;* and the owner retains the title to the land in fee *and the right to make any use of it that does not interfere with the full and free exercise of the public easement.*" (Emphasis added). 26 Am. Jur. 2d Eminent Domain, § 133, p. 794. See also *Light Co. v. Clark, supra; Light Co. v. Carringer,* 220 N.C. 57, 16 S.E. 2d 453; 3 Strong, N.C. Index 2d, Easements, § 8.

[8] Accordingly, we hold that the petitioner acquired only such rights as are incidental to constructing, maintaining and operating a sewer line across the strip of land in question. Necessarily included would be the right to go on the property whenever necessary to inspect, repair or replace the sewer line. The respondents retain the right to traverse it freely, to park on it, to landscape it, to grade over it and to use it for any lawful purpose at such time and for so long as such uses do not conflict with the rights of the petitioner. Indeed, the respondents' own witnesses recognized that some rights would be retained because they complained not that grading would be prohibited but that it would be limited by the depth of the sewer line.

The rights retained by the respondents in the property amount

to substantially more than the "bare fee" and it was therefore prejudicial error for the court to refuse the requested instructions and to charge the jury not to consider the fact that only an easement was taken by petitioner.

New trial.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. OLIVER HILTON DICKERSON

No. 6918SC383

(Filed 17 September 1969)

1. Criminal Law § 99— expression of opinion by trial court — examination of defendant as to prior convictions

In this prosecution for breaking and entering and larceny, the trial court expressed an opinion on the evidence in taking over the cross-examination of defendant concerning prior convictions, the court's questions tending clearly to cast doubt on defendant's testimony and to convey to the jury an impression that the judge did not believe what defendant said.

2. Criminal Law § 86— denial of prior convictions — use of FBI record to contradict denial

Where defendant denied prior convictions when questioned by the solicitor, the trial court erred in bringing defendant's FBI record to the attention of the jury by taking the record from the solicitor and questioning defendant further about prior convictions and about the record itself, the court's action being equivalent to the allowance into evidence of a record of defendant's convictions to contradict his denial.

3. Criminal Law § 134; Burglary and Unlawful Breakings § 8; Larceny § 10— use of symbols B/E and L&R in judgment and commitment

The use of the symbols B/E and L&R in judgments and commitments is disapproved, such symbols having no generally accepted legal meaning.

APPEAL by defendant from *Bowman, J.*, 31 March 1969 Session, GUILFORD Superior Court.

Defendant is charged in three counts in a bill of indictment with the offenses of (1) a felonious breaking and entering, (2) felonious larceny, and (3) receiving stolen goods knowing them to have been stolen.

Defendant waived appointment of counsel and undertook to conduct his own defense. The State's evidence tended to show that defendant and two others broke into the premises occupied by the Jewel Box of Greensboro and took therefrom twenty-one watches and one radio. Defendant's evidence tended to show that he was not in Greensboro on the date of the alleged offense.

The case was submitted to the jury only upon the first two counts in the bill of indictment. It returned verdicts of guilty. Defendant appealed.

Robert Morgan, Attorney General, by Eugene A. Smith, for the State.

Forrest Campbell for the defendant.

BROCK, J.

After defendant testified in his own behalf, the solicitor proceeded to cross-examine him concerning previous convictions of crime, and the following transpired:

"Q. You have been convicted of a number of crimes in Kansas City, Missouri, haven't you?

"A. I refuse to answer that question on the grounds that it might intimidate my rights.

"THE COURT: You are going to be in worse trouble than that if you don't answer the questions that the Solicitor asks you. If you have been convicted of anything, anytime, anywhere, and the Solicitor asks you about it, you will answer his question.

"I have been arrested for some traffic violations."

The solicitor then proceeded to ask the witness about certain convictions in various parts of the country, to which the defendant replied that he was not convicted of the charges read by the solicitor.

"THE WITNESS: I am not guilty of those charges that he is reading off.

"THE COURT: He didn't ask you if you were guilty. He asked you if you were convicted on these matters that he is asking you about or whether you do not remember whether you were convicted or not.

"THE WITNESS: No, sir, I have never been convicted of armed robbery in my life.

"THE COURT: State whether you remember or whether you have been convicted of these things."

The solicitor continued questioning the defendant about prior convictions, to which the defendant answered no and denied each.

"THE COURT: The cross examination is completed. You may step down. Do you have anything else you want to testify as to the facts in this case?

"THE WITNESS: Is that the facts that he read off there, your Honor?

"THE COURT: You saw the record, did you not?

"THE WITNESS: Yes, sir, that could be anything — anything could be typed up there.

"THE COURT: Let me see that record there. Have you ever served any time in any prison as a result of any conviction anywhere in this world as long as you have been born except this sentence you are serving right now?

"THE WITNESS: Yes, sir, I have.

"THE COURT: Where was that and what was it for?

"THE WITNESS: I served time in Alabama.

"THE COURT: Where in Alabama?

"THE WITNESS: At the road camp there. I served time there for illegal possession of alcohol, but these other charges in some places, they are places I have never been.

"THE COURT: Was that in Birmingham, Alabama, where you say you were convicted and served time for illegal possession of alcohol?

"THE WITNESS: No, sir, I don't think so.

"THE COURT: Was it over in Montgomery, Alabama?

"THE WITNESS: Some little small town. It wasn't either one of those larger cities, but I want to ask the Court am I being tried for my past. Am I being tried here for the charge that I'm supposed to be — am I being tried for my past or am I being tried for the charge here in Greensboro?

"THE COURT: You are being tried for breaking and entering or aiding and abetting of the breaking and entering of the Jewel Box here in Greensboro. You may be asked questions about your record for that it goes to your credibility as a witness. Do you know what credibility means? If you do not, it

means that evidence is admitted — that testimony is admitted in evidence as to whether the jury may believe or disbelieve all that you have testified to, or a part of what you have testified to, or none at all of what you have testified to. This evidence as to your record is admissible in evidence because it goes to the credibility of your testimony. Have you ever served any time anywhere except in Alabama for illegal possession of alcohol?

"THE WITNESS: No, sir.

"THE COURT: Except this sentence you are serving right now?

"THE WITNESS: Yes, sir.

"THE COURT: Anywhere in the world since you have been born?

"THE WITNESS: That's right, yes, sir.

"THE COURT: Do you wish to see this record again?

"THE WITNESS: No, sir, I looked at it and it states that it is the United States Department of Justice.

"THE COURT: Talk louder, I can't hear you.

"THE WITNESS: It states that it is the United States Department of Justice, Federal Bureau of Investigation.

"THE COURT: What investigation?

"THE WITNESS: Federal Bureau. I don't know how true it is, but I'd stake my life that isn't my past, no, sir.

"THE COURT: Your name is Oliver Hilton Dickerson, isn't it?

"THE WITNESS: That's true, Oliver H. Dickerson.

"THE COURT: What does the H stand for?

"THE WITNESS: Well, I never learnt what that was.

"THE COURT: What name do you go by?

"THE WITNESS: Oliver Dickerson is usually what I use, but the Induction Board give me the middle initial.

"THE COURT: Well, look on that same record that I gave you there in the second column, what name is there in all those places?

"THE WITNESS: Well, this doesn't have anything to do with the charge that I am facing here.

"THE COURT: You are entitled to see it, if you are satisfied if your name is on that.

"THE WITNESS: Well, Oliver Dickerson — yes, that's my name.

"THE COURT: Oliver Hilton Dickerson is on there, isn't it?

"THE WITNESS: Yes, sir.

"THE COURT: Do you have anything else you wish to tell the Court and the jury?"

[1] In taking over the cross-examination of defendant concerning prior convictions the trial judge seems to have momentarily donned the hat of prosecutor. His questioning clearly tended to cast doubt on defendant's testimony, and surely conveyed to the jury an impression that the judge did not believe what defendant said. This cross-examination by the judge was a repetition of the solicitor's cross-examination. ". . . [C]are must be exercised to avoid indirect expression of opinion on the facts, and it is improper for the trial judge to ask questions which are reasonably calculated to impeach or discredit the witness or his testimony." *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24.

[2] Additionally, the trial judge allowed defendant's record of convictions, as recorded by the Federal Bureau of Investigation, to be brought to the attention of the jury. This was not something the defendant brought out himself; defendant had denied the convictions when questioned by the solicitor. Then the judge, apparently addressing the solicitor, said, "Let me see that record there," and then proceeded to question defendant further about prior convictions and about the record itself. This proceeding was the equivalent of allowing into evidence a record of defendant's conviction of crime to contradict his denial. Such evidence is not admissible. Stansbury, N.C. Evidence 2d, § 48.

It is noted that in undertaking to conduct his own defense defendant's violation of rules of procedure required the trial judge to continually admonish defendant, and apparently strained the patience of the judge. Conceivably, presiding over the trial would have been less burdensome had defendant accepted appointment of counsel. But such is the lot of the trial judge; he must preside with neutrality whatever the circumstances. It is the probable effect or influence upon the jury, and not the motive of the judge, which determines whether the party whose right to a fair trial has been im-

paired to such an extent as to entitle him to a new trial. *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263.

[3] Although no question has been raised on this appeal concerning the "Judgment and Commitment" entered in the trial court we feel impelled to point out certain improprieties contained therein. We take notice that judgments in criminal cases are generally entered on forms provided by the Administrative Office of the Courts. These forms have certain printed wording, and certain blank spaces to be filled in. The use of these forms has the advantage of standardizing the form of judgments and commitments throughout the State. However, the use of forms must not be interpreted as a signal for less exactness in recording the proceedings in the trial court. In the instant case the "Judgment and Commitment" reads, in part, as follows:

> "In open court, the defendant appeared for trial upon the charge or charges of *B/E, L&R* and thereupon entered a plea of *not guilty.*
>
> "Having *been found* guilty of the offense of *B/E, L&R* which is a violation of *G.S. 14-54 14-70* and of the grade of felony, . . ."

(The portion in italics was filled in by the trial court; the part not in italics was printed on the form.)

The symbols B/E and L&R have no generally accepted legal meaning and except for the reference to G.S. 14-54 and 14-70 would leave everyone free to attach to the symbols such meaning as they may choose. We disapprove of the use of such symbols in judgments and commitments; the forms used have sufficient space to write in a more authoritative description of the offense. And while upon the subject of the judgment, the record clearly shows that the third count in the bill of indictment (receiving stolen goods knowing them to have been stolen) was not submitted to or considered by the jury; yet the "Judgment and Commitment" seems to indicate that defendant was convicted of and sentenced for this offense also. A judgment of a trial court of this State deserves a greater dignity than the use of symbols can bestow.

New trial.

BRITT and VAUGHN, JJ., concur.

DONALD A. CHRISTENSON v. FRIENDLY FORD SALES, INC.

No. 6918DC412

(Filed 17 September 1969)

1. Sales § 13— automobile sales contract — failure of consideration — use for intended purpose

There is a failure of consideration for an automobile sales contract if, at the time of the sale, the automobile could not be used for the purposes for which it was intended.

2. Sales § 13— rescission of automobile sale — failure of consideration — sufficiency of evidence

In this action to rescind an automobile sales contract for failure of consideration, plaintiff's evidence is sufficient for the jury where it tends to show that after plaintiff had driven the automobile 750 miles the motor failed, that the cost of repairs would exceed the automobile's value, and that the breakdown resulted from defects which were in the crankshaft at the time of the sale coupled with the fact that the crankcase contained a very heavy oil which would not properly lubricate the motor but would have caused the motor to run quieter.

3. Appeal and Error § 26— assignment of error to entry of judgment

Assignment of error to the court's signing and entry of the judgment presents the face of the record proper for review, including whether the verdict supports the judgment.

4. Sales § 13— rescission of sales contract — failure of consideration — issue for jury — whether property was "worthless"

In this action to rescind an automobile sales contract for failure of consideration, proper issue for the jury was whether the automobile was "worthless" at the time of the sale and not whether it was "virtually worthless," and judgment for plaintiff is not supported by verdict finding the automobile was "virtually worthless" at the time of the sale.

APPEAL from *Kuykendall, J.*, 14 April 1969, Civil Session District Court, GUILFORD Division.

This was an action to rescind a sales contract for failure of consideration brought in the District Court of Guilford County on 14 April 1969. The plaintiff, Donald A. Christenson, alleged that he purchased from the defendant, Friendly Ford Sales, Inc., for $675.00, a 1960 Jaguar sports car on 11 December 1967 and that after he had driven the automobile approximately 750 miles from Greensboro, North Carolina, to near Dubuque, Iowa, the automobile broke down as a result of certain defects which were in existence at the time of the sale, and that the motor was worthless, and the cost of repairs would have exceeded the value of the automobile. The plaintiff further alleged that he advised the seller that he intended to use

the automobile to make a long trip to Minnesota, and that he purchased the automobile because the defendant represented to him that it was in A-1 condition. The plaintiff further alleged that after the sale he expended money for repairs, towing, and auto rental in the amount of $400.00. Plaintiff prayed that the contract be rescinded, and that he recover the purchase price of $675.00, and special damages in the amount of $400.00.

The defendant filed answer denying any failure of consideration.

At the trial the plaintiff introduced evidence that he purchased from the defendant, for $675.00, a 1960 Jaguar sports car which he had seen three times, and had driven twice, prior to the sale, and that he told the defendant's agent that he intended to make a trip from Greensboro, North Carolina, to Minnesota in the automobile. The plaintiff testified that the automobile appeared to operate satisfactorily until he commenced the trip to Minnesota, and that thereafterwards the muffler fell off, the fuel pump had to be replaced and the brakes failed, but that he made these repairs and continued the journey until he reached Dubuque, Iowa, where the automobile broke down, and that it became worthless because the cost of repairing it would be more than it was worth. Plaintiff's evidence tended to show that the automobile was shipped back to Greensboro, North Carolina, where the plaintiff had it examined by a mechanic. The mechanic, who testified as an expert without objection, testified that when he examined the automobile the crankcase contained ninety weight oil which was much heavier than the oil recommended for the particular vehicle, and that the crankcase was only about half full of oil. The mechanic testified:

> "The crankshaft which should have been perfectly circular as it should be when it comes from the factory, was oval — in the shape of an egg, or it gave that impression — and this measured to be approximately five thousandths out of round and caused the crankshaft to be out of center with the insert bearings, causing the problem we had with this vehicle. The bearings get so hot they seize up around the crankshaft and the motor will consequently stop.
>
> "In my examination of Mr. Christenson's crankshaft, I noticed that the bearings had seized around the crankshaft. The crankshaft was oval and that had caused the opposing ends of the bearings to come together and lock on the crankshaft. This would cause the motor to stop — it would heat up and weld itself to the crankshaft. I believe Mr. Christenson had one or two problems with the car. First, the crankshaft was oval where it

should have been circular and second, the oil in the car was exceptionally thick to be running the vehicle. I made an examination of the oil in the crankshaft and would say it was around — probably ninety weight oil."

The mechanic further testified that the ninety weight oil would have quietened the operation of the engine, and that the condition he found with respect to the crankshaft being out of round would not ordinarily happen overnight, and that in his opinion it would cost six to seven hundred dollars to make the automobile serviceable.

The defendant introduced evidence tending to show that the automobile was sold "as is-where is", and that there was no express warranty as to the condition of the vehicle, and that the plaintiff was advised that they did not have facilities to service or repair this particular type of automobile.

The court submitted the case to the jury on the following issues which were answered by the jury as indicated:

"1. Did the plaintiff and defendant enter into a contract for the purchase of the 1960 Jaguar automobile?

ANSWER: Yes, by stipulation.

"2. Was the Jaguar automobile purchased by the plaintiff virtually worthless at the time of its delivery?

ANSWER: Yes.

"3. Did the sale of the 1960 Jaguar automobile breach any of the implied warranties to the plaintiff so that the automobile's value was substantially impaired?

ANSWER .....

"4. Did the defendant effectively exclude all implied warranties in the sale?

ANSWER .....

"5. What amount of damages, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $855.00"

The court entered judgment on the verdict that the plaintiff recover of the defendant $855.00. The defendant appealed, assigning error.

Smith, Moore, Smith, Schell and Hunter, by Larry B. Sitton, for the defendant-appellant.

Jordan, Wright, Nichols, Caffrey and Hill, by Edward L. Murrelle, for the plaintiff-appellee.

HEDRICK, J.

[1] The defendant assigns as error the court's failure to grant his motion for judgment as of nonsuit made at the close of the evidence. At the trial of this cause it was incumbent upon the plaintiff to introduce evidence in support of his allegation that there had been a total failure of consideration for the sale of the 1960 Jaguar sports car. There was a failure of consideration if, at the time of the sale, the automobile could not be used for the purposes for which it was intended. *Furniture Co. v. Manufacturing Co.*, 169 N.C. 41, 85 S.E. 35; *Pool v. Pinehurst*, 215 N.C. 667, 2 S.E. 2d 871.

[2] In support of his allegation that there had been a failure of consideration, the plaintiff testified that after he had driven the automobile approximately 750 miles the motor failed, and the automobile became worthless because the cost of repairs would have exceeded its value. The value of the automobile after it had been driven 750 miles, would not, of itself, infer that the automobile was worthless at the time of the sale unless the breakdown could be attributed to defects in the motor of the automobile at the time of the sale. In this connection, the plaintiff testified that he had the automobile shipped back to Greensboro, North Carolina, where he had it examined by an expert mechanic. The mechanic testified that when he examined the 1960 Jaguar he found the crankshaft to be five thousandths of an inch out of round, and that this condition would not ordinarily occur overnight. He testified that the breakdown resulted from the defects in the crankshaft coupled with the fact that the crankcase contained a very heavy oil which would not properly lubricate the motor but would have caused the engine to run quieter so that any defects in the motor would have been more difficult to discover. There was considerable evidence that the crankcase contained ninety weight oil at the time of the sale. We believe this evidence raises an inference that the crankshaft was defective at the time of the sale, and that the breakdown could have resulted therefrom.

We are not unmindful of the evidence that the plaintiff drove the automobile for a considerable distance prior to the breakdown, and this would certainly raise an inference that the automobile was useful for the purposes for which it was intended. Nevertheless, di-

vergent facts and inferences of fact are for the determination of the jury. Giving the plaintiff the benefit of every fact and inference of fact which may be reasonably deduced from the evidence, we hold that the defendant's motion for a judgment as of nonsuit was properly overruled and that the case should have been submitted to the jury upon appropriate issues.

[3] The defendant-appellant's fourth assignment of error, based on exception number 12, challenges the court's signing and entry of the judgment. This assignment of error presents the face of the record for review, and this includes whether the verdict supports the judgment. *Moore v. Owens,* 255 N.C. 336, 121 S.E. 2d. 540; *Coulbourn v. Armstrong,* 243 N.C. 663, 91 S.E. 2d. 912; *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d. 486; 1 Strong, N.C. Index, Appeal and Error, § 21, p. 91, et seq.

[4] The issues arise from the pleadings and the evidence. In the instant case the second issue, which was answered in the affirmative by the jury, reads as follows:

> "2. Was the Jaguar automobile purchased by the plaintiff virtually worthless at the time of its delivery?"

We hold that the proper issue in the instant case was whether the 1960 Jaguar automobile was "worthless" at the time of the sale and not whether it was "virtually worthless". *Furniture Co. v. Manufacturing Co., supra; Pool v. Pinehurst, supra.* Webster's Third New International Dictionary (1968) defines the word "virtual" as meaning "possessed of certain physical virtues; being in essence or effect but not in fact." Substituting the second definition for the word "virtually" in the issue presented to the jury, it would read as follows:

> "2. Was the Jaguar automobile purchased by the plaintiff in essence or in effect but not in fact worthless at the time of its delivery?"

The affirmative answer to the issue then says that the Jaguar was not in fact worthless at the time of delivery. The verdict thus finds that the consideration might have been inadequate. In *Young v. Highway Commission,* 190 N.C. 52, 128 S.E. 401, the Court said:

> " 'So long as it is something of real value in the eye of the law, whether or not the consideration is adequate to the promise, is generally immaterial in the absence of fraud. The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement and not for the court

when it is sought to be enforced.' 13 C.J. 365, *Exum v. Lynch*, 188 N.C. 392, 396."

We hold that the judgment is not supported by the verdict.

The defendant's additional assignments of error relate to the admission of evidence and to portions of the judge's charge but since the judgment is vacated, and these alleged errors are not likely to reoccur, we do not deem it necessary to discuss them.

The appellee in his brief cited several sections of the Uniform Commercial Code in support of his contentions; however, since the action was brought and the trial had without any reference to the Uniform Commercial Code, we have not applied it in determining the appeal in this case.

For the reasons herein set forth, the judgment of the District Court dated 17 April 1969 is vacated.

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

MAUDE L. HUFFINES v. TROY FREEMAN WESTMORELAND AND MARY WESTMORELAND

No. 6919SC441

(Filed 17 September 1969)

1. Automobiles § 45— accident case — evidence — irrelevant and unresponsive answer

In action by femme plaintiff to recover for personal injuries allegedly resulting from an automobile accident, trial court properly struck as irrelevant and unresponsive plaintiff's answer, in reply to defendant's inquiry as to her injuries and the treatment thereof, that she had been more worried about her injured husband at the time of the treatment.

2. Automobiles § 45— accident case — evidence of death of plaintiff's husband — competency

In action by femme plaintiff to recover for personal injuries resulting from an automobile accident, trial court properly struck plaintiff's testimony that her husband was injured in the collision and later died, there being no merit in plaintiff's contention that the evidence was admissible to explain why her husband did not testify as a witness at the trial.

3. Automobiles § 45— accident case — striking of evidence — harmless error

During the course of the adverse examination of plaintiff, action of the

trial court in striking plaintiff's testimony on cross-examination by her counsel that she was knocked unconscious by the collision, that she did not remember if the traffic light was green, and that her best description of what occurred at the intersection was that it was "just like a dream," *held* harmless error where plaintiff had testified to these same matters on direct examination.

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

The burden is on appellant not only to show error but that the alleged error was prejudicial.

5. Automobiles § 45; Evidence § 25— accident case — evidence — map of accident scene

Purported map of an automobile accident scene is rendered inadmissible where witness who drew the map did not identify its representations with sufficient accuracy on the trial.

APPEAL by plaintiff from *Crissman, J.*, at the 3 February 1969 Civil Session of RANDOLPH Superior Court.

This is a civil action to recover for personal injuries and property damage allegedly sustained by plaintiff in a collision between an automobile owned and operated by her and an automobile owned by the feme defendant and operated by the male defendant.

Plaintiff's complaint alleged, and her evidence tended to show, the following: In the early afternoon of 6 November 1967, plaintiff was driving south on North Fayetteville Street in the City of Asheboro, said street having four traffic lanes — two for southbound traffic and two for northbound traffic. Pritchard Street intersected North Fayetteville Street from the east and formed a "T" intersection. Plaintiff desired to turn left on Pritchard Street and as she was in the process of making her turn she was driven into by the male defendant who was driving a station wagon north on North Fayetteville Street. Further facts pertinent to this appeal appear in the opinion.

Issues of negligence, contributory negligence and damage were submitted to the jury who answered the first two issues yes. From judgment predicated on the verdict in favor of defendants, plaintiff appealed.

John Randolph Ingram for plaintiff appellant.

Coltrane & Gavin by W. E. Gavin for defendant appellees.

BRITT, J.

Plaintiff assigns as error the striking by the trial judge of certain testimony given by plaintiff when she was adversely examined

by defendants' counsel prior to the trial. Plaintiff offered the adverse examination in evidence, but before allowing it to be introduced, the trial judge, on defendants' motion, ordered certain portions stricken.

[1] Several of the exceptions under this assignment relate to testimony of plaintiff about her husband who died from injuries sustained in the collision. Plaintiff's exception No. 1 relates to an answer given by plaintiff to a question asked by defendants' counsel. His inquiry was directed to certain injuries allegedly received by plaintiff and medical treatments pertaining thereto. Defendants' counsel asked plaintiff if a certain doctor examined her; she answered, "He looked in my eye, and at my hand, [and I was more worried about my husband than I was about me, right at the time being.]" That part of plaintiff's answer included in brackets was stricken by the trial judge, and properly so. It was not responsive to the question and was not relevant to the issues, therefore, motion to strike out the objectionable part was properly allowed. *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196.

[2] Plaintiff's exceptions Nos. 2, 3, 4 and 5 relate to testimony which plaintiff attempted to provide showing that her husband was injured in the collision and later died from the injuries received. Plaintiff contends the evidence was proper to explain why her husband did not testify as a witness at the trial. Defendants contend that evidence of the husband's injuries and death was not relevant to the issues in this case and, if admitted, would tend to evoke sympathy from the jury for plaintiff to the prejudice of defendants.

In *Pearce v. Barham,* 267 N.C. 707, 149 S.E. 2d 22, in an opinion written by Higgins, J., we find the following:

> "Three issues were raised by the pleadings: (1) Did the plaintiff suffer injury and damage as a result of the defendant's negligence? (2) Did the plaintiff, by her own negligence, contribute to her injury? (3) What damage, if any, is the plaintiff entitled to recover? Only evidence which had bearing on these issues and tended to aid the jury in finding the proper answers to them should have been admitted at the trial. Rules of evidence furnish the guidelines by which the presiding judge shall determine what shall be admitted to the jury for its consideration in finding the answers to the issues. *Gurganus v. Trust Co.,* 246 N.C. 655, 100 S.E. 2d 81; *DeBruhl v. Highway Commission,* 245 N.C. 139, 95 S.E. 2d 553.
>
> The law recognizes that evidence, when of slight value, may be

excluded because the sum total of its effect is likely to be harmful. Stansbury states the rule: 'Even relevant evidence may, however, be subject to exclusion where its probative force is comparatively weak and the likelihood of its playing upon the passions and prejudices of the jury is great.' N. C. Evidence, 2d Ed., § 80, p. 175. * * *"

We hold that the testimony covered by exceptions 2, 3, 4 and 5 was properly stricken. We fail to find anywhere in the testimony where plaintiff attempted to explain her husband's absence from the trial with the simple statement that he had died between the time of the collision and the date of the trial.

[3] Plaintiff's exceptions Nos. 6, 6A and 6B relate to the striking of certain questions asked plaintiff and answers given by her on cross-examination by her counsel during the course of her adverse examination as follows:

"Q. In other words, you were knocked unconscious in this collision. Is that right?

A. Yes, that's right. EXCEPTION NO. 6

Q. What you are saying about the various things, about whether the light was green, where you were, and knowing about the collision, and so forth, you just have no recollection of it?

MR. GAVIN: I am going to object to the form of that question. EXCEPTION NO. 6A

* * *

Q. Then, are you saying, when you are saying that you don't remember these things, in your testimony today, that you don't have any recollection of it?

A. No sir, it was just like a dream to me. EXCEPTION NO. 6B"

[3, 4] Conceding, *arguendo*, that the court erred in striking said questions and answers, the error was harmless for the reason that plaintiff had testified on direct examination by defendants' counsel that she was knocked unconscious, that she did not remember if the traffic light was green, that the best way she could describe what happened at the intersection was to say that it was "just like a dream." The burden is on appellant not only to show error but that the alleged error was prejudicial. *Burgess v. Construction Co.*, 264 N.C. 82, 140 S.E. 2d 766.

The assignments of error relating to the adverse examination of plaintiff are overruled.

[5] In her assignment of error No. 7, plaintiff contends that the trial court erred in excluding plaintiff's exhibit 10 as evidence. The exhibit is a purported map or plat of the intersection of Pritchard Street with North Fayetteville Street and is drawn to scale on graph paper. It shows the front of one car headed toward Pritchard Street approximately three feet east of the line separating the northbound and southbound traffic lanes; it shows another car headed north in the easternmost lane for northbound traffic approximately 180 feet south of the first car. Plaintiff's witness Voncannon testified that at the time of the collision he was standing on the west side of North Fayetteville Street about 200 feet south of the intersection; that he saw the collision; that he made exhibit 10 and that it correctly represented the intersection where the collision occurred; that he could not say exactly where plaintiff's car was at the time he first saw the Westmoreland car but he "thinks" it (the Huffines car) was across the center line. Exhibit 10 definitely represents the front of plaintiff's car as being some three feet across the center line at the time the defendants' car was some 180 feet away. We hold that the witness did not identify the representations of exhibit 10 with sufficient accuracy to render it admissible. Stansbury, N.C. Evidence 2d, § 34, pp. 64, 65. The assignment of error is overruled.

Plaintiff's assignment of error No. 22 purports to relate to exceptions 22 and 23. The record discloses that these exceptions were not taken at the trial, therefore, they will not be considered here. Rule 21, Rules of Practice in the Court of Appeals of North Carolina.

Plaintiff noted numerous exceptions to portions of the court's charge to the jury as well as failure of the court to charge the jury on certain points. We do not deem it necessary to discuss each of the exceptions relating to the charge. Suffice to say, we have carefully reviewed the charge, with particular reference to the points raised by the exceptions, and conclude that the charge, considered contextually as a whole, was free from prejudicial error. The assignments of error relating to the charge are overruled.

We have carefully considered all assignments of error brought forward and discussed in plaintiff's brief, but finding them without merit, they are all overruled.

No error.

BROCK and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JUNIOR CHARLES HARDEE

No. 6918SC429

(Filed 17 September 1969)

1. Criminal Law § 138; Arrest and Bail § 9— excessive sentence — credit for time served pending appeal

There is no merit in indigent defendant's contention that there existed the possibility he might serve his sentence beyond the statutory limit in that he could not arrange bail and had to remain incarcerated pending appeal, the question being resolved by the 1969 amendment to G.S. 15-184 which provides that a defendant not admitted to bail pending the appeal shall receive credit towards the satisfaction of his sentence for all time spent in custody pending the appeal, except when the sentence is death or life imprisonment.

2. Criminal Law § 98— motion to sequester witnesses

Denial of defendant's motion to sequester witnesses is in the discretion of the trial court and not reviewable.

3. Criminal Law § 89— corroborative testimony — instruction restricting jury's consideration

Although it would have been the better practice in incest prosecution to instruct the jury with regard to the nature of corroborative testimony prior to testimony of prosecutrix' sister that she had had sexual intercourse with defendant, rather than after such testimony, the failure to do so was not prejudicial to defendant.

4. Criminal Law §§ 113, 119— corroborative evidence — requests for instruction

Refusal of trial court to grant defendant's request to instruct the jury in the charge with respect to the nature of corroborative testimony was not error, where defendant's request was not in writing as required by G.S. 1-181, and where the court had so instructed the jury at the time the corroborative testimony was admitted.

5. Criminal Law § 113— instructions — failure to define "corroborative evidence"

Failure of the trial court to define "corroborative evidence" in its instructions to the jury at the time the corroborative testimony was admitted is not error.

6. Incest— nonsuit — evidence of sexual penetration

Testimony by the 12-year-old prosecutrix that her father, the defendant, had had sexual intercourse with her on several occasions is sufficient evidence of sexual penetration to be submitted to the jury in a prosecution for incest.

7. Criminal Law § 106— nonsuit — credibility of prosecuting witness

Nonsuit should not be granted on ground that the prosecuting witness was not worthy of belief; whether testimony is true or false and what it proves if it be true are matters for the jury.

8. Criminal Law § 113— instructions — credibility of witnesses

In the absence of a request, the trial court is not required to charge on the credibility of the witnesses.

APPEAL by defendant from *Ragsdale, S.J.*, 12 May 1969 Criminal Session, GUILFORD Superior Court.

Defendant was charged, in a valid bill of indictment, with incest. He entered a plea of not guilty, was found guilty as charged by the jury, was sentenced, and appealed from the judgment entered. Upon application and finding of indigency, counsel was appointed to perfect his appeal, and Guilford County was ordered to furnish his counsel with a transcript of his trial and pay the mimeographing costs in this Court.

Attorney General Robert Morgan, by Assistant Attorney General Bernard A. Harrell, for the State.

Bencini, Wyatt, Early & Harris, by A. Doyle Early, Jr., for defendant appellant.

MORRIS, J.

[1] Defendant's first assignment of error is to the sentence imposed by the court. He readily admits that the sentence is within the statutory limits but contends that the *possibility* exists of serving beyond the statutory limit by reason of the fact that defendant, an indigent, could not arrange bail and is, therefore, required to remain incarcerated pending appeal. If the contention had any merit, and we do not concede that it does, the question is resolved by the 1969 amendment to G.S. 15-184 providing, in pertinent part, that "[i]f the defendant has not been admitted to bail pending the appeal, the defendant shall receive credit towards the satisfaction of the sentence for all the time the defendant has spent in custody pending the appeal, except when the sentence is death or life imprisonment." This provision was made applicable to all trials commencing after 22 April 1969. Defendant's trial began 13 May 1969.

[2] Defendant's next assignment of error is to the denial of his motion to sequester witnesses. The refusal was in the court's discretion and not reviewable. *State v. Love*, 269 N.C. 691, 153 S.E. 2d 381. Defendant in his brief candidly admits that there is no contention that the court abused its discretion.

[3] The court admitted the testimony of the prosecuting witness's sister to the effect that she also had had sexual intercourse with her father. Defendant does not question the admissibility of this evi-

dence. Immediately after the testimony in this regard, the court instructed the jury that the testimony of the witness that she had had sexual intercourse with the defendant was competent for the purpose of showing intent on the part of defendant and for the purpose of corroborating the testimony of the prosecuting witness, if the jury should find that it did corroborate and not competent if it didn't corroborate, and that it was not competent for any other purpose. Defendant makes this instruction the subject of assignments of error Nos. 5 and 6. He contends that it was error for the court to give the jury instructions after the witness testified rather than before. Defendant cites no authority for his position nor does he show how defendant was prejudiced thereby. Conceding that the better practice would be to instruct the jury prior to the testimony, we do not regard the failure to do so as prejudicial error. Defendant further contends by assignment of error No. 6 that the instruction given was not adequate. It appears from the record that defendant's exception to the instructions given was exception No. 9 which is not brought forward. Assignment of error is based on exception No. 8 which was taken to the court's failure to instruct prior to the evidence. Nevertheless, even though we do not approve the instruction as a model, in this situation we find no prejudicial error sufficient to warrant the granting of a new trial. Additionally, in its charge to the jury the court, while recapitulating the evidence, again gave adequate instructions as follows:

> "And I wish now to recapitulate what I said and to instruct you again with respect to that. I instruct you that the testimony of this girl, Joan Hardee, concerning the commission of similar acts with her is not substantive proof that the defendant is guilty of the crime laid against him in the bill of indictment, but that testimony by Joan Hardee is competent to show intent, design, guilty knowledge or identity of the person or the crime but it is not substantive evidence that the defendant, Junior Charles Hardee, had sexual relations with his daughter, Diane Hardee. It is competent for the purpose of showing, if you find that it does, intent, design, guilty knowledge or identity of the person or the crime."

[4] The tenth assignment of error is directed to the refusal of the court to charge the jury with respect to corroborative testimony of some of the witnesses. Defendant concedes that the jury had been instructed when the evidence was admitted. Oral request for additional instructions was made at the conclusion of the court's charge. The record indicates that the request was for instructions with respect to the testimony of other witnesses as corroborative of the

testimony of the prosecuting witness and that the request was denied for that in view of the fact that such instruction had been previously given on numerous occasions during the course of the trial, further instructions, in the view of the court, were unnecessary.

The rule was stated by Stacy, C.J., in *State v. McKeithan,* 203 N.C. 494, 497, 166 S.E. 336, 337:

> "It is now the rule of practice with us that when testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge does not in his charge again instruct the jury specifically upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; . . ." See *State v. Sutton,* 4 N.C. App. 664, 167, S.E. 2d 499.

Oral requests for instructions at the end of the court's charge were refused in *State v. Spencer,* 225 N.C. 608, 35 S.E. 2d 887. On appeal, the Supreme Court held the assignments of error to be without merit.

> "The pertinent statute, G.S., 1-181, . . . requires counsel praying of the judge instructions to the jury to 'put their requests in writing entitled of the cause, and to sign them; otherwise the judge may disregard them.' Moreover, it is within the sound discretion of the trial judge to give or to refuse a prayer for instruction that is not in writing and signed by the attorney tendering it as required by the statute. (Citations omitted)." *State v. Spencer, supra,* at 609, 610 N.C., 888 S.E. 2d.

This assignment of error is overruled.

[5] Defendant's assignment of error No. 7 is addressed to the failure of the court to define "corroborative" evidence in its instructions to the jury at the time the testimony was admitted. Defendant cites no authority for his position, nor does the record indicate that he requested the court to define the term. Failure to define the term is not ground for exception. *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295. Defendant's mere assertion that the jury probably did not know the meaning of the word is clearly insufficient to show prejudicial error. This assignment of error is overruled.

[6] Assignment of error No. 8 relates to the court's denial of defendant's motion for nonsuit. Defendant urges that there was absolutely no details of any act of sexual intercourse and, therefore, without evidence of penetration, the case should not have been submitted to the jury. To bolster this position, defendant contends that

the State relied primarily on the testimony of the prosecuting witness who had made prior exculpatory statements and whose testimony was, therefore, unworthy of belief. The prosecuting witness was a 12-year-old girl in the sixth grade at school who testified that her father, the defendant, had had sexual intercourse with her on several occasions and that the last such occasion had been "approximately a week before my sister went down to South Carolina". She further testified unequivocally that she knew what sexual intercourse means. Her testimony was corroborated by several witnesses who had talked with her about it. Her 11-year-old sister testified that her father had also had sexual intercourse with her on several occasions but not since the warrant was sworn out against him. The physician who examined the prosecuting witness testified that his examination revealed that her vagina was somewhat relaxed and her hymen was completely obliterated, that in his professional opinion the female sex organs had been penetrated more than once and "the object that penetrated the female sex organs could have been an adult male sex organ." There was also evidence that defendant had stated, "I did but I wasn't the first one."

Defendant's contention that his motion to nonsuit the action should have been granted, based on lack of evidence of sexual penetration, is untenable.

> "The law did not require the complaining witness to use any particular form of words in stating that the defendant had carnal knowledge of her. *S. v. Hodges,* 61 N.C. 231. Her testimony that the defendant had 'intercourse' with her and 'raped' her under the circumstances delineated by her was sufficient to warrant the jury in finding that there was penetration of her private parts by the phallus of the defendant. *Ballew v. State,* 23 Ala. A. 274, 124 S. 123; *S. v. Bailly,* 29 S.D. 588, 137 N.W. 352." *State v. Bowman,* 232 N.C. 374, 376, 61 S.E. 2d 107, 108.

[7] Nor is the contention that the case should not have been submitted to the jury because the prosecuting witness was not worthy of belief well founded. The office of the statutory motion for judgment of nonsuit in a criminal action is not to pass upon the credibility of the witness for the prosecution or take into account any contradictory evidence offered by defendant. Whether the testimony is true or false and what it proves if it be true are matters for the jury. *State v. Bowman, supra.* The court is to consider the evidence favorable to the State, assume it to be true, and determine its legal sufficiency to sustain the allegations of the indictment. This the trial court did and, in our opinion, ruled correctly in denying defendant's motion for nonsuit.

[8] The ninth assignment of error asserts that the court committed reversible error in failing to instruct the jury as to the credibility of witnesses. It is permissible to do so, but not mandatory, and failure to do so is not the proper subject of exception. *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606. Defendant did not request any additional instructions with respect to credibility of witnesses. This assignment of error is without merit.

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

SALLIE C. WEST, EMPLOYEE v. J. P. STEVENS, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 6918IC440

(Filed 17 September 1969)

1. Master and Servant § 96— findings by Industrial Commission — appellate review

Findings of fact by the Industrial Commission are binding upon the courts when supported by competent evidence.

2. Master and Servant § 96— consideration of evidence — role of Industrial Commission

The Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

3. Master and Servant § 77— change of condition — sufficiency of evidence

Findings of fact by the Industrial Commission that, due to change of condition, plaintiff now has a 12.5 percent permanent partial disability of her left leg *are held* supported by competent evidence.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission filed 27 March 1969.

This proceeding arises from an accident in September 1965 for which an award of compensation was entered on 15 March 1967. Thereafter plaintiff made application for review, alleging a change of condition, and the opinion and award appealed from was filed.

The findings of fact by the hearing commissioner after the original hearing are contained in the opinion and award filed 15 March 1967 as follows:

"1. Sometime in September, 1965 plaintiff struck the front of her right thigh on an oil cup on a loom while at work for defendant employer. Such oil cup was made of steel and was approximately two inches in diameter. After the striking of the oil cup with the front of her right leg, plaintiff fell backward and struck the back of her left leg upon a loom.

"2. Plaintiff sustained, as described above, an injury by accident arising out of and in the course of her employment with defendant employer.

"3. Following her accident plaintiff continued to work until 7 October 1965 when she fell while at home and broke her right leg. She was hospitalized by Dr. Sue and on 8 October 1965 was seen by Dr. John Allgood. The doctor found that plaintiff had thrombophlebitis of both legs and an embolus in one of her lungs. The embolism cleared up but the phlebitis of the legs continued. Dr. Allgood is of the opinion that the phlebitis probably did not come from the broken leg which had occurred on the previous day because phlebitis generally took a longer period to time to develop. However, the doctor was further of the opinion that the phlebitis probably was a result of the accident giving rise hereto, although it could have come from various causes.

"4. While in the hospital with the broken leg plaintiff reported to her superintendent concerning her striking her legs upon the loom and oil cup while at work. Plaintiff did not realize that she had phlebitis prior to her hospitalization and she had good cause for not reporting her accident prior to such time. Defendants were not prejudiced by plaintiff's failure to immediately report her accident.

"5. Plaintiff's broken leg healed but she remained temporarily totally disabled solely because of her phlebitis commencing on 7 January 1966. She was rehospitalized for phlebitis under the care of Dr. Allgood at such time. Plaintiff remained temporarily totally disabled as a result of the phlebitis and the accident giving rise hereto until 14 September 1966 but did not return to work until December, 1966.

"6. As a result of the injury by accident giving rise hereto plaintiff was temporarily totally disabled from 7 January to 14 September 1966.

"7. Plaintiff has fully recovered from the injury by accident giving rise hereto and resulting phlebitis and has no permanent disability as a result of her accident."

Upon the foregoing findings the hearing commissioner awarded the sum of $37.04 weekly for the period 7 January 1966 to 14 September 1966. No appeal was taken from this award.

Plaintiff's application for review for change of condition was heard on 10 and 13 June 1968, and the opinion and award of the hearing commissioner was filed 9 December 1968, containing the following findings of fact:

"1. Plaintiff returned to work with defendant employer on December 5, 1966, and worked until July 19, 1967, when she was fired for failing to obey instructions.

"2. Plaintiff claims of having been a cripple ever since she was hit in September, 1965, and that she has more pain now, and has never been well; can't get around and can't perform the job she once held. Plaintiff is still under the care and treatment of Dr. Lusk for varicose veins and phlebitis in the legs.

"3. Following her discharge by the defendant employer the plaintiff worked at various other employments at intervals, and she has also drawn unemployment benefits. Plaintiff is presently employed selling dresses.

"4. Plaintiff was seen by Dr. Lusk of Greensboro, on April 27, 1966. On examination of the legs it was found that the left calf was somewhat larger than the right. The treatment was conservative as the doctor suggested that the plaintiff use an elastic hose for her left leg, and to refrain from long periods of standing or heavy duties. Plaintiff is still under the care of Dr. Lusk and her condition, now, is about the same as when he first saw her. It was the doctor's opinion that the plaintiff has a 25 to 30 percent permanent partial disability of the left leg now, but it could improve to a disability of 10 to 15 percent. It was the doctor's opinion that either the injury of September, 1965, or the injury in October, 1965, when she fell at her home, could have caused the phlebitis — about 50-50.

"5. At the time of the prior hearing in this matter, the plaintiff had no permanent partial disability but since that time had a change in condition for the worse, and now has a 12.5 percent permanent partial disability of her left leg.

"6. Plaintiff has no temporary total disability beyond that period for which she has already been paid.

"7. Plaintiff is entitled to compensation for 12.5 percent permanent partial disability of the left leg."

Upon appeal to the Full Commission, it adopted the findings and conclusions of the hearing commissioner, and affirmed an award of compensation for a 12.5 percent permanent partial disability of her left leg.

Plaintiff appealed to this Court assigning as error the finding and conclusion of only a 12.5 percent permanent partial disability, and the award of compensation based thereon.

Norman B. Smith for plaintiff.

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

BROCK, J.

[3] Plaintiff assigns as error Findings of Fact No. 5 and No. 7, and the conclusion based thereon that plaintiff is entitled to an award on the basis of a 12.5 percent permanent partial disability. Plaintiff argues that the only testimony before the Commission was that of Dr. John A. Lusk, and that his testimony supports only a finding of a 25 or 30 percent disability. Dr. Lusk testified that in his opinion "[h]er disability is about 25 to 30 percent of the left leg."

Dr. Lusk also testified as follows:

> "The thrombo-phlebitis found in both legs and the embolus in one of her lungs could have been caused by the fall at home when she broke her right leg on October 7, 1965. I would divide my opinion about 50-50, as to which is more probable, whether it was caused by the fall on October 7, or the incident at work in September, 1965. I anticipate that Mrs. West will make slow, gradual improvement in her left leg. I do not anticipate the rating of 25 to 30 percent disability of that leg will get any worse. I think it may get better; I certainly hope so. I'm continuing to treat her. I believe she can improve some, but actually never get the full use back of her leg she had prior to the injury, but I hope we can get better use out of it.
>
> "Moving from 25 percent to 10 or 15 percent would be what I would feel is considerable improvement. That would be optimistic."

[1, 2] It is well established that the findings of fact by the Industrial Commission are conclusive and binding upon the courts when supported by competent evidence. *Taylor v. Jackson Training School,* 5 N.C. App. 188, 167 S.E. 2d 787. Also, the Commis-

sion is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Taylor v. Jackson Training School, supra.*

In its consideration of claims the Industrial Commission is not compelled to find in accordance with testimony of any particular witness; its function is to weigh and evaluate the entire evidence and determine as best it can where the truth lies.

[3] We see no error in the finding and conclusion complained of.

Affirmed.

BRITT and VAUGHN, JJ., concur.

EMMIE CASON DOUGLAS v. EDWIN LINEBERRY BOOTH AND THOMPSON-ARTHUR PAVING COMPANY

No. 6918SC445

(Filed 17 September 1969)

1. Automobiles § 19— motorist on dominant street — stop sign removed from servient street — assumptions — right of way

Where plaintiff was traveling along a properly designated dominant street and knew that stop signs had been erected for traffic on an intersecting street, but plaintiff was unaware that the stop sign on one side of the intersection had been temporarily removed, plaintiff was entitled to assume that traffic on the servient street would yield the right of way to her, this right not being lost by temporary removal of the stop sign on the servient street.

2. Automobiles §§ 19, 57— intersection accident — stop sign removed from servient highway — right of way — sufficiency of evidence

In this action for damages resulting from an intersection collision, where plaintiff's evidence shows that plaintiff approached the intersection upon the dominant street from defendant's left, and that the stop sign for the servient street on which defendant approached the intersection had been temporarily removed, and there was no evidence that defendant knew that a stop sign had been erected upon the servient street or that it had been removed, defendant was entitled to rely upon the rule of G.S. 20-155(a) granting the vehicle on the right the right of way when two vehicles approach an intersection at approximately the same time, and defendant's motion for nonsuit is properly granted where the uncontradicted physical facts at the scene, as disclosed by plaintiff's evidence, show that defendant's vehicle entered the intersection before plaintiff's and there was no evidence that defendant was driving at an unreasonable speed or in any other way was improperly operating his vehicle.

3. Negligence § 29; Trial § 22— nonsuit — evidence in conflict with physical facts

Evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury.

4. Highways and Cartways § 7— paving contractor — negligent removal of stop sign — sufficiency of evidence

In an action for damages resulting from an intersection accident allegedly caused by the negligence of defendant paving company in removing a stop sign on the servient street while surfacing the street, defendant's motion for nonsuit was properly allowed where plaintiff's evidence showed only that approximately 30 days before the accident defendant paving company removed the stop sign for one day, and there is no evidence of how, when or by whom the stop sign was again removed, nor is there evidence from which it can reasonably be inferred that removal of the sign again was necessary for defendant paving company to accomplish its work.

APPEAL by plaintiff from *Johnston, J.*, 21 April 1969 Session, GUILFORD Superior Court, Greensboro Division.

Plaintiff seeks to recover damages for personal injuries alleged to have been sustained in a collision at the intersection of Willow Road and Tuscaloosa Street in the City of Greensboro on 19 December 1964, at about four o'clock in the afternoon. Willow Road runs north and south; Tuscaloosa Street runs east and west. Plaintiff was driving her automobile north along Willow Road, and defendant Booth was driving his automobile west along Tuscaloosa Street. The front of plaintiff's automobile struck the left side of defendant Booth's automobile.

Plaintiff alleged and offered evidence to show that stop signs had been erected facing traffic entering the intersection from either direction along Tuscaloosa Street; that she was familiar with the intersection and knew that the stop signs had been placed to control traffic traveling on Tuscaloosa Street; that Tuscaloosa Street, east of its intersection with Willow Road, was in the process of being surfaced; and that unknown to her the stop sign facing traffic traveling west of Tuscaloosa Street (the direction in which defendant Booth was traveling) had been taken down and was lying in the yard of a residence at the northeast corner of the intersection.

Plaintiff alleged that defendant Paving Company had removed the stop sign for purposes of grading Tuscaloosa Street and had negligently failed to replace it.

At the close of plaintiff's evidence judgment of nonsuit as to each

defendant was entered. Plaintiff appealed, assigning as error the entry of the judgments of nonsuit.

Originally plaintiff had named Lambeth Construction Company and the City of Greensboro as defendants also, but she does not appeal from the entry of judgments of nonsuit as to them.

Alston, Pell, Pell & Weston, by E. L. Alston, Jr., for plaintiff.

Smith, Moore, Smith, Schell & Hunter, by Bynum Hunter, for defendant Edwin Lineberry Booth.

Lovelace, Hardin & Bain, by Edward R. Hardin, for defendant Thompson-Arthur Paving Company.

BROCK, J.

Plaintiff contends that she had the right of way at the intersection because she was traveling on the dominant street (Willow Road). She contends that the stop sign, having been erected, designated Willow Road as the dominant street and Tuscaloosa Street as the servient street; and that her rights were not changed merely because the stop sign was not in place at the time of the collision. She relies upon *Kelly v. Ashburn,* 256 N.C. 338, 123 S.E. 2d 775.

Defendant Booth contends that he was not confronted with a stop sign; that there is no evidence that he knew of the previously existing stop sign; and that he was entitled to rely upon the rule of G.S. 20-155(a) granting to him the right of way over a motorist approaching the intersection from his left at approximately the same time. He relies upon *Tucker v. Moorefield,* 250 N.C. 340, 108 S.E. 2d 637.

We do not consider *Kelly v. Ashburn, supra,* and *Tucker v. Moorefield, supra* to be in conflict.

G.S. 20-158(a) provides in part as follows:

> "The State Highway Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main traveled or through highway and approaching said intersection."

With respect to intersections at which no stop sign, or yield right of way sign, has been erected, G.S. 20-155(a) provides in pertinent part 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 where the vehicle on the right is required to stop by a sign erected pursuant to the provisions of § 20-158. . . ."

In *Tucker* the evidence affirmatively showed that the stop sign had not been erected originally under the authority of G.S. 20-158(a) and consequently the street upon which plaintiff (Tucker) was traveling had not been properly designated the dominant street; therefore the Court held that the rule of G.S. 20-155(a) was applicable to both plaintiff and defendant. In *Kelly* the evidence permitted the inference that the stop sign had been erected originally under the authority of G.S. 20-158(a), and the Court held plaintiff's right to rely on the assumption that defendant, approaching from plaintiff's right, would stop was not lost because the stop sign had been removed. However, in both cases the defendant's rights and duties were to be governed by the right of way rule provided by G.S. 20-155(a).

[1] In the present case, considering the evidence in the light most favorable to plaintiff, the evidence would permit findings as follows: Plaintiff was driving north on Willow Road; Willow Road had been designated the dominant street by proper authority by the placing of stop signs on either side of its intersection with Tuscaloosa Street facing traffic on Tuscaloosa Street; plaintiff was familiar with the intersection and with the existence of the stop signs for traffic on Tuscaloosa Street; and she did not know that the stop sign on the east side of the intersection had been removed. Under these circumstances plaintiff was proceeding along the dominant street and was entitled to assume that traffic on the servient street would yield her the right of way, and this right was not lost because the stop sign had been temporarily removed. *Kelly v. Ashburn, supra.*

[2] However, there was no evidence that defendant Booth knew the stop sign had been erected or removed. Willow Road and Tuscaloosa Street are both approximately thirty-four feet wide. Plaintiff and Booth were approaching the intersection at approximately the same time. Plaintiff was approaching from Booth's left and Booth was approaching from plaintiff's right. Under these circum-

stances Booth was entitled to rely on G.S. 20-155(a) granting the vehicle on the right the right of way when they both approach an intersection at approximately the same time. *Kelly v. Ashburn, supra; Tucker v. Moorefield, supra.* There was no evidence that Booth was driving at an unreasonable speed or in any other way was improperly operating his vehicle.

Plaintiff had the burden of proving negligence on the part of defendant Booth; but the record is bare of any evidence of negligence on his part. The physical facts at the scene, as disclosed by plaintiff's evidence, show that Booth's vehicle was in its right lane of travel; that his vehicle entered the intersection before plaintiff's; and that the front of his vehicle was in the northwest quadrant of the intersection at the time plaintiff's vehicle struck his at his left front door. According to the record plaintiff and her passenger both testified that plaintiff's vehicle had almost completely crossed the intersection before defendant Booth's vehicle entered. However, this testimony is in irreconcilable conflict with the physical facts as established by plaintiff's uncontradicted evidence.

Plaintiff's witness, the investigating officer, testified: "I found some skid marks leading up to the rear of the Douglas [plaintiff's] vehicle." "This left skid mark leading up to the left rear of the Douglas car extended back some distance from out of the intersection and into the intersection." "These skid marks leading up to the rear of the Douglas car were about straddle the middle of the street." "The damage to the station wagon [Booth's vehicle] is primarily in the left front door." The damage to plaintiff's vehicle was on its front. Plaintiff's photographs corroborated the testimony of the investigating officer.

The skid marks, point of impact, and damage to the vehicles point clearly to the fact that the vehicles approached the intersection at approximately the same time, and clearly show that plaintiff's vehicle was not "almost out" of the intersection when Booth's vehicle entered.

[3] "As a general rule, evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature 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." *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105; *Hardy v. Tesh,* 5 N.C. App. 107, 167 S.E. 2d 848.

We hold that plaintiff has failed to offer evidence, consistent with the undisputed physical facts, which shows any negligence on the part of defendant Booth, and that the nonsuit as to him was proper.

[4] With respect to the defendant Thompson-Arthur Paving Company, plaintiff contends that it removed the stop sign and negligently failed to replace it, and that such negligence was a proximate cause of the collision and her resulting damages. The only evidence relating to removal of the stop sign for construction showed that the stop sign was temporarily removed on 18 November 1964 and securely replaced on the same day after some grading on the shoulder of the street was completed. This was approximately thirty days before the collision in question, and the record is bare of any evidence of how, when, or by whom the stop sign was again removed. Nor is there evidence from which it can reasonably be inferred that removal of the sign again was necessary for defendant paving company to accomplish its work. How, when, why, or by whom the stop sign was again removed is a matter of conjecture under the evidence in this case.

We hold that plaintiff has failed to offer evidence of any negligence on the part of defendant Thompson-Arthur Paving Company, and that nonsuit as to it was proper.

Affirmed.

BRITT and VAUGHN, JJ., concur.

JULIA HARRIS SWINK v. CALEB WHITE SWINK AND CABARRUS BANK AND TRUST COMPANY, GARNISHEE

No. 6919SC442

(Filed 17 September 1969)

1. Divorce and Alimony §§ 21, 23; Trusts § 1— alimony and child support payments — enforcement — execution on trust income

In wife's action for divorce from bed and board and for permanent alimony, the husband's income from a trust created in another jurisdiction and administered by a trustee bank in this State is subject to execution to satisfy the judgment of the wife against the husband for alimony, child support and counsel fees; this result obtains even if the trust were a valid spendthrift trust administered under the laws of the other jurisdiction.

2. Divorce and Alimony §§ 17, 23— alimony upon divorce from bed and board — child support — fees — sufficiency of findings

In wife's action for divorce from bed and board and for permanent alimony, judgment ordering the husband to pay the wife alimony in the

amount of $175 per month and child support of $175 per month, as well as $1900 for counsel fees and $1400 for accumulated alimony and child support payments under prior orders, *held* supported by the findings and evidence.

3. Divorce and Alimony §§ 17, 23— alimony and support payments — review

The amount allowed by the court for alimony upon divorce from bed and board and for support of the children of the marriage will be disturbed only upon a gross abuse of discretion.

APPEAL by defendant-garnishee, Cabarrus Bank and Trust Company, from *Crissman, J.*, 19 May 1969 Session Superior Court for ROWAN County.

Plaintiff instituted suit for divorce from bed and board and permanent alimony against her husband, Caleb White Swink. The jury by its answers to appropriate issues found that the defendant-husband had offered such indignities to his wife as to render her condition intolerable, abandoned his wife and child, became an excessive user of alcohol and failed to provide his wife and child with necessary subsistence. After hearing the evidence the trial judge made appropriate findings as to the needs of the plaintiff and the child of the parties. Judgment was entered which ordered that defendant pay plaintiff alimony of $175.00 per month and child support in the sum of $175.00 per month; pay plaintiff $1,400.00 accumulated alimony and child support which was due under prior orders of the court; and pay plaintiff $1,900.00 for counsel fees for the services of her attorney. Although the defendant-husband filed answer, his counsel had withdrawn prior to the trial with permission of the court. The defendant-husband did not appear at the trial of the case and does not appeal.

Judge Crissman's judgment provides in the part pertinent to this appeal as follows:

"5. It is further ORDERED and ADJUDGED that Cabarrus Bank and Trust Company, Garnishee, shall pay over currently to the plaintiff Julia Harris Swink all income heretofore or hereafter accruing to the defendant collected by it upon the trust fund established under the will of Louise Swink Fitch (less its allowed fees as Trustee) until the further order of this court, or until this judgment with future accumulated alimony and child support has been discharged; and in the event the defendant Caleb White Swink reaches the age of forty-five years without this judgment having been discharged, the said Cabarrus Bank and Trust Company, Garnishee, is directed to pay

and deliver the principal of said trust fund to a receiver to be appointed by this court upon motion of the plaintiff, to receive the said principal and to apply the same, or the income therefrom, as the court may direct, to the satisfaction of this judgment with any accumulated arrearage of alimony and child support and in satisfaction of the obligation of the defendant for further alimony and child support thereafter. All such payments of income or principal by Cabarrus Bank and Trust as herein directed shall operate as a full acquittance and discharge to the said Bank as to any claims of the defendant Caleb White Swink in respect thereof."

A trust was created in the will of Louise Swink Fitch who was a domiciliary of the District of Columbia. Her will was probated and the estate administered by W. E. Fitch, executor, under the jurisdiction of the appropriate court in the District of Columbia. The Cabarrus Bank and Trust Company, as trustee, has on hand assets of the trust in the amount of $81,000.00.

The defendant-garnishee moved that the portion of the judgment which pertained to garnishment of funds held by it be set aside and that the entire judgment be set aside. From the denial of these motions defendant-garnishee excepted and appeals.

Kluttz and Hamlin by Lewis P. Hamlin, Jr., for plaintiff appellee.

Alexannder and Brown by B. S. Brown, Jr., and E. T. Bost, Jr., for Cabarrus Bank and Trust Company, Garnishee, defendant appellant.

VAUGHN, J.

[1] The appellant contends that the administration of this trust should be governed by the laws of the District of Columbia. The appellee contends that the law of North Carolina should apply. We do not deem it necessary to pass upon this question. We are convinced that under the law of either jurisdiction, the income from the trust under consideration is subject to execution to satisfy the judgment of the wife against the defendant-beneficiary for alimony, child support and counsel fees. The result is reached even if we were to assume, as the appellant contends, that this is a valid "spendthrift" trust to be administered under District of Columbia law. Without question, it is clear that under the law there, the interests of the father may be invaded for the support of minor children. *Seidenberg v. Seidenberg,* 225 F. 2d 545 (D.C. Cir. 1955). Although that case dealt with support of minor children, the court did not

distinguish between a wife and child. The opinion in *Seidenberg* is easily susceptible to the determination that a spendthrift trust can be reached for the purpose of meeting claims for alimony as well as child support. The cases cited and relied upon by the court involved support for wives. Judge Holtzoff quoted from *Safe Deposit and Trust Company v. Robertson,* 192 Md. 653, 65 A. 2d 292, which held that spendthrift trusts could be attached for alimony. He also cited the Restatement of the Law of Torts, § 157, wherein it is stated that the interest of the beneficiary can be reached in satisfaction of an enforceable claim, "(a) by the wife or child of the beneficiary for support, or by the wife for alimony. . . ." It also is to be observed that although the judge in the *Seidenberg* case specifically refused to deal with the validity of spendthrift trusts, he referred to them as of "questionable morality" and being "an undemocratic doctrine."

There is a split of authorities in the states that recognize spendthrift trusts but the preponderance of them are in favor of attachment for maintenance or alimony.

Courts and legislatures have exempted certain classes from the restrictive provisions of spendthrift trusts and decided that the interest of the beneficiary may be reached "notwithstanding an express direction to the contrary" because of the strong equity behind these claims and because of the repugnancy to public policy. Bogert, Trust and Trustees, Second Edition, § 224. It is clear to us that under District of Columbia law the income from this trust is subject to attachment for child support and alimony.

If administration of the trust is to be governed by the laws of North Carolina, the same result is reached. The only spendthrift trust recognized in North Carolina is by G.S. 41-9, the test of which clearly are not met here. North Carolina has valiantly withstood efforts in its courts to have valid spendthrift trusts born out of case law. Traditional notions of public policy and fair play have remained predominant. The view of the North Carolina courts is that whatever interests a debtor has in property of any sort may be reached by his creditors, in law or equity, according to the nature of the property. *Mebane v. Mebane,* 39 N.C. 131.

Restrictive provisions in a trust should not enable a father to shirk his legal obligations. This is especially true where the father has abandoned his wife and child and departed from the jurisdiction, thereby hindering the court in the use of contempt proceedings to enforce its decrees.

Since it is clear that the interest of the defendant-beneficiary can be reached to provide child support and alimony, the only issue left

for this court is the reasonableness of the appropriation of the entire net income from the trust.

[2] Judge Crissman's findings of fact as to the reasonable needs of the plaintiff and the child of the parties are supported by the evidence. The trial judge also found as a fact that the defendant-husband was thirty-five years of age, able-bodied and has two years of college. He concluded that a man of his age, physical condition and educational attainment is capable of earning $200.00 per week. The judge properly considered the earning capacity of the husband along with his income from this trust.

[3] The amount allowed by the court for alimony and support of children of the marriage will be disturbed only where there is a gross abuse of discretion. *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649. *Rayfield v. Rayfield,* 242 N.C. 691, 89 S.E. 2d 399.

The judgment of the superior court entered herein is

Affirmed.

BROCK and BRITT, JJ., concur.

CLARENCE CURRY v. LAWRENCE M. STALEY, ISAAC W. WORRELL, INDIVIDUALLY; AND BOWERS AND WORRELL, ACCOUNTANTS, A PARTNERSHIP

No. 6921SC435

(Filed 17 September 1969)

1. Pleadings § 19— demurrer — construction of pleadings

Upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. G.S. 1-151.

2. Pleadings § 19— office of a demurrer

The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom.

3. Conspiracy § 1— conspiracy defined

A conspiracy is an agreement between two or more persons to commit an unlawful act or to do a lawful act in an unlawful manner.

4. Conspiracy § 1— nature of civil action

A civil action for conspiracy is an action for damages resulting from

wrongful or unlawful acts committed by one or more of the conspirators pursuant to the formed conspiracy.

5. Conspiracy § 2— action for civil conspiracy — sufficiency of complaint — wrongdoing by plaintiff

Allegations that the plaintiff was hired to manage his employer's new restaurant and that the employer and the employer's accountant unlawfully conspired to set up the records and account books of the restaurant so as to give the false appearance that plaintiff, and not the employer, was the owner, thereby subjecting plaintiff to liability for federal and state income taxes and for social security and employees' withholding taxes, *are held* insufficient, when taken with the other allegations of the complaint, to state a cause of action for civil conspiracy against the employer and the accountant, where the other allegations give rise to the inference that plaintiff knew of defendants' scheme and cooperated with them.

6. Conspiracy § 3— liability of conspirators for acts of the others

If two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design; the fact that one conspirator is the instigator and dominant actor is immaterial on the question of the guilt of the other.

7. Actions § 5— party taking advantage of his own wrong

The common law maxim that a person will not be allowed to take advantage of his own wrong has been adopted as public policy in this State.

APPEAL by plaintiff from *Seay, J.*, at the 16 June 1969 Civil Session of FORSYTH Superior Court.

This is an appeal from a judgment allowing demurrers in a civil action for conspiracy. Plaintiff seeks to recover actual and punitive damages; he specifically asks that he be reimbursed for certain state and federal taxes paid by him and also the amount of certain tax assessments made against him.

In his complaint, plaintiff alleges that prior to October 1964 he was a cook employed by defendant Staley in Winston-Salem; that during said month Staley employed plaintiff to manage the operation of a restaurant in Danville, Virginia. He further alleges that defendant Worrell, of the accounting firm of Bowers and Worrell, was Staley's accountant. Further pertinent facts alleged in the complaint are hereinafter set forth in the opinion.

To the complaint defendants demurred for failure to state facts sufficient to constitute a cause of action. Judge Seay adjudged that the demurrer of each defendant be sustained and that plaintiff be allowed thirty days in which to amend the complaint. Plaintiff appealed.

Hatfield, Allman & Hall by James E. Humphreys, Jr., for plaintiff appellant.

Wood & Phillips by William Z. Wood for defendant appellee Staley.

Womble, Carlyle, Sandridge & Rice by David A. Irvin for defendant appellees Worrell, Individually, and Bowers and Worrell, Partnership.

BRITT, J.

[1] In testing the sufficiency of the complaint to withstand the demurrers, this Court must first be guided by G.S. 1-151 which provides: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." Although in numerous cases including *Joyner v. Woodard,* 201 N.C. 315, 160 S.E. 288, our Supreme Court has held that under this section and contrary to the common law rule every reasonable intendment is to be made in favor of the pleader, the court has also held that the section requires a liberal construction of a pleading challenged by demurrer with a view to substantial justice between the parties. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129.

[2] The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom. *Lumber Co. v. Builders,* 270 N.C. 337, 154 S.E. 2d 665.

[3, 4] Plaintiff contends that his complaint alleges sufficient facts to state a cause of action for civil conspiracy. Our courts have said many times that a conspiracy is an agreement between two or more persons to commit an unlawful act or to do a lawful act in an unlawful manner. *Evans v. GMC Sales,* 268 N.C. 544, 151 S.E. 2d 69; *Shope v. Boyer,* 268 N.C. 401, 150 S.E. 2d 771; *McAdams v. Blue,* 3 N.C. App. 169, 164 S.E. 2d 490. A civil action for conspiracy is an action for damages resulting from wrongful or unlawful acts committed by one or more of the conspirators pursuant to the formed conspiracy. *McAdams v. Blue, supra,* and cases therein cited.

[5] Plaintiff argues that the unlawful act committed by defendants alleged in the complaint was the setting up of records and account books for the Danville restaurant so as to give the false appearance that plaintiff, rather than Staley, was the owner, resulting in plaintiff's becoming liable for federal and state income taxes on profits made by the restaurant and income taxes withheld from and

Social Security taxes accruing on employees of the restaurant. The crucial allegation of the complaint is as follows:

> "* * * Bowers and the defendant Staley did fraudulently, corruptly, and unlawfully conspire to set up and did set up, at the time the plaintiff was hired by the defendant Staley to manage the subject restaurant, the records and account books of the subject restaurant so as to give the false appearance that the plaintiff was the owner of and entrepreneur as to the subject restaurant, and so as to cause: 1. The income gain or loss of the restaurant to be taxed personally against the plaintiff, as apparent owner; and 2. The income-withholding and Social Security taxes due for the employees of the restaurant to be taxed personally against the plaintiff, as apparent owner."

Plaintiff's counsel does not cite any law that the alleged act of the defendants violated, and we do not deem it necessary to determine if the facts alleged would constitute an unlawful act. Assuming, *arguendo,* that the act complained of was unlawful, we think sufficient inferences arise from the allegations in the complaint to indicate that plaintiff had knowledge that Staley and Bowers contrived and executed the scheme of having the records and account books of the Danville restaurant show that plaintiff was the owner of the business so as to cause federal and state taxes to be levied against plaintiff, and that plaintiff cooperated with defendants in carrying out said scheme.

The following facts are specifically alleged in the complaint: Plaintiff was employed by Staley in October 1964 to operate the Danville restaurant and was told by Staley at that time that all accounting and record-keeping matters would be taken care of by Bowers and Worrell. Plaintiff managed the operation of the restaurant from October 1964 until October 1966. Early in 1967, Worrell prepared plaintiff's tax returns showing that in 1966 plaintiff made a net profit of $11,143.50 from the operation of the restaurant when, in fact, plaintiff received from Staley during 1966 a salary of only $4,100.00. At the time plaintiff was dismissed, income taxes withheld from and Social Security taxes accruing on other employees of the restaurant for the month of September 1966 were owing to the federal government, which taxes plaintiff has paid in the amount of $697.53. Because of the income falsely attributed to plaintiff for 1966, he paid $69.74 in "excess income taxes" to the State of North Carolina, $325.94 in "excess income taxes" to the Commonwealth of Virginia, and was assessed in excess of $1800.00 by the federal government as income taxes for 1966, part of which plaintiff has paid and the remainder he is in the process of paying.

Although plaintiff does not allege that he ever signed a tax return indicating that he was the owner of the restaurant at any time between October 1964 and October 1966 and thus knew of the scheme devised by defendants about which he now complains, inferences to that effect are reasonably deducible from the allegations. From the complaint, the following inferences are reasonable: As required by federal statutes, plaintiff filed an income tax return for each of the years 1964, 1965 and 1966. As required by federal statutes, plaintiff applied for and obtained an employer's identification number used in making returns for income and Social Security taxes withheld from and accruing on employees of the restaurant, representing himself as the owner. As required by federal statutes, he signed a written return to the federal government at least quarterly — probably monthly — regarding income and Social Security taxes withheld from and accruing on employees. He obtained in his name various permits from state and local governmental agencies in connection with the operation of said restaurant. The foregoing considered, it is just as reasonable to infer from the allegations of the complaint that plaintiff had personal knowledge of the setup arranged by defendants about which he now complains and that he "went along with" said arrangement and cooperated in its execution.

[6, 7] If the act complained of was a conspiracy, plaintiff was a party to it. If two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design; the fact that one conspirator is the instigator and dominant actor is immaterial on the question of the guilt of the other. 2 Strong, N.C. Index 2d, Conspiracy, § 3, p. 172. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241; *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686. The common law maxim that a person will not be allowed to take advantage of his own wrong has been adopted as public policy in this State. *In Re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807.

The judgment of the superior court sustaining defendants' demurrers to the complaint was proper and is hereby

Affirmed.

BROCK and VAUGHN, JJ., concur.

A. L. POPLIN, ET UX v. P. L. LEDBETTER

No. 6919SC380

(Filed 17 September 1969)

1. Damages § 11— worthless check — punitive damages — aggravated fraud — sufficiency of evidence

In plaintiffs' action to recover actual and punitive damages on the ground that defendant had fraudulently given plaintiffs a worthless check in the amount of $1400 in order to induce plaintiffs to convey to a third party a lot upon which defendant had built a house, the evidence *is held* insufficient to be submitted to the jury on the issue of punitive damages, there being no evidence upon which to support a finding of aggravated fraud.

2. Damages § 11— punitive damages — fraud

In order to award punitive damages in an action for fraud, the defendant's fraudulent conduct must contain the additional elements of insult, indignity, malice, oppression or bad motive.

APPEAL by defendant from *Crissman, J.*, 13 January 1969 Regular Civil Session of the Superior Court of CABARRUS County.

The plaintiffs, A. L. Poplin and wife, Callie Poplin, (Poplin), brought this action on 5 February 1968 in the Superior Court of Cabarrus County for actual damages in the sum of $1,400 and punitive damages in the sum of $10,000, alleging that the defendant, P. L. Ledbetter, (Ledbetter), had been guilty of fraud in giving a worthless check in the amount of $1,400.00 to Poplin to induce him to convey a lot which he and his wife owned to one Hastings upon which Ledbetter had built a house. Poplin alleged that on 15 April 1965 he and his wife actually deeded the lot to Hastings upon the request of Ledbetter in exchange for the $1,400.00 check dated 15 April 1965. Poplin further alleged that when Ledbetter gave him the check he knew or ought to have known that he did not have sufficient funds on deposit in the bank to pay the check, and that Ledbetter intended to deceive and defraud Poplin by the false representation, and further that Poplin did in fact rely upon the false representation in conveying the lot to Hastings to his injury and damage.

At the trial, the plaintiffs offered evidence tending to show that on 15 April 1965 they were the owners of a certain lot in Cabarrus County upon which the defendant, Ledbetter, had built a house and that Poplin had given the lot as security to enable Ledbetter to get a construction loan in the amount of $6,000.00. The evidence further tended to show that Ledbetter had negotiated to sell the house to one Hastings and that he gave a $1,400.00 check to Poplin dated

15 April 1965 to get Poplin and his wife to convey the lot to Hastings on 15 April 1965. Poplin testified that he presented the check for payment "a couple of days" after he received it and that it was charged back to his account about 10 days later because Ledbetter did not have sufficient funds on deposit to pay the check, and that although he had made demand upon Ledbetter for the $1,400.00 he had never been paid any part of it. The plaintiffs' evidence further tended to show that on 15 April 1965 Hastings closed a loan at the Cabarrus County Savings and Loan Association in the sum of $12,900.00 giving the house and lot as security for the loan, and that the proceeds of the loan were paid to Ledbetter. The $1,400.00 check dated 15 April 1965 given by Ledbetter to Poplin was offered and admitted into evidence along with evidence tending to show that at no time during the month of April did Ledbetter have on deposit in the bank on which the check was drawn sufficient funds to cover the said check.

The defendant, Ledbetter, offered no evidence and moved for a judgment as of nonsuit at the close of the plaintiffs' evidence. The court overruled the defendant's motion and submitted the case to the jury on the following issues:

"1. What amount, if any, are the plaintiffs entitled to recover from the defendant for actual damages?

"2. Did the defendant represent to the plaintiffs that he had on deposit the sum of One Thousand Four Hundred ($1,400.00) Dollars at the time of the delivery of the check offered as plaintiffs' Exhibit 'A'?

"3. If, so, did the defendant know that he did not have One Thousand Four Hundred ($1,400.00) Dollars on deposit?

"4. If so, did the defendant intend for the plaintiffs to rely upon the representation?

"5. If so, did the plaintiffs reasonably rely upon the representation of the defendant?

"6. If so, what amount, if any, are the plaintiffs entitled to recover of the defendant for punitive damages?"

During the course of the trial the parties stipulated that the court instruct the jury to answer the first issue $1,400.00. The jury answered all of the issues in favor of the plaintiffs and assessed punitive damages against the defendant in the sum of $2,500.00. The court entered judgment that the plaintiffs recover of the defendant $1,400.00 with interest as actual damages, and $2,500.00 as punitive

damages and further ordered that if execution against the property of the defendant be returned either wholly or partially unsatisfied, execution be issued against the person of the defendant and he be committed to the common jail of Cabarrus County until he pays the judgment herein or until he is discharged according to law. The defendant, Ledbetter, appealed assigning error.

Cole and Chesson, by James L. Cole, for the defendant-appellant.

Hartsell, Hartsell and Mills, by William H. Mills, Jr., and K. Michael Koontz, for the plaintiffs-appellees.

HEDRICK, J.

[1] The appellant's assignments of error numbers 1, 2, 3, 4, 5, 29 and 30, challenge the sufficiency of the plaintiffs' evidence to carry the case to the jury on the issue of punitive damages.

In *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d. 202, the Supreme Court of North Carolina, speaking through Johnson, J., said:

> "Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated 'that fraud is better left undefined,' lest, as *Lord Hardwicke* put it 'the craft of men should find a way of committing fraud which might escape a rule or definition.' *Furst v. Merritt,* 190 N.C. 397 (p. 404), 130 S.E. 40."

In *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d. 785, Chief Justice Devin, writing for the Court, said:

> "In some cases, in actions to recover damages for fraud, where punitive damages are asked, it is suggested that a line of demarcation be drawn between aggravated fraud and simple fraud, with punitive damages allowable in the one case and refused in the other. In a note in 165 A.L.R. 616, it is said: 'All that can be said is that to constitute aggravated fraud there must be some additional element of asocial behavior which goes beyond the facts necessary to create a case of simple fraud.' "

Upon this appeal we are not concerned with whether the defendant's conduct amounted to simple fraud. Rather, we must examine the evidence in its light most favorable to the plaintiffs to determine whether Ledbetter's conduct in giving the $1,400.00 check, with all of the attendant circumstances, constituted what has been referred

to in some cases as aggravated fraud, subjecting him to the additional punishment of punitive damages.

[2] In *Swinton v. Realty Co., supra,* and in *Nunn v. Smith,* 270 N.C. 374, 154 S.E. 2d. 497, our Supreme Court indicated that before punitive damages might be assessed, the defendant's fraudulent conduct must contain the additional elements of "insult, indignity, malice, oppression or bad motive". We are inclined to the view that these are the "elements of asocial behavior" referred to in 165 A.L.R. 616 which change simple fraud to aggravated fraud.

[1] There is no showing that there was any prior business relationship between Ledbetter and Poplin unless such an inference can be gleaned from Poplin's statement that "he just gave me the check like he always had, if he ever gave me one, and I took it for granted he had it there." We believe that this statement, standing alone, is not sufficient to infer any prior business association, and this is especially true since, if this had existed, the plaintiffs could have easily elicited this evidence from any of the witnesses available to them, and the appellees' contention to the contrary seems without merit. The fact that Poplin had given the lot as security so that Ledbetter could obtain a construction loan does not, of itself, infer that the plaintiffs and defendant were engaged in a joint venture. On the other hand, it does indicate that Poplin knew that at the time he accepted the check and conveyed the lot to Hastings, that the lot was encumbered at least in the amount of $6,000.00. The additional evidence to the effect that Hastings closed his $12,900.00 loan on the very day that the check was dated and the deed executed could give rise to the inference that Poplin had good reason to wait "a couple of days" before he presented the check for payment. We believe that all of this evidence with respect to the circumstances attendant to the giving of the check tend to negate the essential elements constituting aggravated fraud.

In *Nunn v. Smith, supra,* where the facts were remarkably similar, the Court in affirming the judgment of nonsuit said: "Here, taking all plaintiff's evidence as true, the record is void of evidence of insult, indignity, malice, oppression or bad motive, and the facts upon which plaintiff would recover punitive damages are the same facts on which he bases his cause of action. Therefore, plaintiff cannot prevail." We have examined the plaintiffs' evidence and conclude that the court ought not to have submitted the issue of punitive damages to the jury.

For the reasons herein set forth, that part of the judgment allowing punitive damages and providing for the arrest of the defend-

ant is reversed, and that part of the judgment that the plaintiffs recover of the defendant $1,400.00, with interest and cost, is affirmed. The result is

Reversed in part.

Affirmed in part.

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

STATE OF NORTH CAROLINA v. ROBERT LEE MUSKELLY AND REUBEN ALLEN, JR.

No. 6919SC379

(Filed 17 September 1969)

1. Criminal Law § 107— nonsuit for variance

A fatal variance between indictment and proof may be taken advantage of by motion for judgment as of nonsuit.

2. Indictment and Warrant § 17; Criminal Law § 107— variance between pleading and proof

A defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.

3. Indictment and Warrant § 9— charge of crime — sufficiency of indictment

All that is required in a warrant or bill of indictment is that it be sufficient in form to express the charge against the defendant in a plain, intelligible and explicit manner, and to enable the court to proceed to judgment and thus bar another prosecution for the same offense.

4. Indictment and Warrant § 9— sufficiency of indictment — nonessential words

If when stripped of nonessential words the indictment or warrant is sufficient to charge the offense, it is sufficient to survive a motion to quash.

5. Indictment and Warrant § 9— sufficiency of indictment — evidentiary matters

A bill of indictment is complete without evidentiary matters descriptive of the manner and means by which the offense was committed.

6. Indictment and Warrant § 17; Criminal Law § 124— verdict — relation to offense charged

A verdict of guilty or not guilty relates only to the offense charged, not to surplus or evidential matters alleged.

7. Indictment and Warrant § 17; Assault and Battery § 11— felonious assault — indictment — variance — evidentiary allegations — surplusage

In this prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, there is no fatal variance between indictment and proof where the indictment charges that defendants feloniously assaulted the victim "with a certain deadly weapon, to wit: a pistol," and further alleges the assault occurred "by shooting him with a pistol," and the evidence discloses that although shots were fired by defendants, the victim was not struck by a bullet but was beaten about the head with a pistol, the words "by shooting him with a pistol" being surplusage since they are nonessential in properly charging the offense of felonious assault.

8. Assault and Battery §§ 5, 15— felonious assault — instructions — intent to kill — intent to inflict bodily harm

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, an instruction that the jury might find an intent to kill if defendant intended either to kill or inflict great bodily harm constitutes prejudicial error, since a finding by the jury that defendant intended only to inflict bodily harm would be insufficient to sustain a conviction for felonious assault.

9. Criminal Law § 113; Assault and Battery § 15— felonious assault — joint trial — instructions — conviction of both defendants

In a joint trial of two defendants for two offenses of felonious assault, a charge susceptible to the construction that the jury could find both defendants guilty on each count if it found beyond a reasonable doubt that either of the defendants feloniously assaulted either of the victims constitutes reversible error.

APPEAL by the defendants, from *Crissman, J.*, 6 January 1969, Criminal Session of CABARRUS Superior Court.

The defendants were jointly charged in two bills of indictment with assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. Parks McClain and Arthur Nell Pless were the alleged victims. The evidence tended to show that McClain was shot with a pistol and Pless was beaten about the head with a pistol. The defendants moved for judgment of nonsuit at the close of the State's evidence and at the close of all the evidence. These motions were denied. The jury returned verdicts of guilty as charged in each case as to each defendant. From the verdicts and judgments thereon, defendants appealed.

Attorney General Robert Morgan by Staff Attorney Carlos W. Murray, Jr., for the State.

Johnson, Davis and Horton by Clarence E. Horton, Jr., for defendant appellant Muskelly.

M. B. Shearin, Jr., for defendant appellant Allen.

VAUGHN, J.

[7] Defendants contend that their motions for judgment as of nonsuit as to Case Numbers 12-428 and 12-432, the alleged assault upon Pless, should have been granted. The pertinent parts of these indictments read:

> ". . . [D]id, unlawfully, wilfully and feloniously assault one Arthur Nell Pless with a certain deadly weapon, to wit: a pistol with . . . upon said Arthur Nell Pless to wit: by shooting him with said pistol. . . ."

The defendants' contention is based upon an alleged fatal variance between the allegations of the indictment and proof offered at the trial. The evidence at the trial revealed that although shots were fired by the defendants, Pless was not struck by a bullet but was in fact beaten about the head with a pistol.

[1, 2] Where there is a fatal variance, it may be taken advantage of by motion for judgment as of nonsuit. *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266; *State v. Kimball,* 261 N.C. 582, 135 S.E. 2d 568; *State v. Hicks,* 233 N.C. 31, 62 S.E. 2d 497. It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegations and the proof must correspond. *State v. White,* 3 N.C. App. 31, 164 S.E. 2d 36; *State v. Watson,* 272 N.C. 526, 158 S.E. 2d 334.

[3] What then were the defendants in the present case charged with? The words of the indictment are clear, "feloniously assault . . . with a certain deadly weapon, to wit: a pistol." In the words of this Court in *State v. White, supra,* the offenses were "accurately charged." All that is required in a warrant or bill of indictment is that it be sufficient in form to express the charge against the defendant in a plain, intelligible and explicit manner, and to enable the court to proceed to judgment and thus bar another prosecution for the same offense. *State v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857; 4 Strong, N.C. Index 2d, Indictment and Warrant, § 9, pp. 347, 348.

[4-6] In this case, the gist of the offense charged against these defendants is the assault with a deadly weapon with intent to kill resulting in serious bodily injury but not resulting in death. If when stripped of nonessential words, the indictment or warrant is sufficient to charge the offense, it is sufficient to survive a motion to quash. *State v. Camel,* 230 N.C. 426, 53 S.E. 2d 313. The use of superfluous words in a bill of indictment should be disregarded. The bill is complete without evidentiary matters descriptive of the man-

ner and means by which the offense was committed. A verdict of guilty, or not guilty, is only as to the offense charged, not of surplus or evidential matters alleged. *State v. Wynne,* 151 N.C. 644, 65 S.E. 459. In *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252, it was held that if an averment in an indictment or warrant is not necessary in charging the offense, it may be treated as surplusage. Thus, in that case where the defendant was being tried for escape from legal custody, words in the indictment referring to the felony for which the defendant was serving time were regarded as surplusage. Justice Bobbitt stated that the indictment is sufficient if it alleges that the defendant "was serving time for a felony" without naming the particular felony.

[7] Therefore, the words that these defendants allege created a fatal variance, "to wit: by shooting him with said pistol," were nonessential words in properly charging them with the offense and are thereby to be regarded as surplusage.

The trial court therefore properly denied the defendants' motion for judgment as of nonsuit, and the trial proceeded upon valid indictments.

[8] Further assignments of error by the defendants are directed at alleged errors in the instructions to the jury. Defendants assign as prejudicial and erroneous the following instruction relating to intent to kill:

> "And, so, intent to kill is the intent which exists in the mind of a person at the time he commits the assault, or criminal act, intentionally without justification or excuse, to kill his victim, or to inflict great bodily harm."

Defendants contend that under this instruction the jury would be allowed to find the defendants guilty of felonious assault although they made no finding that the acts were committed with the intent to kill their victims. With this argument this Court is in agreement. In *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626, the instruction in controversy was, ". . . so intent to kill is . . . intent to kill his victim or to inflict great bodily harm on him." The Court allowed a new trial stating that a finding of intent to inflict great bodily harm is insufficient to support the charge of felonious assault since an intent to kill is an essential element. In a more recent case, *State v. Parker,* 272 N.C. 142, 157 S.E. 2d 666, an instruction identical with the one in this case was held to be prejudicial error "for it would allow the jury to find an intent to kill if the defendant intended either to kill or to inflict great bodily harm."

[9] The defendant further assigned as error the part of the charge which states as follows:

> "Now, members of the jury, the State must satisfy you beyond a reasonable doubt that the defendant, or defendants, did commit an assault . . . and that it was done with intent to kill either or both of these victims. . . ."

Defendants contend that this instruction was prejudicial to them in that it would allow the jury to find them guilty upon a finding that either of the defendants feloniously assaulted either of the victims. The assignment of error is well taken. A portion of the Court's decision in *State v. Doss,* 5 N.C. App. 146, 167 S.E. 2d 830, with Judge Morris writing for the Court, is especially pertinent. The rule is succinctly stated that 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. As in these cases, it remains to be error although the instruction is not technically a submission of the question of guilt or innocence in the disjunctive but to the jury it is confusing and ambiguous. The words "defendant, or defendants," are of the same effect as the words "defendants or either of them." The instruction is confusing and ambiguous in that it does not make it clear to the jury that there is the possibility that one of the defendants might be acquitted and one found guilty.

The language "and that it was done with intent to kill either or both of these victims" could lead the jury to believe that both defendants could be found guilty on each count if it was satisfied beyond a reasonable doubt that a felonious assault was committed upon but one of the victims.

Since there must be a new trial, we do not deem it necessary to discuss the remaining assignment of error as it may not arise on another trial.

For errors in the charge, the defendants are, in each case, entitled to

New trials.

BROCK and BRITT, JJ., concur.

EDNA P. SIMMONS, ADMINISTRATRIX OF THE ESTATE OF VELMA PAGE CHAVIS v. R. T. WILDER, M.D.

No. 6918SC434

(Filed 17 September 1969)

1. Torts § 7; Physicians and Surgeons § 11— release of tortfeasor — wrongful death action — malpractice

G.S. 1-540.1, providing that the release of a tortfeasor from liability for injuries resulting from negligence does not bar an action against a physician or surgeon for malpractice in treating the injuries, is inapplicable to an action for wrongful death; consequently, a release of the original tortfeasor by an administrator bars a cause of action for wrongful death against the attending physician.

2. Death § 3— action for wrongful death — statutory remedy

The right to bring an action for wrongful death is exclusively statutory, and the action must be asserted in strict conformity with the statute.

3. Statute § 5— strict construction — common law

Statutes in derogation of the common law must be strictly construed.

4. Statutes § 5— statutory construction

The courts may not, under the guise of judicial interpretation, interpolate provisions which are wanting in a statute and thereupon adjudicate the rights of the parties thereunder.

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

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

6. Constitutional Law § 6— legislative powers — change of laws

What laws shall be changed and when they are to be changed is within the prerogative of the legislature, not the judiciary.

APPEAL by plaintiff from *Gambill, J.*, 21 April 1969 Civil Session, GUILFORD County Superior Court (High Point Division).

Plaintiff-administratrix alleges two causes of action against the defendant. Her first is to recover damages for personal injuries, pain and suffering caused her intestate by the negligence and malpractice of the defendant, a physician, in treating her intestate for injuries sustained in an automobile accident which occurred on 3 May 1965.

Plaintiff's intestate died on 11 May 1965. Plaintiff's second cause of action is to recover for the wrongful death of her intestate which she alleges was caused solely by the negligence and malpractice of the defendant doctor.

Claude Clifton Causey was the driver of the automobile in

which the plaintiff's intestate was a passenger and sustained injury in the accident on 3 May 1965. It was from the injuries sustained in this accident that plaintiff's intestate was treated by the defendant.

The defendant's answer denied negligence and malpractice. As a further defense, the defendant contends that a release executed by plaintiff-administratrix on 8 October 1965 is a bar to both causes of action. The defendant further contends that in exchange for this release, Claude Clifton Causey paid, or caused to be paid, $4,000.00 to the plaintiff in her capacity as administratrix and that any award in this action should be reduced by that amount.

The trial judge concluded as a matter of law that the release is a bar to plaintiff-administratrix's cause of action for the wrongful death of her intestate against the defendant and adjudged that that cause of action be dismissed. The judge denied the defendant's plea in bar as to the cause of action for personal injury, conscious pain and suffering.

From the judgment dismissing plaintiff's cause of action against the defendant for the alleged wrongful death of plaintiff's intestate, the plaintiff appeals.

Sapp and Sapp by W. Samuel Shaffer, II, for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee.

VAUGHN, J.

[1] Prior to 1 October 1961, a release executed in favor of one responsible for the original injury protected a physician or surgeon against a claim based on negligent treatment of the injury. *Smith v. Thompson,* 210 N.C. 672, 188 S.E. 395. In a later case the Supreme Court reached the same result where the administrator had sued a motorist for the wrongful death of his decedent and during the litigation had entered into a consent judgment which stated that its payment would operate as a full and final settlement of all claims against the motorist. The Supreme Court held that this consent judgment in the action against the motorist barred a later action against the doctor. *Bell v. Hankins,* 249 N.C. 199, 105 S.E. 2d 642.

In 1961 the North Carolina General Assembly enacted G.S. 1-540.1, which reads as follows:

> "The compromise settlement or release of a cause of action against a person responsible for personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practi-

tioner treating such injury for negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise."

Plaintiff advances the novel theory that death is the ultimate personal injury and that, therefore, the Legislature intended that actions for wrongful death be included in the terms of G.S. 1-540.1.

[2] This argument ignores the fundamental dissimilarity of the two actions. The right to bring an action for wrongful death did not exist at common law and is, therefore, exclusively statutory. The action must be asserted in strict conformity with the statute. *Webb v. Eggleston,* 228 N.C. 574, 46 S.E. 2d 700. A different Statute of Limitations governs the time within which the action may be brought. G.S. 1-53(4). Moreover, while both the right of action for the recovery of consequential damages sustained between date of injury and date of death, and the right of action to recover damages resulting from such death have as basis the same wrongful act, there is no overlapping of amounts recoverable. *Hoke v. Greyhound Corporation,* 226 N.C. 332, 38 S.E. 2d 105. The distinction between an action for personal injuries and an action for wrongful death was commented upon by Justice Higgins in a case involving the statute under consideration here. *Galloway v. Lawrence,* 263 N.C. 433, 139 S.E. 2d 761.

[1, 3, 4] G.S. 1-540.1, on its face applies only to actions for personal injury. The statute says nothing about actions for wrongful death. Statutes in derogation of the common law must be strictly construed. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925. This Court may not, under the guise of judicial interpretation, interpolate provisions which are wanting in the statute and thereupon adjudicate the rights of the parties thereunder. *Board of Education v. Wilson,* 215 N.C. 216, 1 S.E. 2d 544.

Plaintiff also urges that this Court abolish the distinction between releases and covenants not to sue. If not, we are urged to construe releases, coupled with words reserving rights of action against others, as covenants not to sue.

[5] It is to be observed that, since the enactment of G.S. 1-540.1, the Legislature has enacted the Uniform Contribution Among Tort-Feasors Act. This Act specifically refers to liability for *injury or wrongful death.* (Emphasis ours) G.S. 1B-4, to the extent relevant here, abolishes the distinction between releases and covenants not to sue. Unfortunately, from the point of view of the plaintiff in this action, the Act did not become effective until 1 January 1968, and

does not apply to litigation pending at that time. This action was instituted on 3 May 1967. It was, therefore, "pending litigation" on the effective date of the Act.

[6] What laws shall be changed and when they are to be changed is within the prerogative of the Legislature, not the Judiciary.

We hold that the superior court judge correctly ruled that the release of the original tort feasor bars the action against the attending physician for wrongful death.

Affirmed.

BROCK and BRITT, JJ., concur.

DONALD GUY KINNEY v. CHARLES REID GOLEY, SR.

— AND —

KENNETH E. CROWSON, BY HIS NEXT FRIEND, BOBBIE M. GREEN v. CHARLES R. GOLEY AND DONALD GUY KINNEY

— AND —

JOHN L. NOLL, JR. v. CHARLES R. GOLEY AND DONALD GUY KINNEY

No. 68SC153

(Filed 17 September 1969)

1. Appeal and Error § 62— partial new trial

The Court of Appeals has power to grant a partial new trial, it being discretionary with the Court whether it will grant a partial new trial in a particular case.

2. Appeal and Error § 62— partial new trial — prerequisites

Before a partial new trial is ordered, it should clearly appear that no possible injustice can be done to either party, and where the questions involved are so interwoven that they cannot be separated and a new trial allowed as to one or more issues without prejudicing the rights of one or more of the parties or preventing a full and just trial of the whole matter, the power to grant a partial new trial should not be exercised.

3. Criminal Law § 62— new trial awarded — petition for partial new trial

In this appeal from a consolidated trial of an action by the driver of one automobile involved in a collision against the driver of the second automobile involved, and actions by two passengers in the first automobile against both drivers, the jury having answered issues of negligence in all three cases in favor of the first driver and against the second driver, wherein the second driver was awarded a new trial by the Court of Appeals for error in the charge relating to his negligence, petition by

the first driver that the new trial in each of the passenger cases be limited to the issue of the second driver's liability and that the jury's verdict finding the first driver free from negligence in those cases be allowed to stand is denied by the Court of Appeals, where the evidence and the court's charge thereon relative to the conduct of the two drivers was so interwoven and so interrelated that it would be impossible to give rational consideration to the conduct of one driver except as it was affected by and related to the simultaneous conduct of the other driver.

PETITION to rehear this case, reported in 4 N.C. App. 325, 167 S.E. 2d 97.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and Larry B. Sitton, for petitioner on rehearing, defendant Donald Guy Kinney.

Arch K. Schoch, Jr., for respondent Kenneth E. Crowson (plaintiff in Case No. 2).

Jerry M. Shuping, and Smith & Casper, by Archie L. Smith, for respondent John L. Noll, Jr. (plaintiff in Case No. 3).

Ottway Burton, and Haworth, Riggs, Kuhn & Haworth, by John Haworth, for respondent Charles Reid Goley, Sr., defendant.

PARKER, J.

These three civil actions, which were consolidated for trial, arose out of the same two-car automobile collision. In the first case Kinney, driver of the southbound automobile, sued Goley, driver of the northbound automobile, who was making a left turn. The other two cases were brought by Crowson and Noll, passengers in Kinney's automobile, against both drivers. In all three cases the jury answered the issues of negligence in favor of Kinney and against Goley. On appeal this Court found error in the judge's charge to the jury as to the effect of G.S. 20-154, if they should find as a fact that Goley had failed to give a proper turn signal. Since the erroneous portion of the charge was relevant to all three cases, we held appellant Goley, a defendant in all cases, entitled to new trials in all three cases.

In apt time after the filing of our decision, Kinney, driver of the other vehicle, filed a petition in this Court to rehear, asking that our opinion be modified to provide that the new trial in each of the passenger cases be limited to the issue of Goley's liability and that the jury's verdict finding Kinney free from negligence in those cases be allowed to stand. We granted the petition in order to clarify our opinion and to resolve the issue raised.

Petitioner Kinney contends that the grant of new trials as to

defendant Goley should not disturb the verdicts in petitioner's favor in the two passenger cases, since the portion of the judge's charge found to be erroneous related only to negligence of defendant Goley and, so petitioner argues, bore no relationship to the jury's finding of no negligence on the part of Kinney.

In our opinion reported in *Kinney v. Goley,* 4 N.C. App. 325, 333, 167 S.E. 2d 97, 103, we said:

> "We deem it unnecessary to consider the remaining assignments of error made by appellants Crowson and Noll, since in any event there must be new trials and the questions raised will probably not recur."

We have now further examined those assignments of error and are of opinion that error prejudicial to Crowson and Noll was probably committed in the trial court's instructions to the jury in the cases brought by the two passengers, in failing to charge in those cases on the provisions of G.S. 20-141(c) and their applicability to the duty of defendant Kinney under the evidence presented at the trial. We do not, however, find it necessary to decide this question, since we are of the opinion that in any event the request of defendant Kinney that the new trials awarded in the two passenger cases be against defendant Goley only should be denied.

[1, 2] That the Court has power to grant a partial new trial in appropriate cases has long been settled by the decisions of our Supreme Court. *Johnson v. Lewis,* 251 N.C. 797, 112 S.E. 2d 512, and cases cited therein. However, it is also settled beyond controversy that it is entirely discretionary with the Court whether it will grant a partial new trial in a particular case. *Paris v. Aggregates, Inc.,* 271 N.C. 471, 157 S.E. 2d 131; *Jenkins v. Hines Co.,* 264 N.C. 83, 141 S.E. 2d 1; *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164; *Benton v. Collins,* 125 N.C. 83, 34 S.E. 242; *Burton v. Railroad,* 84 N.C. 192. Our Supreme Court has stated that ". . . before such partial new trial is ordered it should clearly appear that no possible injustice can be done to either party," *Jarrett v. Trunk Co.,* 144 N.C. 299, 302, 56 S.E. 937, 938; and ". . . where the questions involved are so interwoven that they cannot be separated and a new trial allowed as to one or more issues, without prejudicing the rights of one or more of the parties or preventing a full and just trial of the whole matter, the power to grant a partial new trial should not be exercised." *Gregg v. Wilmington,* 155 N.C. 18, 30, 70 S.E. 1070, 1075.

[3] In the present case the evidence and the court's charge thereon relative to the conduct of the respective drivers of the two vehicles

involved in the collision was so interwoven and so interrelated that it would be impossible to give rational consideration to the conduct of one driver except as it was affected by and related to the simultaneous conduct of the other driver. Therefore a new trial of the passenger cases as to one driver should, in fairness to all parties, call for a fresh jury consideration of the interrelated conduct of both drivers.

After full consideration this Court, in the exercise of its discretion, denies petitioner Kinney's request for a partial new trial in the two passenger cases and awards a new trial in each case on all issues raised by the pleadings therein.

New trial.

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

CARL GORDON v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 6922SC455

(Filed 17 September 1969)

1. Insurance § 106— action under liability policy — use of term "and/or"

In an action to recover under an automobile liability insurance policy, use of the term "and/or" in the complaint is disapproved.

2. Pleadings § 2— sufficiency of complaint — legal conclusions

Plaintiff should do more than merely incorporate in his pleading allegations in the nature of legal conclusions.

3. Insurance § 105— action under insurance policy — complaint — showing coverage

In an action to recover under an insurance policy, plaintiff's complaint should show that the loss sued for was covered by the contract of insurance, and ordinarily it should set out facts sufficient to enable the court to decide that his claim is within the coverage of the policy or contract.

4. Insurance § 106— action by injured third party against liability insurer — sufficiency of allegations

In this action by an injured third party against an automobile liability insurer to recover upon a judgment obtained against the negligent driver in a prior action, the complaint fails to state a cause of action where it merely sets forth various legal conclusions joined by the term "and/or"

as to why the automobile in question was insured by defendant, it being impossible to determine on what basis plaintiff desires to rest his cause of action, and defendant's demurrer to the complaint was properly allowed.

APPEAL by plaintiff from *Thornburg, S.J.*, 19 May 1969 Civil Session, DAVIDSON County Superior Court.

This action was instituted 15 June 1966. In the original complaint, plaintiff alleged that defendant had issued a policy of liability insurance to Donald Joe Myers with a coverage of $5,000.00 for the benefit of any person injured on account of the negligent operation of an automobile by Myers; that on 3 November 1962 plaintiff, while riding as a guest passenger with Myers, sustained personal injuries when Myers made a left turn in front of another automobile thereby causing a wreck. Plaintiff also alleged that at the time of sustaining the injuries he was a minor, 19 years of age, and that by next friend he instituted an action against Myers and on 12 June 1963 procured a judgment in the amount of $12,500.00. Plaintiff alleged that on 22 March 1964 he became 21 years of age and that this action was instituted within 3 years of attaining majority.

Defendant answered, denying liability, pleading the 3-year statute of limitations and pleading further that any and all insurance policies issued by it to Myers had been cancelled prior to 3 November 1962. This answer was filed 1 July 1966.

The following is a chronological listing of the pleadings submitted and orders entered subsequent to the filing of the answer.

11 December 1967. Judge Olive entered an order permitting the plaintiff to file an amendment to the complaint.

11 December 1967. The plaintiff filed the first amendment to the complaint.

15 January 1968. The defendant filed a demurrer to the amended complaint for failure to state a cause of action.

16 January 1968. Judge Robert M. Martin entered an order sustaining the demurrer and permitting the plaintiff to file an amended complaint.

17 January 1968. The plaintiff filed a second amendment to the complaint.

9 September 1968. The defendant filed a second demurrer to the second amended complaint for failure to state a cause of action.

2 December 1968. Judge Thornburg entered an order sustaining the demurrer and permitting the plaintiff to file an amended complaint.

19 December 1968. The plaintiff filed a third amendment to the complaint, and this time restated the entire complaint.

14 January 1969. The defendant filed a third demurrer to the third amended complaint for failure to state a cause of action.

10 March 1969. Judge Beal entered an order sustaining the demurrer to the complaint as amended and allowing the plaintiff 30 days within which to file an amendment.

1 April 1969. The plaintiff filed a fourth amendment to the complaint.

29 April 1969. The defendant for the fourth time filed a demurrer to the complaint as amended the fourth time.

20 May 1969. Judge Thornburg entered an order sustaining the demurrer to the complaint for failure to state a cause of action. From this order an appeal was taken to this court.

William H. Steed, Attorney for plaintiff-appellant.

Deal, Hutchins and Minor by Edwin T. Pullen, Attorneys for defendant-appellee.

CAMPBELL, J.

[4] We are concerned solely with the complaint as finally amended which was before Judge Thornburg on 20 May 1969. This complaint does not contain "[a] plain and concise statement of facts constituting a cause of action, without unnecessary repetition." G.S. 1-122. To the contrary, this complaint presents a jumble of words, and we find it impossible to determine just exactly what cause of action the plaintiff is attempting to set out.

For instance, paragraph 12 of the amended complaint attempts to allege in substance that the 1953 Oldsmobile automobile in question was insured by defendant because:

A. It was an "owned automobile" within the meaning of the alleged policy; "and/or"

B. It was a "non-owned automobile" within the meaning of the alleged policy; "and/or"

C. It was an automobile which was to be substituted for the

automobile described in the alleged policy "and/or" a temporary substitute automobile "and/or"

D. An automobile designated in the alleged policy by explicit description as the motor vehicle with respect to which the coverage of the alleged policy was to be granted as required by law.

[1] "We do not look with favor upon the ambiguous and uncertain term 'and/or.'" *Thomas & Howard Co. v. Insurance Co.*, 241 N.C. 109, 84 S.E. 2d 337. The use of this ambiguous and uncertain term in the instant case compounds the confusion as to exactly on what basis the plaintiff desires to rest his cause of action.

[2-4] The pleadings must raise the precise issues which are to be submitted to the jury so that the court itself may not be left in a quandary as to the cause of action it is trying. Likewise the complaint should be worded so that the defendant will not be left in doubt as to how to answer and what defense, if any, to make. The plaintiff should do more than merely incorporate in his pleading allegations in the nature of legal conclusions. He should show that the loss sued for was covered by the contract of insurance, and ordinarily he should set out facts sufficient to enable the court to decide that his claim is included within the coverage of the policy or contract. *Brevard v. Insurance Co.*, 262 N.C. 458, 137 S.E. 2d 837.

In our opinion the ruling of Judge Thornburg should be sustained.

Affirmed.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT LEE BENNOR

No. 6920SC425

(Filed 17 September 1969)

Automobiles § 116; Constitutional Law § 13— speeding statute — trucks — police powers — public safety

The statute, G.S. 20-141, restricting the operator of a two-and-one-half ton truck to a maximum speed limit of 45 mph on the public highway while permitting passenger cars and pick-up trucks of less than one-ton capacity to operate at a maximum speed of 55 mph *is held* constitutional, since the difference in speed based upon weight and size of motor vehicles bears a real and substantial relationship to the public safety.

STATE *v.* BENNOR

APPEAL by defendant from *Exum, J.*, 28 April 1969 Session, MOORE County Superior Court.

The defendant was charged and convicted of operating a truck weighing 2½ tons on North Carolina Highway No. 27 at a speed of 55 miles per hour in violation of G.S. 20-141. This occurred at approximately 11:05 a.m. on 7 February 1969 at a point some six miles west of Carthage, North Carolina. At this location the maximum speed limit for trucks of the type being driven by the defendant was 45 miles per hour.

The defendant testified that he was driving approximately 55 miles per hour. He stated that

> "* * * I usually stay right around 55 and I was traveling approximately 55 miles per hour at this time. I was aware that the speed limit for trucks was 45 miles per hour and I entered my plea of not guilty to this charge 'for the simple fact that traffic moving slower than other traffic around is endangering himself and the life of other people behind him and traffic approaching, cars passing, and everything. As long as traffic moves together, you will not have the places where accidents will occur of passing, and I usually run with the traffic. * * *'"

From a jury verdict of guilty and imposition of sentence, defendant appealed.

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

Seawell, Van Camp & Morgan by William J. Morgan for defendant-appellant.

CAMPBELL, J.

The defendant presents only one question for determination in this case. Is G.S. 20-141, the statute which pertains to speed restrictions in the operation of motor vehicles upon the public highways, unconstitutional, in that trucks weighing 2½ tons are restricted to a maximum speed limit of 45 miles per hour on a public highway such as the one on which the defendant was operating on this occasion whereas "passenger cars, regular passenger carrying vehicles, and pick-up trucks of less than one-ton capacity" are permitted to operate at a maximum speed of 55 miles per hour?

The defendant cites no authority to support his position and simply asserts "[t]he engineering and mechanical achievements of

recent years are well known and a statute written over twenty (20) years ago is not necessarily relevant to today's improved highways and vehicles. * * * The conditions today do not call for such limitations since trucks are normally engineered and produced as well as passenger vehicles and criteria other than weight alone is necessary to so distinguish the proper speed limits."

There is no merit in the contentions made by the defendant. The motor vehicle speed statute G.S. 20-141 has been scrutinized and studied by the Legislature at every session of that body and has been amended, changed and altered constantly in keeping with changes in highway construction and public safety. This statute was "enacted for the protection of persons and property and in the interest of public safety, and the preservation of human life." *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916.

> "* * * The reasonableness of a statutory speed regulation is ordinarily regarded as a question for the legislative branch of the government. * * *" 60 C.J.S., Motor Vehicles, § 29(1)a, p. 226.
>
> "Furthermore there is a presumption that any Act passed by the Legislature is constitutional and all reasonable doubts will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *State v. Anderson,* 3 N.C. App. 124, 164 S.E. 2d 48. Affirmed, 275 N.C. 168, 166 S.E. 2d 49.

We think and hold that a difference in speed based upon weight and size of motor vehicles " 'bears a real and substantial relationship to the public health, safety, morals or some other phase of the public welfare.' " *State v. Anderson,* 275 N.C. 168, 166 S.E. 2d 49.

Affirmed.

PARKER and GRAHAM, JJ., concur.

PINEY MOUNTAIN PROPERTIES v. NATIONAL THEATRE SUPPLY COMPANY, A CORPORATION; CLARK C. TOTHEROW AND JOHN R. INGLE, SUBSTITUTE TRUSTEES

No. 6928SC193

(Filed 17 September 1969)

1. Judgments § 15— judgment by default final — effect

A judgment by default final as authorized by G.S. 1-211 establishes the matters adjudicated, if supported by verified allegations in the complaint, and concludes by way of estoppel.

2. Judgments § 15— judgment by default final — effect on answering defendants

In an action to restrain defendants from foreclosing under a deed of trust, judgment by default final against one defendant who failed to answer the complaint is held not to have prejudiced the rights of the answering defendants in their defense against plaintiff's allegations, the judgment by default final expressly providing that it did not adjudicate any rights between plaintiff and the answering defendants.

THE appeal in this case was originally argued 9 April 1969; and the decision of this Court (reported 4 N.C. App. 334, 166 S.E. 2d 840) was filed 30 April 1969 and certified to the Clerk of Superior Court of BUNCOMBE County on 12 May 1969.

The decision of this Court reversed in part the judgment of the trial court upon the grounds that Mohow, Inc., was not a party to the action. (4 N.C. App. 334, at 341, 166 S.E. 2d 840, at 845.)

The record on appeal shows that this action was instituted against the defendants named in the above caption on 13 January 1967. Also the record shows that on 24 March 1967 plaintiff filed a motion for leave to amend its complaint seeking to allege a cause of action against Mohow, Inc., and asking that Mohow, Inc., be made a party defendant. The motion to amend and the motion to make Mohow, Inc., a party defendant were allowed by appropriate order entered 24 March 1967. Because Mohow, Inc., failed to answer the complaint, plaintiff applied for and obtained, on 10 July 1967, a judgment by default final against Mohow, Inc. The said judgment by default final as it applies to Mohow, Inc., reads as follows:

> "1. That the note in the sum of $961,875.00 made by Host of America Motels of Asheville, Inc. to Mohow, Inc. and the deed of trust securing the same recorded in Deed of Trust Book 650 at page 375 in the office of the Register of Deeds of Buncombe County be and the same is hereby declared to be a cloud on the title of plaintiff in so far as Mohow, Inc. . . . (is) concerned;
>
> "2. That the said note and said deed of trust be and it is

hereby removed as a cloud on the title of the plaintiff in so far as any claim of ownership by Mohow, Inc. . . . (is) concerned and as to any claim of ownership by . . . (it) the same is declared null and void;

"3. That if the defendant National Theatre Supply Company, Inc. has any interest in the same, the same is hereby declared to be the only interest and that said note and deed of trust is extinguished except for the interest of National Theatre Supply Company, Inc., if any;

"4. That the question of the alleged interest of the defendant National Theatre Supply Company, Inc. in said note and deed of trust is specifically not passed on herein but the same is hereby retained to be later adjudicated;"

No appeal from this judgment was noted and no motion to set the same aside has been filed.

The case thereafter came on for trial at the 1 April 1968 Session, Buncombe Superior Court, after which judgment was entered on 23 October 1968, which judgment was the subject of the appeal heard in this Court on 9 April 1969.

On 9 June 1969 plaintiff petitioned this Court for rehearing upon the allegation that this Court had based its reversal of a portion of the judgment of the trial court upon the ground that Mohow, Inc., was not a party to the action, when, in fact, Mohow, Inc., had been made a party defendant on 24 March 1967. The petition to rehear was allowed by this Court on 18 June 1969 upon the following question:

"In view of the judgment by default final entered against Mohow, Inc., in this action on 10 July 1967, what status as a party to this action did Mohow, Inc., have at the time of the trial of issues between plaintiff and National Theatre Supply, and the entry of judgment by Martin, J., on 23 October 1968?"

The rehearing was docketed for the week of 25 August 1969 to be heard upon the foregoing question.

Van Winkle, Buck, Wall, Starnes & Hyde, by Herbert L. Hyde; and Bennett, Kelly & Long, by Robert B. Long, Jr., for plaintiff appellee.

McGuire, Baley & Wood, by Richard A. Wood, Jr., and James T. Rusher; and Myers, Sedberry & Collie, by Charles T. Myers, for defendant appellant.

BROCK, J.

[1] There is a distinct difference in a judgment by default final

as authorized by G.S. 1-211, and a judgment by default and inquiry as authorized by G.S. 1-212. *DeHoff v. Black,* 206 N.C. 687, 175 S.E. 179. A judgment by default final establishes the matters adjudicated, if supported by verified allegations in the complaint, and concludes by way of estoppel. *DeHoff v. Black, supra.* Judgment by default final, where there is no appeal or motion to set aside, concludes the controversy between plaintiff and defaulting defendant, and further proceedings between plaintiff and other defendants cannot adjudicate rights between plaintiff and the defaulting defendant against whom final judgment already had been entered.

[2] Also, it is equally clear that default final judgment against Mohow, Inc., did not adjudicate any rights between plaintiff and the answering defendants. The judgment by default final against Mohow, Inc., in no way prejudiced the rights of the answering defendants in their defense against plaintiff's allegations.

We adhere to our decision as filed 30 April 1969 (reported 4 N.C. App. 334, 166 S.E. 2d 840).

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. BAXTER WILEY

No. 6918SC386

(Filed 17 September 1969)

1. Criminal Law § 26— denial of plea of former jeopardy — sufficiency of evidence

In this prosecution for assault on a female, the trial court did not err in overruling defendant's plea of former jeopardy based upon defendant's contention that he had previously been tried and convicted of the same assault on a female charge and that he had served, or was serving, a prison sentence imposed therefor, where the State introduced court records showing that three warrants charging assault on a female had been issued against defendant, that he had been tried, convicted, sentenced and committed on two of the warrants and that the present case is based on the third warrant.

2. Criminal Law § 26— plea of former jeopardy — burden of proof

While no person may be twice put in jeopardy for the same offense, the burden is upon defendant to prove his plea of former jeopardy and show that the prior prosecution was for the same offense, both in law and fact.

3. Criminal Law § 26— plea of former jeopardy — questions for trial court

Defendant's plea of former jeopardy raises questions of fact and law for the trial judge to determine.

STATE *v.* WILEY

APPEAL by defendant from *May, S.J.*, at the 10 March 1969 Session of GUILFORD Superior Court (High Point Division).

Defendant was tried on a warrant issued 7 July 1964 in the Domestic Relations Court of Guilford County charging defendant with assault on a female, his wife, on 1 July 1964. Defendant was found guilty in said Domestic Relations Court on 14 July 1964 and was given an active prison sentence of eighteen months to begin at expiration of a sentence then being served. He gave notice of appeal to superior court and pending the appeal escaped from custody of the State Prison Department. On 29 January 1968, the State caused a *nolle prosequi* with leave to be entered in the case. Thereafter, the prison department regained custody of defendant and this case was reinstated.

When the case was called for trial in superior court, before pleading to the charge alleged in the warrant, defendant interposed a plea in bar alleging former jeopardy. He contended that he had theretofore been tried and convicted of the same assault on a female charge and that he had served, or was in process of serving, prison sentence imposed therefor.

The court conducted a hearing on the plea in bar and, after considering testimony by the defendant and certain court records, overruled the plea. Defendant pled not guilty to the charge, the jury found him guilty, and from active prison sentence imposed, defendant appealed to this Court.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Trial Attorney J. Bruce Morton for the State.

Haworth, Riggs, Kuhn & Haworth by William B. Haworth for defendant appellant.

BRITT, J.

The sole question presented on this appeal is did the trial judge err in overruling defendant's plea in bar. The answer is no.

[1] The only evidence offered by defendant in support of his plea was testimony given by him personally. He testified that he and his wife had considerable trouble in 1964 but that there were only two court cases arising from their difficulties; that he had served or was in process of serving the sentences imposed in both cases. The State contended and introduced court records showing that three warrants charging assault on a female had been issued against the defendant; that he had been tried, convicted, sentenced and committed on two of the warrants and the present case is based on the

third one. The trial judge found facts in accordance with the State's contentions.

[2, 3] While no person may be twice put in jeopardy for the same offense, the burden is upon defendant to prove his plea of former jeopardy and show that the prior prosecution was for the same offense, both in law and in fact. 2 Strong, N.C. Index 2d, Criminal Law, § 26, p. 516. Defendant's plea in this case raised a question of fact and law for the trial judge to determine. *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424. The conclusion reached by the court is fully supported by the findings of fact, and it is well settled that the findings of fact by the trial judge are binding upon the appellate courts of this State if supported by evidence. *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897, and cases therein cited. The findings of fact are fully supported by the evidence.

No error.

BROCK and VAUGHAN, JJ., concur.

STATE OF NORTH CAROLINA v. JACK BLEDSOE

No. 6922SC431

(Filed 17 September 1969)

Automobiles § 129— driving under the influence — instructions — definition of "under the influence" — use of word "qualities"

In this prosecution for driving a motor vehicle upon the public highways while under the influence of intoxicating liquor, defendant was not prejudiced by an instruction which defined a person as being under the influence of intoxicating liquor when he has consumed a sufficient quantity of some alcoholic beverage to cause him to lose the normal control of his bodily or mental "qualities," either or both, to such an extent that there is an appreciable impairment of his bodily or mental faculties, or both, although the use of the word "faculties" rather than "qualities" is preferred.

APPEAL by defendant from *McConnell, J.,* 21 April 1969 Session of DAVIE Superior Court.

Defendant was tried on his plea of not guilty to a bill of indictment charging him with the crime of driving a motor vehicle upon the public highways of North Carolina while under the influence of intoxicating liquor. The jury found defendant guilty, and from judgment imposed thereon, defendant appealed.

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

Peter W. Hairston for defendant appellant.

PARKER, J.

Appellant's sole assignment of error is that the trial court in its charge to the jury defined a person as being under the influence of intoxicating liquor "when he has consumed a sufficient quantity of some alcoholic beverage to cause him to lose the normal control of his bodily or mental *qualities,* either or both, to such an extent that there is an appreciable impairment of his bodily or mental faculties, either or both." (Emphasis added.) Appellant contends that the judge's use of the word "qualities" instead of the word "faculties" in the above quoted portion of the charge misled the jury to his prejudice and thereby entitled him to a new trial. We do not agree.

Denny, J. (later C.J.), speaking for the Court in the frequently cited case of *State v. Carroll,* 226 N.C. 237, 241, 37 S.E. 2d 688, 691, gave the approved definition as follows:

> "And a person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties."

While our Supreme Court has stated that the definition contained in the *Carroll* case is preferred and any substantial deviation therefrom is not approved, *State v. Ellis,* 261 N.C. 606, 135 S.E. 2d 584, certain minor variations from the approved language have been held not sufficiently prejudicial to require a new trial. *State v. Ellis, supra* (use of the words "a sufficient quantity of some intoxicating liquor or beverage, be it beer, wine or whiskey, be it a spoonful or a quart," *held* not sufficiently prejudicial to justify a new trial in light of evidence in the case); *State v. Lee,* 237 N.C. 263, 74 S.E. 2d 654 (use of the word "perceptibly" instead of the word "appreciably" *held* not sufficiently different in meaning and common understanding for the rule given in the *Carroll* case to have been misunderstood by the jury); *State v. Bowen,* 226 N.C. 601, 39 S.E. 2d 740 (use of the words "materially impaired" instead of the words "appreciable impairment" *held* not prejudicial error).

In the present case we do not think that the inadvertent use by the trial judge of the word "qualities" in place of the word "facul-

ties" at one point in the charge could have in any way misled the jury to defendant's prejudice. In the first place it should be noted that in the very same sentence the court required the jury to find an appreciable impairment of defendant's "bodily or mental *faculties,* either or both," which are the very words approved in the *Carroll* case. Furthermore, some authorities have equated the word "quality" with the word "faculty" when these words are used in the sense here employed. In Rodale, "The Synonym Finder" (printing of March 1967), the word "faculty" is defined as:

> "Ability for a particular kind of action, inherent physical capability, capacity, power, endowment, attribute, qualification, property, virtue, *quality,* . . . . . ." (Emphasis added.)

The same authority defines the word "quality" as:

> "Characteristic, attribute, property, trait, feature, character, . . . *faculty,* . . ." (Emphasis added.)

While, as our Supreme Court has admonished, adherence to the language approved in the *Carroll* case is to be preferred, the trial of cases in court has not been narrowed to the incantation of magic phrases, any variation from which will automatically require a new trial. In the light of the evidence in the present case we cannot conceive that the defendant could have been in anywise prejudiced by the slight deviation in the language employed by the trial judge or that the jury could have been misled thereby from applying correctly the rule laid down in the *Carroll* case.

No error.

CAMPBELL and GRAHAM, JJ., concur.

LESTER T. LAND, JR. v. NEILL PONTIAC, INCORPORATED, AND PONTIAC DIVISION OF GENERAL MOTORS, INCORPORATED (CORRECTLY GENERAL MOTORS CORPORATION, PONTIAC DIVISION)

No. 6922SC340

(Filed 17 September 1969)

1. Limitation of Actions § 4— accrual of right of action — three-year limitations — personal injury action — defective automobile

Plaintiff alleged that on 30 January 1965 he purchased an automobile manufactured by one defendant and sold by the other defendant and that on 22 March 1965 he lost control of the automobile and collided with a bridge abutment when the gasoline tank fell from the automobile. Plaintiff instituted an action for personal injuries against the defendants on 20 March 1968. *Held:* The cause of action accrued on 30 January 1965

and is therefore barred by the three-year statute of limitations, G.S. 1-52, since a cause of action accrues at the time of the commission of the negligent act or omission complained of and not at the time of infliction of injuries resulting therefrom.

2. Limitation of Actions § 4— accrual of right of action — nominal damages

A cause of action accrues at the time of an invasion of a plaintiff's right, and nominal damages, at least, naturally flow from such invasion.

APPEAL by plaintiff from *McConnell, J.*, 17 February 1969, Civil Session. DAVIDSON Superior Court.

The plaintiff Lester T. Land, Jr., instituted this action in the Superior Court of Davidson County, North Carolina, on 20 March 1968 to recover damages for personal injuries allegedly resulting from the negligence of the defendants, Neill Pontiac, Incorporated, and Pontiac Division of General Motors, Incorporated, in the manufacture and sale to plaintiff on 30 January 1965 of a 1965 Pontiac automobile. The plaintiff alleged that his injuries proximately resulted from the negligence of the defendants when the gasoline tank fell from the automobile while he was operating the same on public highway I-85 in Davidson County, causing him to lose control of the vehicle and collide with a bridge abutment. Each of the defendants filed answer denying the allegations of the complaint and pleaded contributory negligence and likewise pleaded the three-year statute of limitations in bar of the plaintiff's right to recover. The defendants' motion for judgment on the pleadings was allowed by the superior court and the plaintiff's action was dismissed upon a finding that the same was barred by the three-year statute of limitations. To the entry of the judgment, the plaintiff excepted and appealed, assigning error.

Clarence C. Boyan, for the plaintiff appellant.

Walser, Brinkley, Walser & McGirt, by Walter F. Brinkley, for Neill Pontiac, Incorporated, defendant appellee.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and Larry B. Sitton, for General Motors Corporation, defendant appellee.

HEDRICK, J.

[1] The sole question presented upon this appeal is whether the record discloses that the plaintiff's alleged cause of action was barred by the three-year statute of limitations. G.S. 1-52. The uncontroverted facts as they appear in the record are: (1) That the auto-

mobile manufactured by the defendant General Motors Corporation was sold to the plaintiff by the defendant Neill Pontiac, Incorporated, on 30 January 1965; (2) the collision wherein plaintiff alleged that he was injured occurred on 22 March 1965; (3) the summons commencing this action was issued 20 March 1968.

The pivotal issue is when does a cause of action for negligent injury accrue so as to commence the running of the statute of limitations?

[1, 2] The North Carolina Supreme Court has consistently held that the cause of action accrues at the time of the invasion of the right, and that nominal damages, at least, naturally flow from such invasion. *Motor Lines v. General Motors Corporation,* 258 N.C. 323, 128 S.E. 2d. 413; *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d. 508; *Lewis v. Godwin Oil Company,* 1 N.C. App. 570, 162 S.E. 2d. 135; 5 Strong, N.C. Index 2d., Limitation of Actions, Section 4. The plaintiff contends that his damages resulted from injuries sustained on 22 March 1965, but we hold that his cause of action for negligent damage accrued on 30 January 1965.

The cause of action accrues at the time of the commission of the negligent act or omission complained of, not at the time of infliction of injuries resulting therefrom. Insofar as the time of the accrual of the cause of action for the commencement of the running of the statute of limitations is concerned, there is no difference between a cause of action for negligent damage to property, and a cause of action for negligent injury to person. *Shearin v. Lloyd, supra; Motor Lines v. General Motors Corporation, supra.*

> "A judgment on the pleadings in favor of a defendant on defendant's plea in bar of the statute of limitations is proper when all the facts necessary to establish said plea are alleged or admitted in plaintiff's pleadings. *Reidsville v. Burton,* 269 N.C. 206, 152 S.E. 2d 147." *Lewis v. Godwin Oil Company, supra.* See also *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d. 384.

The judgment of the superior court is

Affirmed.

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

STATE OF NORTH CAROLINA v. ALBERT ALSTON
No. 6918SC405

(Filed 17 September 1969)

1. **Criminal Law § 161— appeal — exception to judgment**
The appeal itself is an exception to the judgment.

2. **Automobiles § 131— failing to stop after accident — plea of guilty — appeal**
In this appeal from sentence imposed upon defendant's plea of guilty to a violation of G.S. 20-166, no error appears on the face of the record where the trial judge found that the plea of guilty was made freely, understandingly and voluntarily, the warrant upon which defendant was tried is in proper form, the judgment is in proper form and is supported by the warrant and plea, and the sentence imposed is not excessive.

APPEAL by defendant from *Bowman, S.J.*, 14 April 1969 Session of Superior Court held in Greensboro Division of GUILFORD County.

Defendant was tried on a warrant charging him with a violation of G.S. 20-166. This statute states in detail the duty of the operator of a motor vehicle to stop in the event of accident or collision.

The defendant, an indigent represented by court-appointed counsel, in writing pleaded guilty as charged. The plea was found by the trial judge to have been made freely, understandingly and voluntarily.

From the sentence imposed, the defendant appealed to the Court of Appeals.

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

Charles W. Harden for defendant appellant.

MALLARD, C.J.

Defendant was represented in Superior Court by Mr. Kenneth M. Carrington. In defendant's brief it is asserted that Mr. Carrington was subsequently appointed district court judge before filing a brief herein and that defendant's present attorney was substituted.

[1] On the record in this case no error is asserted. The appeal itself is treated as an exception to the judgment. 1 Strong, N.C. Index 2d, Appeal and Error, § 26, p. 152.

[2] The plea of guilty was freely, understandingly and voluntarily made. The warrant is in proper form. The judgment is in proper form and is supported by the warrant and the plea. The sentence imposed is not excessive. No prejudicial error appears on this record.

Affirmed.

MORRIS and HEDRICK, JJ., concur.

LORENE SEBASTIAN v. DAISY M. KLUTTZ

No. 6919SC400

(Filed 22 October 1969)

1. Husband and Wife § 24— alienation of affections — criminal conversation — tort actions

Alienation of affections and criminal conversation are actions in tort.

2. Husband and Wife § 24— alienation of affections — nature of the tort

One who, without privilege to do so, purposely alienates a husband's affections from his wife, or who has sexual intercourse with him, is liable for the harm thereby caused to the wife's legally protected marital interests.

3. Husband and Wife § 24— alienation of affections — elements

The gravamen of the action for alienation of affections is the wife's loss of her protected marital right of the affection, society, companionship and assistance of her husband; and where there is no element of sexual defilement of her husband, malice must be shown.

4. Husband and Wife § 24— alienation of affections — malice

Malice as used in an action for alienation of affections means unjustifiable conduct causing the injury complained of.

5. Husband and Wife § 25— alienation of affections — sufficiency of evidence

In an action by the wife to recover damages for the alleged alienation of affections of her husband, there was ample evidence that plaintiff and her husband were married and that there was some love and affection existing between them which was alienated and destroyed by the wrongful and malicious acts of defendant; therefore, defendant's motion for judgment as of nonsuit was properly overruled.

6. Husband and Wife § 24— alienation of affections — husband's willingness to be seduced

The consent and apparent willingness on the part of the plaintiff's husband to be seduced cannot be claimed as a defense by the defendant in an action for alienation of affections.

7. Husband and Wife § 27— criminal conversation — nature of the tort

The term "criminal conversation" is synonymous with "adultery"; the cause of action is founded on the violation of the fundamental right of exclusive sexual intercourse between spouses, and also on the loss of consortium.

8. Husband and Wife § 27— criminal conversation — elements

The elements of criminal conversation are the actual marriage between the spouses and sexual intercourse between defendant and plaintiff's

spouse during the coverture; alienation of affections is not a necessary element.

9. Husband and Wife § 28— criminal conversation — sufficiency of evidence

Evidence in the wife's action for criminal conversation *is held* sufficient to justify submission of the issue to the jury.

10. Husband and Wife §§ 24, 27— alienation of affections — separation agreement — accrual of action

A valid separation agreement entered into between the spouses is not a bar to an action for alienation of affections or for criminal conversation which accrued prior to the date of the separation agreement.

11. Limitation of Actions § 4— accrual of actions — disability

A cause of action accrues at the time the right to institute and maintain a suit arises, if at such time the demanding party is under no disability.

12. Husband and Wife §§ 24, 27— alienation of affections and criminal conversation — damages — separation agreement

In the trial of wife's actions for alienation of affections and for criminal conversation, a separation agreement between the wife and her husband in which the wife released all rights arising out of the marriage (except for payments by the husband of $100 per month for 12 consecutive months) *is held* not to bar recovery for damages from defendant's tortious conduct that the wife may sustain after the execution of the separation agreement.

13. Husband and Wife § 1— marital duties of the husband

It is the duty of the husband, nothing else appearing, to supply support and maintenance to his wife, and this duty may be enforced in a court of law.

14. Husband and Wife § 10— separation agreement — release of right to support

The right of a married woman to support and maintenance is a property right which she may release by an agreement executed in accord with G.S. 52-6.

15. Husband and Wife § 26— alienation of affections — damages — loss of support

The wife's loss of support by the husband, if shown to be of value, is a proper element of damages in an action for alienation of affections.

16. Husband and Wife §§ 26, 29— damages — loss of support — burden of proof

In actions for alienation of affections and for criminal conversation, plaintiff has the burden of proving not only that a loss of support proximately resulted from the tortious acts of defendant, but also the value of such loss of support.

17. Husband and Wife § 11— separation agreement — intent of parties

The intent of the parties as expressed in a separation agreement is controlling.

18. Husband and Wife § 11— separation agreement — effect of contract rules

The ordinary rules governing the interpretation of contracts apply to separation agreements, and the courts are without power to modify them.

19. Husband and Wife § 24— alienation of affections — burden of proof

In a wife's action for alienation of affections, plaintiff has the burden of proof to show a loss of support as an element of the damages sustained, and she may do this by either circumstantial or direct evidence.

20. Husband and Wife § 26— alienation of affections — instruction on compensatory damages — loss of support — proximate cause — support payments

In an action for alienation of affections, the jury should have been instructed, on the issue of compensatory damages, that it was a question of fact for them to determine upon all the evidence presented, which included a separation agreement executed between plaintiff and her husband, whether plaintiff had sustained any loss of support as a proximate result of the tortious conduct of the defendant, and that if plaintiff had suffered no such loss they should not consider it as an element of damages, and, further, that if the husband had partially fulfilled his obligation to support his wife, then the plaintiff did not sustain a loss to the extent of such support.

21. Husband and Wife § 25— alienation of affections — mortuary tables — competency

In wife's action for alienation of affections, it was proper to admit the mortuary tables in evidence to prove the life expectancy of the wife.

22. Husband and Wife § 26— alienation of affections — instructions on life expectancy — mortuary tables

In wife's action for alienation of affections, the jury should have been instructed, on the issue of the wife's life exceptancy, that life expectancy is a question of fact and is to be determined from all the evidence in the case, and that the mortuary tables are not conclusive but are to be considered by the jury only as evidence in connection with other evidence on the age, health, constitution, and habits of the wife.

23. Husband and Wife §§ 26, 29— instructions on damages — future losses — present cash value

In wife's actions for alienation of affections and for criminal conversation in which the jury had been instructed that they could consider the life expectancy of the wife, it was prejudicial error for the trial judge, on the issue of compensatory damages, to fail to instruct the jury that they should limit their award for future losses to the present cash value or present worth of such losses.

24. Husband and Wife § 29— criminal conversation — instructions on compensatory damages — G.S. 1-180

In an action for criminal conversation, trial court's instructions on the issue of compensatory damages *is held* not to comply with G.S. 1-180 in that the law relating to compensatory damages was not applied to the facts.

25. Husband and Wife §§ 26, 29— alienation of affections — criminal conversation — identity of issues and damages — instructions

In this trial of the wife's actions for alienation of affections and for criminal conversation, where the two causes of action and the elements of damages were so connected and intertwined that each cause of action became an element of damages in the other cause of action, only one issue of compensatory damages and one issue of punitive damages should have been submitted to the jury; and the jury should have been instructed, *inter alia*, that plaintiff, if entitled to recover anything, was entitled to the present cash value of such damages she had sustained or would sustain to her legally protected marital interests as a proximate result of the wrongful conduct of defendant, the jury to consider loss of consortium, the circumstances tending to show sexual relations between plaintiff's husband and defendant, the wife's humiliation and mental anguish, and the wife's loss of support.

26. Husband and Wife § 26— alienation of affections — measure of damages

In wife's action for the alienation of affections of her husband, the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by her through the defendant's wrong, and, in addition thereto, she may also recover for the wrong and injury done to her health, feelings, or reputation.

27. Husband and Wife § 1— "consortium" defined

Consortium is the conjugal fellowship of husband and wife, and the right of each to the company, cooperation, affection, and aid of the other in every conjugal relation.

28. Husband and Wife § 29— criminal conversation — measure of damages

Although the measure of damages in an action for criminal conversation is incapable of precise measurement, the jury in awarding damages may consider the spouse's loss of consortium, mental anguish, humiliation, injury to health, and loss of support.

29. Husband and Wife § 26— alienation of affections — punitive damages

In an action for alienation of affections, punitive damages may be awarded where the conduct of the defendant was wilful, aggravated, malicious, or of a wanton character.

30. Husband and Wife § 29— criminal conversation — punitive damages

Punitive or exemplary damages may also be recovered in an action for criminal conversation.

SEBASTIAN *v.* KLUTTZ

APPEAL by defendant from *Crissman, J.*, 24 March 1969 Civil Session of Superior Court held in ROWAN County.

Plaintiff alleges two separate causes of action, one for alienation of the affections of plaintiff's husband and the other for criminal conversation.

Issues were submitted to and answered by the jury as follows:

"1. Did the defendant alienate the affections of the plaintiff's husband as alleged in the complaint?

ANSWER: Yes.

2. What amount of actual damages, if any, is the plaintiff entitled to recover for such alienation?

ANSWER: $15,000.

3. What amount of punitive damages, if any, is the plaintiff entitled to recover for such alienation?

ANSWER: $2,500.

4. Did the defendant engage in criminal conversation with plaintiff's husband as alleged in the complaint?

ANSWER: Yes.

5. What amount of actual damages, if any, is plaintiff entitled to recover for such criminal conversation?

ANSWER: $2,500.

6. What amount of punitive damages, if any, is the plaintiff entitled to recover for such criminal conversation?

ANSWER: $10,000."

From the judgment entered upon the verdict, defendant appealed to the Court of Appeals.

George L. Burke, Jr., for plaintiff appellee.

Robert M. Davis and Clarence E. Horton, Jr., for defendant appellant.

MALLARD, C.J.

The first question discussed by defendant in her brief concerns the assignment of error relating to the failure of the court to allow her motion for nonsuit at the close of all the evidence in the cause of action alleging alienation of affections.

[1] These actions alleging alienation of affections and criminal

conversation are actions in tort. *Hardison v. Gregory,* 242 N.C. 324, 88 S.E. 2d 96 (1955).

[2] One who, without privilege to do so, purposely alienates a husband's affections from his wife, or who has sexual intercourse with him, is liable for the harm thereby caused to her legally protected marital interests. *Brown v. Brown,* 121 N.C. 8, 27 S.E. 998 (1897); Restatement, Torts, § 690; *Hinnant v. Power Co.,* 189 N.C. 120, 126 S.E. 307 (1925). "The legally protected marital interests of one spouse include the affections, society and companionship of the other spouse, sexual relations and the exclusive enjoyment thereof. In the case of a husband, they include the wife's services in the home. In the case of the wife, they include support by the husband." Restatement, Torts, § 683.

[3, 4] The gravamen of the action for alienation of affections is the wife's loss of her protected marital right of the affection, society, companionship and assistance of her husband, and where there is no element of sexual defilement of her husband, malice must be shown. Malice as used in an action for alienation of affections means "unjustifiable conduct causing the injury complained of." *Rose v. Dean,* 192 N.C. 556, 135 S.E. 348 (1926). Malice also means "a disposition to do wrong without legal excuse (*R. R. v. Hardware Co.,* 143 N.C. 54), or as a reckless indifference to the rights of others." *Cottle v. Johnson,* 179 N.C. 426, 102 S.E. 769 (1920).

In 41 Am. Jur. 2d, Husband and Wife, § 467, it is said:

> "Alienation by persuasion differs from alienation by adultery in that, in the former, loss of consortium must be proved, while in the latter, it is conclusively presumed."

In the case of *Bishop v. Glazener,* 245 N.C. 592, 96 S.E. 2d 870 (1957), the Supreme Court said:

> "The essential elements of an action for alienation of affections are the marriage, the loss of affection or consortium, the wrongful and malicious conduct of the defendant, and a causal connection between such loss and conduct. . . ."
>
> * * *
>
> "The wrongful and malicious conduct of the defendant need not be the sole cause of the alienation of affections. It suffices, according to the rule in a large majority of the cases, if the wrongful and malicious conduct of the defendant is the controlling or effective cause of the alienation, even though there were other causes, which might have contributed to the alienation. Anno.

19 A.L.R. 2d, sec. 6, p. 500 *et seq.*, where the cases are cited; 27 Am. Jr., Husband and Wife, p. 129.

Manifestly, if the affection of the wife was destroyed by the habits and conduct of the husband, or other cause, without the malicious interference or procurement of a third person, then such third person would not be liable. *Hankins v. Hankins, supra.* It is fundamental to a recovery against a third person that the alienation of affections resulted from his malicious interference. Anno. 108 A.L.R., pp. 426-7, where many cases are cited; Anno. 19 A.L.R. 2d, pp. 471-509, Element of Causation in Alienation of Affections Action."

Defendant contends that plaintiff's evidence failed to show that any genuine love and affection existed between plaintiff and her husband or that defendant had alienated any love and affection which did exist.

[5] The evidence of the plaintiff tended to show that she and her husband were married 16 October 1940, and they have one son who is married and has his own home. On 11 April 1968 plaintiff's husband left the home they were occupying. Plaintiff testified:

"Mr. Sebastian and I have been separated before during our marriage. The first separation was in 1963. We remained apart then for two months, but we seen each other during that time. We were then reconciled. The second separation occurred approximately a year later. Mr. Sebastian left the premises on the first occasion and I left on the second occasion. I seen that after I had left out that it was better for me to go back, I felt more for Mr. Sebastian that I had thought I did when I had left. I returned to 1310 Glenwood Avenue, and Mr. Sebastian and I lived together until he left April 11, 1968."

Plaintiff also testified that on the occasion when she left her husband they remained separated for five weeks. On both occasions they had reestablished their home after the separation.

Plaintiff testified that her relationship with her husband was good during Christmas 1967 and that during February 1968 he expressed affection for her on a number of occasions.

Plaintiff's evidence tended to show that defendant's husband died in July 1967. In November 1967 plaintiff's husband started visiting defendant in defendant's home and that thereafter they were seen together frequently in various places by the neighbors and others.

Mrs. Margaret Brooks, a witness for plaintiff, testified:

"I have seen Mr. Sebastian in or around the residence occupied by Mrs. Kluttz in the past twelve months. I was in my own yard working, mowing, and he was across the street in Mrs. Kluttz's yard and she was there too. They were working in the yard. I have seen them several times. I have seen Mr. Sebastian there in the evening and he would come out in the morning to go to work on John's Piano truck, and that would be about 6:30 or a quarter to seven."

[6] The evidence also showed that some time prior to the separation, the husband had been unfaithful to his marriage vows. However, this past activity had been forgiven and condoned by the plaintiff prior to the time defendant interfered with the marital relationship existing between plaintiff and her husband. Evidence also tended to show that the tranquility of the home may have been impaired by the drinking and other conduct of the plaintiff's husband. However, this conduct does not appear to have been more than a contributing cause of the separation of plaintiff and her husband. The evidence tended to show defendant's conduct was the controlling and effective cause. Until defendant arrived on the scene, plaintiff and her husband had always resolved their differences. The defendant cites *Warner v. Torrence,* 2 N.C. App. 384, 163 S.E. 2d 90 (1968), in which this Court sustained a nonsuit of the cause of action for alienation of affections on the grounds that the plaintiff failed to show the existence of any genuine love and affection which was alienated and destroyed by the defendant. We think the facts in *Warner v. Torrence* are distinguishable from the facts in the case before us. Here, the evidence tended to show that some love and affection existed between plaintiff and her husband and that they had lived a relatively happy married life for approximately three years prior to the final separation on 11 April 1968. Although plaintiff's life with her husband apparently had not been as happy and tranquil as some marriages are, she was entitled to possess and enjoy all of her legally protected marital interests free from interference by the defendant. The husband and plaintiff were living together until the defendant, after the death of defendant's husband, became involved with plaintiff's husband and finally encouraged him to leave his wife in order to live with her. The consent, and apparent willingness, on the part of the plaintiff's husband to be seduced cannot be claimed as a defense by defendant because the husband cannot thus affect plaintiff's right to her legally protected marital interests. *Powell v. Strickland,* 163 N.C. 393, 79 S.E. 872 (1913).

The only evidence offered by the defendant was a separation agreement entered into between plaintiff and her husband dated 16

July 1968. The execution of the separation agreement was duly acknowledged by plaintiff before the Clerk of the Superior Court of Rowan County on 29 July 1968.

Plaintiff testified on cross-examination:

"The reason that the deed of separation was entered into was because of the differences between my husband and me. I felt it was to the best interest of my husband and me to sign the deed of separation since he had already took up residence with Mrs. Kluttz."

[5] There was ample evidence, when viewed in the light most favorable to the plaintiff, that the plaintiff and her husband were married, and that there was some love and affection existing between them which was alienated and destroyed by the wrongful and malicious acts of the defendant. We think in this case the existence of and extent of such love and affection was a matter to be considered and determined by the jury.

We are of the opinion and so hold that the court correctly overruled defendant's motion for judgment as of nonsuit in the action for alienation of affections.

[7] "The term 'criminal conversation' is synonymous with 'adultery.' The cause of action is founded on the violation of the fundamental right of exclusive sexual intercourse between spouses, and also on the loss of consortium." 42 C.J.S., Husband and Wife, § 697.

[8] The elements of the cause of action for criminal conversation are the actual marriage between the spouses and sexual intercourse between defendant and plaintiff's spouse during the coverture. Alienation of affections is not a necessary element. 42 C.J.S., Husband and Wife, § 698.

In 41 Am. Jur. 2d, Husband and Wife, § 476, p. 402, it is written:

"A fundamental right that flows from the relation of marriage, and one that must be maintained inviolate for the well-being of society, is that of one spouse to have exclusive marital intercourse with the other; and whenever a third person commits adultery with either spouse, he or she commits a tortious invasion of the rights of the other spouse, from which a cause of action for criminal conversation arises."

[9] Defendant has apparently abandoned her motion for judgment of nonsuit to the cause of action alleging criminal conversation. If not, we hold that there was ample circumstantial evidence of criminal conversation between the defendant and plaintiff's hus-

band to require submission of the issue to the jury. *Hardison v. Gregory, supra; Powell v. Strickland, supra.*

[10] The next question defendant raises relates to the separation agreement between plaintiff and her husband, as a bar to the cause of action and its effect on the introduction of the evidence and the charge of the court. This separation agreement was introduced in evidence by defendant without objection on the part of the plaintiff.

[11] The general rule is that the cause of action accrues at the time the right to institute and maintain a suit arises, if at such time the demanding party is under no disability. 5 Strong, N.C. Index 2d, Limitation of Actions, § 4, p. 234; *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967). In the instant case the causes of action had accrued and were complete prior to the execution of the separation agreement on 29 July 1968.

[10] In 2 Lee, N.C. Family Law, § 207, p. 458, it is stated: "The fact that the plaintiff has become divorced from the alienated spouse subsequent to the wrongful acts of the defendant is no bar to the cause of action." In like manner, a valid separation agreement entered into between the spouses is not a bar to the cause of action for alienation of affections or criminal conversation accruing prior to the date of the separation agreement.

[12] Defendant claims that by the terms of the separation agreement of 29 July 1968, plaintiff released her husband from his legal duty to support her, and therefore she would be entitled to recover damages only up to the date of the separation agreement. We do not agree with this interpretation. The question of the effect of a separation agreement on an action to recover damages for alienation of affections and criminal conversation is one of first impression in this jurisdiction.

[13] It is the duty of the husband, nothing else appearing, to supply support and maintenance to his wife, and this duty may be enforced in a court of law.

[14] In 4 Strong, N.C. Index 2d, Husband and Wife, § 10, p. 291, it is said: "The right of a married woman to support and maintenance is a property right which she may release by an agreement executed in accord with G.S. 52-6." There is no contention by either of the parties to this action that the separation agreement was not executed as required by G.S. 52-6.

[15] The right of the wife to support by the husband is one of her legally protected marital interests. "It is established by the au-

thorities that loss of support, if shown to be of value, is a proper element of damages in a case of this kind." *Johnston v. Johnston*, 213 N.C. 255, 195 S.E. 807 (1938).

The pertinent parts of the separation agreement read as follows:

"NOW, THEREFORE, to that end and for and in consideration of the mutual covenants and agreements hereinafter contained and set forth, the said Walter A. Sebastian, Sr., party of the first part and Lorene T. Sebastian, party of the second part, do hereby agree as follows:

The residence known as 1310 Glenwood Avenue together with a rectangular shaped lot fronting 125 feet on Glenwood Street shall be conveyed to Lorene T. Sebastian and she shall own this property in fee simple.

The residence known as 1308 Glenwood Avenue together with a rectangular shaped lot fronting 100 feet on Glenwood Avenue shall be conveyed to Walter A. Sebastian Sr. and he shall own this property in fee simple.

The present mortgage indebtedness in the amount of $5,210.35 together with this lien therefore shall be divided equally for security purposes between 1308 Glenwood Avenue and 1310 Glenwood Avenue and the husband shall, subject to the lending agency's approval, pay $2605.18 of the current balance and the wife shall assume and pay the other $2605.18.

The husband, Walter A. Sebastian, Sr. agrees to pay to Mrs. Annie P. Trexler, mother of Lorene T. Sebastian, the sum of $3,718. This amount being in reimbursement for the money paid by Mrs. Trexler in repairing the residence at 1308 Glenwood Avenue and tapping into the sewer lines at said residence and for the stove and oven now located in said residence. It is understood by the parties hereto that until the aforesaid amount of $3718 is paid that Mrs. Trexler shall have a right to live at the 1308 Glenwood Avenue residence and shall be entitled to the exclusive possession thereof but when the said amount of $3718 is paid to Mrs. Trexler then the residence at 1308 Glenwood Avenue shall on that day belong to the husband, Walter A. Sebastian, Sr. and he will have the right to it on that day and the right to sell it or otherwise dispose of this property free of any claim on the part of Mrs. Trexler.

It is further understood and agreed that when Mrs. Trexler moves from the residence at 1308 Glenwood Avenue she shall remove only her personal effects and household property that

belongs to her and all the other furnishings and appliances at 1308 Glenwood Avenue shall belong to the husband, Walter A. Sebastian, Sr.

The husband agrees to pay his wife $100 per month for 12 consecutive months beginning on the 15 day of August, 1968, and the husband agrees to pay to Walter Woodson, Jr., his wife's attorney, the sum of $250 within thirty days after the execution of this agreement.

Household items shall be divided as follows:

To the husband;

1. Pictures of guns hanging in 1310 residence.
2. One Cherry bedroom suite from 1310 residence.

The said party of the first part, the husband, does hereby release and relinquish unto said Lorene T. Sebastian, her executors and administrators, heirs and assigns, all his rights to share in her estate at her death by virtue of her will or by descent, distribution or otherwise and does further release and relinquish any and all other rights arising out of the marriage relationship in and to any and all real and personal property now owned by his said wife or which may be hereafter acquired by her, and hereby agrees that she may henceforth acquire, hold, manage, convey and alienate her said property without his knowledge or consent just the same as if she had never been married to him, and further does hereby release and relinquish the right to administer upon her estate.

That the said party of the second part, the wife, *does hereby release and relinquish* unto said Walter A. Sebastian, Sr., his executors and administrators, heirs and assigns, *all her right to share in his estate at his death by virtue of his will or by descent, distribution or otherwise and does further release and relinquish any and all other rights arising out of the marriage relationship in and to any and all real and personal property now owned by her said husband or which may be hereafter acquired by him, and hereby agrees that he may henceforth acquire, hold, manage, convey and alienate his said property without her knowledge or consent just the same as if he had never been married to her, and further does hereby release the right to administer upon his estate.*

Both parties hereto agree that henceforth neither of them will in any manner, molest or interfere with the personal rights,

liberties, privileges and affairs of the other, and each shall henceforth live his or her own personal life as he or she may see fit, unrestricted in any manner.

It is the purpose and intent of this agreement to separate the lives and estates of the parties hereto to the end that each of the parties may go his or her way, *and each live his or her own personal life, unmolested, unhampered and unrestricted by the other, just the same as if the parties had never been married to each other.*" [Emphasis Added.]

The pertinent parts of the separation agreement which defendant contends prohibit plaintiff from recovering for loss of support are shown in *italics* in the separation agreement set forth above.

[16] In this case the plaintiff had the burden of proving not only that a loss of support proximately resulted from the tortious acts of defendant, but also the value of such loss of support.

[17, 18] The intent of the parties as expressed in a separation agreement is controlling. *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826 (1961). "The ordinary rules governing the interpretation of contracts apply to separation agreements and the courts are without power to modify them." *Church v. Hancock,* 261 N.C. 764, 136 S.E. 2d 91 (1964); 4 Strong, N.C. Index 2d, Husband and Wife, § 11.

Defendant does not say in what manner the separation agreement was responsible for ending the loss of affections, comfort, society, companionship and exclusive enjoyment of sexual relations with the husband, nor how they can be determined to end on any certain date.

In McCormick on Damages, § 112, it is said: "Compensation is not limited to the injury which has accrued up to the time of bringing the suit or the time of trial, but if it appears that the estrangement or its effects will be permanent or will continue for some time in the future, the damages must cover this once and for all."

The experience by plaintiff of the humiliation, the mental anguish and hurt feelings, the experience of the irrevocable loss of conjugal kindness, and the companionship of the marital relationship did not end for plaintiff on 29 July 1968 when she and her husband signed the separation agreement.

In addition, the record does not indicate that the husband has complied with or "performed" his obligation under the separation agreement by making the payments therein provided for, conveying the land, or dividing the personal property.

[12] Applying the rules of construction set forth herein, we are of the opinion and so hold that the separation agreement in this case does not operate as a bar to, or release of, the right of plaintiff to recover for any temporary or permanent loss of support the jury may find from the evidence she has or will sustain as a proximate result of the tortious conduct of the defendant, and the jury should have been so instructed.

In this case we are of the opinion and so hold that the judge committed error in charging the jury on the second issue, as follows:

> "[A]nd that you may take into consideration the maintenance and the support that the plaintiff has been accustomed to getting and is entitled to get from a marriage wherein the standard of living and the scale in which they were living had been, and which may have been indicated here from the evidence."

This instruction was not clear and tended to confuse the jury on the question of loss of support, if any, sustained by plaintiff.

[19] This issue upon which the jury was being thus instructed relates to compensatory damages for the loss of alienation of affections. Unless damages result from the tortious act of alienation of affections, there can be no recovery. The burden of proof was on the plaintiff to show a loss of support as an element of the damages sustained. She is permitted to do this by either circumstantial or direct evidence.

[20] The jury should have been instructed that it was a question of fact for them to determine, based on all the evidence presented, including the separation agreement, whether plaintiff had or would sustain any loss of support as a proximate result of the tortious conduct of the defendant, and if plaintiff had suffered no such loss, they should not consider such as an element of damages. The jury should have been further instructed that if the husband had partially fulfilled his obligation to support his wife, then to the extent thereof, the plaintiff did not sustain a loss.

In 42 C.J.S., Husband and Wife, § 694, it is said:

> "The fact of divorce may be pleaded and considered in mitigation of damages, *and a separation agreement whereby either party releases all claims against the other including the right to demand any aid or support, bars recovery for loss of such aid and assistance,* although not for loss of love and affection." [Emphasis Added.]

[21] Defendant contends that the court committed error in al-

lowing the mortuary tables in evidence. We do not agree. We think that it was proper to prove the life expectancy of the plaintiff under the circumstances of this case.

[22] Also, defendant assigns as error the failure of the judge to charge on the second issue as to how the jury was to consider the mortuary tables. The judge did not specifically refer to the mortuary tables in the charge but did say "and you may take into consideration along with all other evidence the life expectancy of the plaintiff." This instruction was not sufficient. The judge should have instructed the jury that where the question of the life expectancy of a person is involved, it is for the jury to determine the life expectancy from all the evidence in the case; that life expectancy is a question of fact; that the mortuary tables are not conclusive but are to be considered by the jury only as evidence on the question of life expectancy in connection with other evidence as to age, health, constitution, and habits of such person. Stansbury, N.C. Evidence 2d, § 101; *Harris v. Greyhound Corporation,* 243 N.C. 346, 90 S.E. 2d 710 (1956); *Derby v. Owens,* 245 N.C. 591, 96 S.E. 2d 851 (1957).

[23] Defendant contends, and we agree, that the court also committed error in its charge as to this second issue in that it did not limit the recovery of any award the jury should make for future damages to its present worth.

Plaintiff appellee cites *Johnston v. Johnston, supra,* in which Chief Justice Stacy said:

> "It is urged for error that in enumerating the elements of damage 'loss of his assistance' was included, without limiting such future loss, if any, to its present worth or present cash value. *Lamont v. Hospital,* 206 N.C., 111, 173 S.E., 46.
>
> Without making definite ruling upon this point it is sufficient to say that no reference is made in the court's charge to any future loss of assistance. *Murphy v. Lbr. Co.,* 186 N.C., 746, 120 S.E., 342. It is established by the authorities that loss of support, if shown to be of value, is a proper element of damages in a case of this kind."

Defendant appellant cites 3 Strong, N.C. Index 2d, Damages, § 16. Defendant also cites *Bryant v. Carrier,* 214 N.C. 191, 198 S.E. 619 (1938), which was an action for alienation of affections and criminal conversation in which the jury found that there was no alienation of affections but that the defendant did have "immoral relations" with the plaintiff's wife as alleged in the complaint and awarded compensatory and punitive damages. The Court said:

"The exception to the court's instruction to the jury, that if they found the plaintiff's injury and loss would continue in the future they should award the present value of such prospective damages as they found would accrue, cannot be sustained. While compensation cannot be based upon a mere conjectural probability of future loss (17 C.J., 764), here there was evidence to justify the instruction to which the exception was noted. 'If it appears that the estrangement (between husband and wife) or its effects will be permanent, or will continue for some time in the future, the damages must cover this once and for all.' McCormick on Damages, 409; *Riggs v. Smith,* 62 Idaho, 43; 17 C.J., 762; 30 C.J., 1148."

In the case before us the jury had been instructed that they could consider the life expectancy of the plaintiff. We are of the opinion and so hold that it was prejudicial error for the judge, on the issue of compensatory damages, to fail to instruct the jury that they should limit the award, if any, for future losses to the present cash value or present worth of such losses. *Faison v. Cribb,* 241 N.C. 303, 85 S.E. 2d 139 (1954).

[24] Defendant also assigns as error portions of the charge of the court on the issues of compensatory and punitive damages in the action for criminal conversation. The entire charge of the court with respect to the fifth and sixth issues is as follows:

"If you answer this issue 'Yes,' you must consider the fifth issue. If you answer it 'No,' you need not consider the fifth issue or the sixth issue.

Now, members of the jury, you will have to determine from the evidence and by its greater weight whether or not the plaintiff is entitled to actual damages for some criminal conversation, and you will have to determine from all the evidence what that might be worth. What such a defilement of the marriage bed would be worth. The plaintiff has sued for Five Thousand Dollars and she says that wouldn't be too much.

The defendant says you ought not to get to that issue at all; but that if you do, that there hasn't been anything much destroyed either; and that it ought not to be much. The plaintiff says that you ought to give compensary (sic) damages under the sixth issue, 'What amount of punitive damages is the plaintiff entitled to recover for criminal conversation?'

The court charges you as to whether or not you give any punitive damages is a matter in your wise discretion. It is up to you

as to whether or not that you feel under all these circumstances that there should be from the evidence and by its greater weight, 'Smart-money,' so to speak, or punitive damages.

Now, the court has defined punitive damages to you heretofore and will not repeat it. You must determine what, if any, that should be within the limit of what has been asked for in the complaint.

ANY OTHER CONTENTIONS?

For the Plaintiff: No, sir.

For the Defendant: No, sir.

COURT: You may take these issues, retire to the jury room, and say how you find."

The parties stipulated as to the correctness of the record, and the record reveals the above as being the entire charge of the court on the fifth and sixth issues. We are bound by the record.

The above instruction does not comply with the provisions of G.S. 1-180 in that the law is not applied to the facts. The final mandate as to each issue does not clearly instruct the jury what they should consider and find in answering the issues. The jury was left to wander in the field of speculation and conjecture. Although the jury had been instructed under the third issue as to punitive damages generally, and it was not necessary to repeat such instructions, they were not properly instructed as to the measure of compensatory damages for criminal conversation.

[25] The court in its final mandate on the compensatory issue in the action for alienation of affections did not instruct the jury to consider the criminal conversation between plaintiff's husband and defendant.

In Restatement, Torts, § 683, comment k., on the question of damages for alienation of affections, it is stated:

"In an action for alienation of affections, a husband is entitled to recover damages for the loss of his wife's affections and his emotional distress caused thereby, even though there is no harm to any other incident of the marriage relation. Thus, if there is a loss of affections, the husband can recover, although the wife still lives and cohabits with him and performs all the household services to which he is entitled. If, however, the alienation of affections is accompanied or followed by loss of services in the home, a separation or divorce, or sexual relations with the defendant, such harms may be included by the jury in assessing

the amount of damages recoverable. In determining the amount to be awarded for loss of affections and emotional distress resulting therefrom, the character of the relations existing between the husband and the wife before the defendant's interference therewith is a factor to be considered. If the marital relation was already strained and impaired by frequent quarrels so that the parties were not living happily together, or if for other reasons the affection of the alienated spouse was slight, the amount of recovery will be diminished thereby."

In Restatement, Torts, § 685, comment e., on the question of damages for criminal conversation, it is stated:

"The plaintiff is entitled to recover for emotional distress resulting from the fact that the defendant has had sexual relations with his wife. In the determination of the amount recoverable for such emotional distress, the husband's neglect or indifference toward his wife is a factor to be considered. If, during the marriage with the plaintiff, the wife has repeatedly had sexual relations with the defendant, the plaintiff's damages will be enhanced, if she has previously had sexual relations with other men his damages will be reduced. If, in addition to the loss of exclusive cohabitation with his wife, the plaintiff has lost her affections and service in the home, he is entitled to recover therefor. He is also entitled to recover for any medical expenses incurred by reason of the pregnancy or illness of his wife resulting from the intercourse with the defendant."

Also, in Restatement, Torts, § 690, it is stated:

"One who alienates the affections of a husband or induces a husband to separate from his wife or not to return to her or who has sexual intercourse with him is liable to the wife for harm thereby caused to any of her legally protected marital interests under the same conditions as would permit the husband to recover for similar wrongs as stated in §§ 683-689."

Under comment b. of § 690, it is stated that:

"In an action by a married woman under the rule stated in this Section, she may recover for the loss of her husband's affections and other incidents of the marriage relation which receive legal protection on behalf of the husband, as, for example, the exclusive right to cohabitation with him and the right to his society and companionship. The damages may include recovery for emotional distress caused by an invasion of such interests. If the marriage relation is disrupted and the husband is no

longer supporting her, this fact may be considered in the determination of damages, and in this connection the wealth of the husband and the position in society which the spouses enjoyed are significant factors. If there has been a divorce, any alimony which the wife is awarded or any property settlement by her husband are factors indicating the extent to which she has or has not been deprived of support by the defendant's misconduct."

In *Powell v. Strickland, supra,* which was an action to recover damages for criminal conversation with plaintiff's wife and the alienation of her affections, the Court said:

"The consent of the wife to her own defilement is no defense to the action [citations omitted], since the wrong relates to the injury which the husband sustains by the dishonor of his marriage bed; the alienation of his wife's affections; the destruction of his domestic comfort; the suspicion cast upon the legitimacy of her offspring, the loss of consortium, or the right to conjugal fellowship of his wife, to her company, cooperation and aid in every conjugal relation; the invasion and deprivation of his exclusive marital rights and privileges; his mental suffering, injured feelings, humiliation, shame and mortification, caused by the loss of her affections and the disgrace which the tortious acts of defendant have brought or heaped upon him, and which are proximately caused by said wrong. [citations omitted.] And for these results the plaintiff is entitled to recover compensatory damages, as the authorities cited will show. He may also have added by the jury, in their sound discretion, a reasonable sum as punitive, vindictive, or exemplary damages, or smart money, for the willful and wanton conduct of defendant towards him; and these damages, though not susceptible of proof at a money standard, may be fixed by the jury in view of all the facts and circumstances."

[26] In a cause of action for alienation of affections of the husband from the wife, the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by her through the defendant's wrong. In addition thereto, she may also recover for the wrong and injury done to her health, feelings, or reputation. *Bryant v. Carrier, supra; Cottle v. Johnson, supra;* 42 C.J.S., Husband and Wife, § 692.

[27] "Consortium" is defined in Black's Law Dictionary, 4th Ed., as follows:

"Conjugal fellowship of husband and wife, and the right of each

to the company, co-operation, affection, and aid of the other in every conjugal relation."

[28] In a cause of action for criminal conversation the measure of damages is incapable of precise measurement; however, it has been held, and we think properly so, that the jury in awarding damages may consider the loss of consortium, mental anguish, humiliation, injury to health, and loss of support by the wife. *Bryant v. Carrier, supra.*

[25] In an action for alienation of affections, criminal conversation is not a necessary element. In an action for criminal conversation, the alienation of affections is not a necessary element. However, on the issues of compensatory and punitive damages, in this case where there is evidence of both, they both become elements of the damages in each cause of action.

[29] In actions for alienation of affections punitive damages may be awarded in addition to compensatory damages where the conduct of the defendant was willful, aggravated, malicious, or of a wanton character. *Powell v. Strickland, supra; Chestnut v. Sutton,* 207 N.C. 256, 176 S.E. 743 (1934).

[30] Punitive or exemplary damages may also be recovered in an action for criminal conversation. 42 C.J.S., Husband and Wife, § 706; *Chestnut v. Sutton, supra.*

[25] In this case we are of the opinion and so hold that because the two causes of action and the elements of damages here are so connected and intertwined, only one issue of compensatory damages and one issue of punitive damages should have been submitted to the jury. We also hold that as to this issue of compensatory damages, the jury should have been instructed, *inter alia,* that plaintiff, if entitled to recover anything, was entitled to recover the present cash value of such damages as the jury might find by the greater weight of the evidence she had sustained or would sustain to her legally protected marital interests as a proximate result of the wrongful conduct of the defendant. In arriving at their verdict on this issue, the jury should consider loss of consortium, the circumstances tending to show sexual relations between defendant and plaintiff's husband, the humiliation and mental anguish caused by the invasion of such interests, and any loss of support the jury may find she has and will sustain as a proximate result of the tortious conduct of the defendant. *Cottle v. Johnson, supra; Johnston v. Johnston, supra; Powell v. Strickland, supra; Hyatt v. McCoy,* 194 N.C. 760, 140 S.E. 807 (1927); *Bryant v. Carrier, supra; Chestnut v. Sutton, supra;* McCormick on Damages, § 112.

Plaintiff has other assignments of error, some of which may have merit; but since they probably will not recur on a new trial, we do not deem it necessary to discuss them.

For the errors committed, there must be a

New trial.

MORRIS and HEDRICK, JJ., concur.

ELSIE MAE WAGONER v. CAROLYN LEWEY BUTCHER AND ROBERT ALEXANDER BUTCHER

No. 6915SC450

(Filed 22 October 1969)

1. Automobiles § 40— pedestrians — right-of-way — assumptions

To a pedestrian the right-of-way means that he has the right to continue in his direction of travel without anticipating negligence on the part of motorists, and unless the circumstances are sufficient to give him notice to the contrary, he may act upon the assupmtion, even to the last moment, that motorists will recognize such a preferential right.

2. Automobiles § 40— pedestrians — duty to yield right-of-way

The pedestrian's right-of-way is limited by provision of G.S. 20-174(a) which requires every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection to yield the right-of-way to vehicles upon the roadway.

3. Statutes § 5— construction — literal interpretation — purpose

Where a literal interpretation of the language of a statute would lead to absurd results and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded.

4. Automobiles § 40— crosswalk right-of-way — leaving crosswalk to go around barricade

Where gutter repair work and barricades prevented exit from the street within the crosswalk lines, plaintiff pedestrian did not forfeit the right-of-way at the intersection by stepping a few feet outside the painted crosswalk lines to skirt a barricade.

5. Automobiles §§ 19, 40— intersection controlled by traffic signals — right-of-way — pedestrian — motorist

Provisions of G.S. 20-155(c) requiring motorists to yield the right-of-way to pedestrians within a marked or unmarked crosswalk "except at intersections where the movement of traffic is being regulated by traffic

officers or traffic direction devices" do not subordinate the right-of-way of a pedestrian to that of a turning vehicle at an intersection controlled by traffic signals which are favorable to both.

6. Automobiles §§ 19, 40— intersection controlled by traffic signals — right-of-way — pedestrian — motorist

The crosswalk right-of-way is not impaired by G.S. 20-155(c) when the movement of the pedestrian is in accord with the traffic lights.

7. Automobiles § 40— pedestrians — right to proceed — favorable traffic light

Principle that the right to proceed is superior to the right to turn applies to a pedestrian crossing an intersection with a favorable light.

8. Automobiles § 19— intersection — right-of-way — traffic lights

While the green signal of a traffic light merely gives permission to make a turn, it is an invitation to proceed ahead, and although a motorist facing the green light has permission to make a turn and proceed under what is actually a red light, a party crossing his path following a green light has the superior right.

9. Statutes § 5— construction — prevention of injustice

The courts will not adopt a statutory construction that results in palpable injustice when the language of the statute is susceptible to another reasonable construction which is just and consonant with the purpose and intent of the act.

10. Automobiles § 40— pedestrians — duty of motorist to sound horn

A pedestrian following the traffic lights and continuing his straight course has the right to rely on the presumption that motorists will obey provisions of G.S. 20-154(a) which require a driver, before starting, stopping or turning from a direct line, first to ascertain that such movement can be made in safety, and to give a clearly audible signal by horn if any pedestrian may be affected by such movement.

11. Automobiles § 40— pedestrians — right-of-way — traffic lights

Effect of G.S. 20-173(a) is to give a pedestrian the right-of-way at an intersection controlled by traffic signals only when he is moving with the green light.

12. Automobiles § 40— pedestrians — right-of-way — assumption

In the absence of anything which gives or should give notice to the contrary, a pedestrian who has the right-of-way is entitled to assume and to act upon the assumption, even to the last moment, that an approaching motorist will yield the right-of-way.

13. Automobiles § 40— pedestrian — right-of-way — duty to use due care

A right-of-way is not absolute and even a pedestrian with the right-of-way must exercise ordinary care for his own safety.

14. Automobiles § 40— pedestrians — crossing street without right-of-way — evidence of negligence

Crossing a street without a right-of-way is not negligence *per se*, but is evidence of negligence to be considered with other evidence in the case.

15. Negligence § 13— contributory negligence — affirmative defense

Contributory negligence is an affirmative defense which must be pleaded and established by proof.

16. Negligence § 35— nonsuit for contributory negligence

Nonsuit on the ground of contributory negligence is proper only if plaintiff's evidence, considered in the light most favorable to her, so clearly establishes her own negligence as one of the proximate causes of her injury that no other reasonable inference may be drawn therefrom.

17. Automobiles § 83— intersection controlled by traffic signals — right-of-way — contributory negligence of pedestrian

In this action for injuries sustained when plaintiff pedestrian was struck by defendants' automobile at an intersection controlled by traffic signals, the trial court erred in finding that plaintiff was contributorily negligent as a matter of law, where plaintiff's evidence tended to show that she started across the intersection in a marked crosswalk with the traffic signals in her favor, that plaintiff looked to the left and to the right before she crossed and while in the middle of the street, that barricades in front of gutter repair work prevented plaintiff's exit from the street within the crosswalk lines and blocked defendants' right-turn lane, that plaintiff turned to her left to go around the barricades, and that she was struck by defendants' automobile, which went around the barricades and made a right turn in the intersection, while she was either inside the marked crosswalk or two steps outside of it.

APPEAL by plaintiff from *Clark, J.*, at the May 1969 Civil Session of ALAMANCE Superior Court.

This is a civil action brought by a pedestrian against a motorist and the owner of the car she was driving. Plaintiff Mrs. Wagoner was struck by the Butcher car at the intersection of Webb Avenue and Anthony Street in Burlington on the morning of 26 June 1967. The case is before this Court as an appeal from a judgment of involuntary nonsuit, so the evidence presented is that most favorable to the plaintiff, summarized as follows:

Plaintiff walked several blocks from her home to a bakery on Webb Avenue. Webb Avenue runs in an east-west direction and Anthony Street runs in a north-south direction so that they intersect at right angles. The intersection is controlled by a single overhead stop-go traffic control light. Plaintiff approached the intersection walking in a westerly direction on the sidewalk on the south side of Webb Avenue. Anthony Street to the south of Webb is 43 feet wide with two northbound traffic lanes and one southbound

lane. The gutter and curb were being replaced on the southwest corner of the intersection. Barricades which extended around the corner blocked the right-hand turn lane of Webb so that traffic in that lane which stopped for a red light did so at least 25 feet west of the corner. Traffic had to merge left into the eastbound middle lane to turn. The barricades extended around the corner onto Anthony Street and in doing so blocked the western end of the crosswalk. The Butcher car, approaching the intersection from the west on Webb Avenue, was in the right-hand turn lane. It stopped for a red light at a point somewhat west of the barricades. The witness Miles came to a stop behind the Butcher car. There were cars stopped in the center lane. The light changed to green for traffic on Webb Avenue and those cars proceeded in an eastwardly direction before the Butcher car pulled out from behind the barricade into that middle lane. Plaintiff approached the intersection on Webb Avenue's sidewalk, saw the light change, and looked both ways. Two cars stopped on Anthony to her left, one in the turn lane and one beside it in the northbound lane. No traffic approached from her right. No traffic turned from Webb sharply around the corner in front of her; the Butcher vehicle was still behind the barricade west of the intersection. She proceeded to cross Anthony Street from east to west walking in the crosswalk. She reached a point approximately in the middle of the third lane and turned somewhat in a southwesterly direction to pass around to her left of the barricade. She was then either inside the painted crosswalk or two steps south of it. At this point she was struck by the Butcher car. The witness Miles, who followed the Butcher car from behind the barricade into the middle lane of Webb Avenue, saw the Butcher car headed toward the path of the pedestrian. "* * * [I]t was a Chrysler built car and I could see all the way through the automobile and at the angle we both were in I got a pretty fair view of what was going on." He testified that "* * * after I proceeded to merge out in the center lane of Webb Avenue I noticed she made a right turn on to Anthony Street and saw Mrs. Wagoner walking and it looked like neither of them were going to stop * * *."

After the plaintiff's evidence was presented, defendants' motion for nonsuit was granted and the judgment as of nonsuit was entered. Plaintiff appealed.

Ross, Wood & Dodge by Harold T. Dodge for plaintiff appellant.

Sanders & Holt by Emerson T. Sanders and James C. Spencer, Jr., for defendant appellees.

BRITT, J.

The question posed by this appeal is whether a judgment of nonsuit was proper on the facts shown. Our answer is no.

The defendants properly concede that certain allegations of defendant Mrs. Butcher's negligence are supported by evidence sufficient to go to the jury on the issue of defendants' negligence and submit that the issue before us is narrowed to whether the plaintiff's own acts clearly establish contributory negligence as a matter of law. The facts of this case also raise the question, "Does a pedestrian crossing a roadway with a favorable light have a right-of-way over a turning motorist subject to the same favorable light?" Our answer is yes.

[1, 2] To a pedestrian the right-of-way means that he has the right to continue in his direction of travel without anticipating negligence on the part of motorists. Unless the circumstances are sufficient to give him notice to the contrary, he may act upon the assumption, even to the last moment, that motorists will recognize such a preferential right. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47. The pedestrian's right-of-way is limited in North Carolina by G.S. 20-174(a) which provides that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

[3, 4] Although some evidence here raises the possibility of an extremely literal argument that plaintiff is precluded from claiming a crosswalk right-of-way by her being two steps outside it, the defendants make no such contention and, in fact, there is evidence that she was within it. The statute itself extends right-of-way to a pedestrian within "an unmarked crosswalk at an intersection." The focus is not on the lines but on the proximity to an intersection which is a place a motorist should expect pedestrians will have to cross and should yield to them. In *Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607, the court construed the term "unmarked crosswalk at an intersection" to mean "* * * that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection." In *Bowen v. Garner, supra,* the right-of-way was established by the projections of an unpaved grass strip which one of the witnesses described as "what you would call a sidewalk." In *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214, where the pedestrian crossed a highway between two "T" intersections fifty feet apart, the court observed that "[o]bviously, plaintiff was crossing the highway diagonally in a southwesterly direction and not at a

crosswalk as she alleged," and indicated a liberal interpretation is in order: "Had she crossed *in the vicinity* of the Nightingale where the unnamed dirt street joined the highway she would have had the right of way over a motorist approaching that intersection * * *." (Emphasis added) This Court is guided by the rule of construction that "[w]here a literal interpretation of the language of a statute would lead to absurd results and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded." 7 Strong, N.C. Index 2d, Statutes, § 5, p. 70; *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1. Where the gutter repair work and barricades prevented exit from the street within the crosswalk lines, it would be unreasonable and unjust for this Court to say plaintiff forfeited her intersection crossing right-of-way by stepping a few feet outside the painted lines to skirt a barricade.

[5] Although both the defendant motorist and the plaintiff pedestrian in the case at bar were proceeding pursuant to a green light, the defendants contend that the mere presence of the traffic light removed from the plaintiff the crosswalk right-of-way available to her in its absence. *Miller v. Henry,* 270 N.C. 97, 153 S.E. 2d 798, suggests in general terms that "* * * a pedestrian has the same rights, or responsibilities as the case may be, as a driver." The *Miller* case, however, turned on the simple jury question, "Who had the green light?" and the whole nature of its discussion reflects the fact that only one of the parties did have the green light. The decision restates the basic principle that although one party may be a motorist and the other a pedestrian "* * * whoever had the green light had the superior right to traverse the intersection and to assume that the other would recognize it and conduct himself accordingly." The basic for this principle is statutory. G.S. 20-172 provides:

> "Pedestrians shall be subject to traffic control signals at intersections as heretofore declared in this article, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in part eleven of this article."

Those section eleven privileges include the crosswalk right-of-way and are clearly not to apply where a right conferred there would conflict with a traffic signal. *Miller v. Henry, supra,* pointed out that "[a] pedestrian at a crosswalk acquires no additional rights against a red traffic light * * *."

The defendants urge this Court to go much further than simply recognizing that the pedestrian's rights at intersections are limited

by conflicting traffic control signals. The defendants contend that there is a manifest legislative intent to set up two separate and sharply opposing lines of authority to be applied according to the mere presence or absence of a traffic light, and without any regard to whether the light in fact confers superior rights on either of the parties. In several instances, the statutory language is indeed susceptible to such an interpretation. G.S. 20-155(c) provides:

> "The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked cross-walk, or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices."

We do not think the effect of the statute's exception is to subordinate the right-of-way of a pedestrian moving on a green light to that of a turning motorist.

In the case of *Lott v. DeLuxe Cab,* 136 Or. 349, 299 P. 303 (1931), the Oregon court was faced with an identical clause ("except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices." Chapter 217, § 2, Subdivision 7(b) of General Laws of Oregon for 1927) and said: "We think it was not the intention of the legislature to change the rule of right of way between vehicles and pedestrians, but rather to subject the latter to the regulation of traffic signal devices at street intersections."

[6] In *Sanders v. Newsome,* 179 Va. 582, 19 S.E. 2d 883 (1942), the Virginia Supreme Court of Appeals construed Michie's 1936 Code, § 2154, subsection (123)(c), which is identical to G.S. 20-155(c) in its entirety. The court examined the related statutory provisions and particularly one similar to G.S. 20-154(a). That was subsection (122)(a) which provided: "Every driver who intends to * * * turn, or partly turn from a direct line, shall first see that such movement can be made in safety * * *." The court concluded:

> "When these statutes are read and construed together, as they must be, the reason for excepting the provisions of subsection (123)(c) at intersections where the movement of traffic is controlled by traffic officers or signal direction devices is manifest. To give a pedestrian, crossing an intersection *on a red light,* the right of way would create much confusion, hinder the or-

> derly movement of traffic and unreasonably impair the safety of travelers upon the highway." (Emphasis added)

The construction argued by the defendants, on the other hand, "would turn a traffic safety signal device into an invitation to a place of danger." *Sanders v. Newsome, supra.* G.S. 20-155(c) may thus be construed to mean that the crosswalk right-of-way is not impaired when the movement of a pedestrian is in accord with the traffic lights.

[7] The pedestrian crossing with a favorable light is also assisted by the principle that the right to proceed is superior to the right to turn. The 1967 amendment to G.S. 20-155(b) added to the weight of this principle by providing:

> "* * * Notwithstanding the provisions of this section and § 20-154, a vehicle making a left turn in front of an approaching vehicle does not have the right-of-way unless such movement can be completed with safety prior to the arrival of the approaching vehicle, and when the movement cannot be completed with safety, the driver of the vehicle making the left turn shall yield the right-of-way."

Although several of the provisions of G.S. 20-155, which determine the right-of-way in the absence of traffic lights are inapplicable where there are lights, *White v. Phelps,* 260 N.C. 445, 132 S.E. 2d 902, the amendment would appear applicable to a driver turning into the path of approaching traffic whether he has a green light or no light at all. The spirit of this amendment would apply equally well to an approaching *pedestrian* and a vehicle turning to the right.

[8] The distinction has been made that while the green signal of a stop-go light merely gives *permission* to make a turn, it is an *invitation* to proceed straight ahead. *Sanders v. Newsome, supra.* That theory is based on the observation that once the turn has been made the turning vehicle is actually traveling "in a direction against which the signal is closed." *Sanders v. Newsome, supra.* While the motorist has permission to make the turn and proceed under what is actually a red light, a party crossing his path following a green light has a superior right.

[9] Guided by the principle that "[t]he intent and spirit of an act are controlling in its construction," 7 Strong, N.C. Index 2d, Statutes, § 5, p. 69, and cases cited, this Court does not adopt the view urged by the defendants that the legislature intended that the provisions subjecting pedestrians to traffic lights would impair their rights as pedestrians proceeding in accord with such lights. This

Court follows the rule that "[t]he courts will not adopt a construction that results in palpable injustice when the language of the statute is susceptible to another reasonable construction which is just and is consonant with the purpose and intent of that act." 7 Strong, N.C. Index 2d, Statutes, § 5, p. 70, and cases cited. The injustice of holding that the legislature intended in all events to impair the pedestrian's right-of-way where the intersection may be in some ways a controlled one is clear. If he had no right-of-way, the pedestrian faced with heavy turning traffic would not even be able to cross the street even though he had the green light. He would be "invited into a place of danger" every time he obeyed the green light only to find himself dodging or being hit by turning traffic. His position is bad enough with a right-of-way for he is "bound to center at least a part of his attention upon the condition of the pavement and upon the traffic signal itself, in order to be aware of any changes therein." *Goodman v. Brown,* 164 Misc. 145, 298 N.Y.S. 574.

[10] In G.S. 20-154(a) there is no hint of a legislative intent to create a clear dichotomy between those intersections with and those without traffic lights. It provides across the board that "[t]he driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn * * *." A pedestrian following the lights and continuing his straight course has the right to rely on the presumption that the driver will obey the law as set forth in this statute. *Gearhart v. Des Moines R. Co.,* 237 Iowa 213, 21 N.W. 2d 569 (1946).

[11] This Court does not adopt the defendants' contention that G.S. 20-173(a) must be construed as indicating a legislative intent to establish two mutually exclusive sets of rules to be applied according to the mere presence or absence of a traffic light. That statute, in language superficially susceptible to such a construction, provides:

> "Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection * * *."

The construction argued by defendants would have the effect of depriving a pedestrian of all right-of-way privileges at an intersection at which there is a traffic control signal. We do not think the General Assembly so intended. The more reasonable construction, which

we adopt, is that the right-of-way given a pedestrian by G.S. 20-155(c) at an intersection where there is no traffic control signal is limited at an intersection where there is a traffic control signal by G.S. 20-173(a) to the pedestrian having the right-of-way only when he is moving with the green light. In the instant case, when vehicular traffic on Webb Avenue had the green light and the right to proceed on Webb Avenue across Anthony Street, pedestrian traffic on Webb Avenue had the right to proceed across Anthony Street and that right was superior to that of a motorist turning from Webb Avenue onto Anthony Street.

[12, 13] Where the pedestrian has the right-of-way, he is "not required to anticipate negligence on the part of others." *Bowen v. Gardner, supra.* Plaintiff was entitled to assume and to act upon the assumption, even to the last moment, that an approaching motorist would yield the right-of-way "[i]n the absence of anything which gave or should have given notice to the contrary." *Bowen v. Gardner, supra.* The Supreme Court in *Bowen* held that where the pedestrian had the right-of-way afforded her by an intersection crosswalk it was erroneous to find contributory negligence as a matter of law simply because she failed to see the defendant motorist approaching the intersection. However, a right-of-way is not absolute and even a pedestrian with the right-of-way must exercise ordinary care for her own safety. *Bowen v. Garner, supra.* Whether plaintiff, simply by failing to see the vehicle, failed to exercise due care is a jury question. The jury must determine whether the vehicle's speed, proximity, or manner of operation would have put the plaintiff, had she seen it, on notice that the motorist did not intend to yield the right-of-way. *Bowen v. Gardner, supra.*

[14-16] A judgment of nonsuit on the premise that plaintiff was contributorily negligent as a matter of law would be erroneous even if she did not have the right-of-way. Crossing a street without a right-of-way is not negligence *per se.* In *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323, the court said:

> "If it be conceded that the intestate failed to yield the right of way * * * even so, it was the duty of the defendant, both at common law and under the express provisions of G.S. 20-174(e), to 'exercise due care to avoid colliding with' [any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary] * * *.
>
> Nor may the evidence tending to show that intestate failed to yield the right of way as required by G.S. 20-174(a) be treated on this record as amounting to contributory negligence as a

matter of law, particularly so in view of the testimony to the effect that intestate at the time he was struck had reached a point about 10 feet from the west curb of the street. Our decisions hold that a failure so to yield the right of way is not contributory negligence *per se,* but rather that it is evidence of negligence to be considered with other evidence in the case in determining whether the actor is chargeable with negligence which proximately caused or contributed to his injury. [Cases cited]"

As the court said in *Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305, "[c]ontributory negligence is an affirmative defence which must be pleaded and established by proof." In *Bowen v. Gardner, supra,* the court restated the rule that "[n]onsuit on that ground is proper only if plaintiff's evidence, considered in the light most favorable to her, so clearly establishes her own negligence as one of the proximate causes of her injury that no other reasonable inference may be drawn therefrom."

In *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589, the court held the plaintiff contributorily negligent as a matter of law because he did not see the defendant's vehicle although the highway was almost level and visible for a distance of 700 to 1000 feet.

In *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246, the highway was visible for a distance of 300 yards to a quarter of a mile in the direction from which the defendant's vehicle approached. Plaintiff was held contributorily negligent where under those circumstances he walked into the side of a fast-moving truck.

In *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499, the plaintiff was held to be contributorily negligent where she had clear visibility for 500 to 600 feet and failed to heed the timely sound of defendant's horn because she attempted the crossing without wearing her hearing aid.

In *Blake v. Mallard, supra,* a "colored woman wearing dark clothing" crossing a highway diagonally at night was contributorily negligent where "defendant was two hundred yards away, approaching at a speed of sixty miles per hour when she started 'walking normally' into his path." His lights had been visible for a mile. Instead of stopping in the other lane, she entered his lane and attempted to run across that lane after seeing the defendant only forty-five feet away.

A rule which by definition requires contributory negligence to be so clear "that no other reasonable inference may be drawn there-

from" will by its nature be satisfied only infrequently and only in extreme circumstances. In each of those cases holding contributory negligence as a matter of law, the dominant characteristic was the exceptionally high visibility of the open road. In a more congested and confused setting like the busy intersection under repair in the case at bar, the conclusion that the plaintiff was negligent as a matter of law in crossing with a favorable light is far less compelling. As Justice Higgins observed in *Warren v. Lewis, supra,* "[o]rdinarily, the issue is one of fact to be decided by the jury."

The issue of contributory negligence was submitted to the jury in *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696, where the plaintiff in a business district was crossing without a right-of-way and stopped for a car approaching at 15 miles per hour, only to be struck by a second car that "whipped around to the left of the car in front, and hit me."

The issue was submitted to the jury in *Bank v. Phillips, supra,* where a pedestrian without a right-of-way was struck by a car which had left its normal lane and crossed the intermittent center line to pass another car. The pedestrian was, like Mrs. Wagoner, only 10 feet from the curb he was to reach.

The issue was submitted to the jury in *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762, where a pedestrian without a right-of-way was struck near the shoulder of the road.

It was submitted to the jury in *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462, where a pedestrian without a right-of-way saw an approaching truck and safely crossed in front of it to reach her mailbox. She watched it pass and stepped back across, oblivious to a second truck following close behind which struck her. The court cited G.S. 20-174(e) for the rule that "* * * every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary * * *" and G.S. 20-141(c), providing that the driver is under a duty to decrease speed "when special hazard exists with respect to pedestrians" or "as may be necessary to avoid colliding with any person." The court concluded that "[a] motorist operates his vehicle on the public highways where others are apt to be. His rights are relative."

[17] The issue of contributory negligence was one for the jury in the case at bar. As plaintiff approached the Anthony Street intersection, she looked up to see the traffic light. She saw the light facing south on Anthony Street change to red thereby making the light on

Webb Avenue green. She saw two cars stop for the red light in the two northbound lanes of Anthony Street. They were immediately to her left and stopped abreast about three feet away from the crosswalk. She looked to the left and saw these two stopped cars. She looked to the right and saw no approaching southbound traffic on Anthony Street because that traffic stopped for the light. She saw no one turning from the right lane of Webb around the corner onto Anthony, because the Butcher car had stopped for the previous red light at least twenty-five feet back from the corner. Defendant Mrs. Butcher waited there until the eastbound lane to her left cleared and followed that traffic lane into the intersection. In plaintiff's words, "[w]hen I got up to the intersection of Anthony and Webb Avenue, there was a stop light and I looked up to see if the light was red so I could cross and I looked up and it was on red * * * I looked both ways * * * I seen two cars to my left that were stopped there at the red light. I saw them. I didn't see any car coming from my right at all. * * * I went across the street and got in the third lane and I happened to look to see if any cars were moving and I started on across * * *." She crossed the middle of the third lane and started shifting her course to her left to get around some barricades. As she turned to face a southwesterly direction, she was struck by the Butcher car which had completed its turn near the middle of the intersection and proceeded in a southerly direction straight toward plaintiff without its driver ever seeing her.

Plaintiff proceeded with a favorable light; she used the crosswalk so long as it was possible to do so; she looked to the left and to the right both before she crossed and at "midstream," and she was struck as she attempted to negotiate an obstacle course of barricades. Such circumstances do not so clearly require the conclusion that plaintiff failed to exercise ordinary care for her safety that no other inference is possible.

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

Reversed.

MALLARD, C.J., and VAUGHN, J., concur.

CURTIS E. McCOMBS, Administrator of the Estate of ERIC WOOD McCOMBS, Deceased v. CITY OF ASHEBORO, a Municipal Corporation

No. 6919SC402

(Filed 22 October 1969)

1. Municipal Corporations § 21— governmental immunity — construction of sewerage system

A municipal corporation is performing a governmental function when engaged in construction of a sewerage system and is not liable for personal injuries resulting from the alleged negligent acts of its employees in such construction, notwithstanding the municipality charges for sewage and sanitary services which it furnishes its citizens.

2. Municipal Corporations § 12— governmental immunity — profitable activity

A municipality will not lose its governmental immunity solely because it is engaged in an activity which makes a profit, the test being whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit.

3. Negligence § 51— attractive nuisance

The attractive nuisance doctrine is an exception to the general rules applicable to liability of owners or occupants for injuries sustained by others on their premises.

4. Negligence § 51— attractive nuisance — mere attractiveness

Mere attractiveness of premises to children will not bring a case within the doctrine of attractive nuisance.

5. Municipal Corporations §§ 12, 21; Negligence § 51— tort liability — sewerage system construction — allegations of profit — sufficiency of complaint — attractive nuisance

In this action for the wrongful death of a six-year-old child who was killed when an open ditch dug by municipal employees during construction of a sewerage system collapsed while the child was playing therein, it was alleged that defendant municipality "was engaged in the business of selling and providing sanitary sewage facilities to various purchasers throughout the city at a profit for pay," and that municipal employees had been negligent in failing to erect barricades, fences or other warning devices along the entire length of the open ditch, in failing to shore up the walls of the ditch, and in creating an attractive nuisance. *Held:* Assuming that the allegations relating to profit were sufficient to save the complaint from demurrer on the ground of governmental immunity, the complaint is subject to demurrer for failure to state a cause of action on grounds that there are no facts alleged constituting negligence on the part of defendant and that the doctrine of attractive nuisance is inapplicable, defendant municipality having no duty to place a fence the entire length of the ditch or to shore up its sides, and an open excavation not being an attractive nuisance.

Appeal by plaintiff from *Crissman, J.*, 7 April 1969 Session, Randolph County Superior Court.

This is a civil action to recover damages for the alleged wrongful death of plaintiff's intestate.

The complaint alleges, in substance except where quoted, that defendant is a municipal corporation which did not, at the time of the death of plaintiff's intestate, have municipal immunity in a tort action. The defendant, "in exercise of its proprietary powers as a municipal corporation," did, on and before 17 March 1964, maintain sanitary facilities for the residents of the City of Asheboro and owned "certain sewage facilities including sewage lines and treatment plants". That defendant on said date charged for such sewage and sanitary service so furnished the citizens of the city and was in the business of selling and providing sanitary sewage facilities "at a profit for pay" and on 17 March 1964 had exclusive control and supervision of the sewage ditch on Westwood Drive in Asheboro. Defendant, on 17 March 1964, was in the process of installing a sewer line on the eastern margin of Westwood Road. The ditch ranged in depth from 10 to 14 feet, was open for a distance of 150 feet or more, and pipe was laid ready to be covered. Defendant had been operating a rotary wheel type ditchdigger in the construction of the ditch until a stump was encountered under the roadbed, at which point a backhoe was brought in and digging was continued for several additional feet. The area which was dug by the backhoe was approximately 250 feet from the home of the plaintiff's intestate. Defendant's workmen left the project about 4 o'clock p.m. on 17 March 1964. There was a barricade approximately eight feet wide and one smudge pot on the north end of the excavation and a barricade approximately eight feet long and one smudge pot at a point approximately 200 feet south of the "open excavation". There were "no barricades, fences, or warning lights of any type installed by the defendant along the entire length of the open ditch line." Plaintiff's intestate, a six-year-old boy, was playing outdoors about one-half hour after the workmen left. A short while later, "plaintiff's intestate got down in the said ditch which had been dug by the workmen of the defendant, City of Asheboro, and the ditch collapsed and a large wedge of pavement fell on plaintiff's intestate while he was in the ditch, and as a result of the falling in of the ditch and pavement in the ditch, the plaintiff's intestate was killed instantly." The death of plaintiff's intestate was proximately, solely, and directly caused by the negligence of defendant in that:

> "(A) The defendant permitted the ditch to stand without proper barricades and devices to protect persons, particularly the plaintiff's intestate, a child of tender years, from playing in the same and did neglect to leave the premises on this date and

at this time in a proper and safe condition and properly protected by barricades and fences.

(B) In that the defendant failed to exercise due care to see that the pavement was shored up or braced in some manner to prevent it from falling into the ditch which had been excavated by the defendant.

(C) In that the defendant constructed and permitted to be maintained this ditch which constituted an attractive nuisance to children and particularly plaintiff's intestate, and because of the dangerous and potentially dangerous condition and because of the nature of the excavation, the defendant knew or should have known, and in the exercise of reasonable caution and prudence would have known, that children, particularly of tender years, would be likely to play in the ditch and that permitting a condition such as this to exist constituted a hazard for plaintiff's intestate by virtue of constituting an attractive nuisance which was inherently dangerous.

(D) In that the defendant failed to exercise commensurate care with the danger arising from the excavation of deep ditches under the exclusive control and supervision of the defendant in residential neighborhoods for children who are likely to play in or about the project, particularly after the workmen of the defendant had left the premises in such conditions that serious and fatal injuries might arise therefrom."

Defendant demurred *ore tenus* to the complaint for that it failed to state a cause of action for the following reasons: 1. Defendant in the construction of a sewer line was exercising a governmental function and is immune from any tort action. 2. (a) There are no facts alleged which set forth any negligence on part of defendant, (b) plaintiff has attempted to allege a cause of action based on the doctrine of attractive nuisance which doctrine is not applicable.

The court sustained the demurrer and gave plaintiff leave to amend. By amendment plaintiff added to his complaint an allegation that each barricade consisted of a "saw horse"; that in opening the ditch the defendant cut vertical walls and piled the dirt therefrom along and close to the northern side of the ditch so that the weight of the dirt exerted pressure downward; that the dirt along the sides was porous and loose; that defendant failed to brace or shore up the walls in any way when it knew or should have known that the walls would be likely to cave in and injure someone; that defendant had been constructing the ditch along and within the

right-of-way of Westwood Road for several days and one or more persons had informed the city, through its agents, that numerous small children were accustomed to playing in and about the ditch, but the defendant failed to take any action to secure the open, deep ditch.

Defendant again filed demurrer upon the same grounds and filed answer admitting there were no barricades or fences installed along the entire length of said project but averring that proper and appropriate barricades were erected, denying negligence, averring that plaintiff's intestate and another child entered the ditch although they were warned on the immediate occasion not to, that the child was playing in the vicinity of the ditch a considerable distance from his home with express consent of plaintiff and the adult person employed as a domestic by plaintiff, that plaintiff's intestate was a trespasser, and setting up the plea of contributory negligence on the part of plaintiff and his intestate.

After hearing on 7 April 1969, the demurrer was again sustained. Plaintiff excepted and gave notice of appeal.

Coltrane and Gavin, by W. E. Gavin and Hugh R. Anderson, for plaintiff appellant.

Miller, Beck and O'Briant, by Adam W. Beck, for defendant appellee.

Morris, J.

Defendant's grounds for demurrer are twofold: The first ground is that the plaintiff's alleged cause of action arises out of the alleged negligence of defendant in the construction of a sewer line along a city street and that this is a governmental function for which it is not subject to tort liability. The second basis for demurrer is that the complaint fails to state a cause of action for the reason that there are no facts alleged constituting negligence on the part of the defendant and that the doctrine of attractive nuisance is not applicable.

With respect to the first ground, plaintiff contends and alleges that the defendant was engaged in a proprietary function in the construction of a sewer line. The question of a municipality's governmental immunity from tort liability has often been discussed by our Supreme Court. A list of situations in which the municipality has been held immune by reason of its being engaged in a governmental function can be found in *Rhyne v. Mount Holly,* 251 N.C. 521, 112 S.E. 2d 40 (1959). Justice Brown, in *Metz v. Asheville,*

150 N.C. 748, 64 S.E. 881 (1909), distinguished between governmental and proprietary functions thusly:

> "When power conferred has relation to public purposes and for the public good, it is to be classified as governmental in its nature and appertains to the corporation in its political capacity. But when it relates to the accomplishment of private purposes in which the public is only indirectly concerned, it is private in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation."

While the rule may be simply stated, application of the definition to particular situations is not so simple. The line between powers classed as governmental and those classified as proprietary is none too sharply drawn and seems to be subject to a change in position as society changes and progresses and the concepts of the functions of government are modified.

In actions brought to recover damages for injury to property and person by reason of the alleged negligent maintenance of a sewerage system, our Court has allowed recovery for damage to property on the theory of the creation of a nuisance and the taking of property. *Hines v. Rocky Mount,* 162 N.C. 409, 78 S.E. 510 (1913); *Moser v. Burlington,* 162 N.C. 141, 78 S.E. 74 (1913); *Williams v. Greenville,* 130 N.C. 93, 40 S.E. 977 (1902); *Downs v. High Point,* 115 N.C. 182, 20 S.E. 385 (1894). However, recovery for illness or death resulting from the negligent maintenance of sewerage systems was specifically denied and evidence with respect thereto admitted only for purpose of proving existence of the nuisance. In *Metz v. Asheville, supra,* plaintiff sought to recover for the death of his intestate from typhoid fever allegedly communicated by the condition of Reed Branch which ran near the house in which plaintiff's intestate resided and into which the defendant's public sewerage system emptied. Plaintiff contended the defendant should have had the sewage empty into French Broad River. The Court, apparently basing its decision on the exercise of the police power, held the establishment of a free public sewer system to be a governmental function and said:

> "Certainly, nothing is more necessary to the health of a city than that its filth should be removed and its area well drained. That the establishment of a public sewer system is an exercise

of a governmental function is recognized by all the authorities I have quoted."

In *Hines v. Rocky Mount, supra,* an action based on negligent maintenance of the sewer system, the Court quoted with approval the following statement of O'Brien, J., in *Hughes v. Auburn,* 161 N.Y. 96, 55 N.E. 389 (1899):

> "In the construction and maintenance of a sewer or drainage system, a municipal corporation exercises a part of the governmental powers of the State for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health, resulting either from omissions to act or the mode of exercising the power conferred on it for public purposes to be used at discretion for the public good . . ."

Justice Seawell, in *Plant Food Co. v. Charlotte,* 214 N.C. 518, 199 S.E. 712 (1938), commenting on the *Metz* case, noted that recovery was denied "on the ground that the commissioners of the town, in the construction and operation of the sewerage plant, were in the performance of a purely governmental function" and noted further that under the general powers given to cities and towns to construct and operate sewer systems, it is doubtful whether it is necessary to invoke the police power to sustain such authority.

[1] However, we find no case presenting squarely to the Court the question of whether a municipality can be required to respond in damages for personal injuries resulting from the alleged negligent acts of its employees in the *construction* of a sewer line. In *Insurance Co. v. Blythe Brothers Co.,* 260 N.C. 69, 131 S.E. 2d 900 (1963), an action for damage to property resulting from dynamiting in constructing a sewer outfall for the City of High Point, the defendant by answer contended that the City of High Point, if a party, would be immune from liability under the doctrine of governmental immunity and this immunity would enure to its benefit. The Court, speaking through Bobbitt, J., noting that a determination of the question of governmental immunity was not necessary to the disposition of the appeal, said:

> "There is a conflict of authority in other jurisdictions as to whether a municipal corporation is performing a governmental function when engaged in the *construction* of a sewerage system. 63 C.J.S., Municipal Corporations § 1049; 38 Am. Jur., Municipal Corporations § 585; McQuillin on Municipal Cor-

porations, 3rd Edition, Vol. 18, § 53.125, and cases cited. No decision of this Court determinative of the precise question has come to our attention."

The Court has held that garbage removal by the municipality is a governmental function. *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423 (1922); *Snider v. High Point,* 168 N.C. 608, 85 S.E. 15 (1915).

[1] It appears that the courts are sharply divided as to whether the construction of a sewerage system constitutes a governmental function or a proprietary function. However, the weight of recent authority seems to favor the theory of a governmental function. e.g., 63 C.J.S., Municipal Corporations, § 873, p. 253; 61 A.L.R. 2d 881. See *City of Scottsdale v. Municipal Court of Tempe,* 90 Ariz. 393, 368 P. 2d 637 (1962); *Foster v. Crowder,* 117 Ga. App. 568, 161 S.E. 2d 364 (1968); *Smith v. Kansas City,* 158 Kan. 213, 146 P. 2d 660 (1944); *Trapani v. Parish of Jefferson,* (Ct. App. Louisiana 4th Cir.) 180 So. 2d 850 (1965); *Safransky v. City of Helena,* 98 Mont. 456, 39 P. 2d 644 (1935); *Bengivega v. Plainfield,* 128 N.J. Law 418, 26 A. 2d 288 (1942); *Hamilton v. Bismarck,* 71 N.D. 321, 300 N.W. 631 (1941); *State ex rel Gordon v. Taylor,* 149 Ohio St. 427, 79 N.E. 2d 127 (1948); *Ratliff v. City of Akron,* 157 N.E. 2d 151 (1959); *Bowie v. City of Houston,* 152 Tex. 533, 261 S.W. 2d 450 (1953). We are persuaded to the view that the construction of a sewerage system is a governmental function by what we consider to be the better reasoning. Certainly, the preservation of the public health is one of the duties devolving upon the State as a sovereign power and in the discharge of this duty the State is acting strictly in discharge of one of the functions of government. Similarly, a municipal corporation in the discharge of the duty of preservation of the public health is exercising a purely governmental function affecting the welfare not only of citizens of the corporate community but of the citizens of the State generally, all of whom have an interest in the prevention of the spread of infections or contagious disease. If the reasoning advanced in the cases, *James v. Charlotte, supra,* and *Snider v. High Point, supra,* was valid as to garbage collection more than forty years ago, it is even more apposite today in the case of sewage. The use of modern devices and appliances results in the disposal of garbage as well as human excretion and waste into sewer lines. In today's society people are compelled to live in close proximity. Adequate sewage disposal is no longer merely desirable. It is an absolute necessity.

Nor do we think the fact that "defendant charges, and did on

March 17, 1964, for such sewage and sanitary service so furnished the citizens of the City of Asheboro" removes the defendant city from the protection from liability. This question was raised in *James v. Charlotte, supra.* There the plaintiff contended that the city was not protected from liability because it charged a fee for removal. The Court held the principle which applied in cases where municipal corporations enter into the business of selling light and power to the citizens for profit was not applicable, because the City of Charlotte was merely making a charge covering the actual expense of removing garbage and refuse in discharge of a duty primarily incumbent on the individual citizen and occupant of the property. The statute (C.S. 2799—now G.S. 160-233), under which the regulations of the city were made, provided that the city could charge for garbage removal "the actual expense thereof". We note that under Part 7, Article 18, and Article 34A, Chapter 160, General Statutes of North Carolina, municipalities are authorized to make charges for sewerage system connections and for use of services and facilities furnished by sewage disposal system at least sufficient at all times to pay expenses of operating, managing and repairing the system and to pay principal and interest on any bonds issued to pay the cost of its construction, extension, enlargement, or improvement. "A small charge made to help pay the expenses of carrying on a work purely governmental in character will not transform it into a profit-making enterprise." 63 C.J.S., Municipal Corporations, § 750, p. 39.

[5] Plaintiff has, however, alleged that the defendant "was engaged in the business of selling and providing sanitary sewage facilities to various purchasers throughout the city at a profit for pay . . ." and contends that this allegation saves the complaint from demurrer.

[2] As has been stated frequently by courts of other jurisdictions, actual profit is not the test, and the city will not lose its government immunity solely because it is engaged in an activity which makes a profit. *Beard v. City and County of San Francisco,* 79 Cal. App. 2d 753, 180 P. 2d 744 (1947); *Watkins v. City of Toccoa,* 55 Ga. App. 8, 189 S.E. 270 (1936); *Hahn v. City of Ortonville,* 238 Minn. 428, 57 N.W. 2d 254 (1953); *Huffman v. Columbus,* 51 N.E. 2d 410 (1943); *Griffin v. Salt Lake City,* 111 Utah 94, 176 P. 2d 156 (1947); *Marshall v. Brattleboro,* 121 Vt. 417, 160 A. 2d 762 (1960). "The underlying test is whether the act is for the common good of all without the element of special corporate benefit, or, pecuniary profit." McQuillin, Municipal Corporations, 3d ed., § 53.29, p. 192. This test was applied by the Supreme Court in *Glenn v. Raleigh,*

246 N.C. 469, 98 S.E. 2d 913 (1957), and 248 N.C. 378, 103 S.E. 2d 482 (1958), the opinion in the first appeal having been written by Parker, J. (now C.J.), and in the second appeal by Johnson, J. Plaintiff was injured while with his schoolmates at a picnic supper at Pullen Park. The complaint alleged that the City of Raleigh maintained, managed, controlled, and operated for profit a public recreation ground known as Pullen Park. The evidence of plaintiff tended to show that the net revenue received by the city from the operation of the park for the fiscal year in question was $18,531.14 which was used by the city for the capital maintenance of the park area, building items, paying salaries, buying fuel, etc. The Court held that, for the purposes of the consideration of a motion for judgment of nonsuit, this item of $18,531.14 constituted receipts over and beyond incidental income and "imports such a corporate benefit or pecuniary profit or pecuniary advantage to the City of Raleigh as to exclude the application of governmental immunity."

[5] Conceding, *arguendo,* that this allegation is sufficient to save the complaint from demurrer on the ground of governmental immunity, we are of the opinion that the complaint must fail on the second ground relied upon by defendant.

Plaintiff does not argue this ground of demurrer in his brief, apparently assuming that the allegations of negligence are sufficient. We do not agree.

[3] The attractive nuisance doctrine, is, of course, an exception to the general rules applicable to liability of owners or occupants for injuries sustained by others on their premises. There is a wide diversity of judicial opinion with respect to the acceptance or rejection in whole or in part of the doctrine. 65 C.J.S., Negligence, § 63(72), p. 809. In 65 C.J.S., Negligence, § 63(76), p. 815, it is stated:

> "Generally, the attractive nuisance doctrine is applicable when, and only when, the following elements are present: (1) The instrumentality or condition must be dangerous in itself, that is, it must be an agency which is likely to, or probably will, result in injury to those attracted by, and coming into contact with, it. (2) It must be attractive and alluring, or enticing, to young children. (3) The children must have been incapable, by reason of their youth, of comprehending the danger involved. (4) The instrumentality or condition must have been left unguarded and exposed at a place where children of tender years are accustomed to resort, or where it is reasonably to be expected that they will resort for play or amusement, or for the gratification of youthful curiosity. (5) It must have been reasonably prac-

ticable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended."

[4] An extensive discussion of the doctrine is found in the leading case of *Briscoe v. Lighting and Power Co.*, 148 N.C. 396, 62 S.E. 600 (1908). Justice Connor, writing for the Court, quoted from *Kramer v. R. R.*, 127 N.C. 328, 37 S.E. 468 (1900); "These cases are exceptions to the general rule, and went to the very limit of the law. Mere attractiveness of premises to children will not bring a case within that exceptional doctrine." Justice Connor further wrote:

"It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane in policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury."

A general discussion of particular dangers to which the doctrine is or may be applicable in 38 Am. Jur., Negligence, § 151, p. 818, contains this statement:

"A danger which is not only obvious but natural, considering the instrumentality from which it arises, is not within the meaning of the attractive nuisance doctrine, for the reason that an owner or occupant is entitled to assume that the parents or guardians of a child will have warned him to avoid such a peril. Pits and excavations on land embody no dangers that are not readily apparent to everyone, even very young children. For this reason, the proprietor is under no obligation, as a rule, to fence or otherwise guard such places, and he will not be liable for injuries to children who may have fallen therein. Nor is the landowner

liable for injuries sustained by earth falling into excavations as a result of the embankment being undermined by children."

The Appellate Court of Indiana refused to apply the doctrine where the defendant had removed a large amount of sand, leaving a hole 100 feet long, 50 feet wide and 10 feet deep, with perpendicular walls, and adjacent to a viaduct on which children were accustomed to play. A nine-year-old boy, who entered the sand hole to play and excavated below the surface, was killed in the cave-in which followed. The Court held that under the circumstances the sand pile did not constitute an attractive nuisance. *Anderson v. Reith-Riley Const. Co.*, 112 Ind. App. 170, 44 N.E. 2d 184 (1942).

The same result was reached in *Johnson v. City of New York*, 208 N.Y. 77, 101 N.E. 691 (1913). There the city was constructing, in a public street, a large sewer laid at a depth of 25 to 35 feet. The trench was about 16 feet wide at the top, leaving a narrow strip of roadway on either side not more than 6 or 7 feet wide. The street was barricaded at each end against vehicular traffic, but the sidewalks were kept open for the use of the abutters and their families and for the children who attended the public school located in the block. A short distance from the school, there was a pile of sand which had been placed there during the course of the work. The pile of sand was about 3 feet high, extended over the sidewalk about 2 feet and out into the street at least 5 feet so that the outer margin of the sand pile was within 1 foot of the trench. Plaintiff, a 12-year-old boy, on his way home from school went upon the pile of sand and sat there playing for a while. When he started to leave, he slid down with the sand into the ditch and was injured. The Court held the doctrine of attractive nuisance not applicable and that the city had no duty to erect a fence around its construction or to keep a watchman there.

[5] We are of the opinion that the facts alleged here do not "impose the duty of anticipation or prevision" which would require the city to do more than is alleged in the complaint. Municipalities must build sewers and other conduits necessitating the making of excavations. This creates some obvious danger, but we do not categorize it as an attractive nuisance. Nor do we perceive that the city had any duty to place a fence the entire length of the ditch. Neither was there any duty on the part of the city to shore up the sides of the ditch. "The use of property, to which an owner is entitled, should not be encumbered with the necessity of taking precautions against every conceivable danger to which an irrepressible spirit of adventure may lead a child. There is no duty to take precautions where

to do so would be impracticable, unreasonable, or intolerable." 38 Am. Jur., Negligence, § 147, p. 813.

Although the case is one which arouses sympathy, the complaint does not meet the test of legal rules.

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

STATE OF NORTH CAROLINA v. EDWARD GRADY MACON, JR.

No. 6910SC88

(Filed 22 October 1969)

1. Criminal Law § 80; Homicide § 15— SBI agent's interrogation notes — inspection by defendant

In a prosecution for homicide, the trial court properly refused to require the State to produce for defendant's examination the typewritten transcript of notes made by an SBI agent during his interrogation of defendant, where the defendant failed to show that he was taken by surprise or otherwise prejudiced by his inability to inspect the notes prior to trial, and where the notes were not designed as exhibits to be used in the trial, the statute, G.S. 15-155.4, upon which defendant relies relating solely to trial exhibits.

2. Criminal Law § 167— prejudicial error — burden of proof

Defendant must not only show error but also must show that the error complained of was prejudicial to him and affected the result adversely to him.

3. Criminal Law § 101— conduct affecting jury — deputy sheriffs as witnesses and court officers

In a prosecution for homicide, defendant was not prejudiced by the fact that the trial court allowed two deputy sheriffs who were witnesses for the State to act as court officers during the trial, where there was no suspicious or prejudicial conduct on the part of the officers, neither officer was a key witness for the prosecution, and the jury was not sequestered and placed in the charge of the officers.

4. Criminal Law § 101— custody of jury — custodian as State's witness

The practice of putting the jury in the custody of an officer who has actively investigated the evidence or has become a witness for the State is not to be approved.

5. Criminal Law § 1— proof of crime — corpus delicti

The proof of every crime consists of (1) proof that the crime charged

has been committed by someone and (2) proof that the defendant is the perpetrator of the crime.

6. Criminal Law § 106— corroboration of confession — sufficiency of evidence

The confession must be corroborated by independent evidence of the *corpus delicti;* the corroborative evidence need not be direct, but may be circumstantial, and it is sufficient if the circumstances are such as will, when taken in connection with the confession, establish the prisoner's guilt beyond a reasonable doubt.

7. Criminal Law § 106— corpus delicti — prima facie case

To establish a *prima facie* showing of the *corpus delicti* the prosecution need not eliminate all inferences tending to show a non-criminal cause of death.

8. Homicide § 21— sufficiency of evidence — corpus delicti — skeletal remains — confession — nonsuit

Evidence of the State tending to show that a skeleton was found near a pond in a rural area, that at the site of the skeleton were the undergarments, the blouse, the ring, the wristwatch and other personal effects which were worn by a woman on the night of her disappearance, and that the perforations in the skull were identified by expert testimony as being compatible with those caused by a bullet and that injury to the brain between the perforations would likely cause death, *is held* sufficient to make a *prima facie* showing of a homicide *corpus delicti;* and such evidence, together with defendant's confession to an SBI agent that he shot the woman with a .38 caliber revolver during an argument and left her body and personal effects in a wooded area, is sufficient to be submitted to the jury upon the question of defendant's guilt of murder in the second degree or of manslaughter.

9. Homicide § 27— involuntary manslaughter — instructions

In a homicide prosecution the failure to charge the jury with reference to involuntary manslaughter was not error, since there was no evidential basis for submitting to the jury an issue of involuntary manslaughter.

10. Homicide § 28— instructions on legal provocation — sufficiency of evidence

Trial court was not required to charge the jury as to what would be sufficient legal provocation to reduce the crime of second-degree murder to manslaughter, where the State's evidence consisted of defendant's statement to an SBI agent that he and the deceased, a woman, got into an argument, that no blows were passed, and that he shot the deceased with a .38 caliber revolver, and where defendant denied the shooting, denied the statement to the agent, and relied on the defense of alibi.

11. Criminal Law § 122— additional instructions — question of coercion

Trial judge's statement at the close of the charge that he would not keep the jury beyond 9 p.m. except at their request and that if the jury had not reached a verdict by that time and did not want to stay longer he would adjourn to the following morning, *held* not to have put undue

pressure upon the jury to hasten their deliberation and to surrender their unbiased judgment.

12. Criminal Law § 75— admissibility of confession — procedure on voir dire

Testimony by an SBI agent as to incriminating statements made by the defendant is properly admitted into evidence where the trial court found upon ample evidence on voir dire that the statements were voluntarily and understandingly made after defendant had been advised of his rights as required by *Miranda v. Arizona*, 384 U.S. 436.

13. Criminal Law § 76— confession — question of fact — jury

Whether or not the defendant made the incriminating statements admitted in evidence is a question of fact to be determined by the jury.

APPEAL by defendant from *McKinnon, J.*, 8 July 1968 Session, WAKE Superior Court.

Defendant was brought to trial upon a bill of indictment, proper in form, charging him with the first-degree murder of Jane Ellen Smith on 31 July 1967. Upon the case being called for trial, the solicitor for the State announced in open court that the State 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 or of manslaughter as the jury may find. Defendant entered a plea of not guilty and was tried by jury.

The State offered evidence which tended to show the following:

Jane Ellen Smith was married to Carl D. Smith and lived at Route 3, Apex, North Carolina. On 31 July 1967 (a Monday) she left home about 7:15 to 7:30 p.m. in her husband's 1956 Ford to go to the store. She was attired in a blouse, shorts and leather-strap sandals; she also had on her high school class ring with her initials in the band, and a Miss America Bulova wristwatch. Because she did not return home at any time that night her husband and sister called a deputy sheriff in Apex, informing him that Jane Ellen Smith was missing and giving him a description of what she was wearing and driving when she left home. The automobile was later found parked about three miles from Apex.

A little over seven months later, on 10 March 1968, a skeleton was found near Oscar Jones' pond near Holly Springs in the southern portion of Wake County. This pond lies approximately one mile east of Highway 55, approximately two miles north of Holly Springs, and approximately five miles southwest of Apex. The bones of the skeleton were widely scattered and appeared to have been gnawed upon; numerous small bones, such as some of the digits of the hands

and feet, were missing. The skull, the larger bones, and many of the smaller bones were recovered. Also at the site of the skeleton were the undergarments, the blouse, the shorts, the sandals, the ring, and the wristwatch which were worn by Jane Ellen Smith when she left home in the evening of 31 July 1967.

The skeleton was compatible with that of an adult female; and in the opinion of Doctor Laurin J. Kaasa, an expert in the field of pathology, was the skeleton of an adult female human being. The undergarments found at the site of the skeleton, in the opinion of Mr. Glen Glesne, a laboratory analyst, contained some human hairs of caucasian characteristics and of such characteristics as to indicate it was pubic hair. The skull had two holes, one on the left side and one on the right. The hole on the left side was smaller than on the right, and the hole on the right had portions around the rim which had the appearance of being blown outward by a force projecting through from left to right and going out at the right side. In the opinion of Doctor Kaasa, this type of perforation of the skull was compatible with that caused by a bullet, and injury to the brain that lies between the two holes would likely cause death. Small metalic fragments were removed from inside the skull which were analyzed to be lead and copper.

Prior to 31 July 1967 defendant had been acquainted with Jane Ellen Smith. He had been observed frequently driving along the road in front of her house, looking towards her house. He had been observed by Jane Ellen Smith's sister on two occasions when he stopped to pick her up in front of her house. Jane Ellen Smith's fourteen-year-old daughter had gone with her on several occasions when she drove to meet defendant at some other place; twice when they met in the woods on the road leading from Highway 55 to Oscar Jones' pond. During the late afternoon of 31 July 1967 defendant was observed passing Jane Ellen Smith's house and looking towards the house.

On 7 October 1967 defendant traded a .38 caliber Charter Arms pistol (serial number 5744) for a .38 caliber Smith and Wesson, model ten.

The State also offered evidence which tended to show that on 16 March 1968 defendant told Special Agent Robert D. Emerson of the State Bureau of Investigation that he knew and associated with Jane Ellen Smith; that he formerly resided in Apex; that during the mid-summer of 1967 he was associating with her and that he had sexual relations with her on at least one occasion; that on one night during the mid-summer of 1967 he met Mrs. Smith on Highway 64

near Apex; that she parked her automobile and got into his 1955 Chevrolet with him; that he drove with her south of Apex down Highway 55 and parked off of Highway 55; that they drank some beer which he had with him; that he and Jane Ellen Smith got into an argument, a verbal argument; that no blows were passed between the two of them; that he had a .38 caliber revolver in the automobile with him and that he used the revolver and shot Jane Smith; that he took the body and left it in a wooded area off of Highway 55; left the area, leaving her personal effects with the body, drove to Fuquay and left Fuquay and returned to Wake Forest, where he was staying; that he did not see why he had to suffer for the death of Jane Ellen Smith; that she was a slut and led him on and that she was not worth a tinker's dam; that to the best of his knowledge the .38 caliber Charter Arms pistol (serial number 5744) was the weapon he used to shoot Jane Ellen Smith.

The defendant offered evidence which tended to show the following:

Defendant is forty-nine years of age, married and has four children. He lived in Apex and was employed by the Durham and Southern Railway until 15 November 1966. He first met Jane Ellen Smith when he talked with her about the crossing over the Durham and Southern tracks between her house and the paved road. Later he went with her three times. The last time he went with Jane Ellen Smith was on 24 July 1967. At that time he stopped to pick up someone flagging him down, at the intersection of Highways 1 and 64 south of Raleigh; it turned out to be Jane Ellen Smith. He took her to get some beer, drove down Highway 55 south of Apex, parked opposite the gas pipeline terminal, drank the beer and proceeded on down Highway 55 to Fuquay-Varina. When they arrived at the north end of Fuquay-Varina, Jane Ellen Smith wanted more beer, but he refused to take her to get more. She got out of the car to walk on into town, and defendant continued on down Highway 55. He has not seen Jane Ellen Smith since that time. On 30 July and 31 July 1967 (Sunday and Monday) defendant was staying in Wake Forest with his sister, mother, and grandmother. He was working at that time for the Seaboard Railway, assigned to work out of Henderson. On 31 July 1967, upon getting off work at four o'clock, defendant went straight to Wake Forest, rested for awhile, ate supper, watched television, and went to bed for the night. Defendant did not go to the vicinity of Apex or Holly Springs on 31 July 1967, and has never told anyone that he did. He did not tell the officers that he shot Jane Ellen Smith; he had no ill feelings towards her nor any desire to have her out of the way.

The jury returned a verdict of guilty of second-degree murder, and a sentence of not less than twenty nor more than thirty years was imposed. Defendant appealed.

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

Hatch, Little, Bunn & Jones, by E. Richard Jones, Jr., for defendant appellant.

PARKER, J.

[1] Defendant assigns as error that the trial court refused to require the State to produce for examination by defendant the typewritten transcript of notes made by S.B.I. Agent Emerson during the interrogation of defendant on 16 March 1968.

By written motion dated 25 June 1968, defendant moved the court to require the State to produce for inspection by defendant the following:

1. Jewelry and clothing alleged to have been worn by Jane Ellen Smith on 31 July 1967.

2. Any pistol or other weapon alleged to have been used in the alleged crime; together with any bullet discovered in or near the remains recovered on 10 March 1968 in Holly Springs Township.

3. Vacuum sweepings or other items taken from any automobile formerly owned by the defendant.

4. Typewritten transcript of notes made by S.B.I. Agent Emerson during the interrogation of defendant on 16 March 1968.

5. Autopsy report of medical examiner and pathologist as to the remains recovered on 10 March 1968.

By order dated 28 June 1968, Bickett, J., required the State to produce the items requested in paragraphs 1, 2, 3 and 5 of the motion for inspection by defendant. With respect to the item requested in paragraph 4 of the motion, Bickett, J., ruled as follows:

> "And it appearing to the court that the article enumerated as Article (of) (E)vidence Number 4 in the defendant's motion is not a transcribed and signed confession of the defendant, but rather the personal notes taken pursuant to the investigation and interrogation of the defendant by S.B.I. Agent Emerson, and it further appearing to the court that the defendant's attorney has had ample opportunity to cross examine S.B.I. Agent Emerson at the preliminary hearing; therefore, the court is of

the opinion that the defendant is not entitled (to inspect the) typewritten transcript of notes made by S.B.I. Agent Emerson during the interrogation of the defendant on March 16, 1968."

Defendant relies primarily on the provisions of G.S. 15-155.4 as giving him the right to inspect the transcribed notes of the interrogating officer. However, the statute relied upon provides that prior to the issuance of an order for inspection ". . . the accused or his counsel shall have made a written request to the solicitor or other counsel for the State for such inspection. . . ." Nowhere is it shown that defendant made such a request. Also the statute relied upon relates to the inspection of ". . . any specifically identified exhibits to be used in the trial. . . ." The interrogating officer's notes were not designed as exhibits to be used in the trial, nor were they offered to corroborate the officer's testimony as a prior consistent statement. It is noteworthy that on the *voir dire* examination of Agent Emerson, counsel for defendant made no inquiry concerning the interrogation notes nor of their contents. Additionally, it does not appear that S.B.I. Agent Emerson used the transcribed notes during his testimony, nor does it appear that they were mentioned before the jury until upon cross-examination when defense counsel questioned him about taking notes and asked if he had them with him.

[1, 2] We do not need to decide whether under proper circumstances a defendant is entitled to inspect the notes taken by an officer during interrogation of defendant. If we concede *arguendo* that the trial court committed error in its refusal to allow the inspection, defendant has failed to show any prejudice from such error. According to Judge Bickett's unchallenged finding defendant had ample opportunity to cross-examine the officer about the notes during the preliminary hearing. Defendant had ample opportunity to cross-examine the officer about the notes in the absence of the jury during the *voir dire;* but he must have deemed it unnecessary because he did not do so. But, primarily, defendant has failed to point out to us any way in which he was taken by surprise or otherwise prejudiced by his inability to inspect the notes before trial. Defendant must not only show error but also must show that the error complained of was prejudicial to him and affected the result adversely to him. 3 Strong, N.C. Index 2d, Criminal Law, § 167, p. 126. This assignment of error is overruled.

[3] Defendant assigns as error that the trial court allowed Deputy Sheriff Connie Holmes and Deputy Sheriff W. L. Pritchett, who were witnesses for the State, to act as court officers during the trial. Defendant relies strongly upon *Turner v. Louisiana,* 379 U.S. 466, 13

L. Ed. 2d 424, 85 S. Ct. 546. In *Turner*, the jury was sequestered, and placed in charge of deputies who accompanied the jury to meals and to their lodgings and two of those deputies were the principal witnesses for the State. The court rightly observed that ". . . it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." *Turner v. Louisiana, supra.*

However, in the present case neither Deputy Holmes nor Deputy Pritchett was a "key witness" for the prosecution. It was the testimony of S.B.I. Agent Emerson which connected defendant with the crime. Also, in the present case the jury was not sequestered nor were the two deputies placed "in charge" of the jury. It is true that both of them from time to time performed the function of courtroom deputy or bailiff, but there was no suspicious or prejudicial conduct.

Immediately after the jury was impaneled counsel for defendant lodged their objection to these two deputies acting as courtroom deputies, which objection the trial judge overruled. Later the trial judge made the following findings: "After this objection was made, no further objection or suggestion of improper contact was made during the trial, and as a result of the objection the court observed the conduct of the officers and observed no improper conduct. The jury was not sequestered and the only services of these officers in connection with the jury was in opening the door to send them out or call them in as occasion required."

[4] Although this assignment of error is overruled we think it appropriate to reiterate here what was said in *State v. Taylor*, 226 N.C. 286, 37 S.E. 2d 901. "The practice of putting the jury in the custody of an officer who has actively investigated the evidence or has become a witness for the State is not to be approved. While, in the absence of evidence of some fact or circumstance tending to show misconduct on the part of the officer or the jury, we hesitate to make it alone the grounds for a new trial, we do stress the need for trial judges to be extremely careful to avoid such incidents. However circumspect the officer and jurors may be when placed in such a situation, these occurrences always, as here, tend to bring the trial into disrepute and produce suspicion and criticism to which good men should not be subjected." See also, *State v. Hart*, 226 N.C. 200, 37 S.E. 2d 487. This assignment of error is overruled.

Defendant assigns as error that his motion for nonsuit was de-

nied. He contends there is insufficient evidence *aliunde* the confession to carry the case to the jury.

[5, 6] "The proof of every crime consists of: (1) proof that the crime charged has been committed by someone; and (2) proof that the defendant is the perpetrator of the crime. The first element is the body of the crime, or the *corpus delicti;* the second is the proof of defendant's connection with the crime, *i.e.,* his guilty participation or agency therein." Wharton's Criminal Evidence (12th Ed.), Vol. 2, § 393, p. 130. In North Carolina it is required that ". . . the confession be 'corroborated' by independent evidence of the *corpus delicti.* By this is meant, evidence that the offense charged was committed by someone, not necessarily by the defendant himself. The corroborative evidence need not be direct; it may be circumstantial, and it is sufficient (if) the circumstances are such 'as will, *when taken in connection with the confession,* establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt." Stansbury, N.C. Evidence 2d, § 182.

[7] To establish a *prima facie* showing of the *corpus delicti* the prosecution need not eliminate all inferences tending to show a non-criminal cause of death. "Rather, a foundation (for the introduction of a confession) may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency . . . even in the presence of an equally plausible non-criminal explanation of the event (citing cases)." *State v. Hamilton,* 1 N.C. App. 99, 160 S.E. 2d 79.

[8] We hold that the evidence introduced by the State, independent of the confession, was sufficient to create a reasonable inference that Jane Ellen Smith's death *could have been* caused by a criminal agency and was therefore sufficient to make out a *prima facie* showing of *corpus delicti.* This independent evidence of *corpus delicti,* together with defendant's confession, was sufficient to require submission of the case to the jury upon the question of defendant's guilt. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53. This assignment of error is overruled.

[9] Defendant assigns as error the court's charge to the jury that the question of involuntary manslaughter was not before them in this case. In this there was no error. S.B.I. Agent Emerson, a witness for the State, testified that the defendant had told him that he and Jane Smith "got into an argument, a verbal argument, that no blows were passed between the two of them; that he had a .38 caliber revolver in the automobile with him and that he used the revolver and shot Jane Smith; that he took the body and left it in

a wooded area off of Highway 55." There was no evidence that the shooting occurred in any other manner; defendant's evidence was that he had never shot Jane Smith at all and that he had never told the officers that he did. There was no evidential basis for submitting to the jury an issue of involuntary manslaughter. *State v. Price,* 271 N.C. 521, 157 S.E. 2d 127; *State v. Hamilton, supra.*

[10] Defendant assigns as error that the court failed adequately to charge the jury as to what would be sufficient legal provocation to reduce the crime from second-degree murder to manslaughter. There was in this case, however, no evidence of any legal provocation. The only evidence for the State as to how the killing occurred is quoted above. The defendant denied the shooting, denied his statement, and relied on alibi. On the evidence the court was not required to charge as to what might constitute legal provocation sufficient to reduce the crime of second-degree murder to manslaughter. Insofar as the court referred to the matter of legal provocation at all in its instructions to the jury, the charge could only have been beneficial to defendant, not harmful, and no prejudicial error is shown.

[11] At the close of his charge, the trial judge, after instructing the jury that their verdict must be unanimous, stated:

> "I would like to say, members of the jury, consistent with my statement made earlier, I will not keep you here beyond 9:00 o'clock, except by your request. If you have not reached a verdict by approximately 9:00 o'clock, I will make inquiry and if you have not and do not want to stay longer, we will recess for the evening and come back tomorrow; . . ."

Defendant contends this statement tended to put undue pressure upon the jury to hasten their deliberations and to surrender their unbiased judgment, thereby depriving him of a fair and impartial trial. There is no merit to this contention. Here, unlike the situation presented in *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767, the jury had not begun their deliberations when the challenged instruction was given; hence the statement was not made to get the jurors of one mind. Nothing in the challenged statement in the present case could have been rationally interpreted by any juror as coercive. On the contrary, the able judge was making it clear that he was not placing any time limitation upon the jury's deliberations, nor would he insist that they remain in session until an inconveniently late hour in the night. In stating that he would consult with and follow the jury's wishes in the matter, the trial judge placed no pressure upon any juror to surrender his independent judgment nor upon the

jury as a whole to hasten its deliberations, and the defendant was not deprived of a fair trial.

[12, 13] Defendant's final assignments of error relate to the admission in evidence of the testimony of the State's witness, S.B.I. Agent Emerson, as to the incriminating statements made by the defendant. This testimony was admitted only after the trial judge had conducted an extensive *voir dire* examination in the jury's absence, at the conclusion of which the court made findings of fact that any statements made by defendant to the officers were made voluntarily and understandingly, without coercion, duress, promise, or threat, and after the defendant had been advised of his rights as required by the *Miranda* decision. These findings of fact are fully supported by the evidence taken on the *voir dire* examination and the trial court fully complied with the procedures prescribed in *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, for determining the admissibility in evidence of an extrajudicial confession. It is significant that the defendant himself testified in the *voir dire* examination that prior to questioning him S.B.I. Agent Emerson had advised him that he had a right to an attorney and that he could remain silent. The defendant testified before the jury that he had not made the statements attributed to him. Whether the defendant did or did not make the incriminating statements was a question of fact to be determined by the jury from the evidence admitted in its presence. *State v. Gray, supra; State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619. By its verdict the jury obviously found against defendant's contentions.

In the entire trial we find

No error.

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

JAMES A. HILL, JR. v. DENNIS E. SHANKS

No. 6912SC259

(Filed 22 October 1969)

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

On motion to nonsuit, the evidence and stipulations must be considered in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences therefrom, resolving all conflicts in his favor, and disregarding defendant's evidence tending to show a different state of facts.

2. Automobiles § 62— striking soldier in drill formation — failure to keep proper lookout — sufficiency of evidence

In this action for personal injuries received when plaintiff was struck during darkness by defendant's automobile at an intersection on a military reservation while double-timing in formation with his platoon, plaintiff's evidence and stipulations by the parties *are held* sufficient to be submitted to the jury on the issue of defendant's negligence in failing to maintain a proper lookout, where they tend to show that defendant was driving at a time when and in an area where he knew troop movements in formation were to be expected, that he knew such troops would have the right-of-way over his vehicle, that he was approaching an intersection lighted by a street light, that a road guard was in the center of the intersection in front of him, that the guard raised his hand and yelled "Stop," and that defendant failed to see the guard and failed to see a platoon of 45 or 50 men moving in formation into the intersection in front of him until after his car had struck plaintiff.

3. Automobiles § 8— duty to maintain proper lookout

The driver of a motor vehicle has the duty to keep an outlook in the direction in which he is traveling and is held to the duty of seeing that which he ought to have seen.

4. Negligence § 35— nonsuit for contributory negligence

Judgment of nonsuit on the ground of contributory negligence should not be entered unless the evidence, taken in the light most favorable to plaintiff, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom.

5. Automobiles § 83— crossing intersection — soldier in drill formation — contributory negligence

In this action for personal injuries received when plaintiff was struck during darkness by defendant's automobile while double-timing in platoon formation across an intersection on a military reservation, the evidence *is held* not to disclose contributory negligence on the part of defendant as a matter of law in failing to observe the headlights of defendant's automobile approaching the intersection, where it would permit the inference that plaintiff's attention was directed to performing his duties as squad leader, and that he relied upon the customary practice of the road guard to stop all oncoming traffic.

6. Damages § 12; Pleadings §§ 32, 36— evidence of loss of sense of taste — failure to allege — denial of amendment to pleadings

In this action for personal injuries received when plaintiff was struck by defendant's automobile, the trial court did not err in refusing to allow plaintiff to testify with respect to his loss of the sense of taste, where there was no allegation in the complaint concerning plaintiff's loss of the sense of taste, and no abuse of discretion has been shown in the disallowance of plaintiff's motion made during trial for leave to amend his complaint to allege the loss of sense of taste as an element of damages.

7. Pleadings § 32— amendment during trial

A ruling upon a motion to amend pleadings made during the course of the trial is addressed to the trial court's discretion, G.S. 1-163, and the

exercise of this discretion is not reviewable on appeal in the absence of palpable abuse.

8. Appeal and Error § 50; Damages § 16— evidence of loss of sense of smell — stipulation — instructions — harmless error

In this action for personal injuries in which it was stipulated during trial that plaintiff lost his sense of smell as a result of the accident complained of, plaintiff was not prejudiced by trial court's instruction that there was evidence in the case tending to show that plaintiff received an injury to his head which resulted in the loss of his sense of smell, where the court instructed the jury when the stipulation was entered that it had been conceded that plaintiff had lost his sense of smell as a result of the accident, following the stipulation plaintiff and his expert medical witness both testified at length concerning plaintiff's loss of the sense of smell, and no conflicting evidence on the matter was introduced by defendant.

9. Appeal and Error § 46— burden of showing prejudicial error

The burden is on an appellant not only to show error, but to show that the alleged error was prejudicial and amounted to the denial of some substantial right.

APPEALS by defendant and by plaintiff from *Braswell, J.*, 2 December 1968 Civil Session of CUMBERLAND Superior Court.

Plaintiff received personal injuries when struck by a car driven by defendant on 6 July 1967 at approximately 5:30 a.m. at the intersection of K Street with Fifth Street on the military reservation at Fort Bragg, North Carolina. K Street runs generally east and west and dead ends into Fifth Street which runs north and south, forming a "T" intersection. Plaintiff, a ROTC cadet, was double-timing in formation with his platoon in a westerly direction along the right-hand side of K Street. Defendant was driving in a northerly direction along Fifth Street.

The pleadings raised issues of negligence, contributory negligence, and damages. Defendant, at the close of plaintiff's evidence and again at the close of all the evidence, moved for judgment as of involuntary nonsuit. To the overruling of his motions defendant excepted and appealed. The jury answered the issues in favor of plaintiff and awarded him $4,949.00. In apt time plaintiff moved that the verdict be set aside, the judgment vacated, and a new trial granted on the issue of damages. The court denied plaintiff's motion and plaintiff excepted and appealed.

Facts necessary for determination of both appeals are set out in the opinion.

McCoy, Weaver, Wiggins, Cleveland & Raper, by L. Stacy Weaver, Jr., for plaintiff appellant-appellee.

Anderson, Nimocks & Broadfoot, by Henry L. Anderson, for defendant appellant-appellee.

PARKER, J.

DEFENDANT'S APPEAL:

Defendant contends his motions for nonsuit should have been granted on the grounds that, first, no actionable negligence on the part of defendant has been shown by the evidence, and second, even if the evidence should be deemed sufficient for submission to the jury on the question of defendant's negligence, plaintiff's contributory negligence is apparent as a matter of law.

[1] It is elementary that on motion to nonsuit all 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. Stipulations favorable to plaintiff must also be considered. *Lienthall v. Glass,* 2 N.C. App. 65, 162 S.E. 2d 596 (certiorari denied 274 N.C. 378). All conflicts in the evidence are to be resolved in plaintiff's favor, and all evidence by defendant tending to show a situation or a course of events contrary to that shown by the plaintiff's evidence is to be disregarded. *Bennett v. Young,* 266 N.C. 164, 145 S.E. 2d 853. It is our duty, as it was the trial tribunal's, to consider the evidence in the light of these principles. If, when so considered, it is sufficient to support a finding by the jury that defendant was negligent and that his negligence was a proximate cause of plaintiff's injury, defendant's motions were properly denied, unless the evidence, so considered, so clearly reveals contributory negligence on the part of plaintiff that no other inference may be reasonably drawn therefrom. *Bennett v. Young, supra.*

At the trial the parties stipulated that the following portions of the Post Motor Vehicle and Traffic Regulations at Fort Bragg, N. C., were in force and effect at the time of the injuries to plaintiff:

"'5-3. Established speed limits are as follows:

5-3.1. Housing and troop areas — 20 miles per hour.'

5-3.2. Service drives in housing areas — 10 miles per hour.

5-3.3. When approaching or passing troops in formation — 10 miles per hour.

Section 8-3 which relates as follows:

'8-3. Pedestrians' right-of-way at crosswalks. Within any marked or unmarked crosswalks at an intersection, not protected by a traffic signal or Military Policeman, any pedestrian having entered same has the right-of-way over all approaching vehicles.'

Section 12-1. through 12-5.4 which relates as follows:

'12. Pedestrians' Rights and Duties.

12-1. Pedestrians will obey all traffic control signs and signals.

12-2. Crossing at Other than Crosswalks.— Any pedestrian crossing a roadway other than at an intersection or marked crosswalk, will yield the right-of-way to all approaching vehicles.

12-3. Pedestrians to Use Sidewalks and Left Side of Road. Pedestrians, including small troop details, will use sidewalks, and where not available, will walk on the left side of road facing traffic.

12-4. Foot Columns Have Right-of-Way. Foot troops in column have the right-of-way over all traffic except emergency vehicles and will march on the right side of road as near the curb or shoulder as possible.

12-5. Unit Commanders are responsible for the safe movement of foot troops and will:

12-5.1 Have flank guards halt traffic from all directions when crossing roadways or intersections.

12-5.2 Use flank movements to cross roadways.

12-5.3 Avoid heavily traveled roadways whenever possible.

12-5.4 If roadways must be used for movements of troops during the hours of darkness, adequately positioned and well lighted advance, flank and rear guards will be provided to warn approaching vehicular traffic. Lighting used will be of a type of intensity that does not blind oncoming motorists.' "

It was also stipulated that defendant was the owner and operator of the automobile which struck plaintiff at or near the intersection of Fifth and K Streets on 6 July 1967, and that 20 m.p.h. was the posted speed limit for Fifth Street at the time of the accident.

Plaintiff offered evidence which tended to show: Plaintiff was at Fort Bragg, N. C., attending summer camp as a College ROTC cadet. On the morning of 6 July 1967, he and the other members of his platoon were awakened around 4:30 or 5:00 o'clock. They dressed in white T shirts, fatigue pants, and combat boots and went out for the customary morning run. Plaintiff was first squad leader, which put him in the left front position of his platoon. The platoon consisted of between 45 to 50 men and there were four squad leaders and a platoon sergeant. Under the system used, as the platoon approached an intersection the first man behind the squad leader of the first squad and the first man behind the squad leader of the fourth squad, upon the command of the Platoon Leader, "Road Guards Post," were to break ranks, run ahead of the rest of the platoon out into the intersection, and there stop any oncoming traffic. The platoon was moving at double-time (170 36-inch steps per minute) along K Street toward Fifth Street. Cadet Erb, who was the first man immediately behind plaintiff, had the duty of acting as one of the road guards. Approximately 20 yards before the platoon reached the intersection, the platoon leader gave the command "Road Guards Post" and the road guards immediately broke ranks. Plaintiff's duty was to stay in front of the squad in line with the other squad leaders and lead the men around the block. As Cadet Erb left the platoon formation, a Volkswagen turned the corner from his right, coming close to hitting him, but Erb got out of the way and proceeded to his post in the center of the lane of the intersection. Defendant's car was approaching at the time. It was dark and all Cadet Erb could see were headlights. He raised his hand and yelled "Stop," but defendant evidently did not see him, so Erb again yelled "Stop." When it became obvious that defendant did not see him, Erb moved to the left to keep from being hit and yelled "Watch out" several times. The platoon and the car were both then entering the intersection. Cadet Erb heard the car thud against the platoon. Erb first saw defendant's car when he was approaching the intersection, at which time the car was about 75 yards away. When he assumed his road guard position in the center of the lane, the car was 40 to 50 yards away. Erb estimated the speed of the car to be 20 miles per hour or more. The road guards wore nothing distinctive to distinguish them from any other men in the outfit. Erb had no flashlight and was dressed in fatigue pants, combat boots and white T shirt. The platoon was moving straight when he first called "Watch out." By the time he called a second time, the platoon had begun the turn and plaintiff was moving away from the oncoming vehicle. Erb observed

no marked change in the position of the platoon in response to his call.

Defendant's evidence tended to show: Defendant had been stationed at Fort Bragg about a year and one-half and was living in barracks on post. For approximately two months he had been temporarily assigned to a truck company to drive trucks for the ROTC cadets while they were at Fort Bragg for summer training. At the time of the accident he was driving his personal car north on Fifth Street, accompanied by one passenger, and was on his way to the motor pool to pick up his truck to go to work. He was familiar with the area and had been on this special duty assignment to the ROTC units since about the first of June. There was a stop sign on K Street. The weather was clear and it was dark. Defendant entered Fifth Street about four blocks from K Street. He had stopped for a stop sign at I Street. Fifth Street passes over a small hill between I and J Streets, the crest of the hill being approximately 40 to 50 yards from K Street. K Street is the first street north of J Street and as one approaches K Street from J Street, the roadway is running downhill. As defendant came over the hill, he saw the Volkswagen, which turned in front of him. Defendant dimmed his lights and went on. He was driving about 15 miles per hour. There was a thud and defendant swerved and stopped. The right front fender of defendant's car struck plaintiff. Defendant saw plaintiff on the hood of the car. Defendant hit the brakes and plaintiff slid off the front fender. Defendant had gotten three-fourths of the way through the intersection when his car struck plaintiff. Defendant heard nothing as he approached the intersection. He was familiar with the intersection. He had taken special examinations and tests to drive military vehicles and knew the rules and regulations with respect to motor vehicles, pedestrian and troop traffic on the Fort Bragg military reservation. He knew that a platoon of men had the right-of-way over motor vehicles, with the exception of emergency vehicles. He knew that ROTC cadets were barracked in the vinicity of K Street and knew they engaged in close-order drills and double-time drills upon the streets of their barracks area. Defendant did not see the platoon nor did he see Cadet Erb in the road immediately ahead of him. He did not hear anyone yell "Stop." Until the point of impact he had not slowed his vehicle nor swerved either right or left. There was no obstruction in the road to prevent his turning to the left. After his car struck plaintiff, defendant had no trouble seeing plaintiff lying on the pavement and no trouble seeing the other members of the platoon. There was a street light at the intersection and there was nothing to prevent the light from shining down K Street.

Defendant could not say whether the light was shining at the time of the accident.

There was also evidence tending to show that the defendant's car had been left out all night in a parking lot; that when defendant and his passenger first got into the car in the parking lot, there was a considerable accumulation of moisture on the windshield; and that defendant had operated the defroster for a short period prior to driving his car from the parking lot. The passenger testified that the windshield was clear at the time of the accident.

[2, 3] In our opinion the evidence and the stipulations, when considered in the light most favorable to the plaintiff, were sufficient to support a jury finding of actionable negligence on the part of the defendant. So considered, the evidence would permit but not compel the jury to find that defendant was driving before daylight at a time when and in an area where he knew troop movements in formation were to be expected; that he knew that troops moving in formation would have the right-of-way over his vehicle; that he was approaching an intersection lighted by a street light; that a road guard was in the center lane of the intersection in front of him; that the guard raised his hand and yelled "Stop"; that the defendant failed to see or hear the guard, and failed to see a platoon of 45 or 50 men moving double-time in formation into the intersection in front of him; that plaintiff, moving as a part of this platoon and as the front man in the left-hand squad, moved into the intersection; and that defendant failed to see the plaintiff or any other member of the platoon until after defendant's car had struck the plaintiff. While there is no evidence that the defendant actually saw plaintiff prior to the instant of impact, the driver of a motor vehicle has the duty to keep an outlook in the direction in which he is traveling and is held to the duty of seeing that which he ought to have seen. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330. The evidence in this case raised an issue for the jury as to whether the outlook being maintained by defendant was the exercise of that degree of care which a reasonably prudent man would have exercised under like circumstances.

Defendant contends, however, that the evidence discloses contributory negligence on the part of plaintiff as a matter of law in that plaintiff ran, in the darkness, toward and into an intersection where he saw or should have seen automobile headlights approaching and that plaintiff thereby failed to exercise due care for his own safety. We do not agree.

[4] Judgment of nonsuit on the ground of contributory negligence

should not be entered unless the evidence, taken in the light most favorable to the plaintiff, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. *Black v. Wilkinson,* 269 N.C. 689, 153 S.E. 2d 333; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360.

In *Dennis v. Albemarle,* 242 N.C. 263, 87 S.E. 2d 561, the Court speaking through Bobbitt, J., said at page 268:

> "The general rule, applicable here, is well stated in 65 C.J.S. 726, Negligence sec. 120, as follows: 'When a person has exercised the care and caution which an ordinarily prudent person would have exercised under the same or similar circumstances, he is not negligent merely because he temporarily forgot or was inattentive to a known danger. To forget or to be inattentive is not negligence unless it amounts to a failure to exercise ordinary care for one's safety. *Regard must be had to the exigencies of the situation, and the circumstances of the particular occasion.* Circumstances may exist under which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care, as where the situation requires one to give undivided attention to other matters, or is such as to produce hurry or confusion, or where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger. In order to excuse forgetfulness of, or inattention to, a known danger, some fact, condition, or circumstance must exist which would divert the mind or attention of an ordinarily prudent person; mere lapse of memory is not sufficient, and, if, under the same or similar circumstances, an ordinarily prudent person would not have forgotten or have been inattentive to the danger, such conduct constitutes negligence.' " (Emphasis added.)

See also *Walker v. Randolph County,* 251 N.C. 805, 112 S.E. 2d 551, wherein the same principle was applied.

[5] Upon the evidence presented in the present case, the inference is permissible that plaintiff's attention was directed to performing his duties as squad leader, relying upon the customary practice of the road guard to perform the duty assigned to him. It was for the jury to determine whether plaintiff's failure to observe the oncoming vehicle was a failure to exercise the degree of care which an ordinarily prudent person would have exercised under the circumstances.

PLAINTIFF'S APPEAL:

Plaintiff assigns as error the court's refusal to set aside the verdict, vacate the judgment, and grant a new trial on the issue of damages.

[6, 7] Within the framework of this assignment, plaintiff contends that the court erred in not allowing plaintiff to testify with respect to his loss of the sense of taste (as distinguished from loss of the sense of smell, which was stipulated). While the excluded testimony would have been relevant on the issue of damages and would have been admissible if there had been an appropriate allegation in the complaint, in the present case there was no allegation in the complaint concerning plaintiff's loss of the sense of taste. During the course of the trial and after this testimony had been excluded, the plaintiff did move the court for leave to amend his complaint to allege the loss of the sense of taste as an element of damages. This motion was overruled. A ruling upon a motion to amend pleadings made during the course of the trial is addressed to the trial court's discretion, G.S. 1-163, and the exercise of this discretion is not reviewable on appeal in the absence of palpable abuse. *Crump v. Eckerd's, Inc.*, 241 N.C. 489, 85 S.E. 2d 607. No manifest abuse of discretion has been made to appear in this case.

[8, 9] Finally, plaintiff assigns as error that portion of the judge's charge to the jury in which the court, in referring to the evidence as to the plaintiff's injuries, stated: "There is evidence in this case which tends to show . . . that he (the plaintiff) received an injury to his head which resulted in the loss of his sense of smell." Plaintiff contends that this was error in view of the fact that during the course of the trial and while plaintiff was testifying as to the nature of his injuries, the parties had stipulated that "the plaintiff, James A. Hill, Jr., had a sense of smell prior to the accident and as a result of the accident he has lost his sense of smell." However, even if it be conceded that the court by inadvertence appeared to be leaving to the jury the discretion to determine a fact which had already been established by stipulation, in our opinion plaintiff has not been in any way prejudiced by such inadvertence. At the time the parties entered into their stipulation, the court clearly instructed the jury that it had been conceded that plaintiff had lost his sense of smell as a result of the accident. Furthermore, following the making of this stipulation, plaintiff and an examining physician, who was called as an expert witness by the plaintiff, both testified at considerable length concerning the plaintiff's loss of the sense of smell. No conflicting evidence on this matter was introduced by the defendant. We do not see how the court's reference to the plaintiff's evidence or its inadvertent failure to make a further reference to the stipulation in its charge could have in any way misled the jury to the prejudice of the plaintiff. The burden is on an appellant not only to show error, but to show that the alleged error

was prejudicial and amounted to the denial of some substantial right. 1 Strong, N.C. Index 2d, Appeal and Error, § 46, p. 190. No such denial of any substantial right has been demonstrated in this case.

On defendant's appeal we find

No error.

On plaintiff's appeal we find

No error.

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

ROBERT M. OLIVE, SR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF RUTH SEDBERRY OLIVE, DECEASED v. GEORGE BIGGS; CHRISTINE BIGGS; RUTH OLIVE NEITMAN; CLARENCE SEDBERRY OLIVE; JEAN McKAY OLIVE TOLAR, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT M. OLIVE, JR., DECEASED; ANN M. OLIVE; CARRIE BLACKMAN SIMMONS; MYRA OLIVE; LOWNEY OLIVE; IULA OLIVE AND ROBERT M. OLIVE, III; TERRY DEE OLIVE; HUNTER OLIVE; THERESA OLIVE; WINSTON OLIVE; CARLA NEITMAN; ROBIN NEITMAN; RENEE NEITMAN; DEBRA NEITMAN; KAY OLIVE AND NANCY OLIVE, MINORS

No. 6912SC467

(Filed 22 October 1969)

1. Wills § 73— action to construe will — competency of evidence

In an action to construe a purported will executed jointly by the husband and wife, it was proper to admit the testimony of a witness relating to what knowledge, if any, he may have had of the existence of a contract between the husband and wife which provided that the will was to remain in effect as the will of the surviving spouse at the time of such spouse's death, the testimony being relevant to an issue in the action.

2. Wills §§ 2, 73— joint will of spouses — existence of contract to execute will — findings — action to construe

In an action by a husband, individually and as executor of the estate of his deceased wife, to seek construction of a purported will executed jointly by the husband and the wife, findings and conclusions by the trial court that (1) there was no contract between the husband and wife to execute the joint will and that (2) the purported will itself did not constitute a contract between the spouses so as to require that the will remain in effect as the will of the surviving spouse, *held* supported by the pleadings, the stipulations, and the evidence.

3. Wills § 8— joint or reciprocal wills — revocation

In the absence of a valid contract, the concurrent execution of a joint, conjoint, or reciprocal will, with full knowledge of its contents by those executing, is not enough to establish a legal obligation to forbear revocation, either before or after the death of a party thereto.

4. Wills § 73— action to construe will — conflict between items of will — dominant purpose of testator

In an action by a husband, individually and as executor of the estate of his wife, to seek construction of a purported will executed jointly by the husband and the wife, item two of the will devised and bequeathed "all of his or her property, unconditionally and in fee simple, to the survivor, in the event that one of us survives the other." The remaining items attempted to devise and bequeath to various beneficiaries the property described in item two in addition to other property owned by the spouses as tenants by the entirety. *Held:* It was the dominant or primary purpose of the testator to devise or bequeath all of her individual property in fee simple to her husband if he should survive her, and, secondarily, to provide for the disposition of her property in the remaining items of the will in the event that the two of them should die simultaneously; consequently, the testator's primary purpose controls and the husband may dispose of the realty devised to him under the will.

5. Wills § 28— rule of construction — intention of testator

In the construction of wills the intention of the testator must prevail, provided it can be effectuated within the limits which the law prescribes.

6. Wills § 28— rule of construction — conflict between purposes of testator

When the primary purpose and a secondary purpose of a testator conflict and are inconsistent with each other, that purpose which is primary will control that which is secondary.

APPEAL by defendant Jean McKay Olive Tolar, Individually and as Executrix of the Estate of Robert M. Olive, Jr., Deceased, from *Canaday, J.*, May 1969 Civil Session of Superior Court held in CUMBERLAND County.

Plaintiff, individually and as executor, instituted this action and filed complaint on 4 March 1968 under the provisions of the Uniform Declaratory Judgment Act. See G.S. 1-253, *et seq.* Plaintiff seeks to obtain a judgment of the court construing the paper writing purporting to be a last will and testament dated 25 February 1965 executed by plaintiff and his deceased wife, Ruth Sedberry Olive (hereinafter referred to as the deceased wife). Plaintiff's wife died 29 September 1965. The paper writing was admitted to probate in common form as the last will and testament of the decedent, Ruth Sedberry Olive. On 20 October 1965 Robert M. Olive, Sr., qualified as executor under the will. The will is as follows:

"NORTH CAROLINA
CUMBERLAND COUNTY

We, Robert M. Olive, Sr. and Ruth Sedberry Olive, husband and wife, both of Cumberland County, North Carolina, and both being of sound mind, but considering the uncertainty of our earthly existence, in consideration of each making this OUR LAST WILL AND TESTAMENT, do hereby MAKE, PUBLISH and DECLARE this instrument to be jointly as well as severally OUR LAST WILL AND TESTAMENT.

ONE:

We direct our Executors, hereinafter named, to pay all of our just debts and funeral expenses out of the first money coming into their hands belonging to our estate.

TWO:

We, and each of us, devise and bequeath all of his or her property, unconditionally and in fee simple, to the survivor, in the event that one of us survives the other.

THREE:

Upon the death of the survivor, or in the event that our death is simultaneous, we do hereby give and devise our home place, at No. 126 Dobbin Avenue, in the City of Fayetteville, to our sons ROBERT M. OLIVE, JR. and CLARENCE S. OLIVE, and our daughter, RUTH OLIVE NIETMAN.

FOUR:

We give and devise, in fee simple, to our son, ROBERT M. OLIVE, JR., the white brick and weatherboard constructed house at No. 209 A DeVane Street, in the City of Fayetteville, including the household and kitchen furniture therein.

FIVE:

We give, devise and bequeath, in fee simple, subject to the conditions hereinafter set out, to our daughter, RUTH O. NIETMAN, our following described property:

1. The two store brick dwelling at No. 209 DeVane Street, together with the furniture and furnishings therein, being on the corner of DeVane and Olive Court, in the City of Fayetteville.

2. The brick dwelling and the furniture and furnishings therein,

at 209 B on Olive Court leading from DeVane Street eastwardly in the City of Fayetteville.

3. The brick dwelling, and the furniture and furnishings therein, at 209 C on Olive Court leading from DeVane Street Eastwardly in the City of Fayetteville, if, at the time of our death we still own the house and property on East Mountain Drive; but if, at the time of our death we do not own the said property on East Mountain Drive, then the brick dwelling, and the furniture and furnishings therein, at 209 C on Olive Court, shall vest in ROBERT M. OLIVE, JR., as set out in Article SIX of this will.

4. The house and lot on Grove Street, the two houses and lots on Bell Street, and one vacant lot on New York Street, all in the City of Fayetteville.

All of the foregoing described property is devised and bequeathed to our daughter, RUTH O. NIETMAN, subject to the condition and provision that no part thereof may be sold or mortgaged without the consent, in writing, of ALEXANDER E. COOK and LACY S. COLLIER, Fayetteville, North Carolina, or the survivor.

In the event, however, that either ALEXANDER E. COOK or LACY S. COLLIER be not living at the time of the death of the survivor of us, or either declines to serve, or either dies before the estate is fully administered, then, and in any one of said events, we hereby appoint JAMES R. NANCE of Fayetteville, North Carolina, in the place of that one, to serve in this capacity.

SIX:

We give, devise and bequeath to our son, ROBERT M. OLIVE, JR., our country place located on East Mountain Drive in Pearce's Mill Township, about six miles south of Fayetteville, which country place consists of a concrete and masonry house and two lots, and including the fishing pier in Watson's Pond, and also including the furniture and furnishings in the house.

In the event, however, that at the time of our death we do not own this said property, then we give and devise to our son, ROBERT M. OLIVE, JR., the brick building at 209 C on Olive Court leading from DeVane Street eastwardly, in the City of Fayetteville.

SEVEN:

We give and devise and bequeath to our son, CLARENCE S. OLIVE, the brick dwelling house, and the furniture and furn-

ishings therein, at No. 209 D. Olive Court in the City of Fayetteville.

EIGHT:

We give and bequeath to our sons, ROBERT M. OLIVE, JR. and CLARENCE S. OLIVE, to be equally divided between them, all of the dental office equipment of ROBERT M. OLIVE, SR.

NINE:

The diamond solitaire ring of ROBERT M. OLIVE, SR., shall be sold and the proceeds of the sale divided equally among our children, ROBERT M. OLIVE, JR., CLARENCE S. OLIVE and RUTH O. NIETMAN.

TEN:

Our household furniture and furnishings in our home, and certain other articles of personal property shall be divided among our children and the others named in a memorandum and list that will be found with this will.

ELEVEN:

We give and bequeath to our faithful and dependable house servant, CARRIE BLACKMON SIMMONS, the sum of ONE HUNDRED ($100.00) DOLLARS.

TWELVE:

All the rest and residue of our estate, meaning thereby all of our property of any sort, kind and description, both real and personal, except that described on the list and memorandum referred to in Paragraph TEN, which remains after all debts and costs of administration are paid, and all prior provisions of this will fully complied with and carried out, we will, devise and bequeath, after the death of the survivor, to our three children, ROBERT M. OLIVE, JR., CLARENCE S. OLIVE and RUTH O. NIETMAN, share and share alike.

THIRTEEN:

We, and each of us, do hereby appoint the survivor of the two as executor or executrix of this OUR LAST WILL AND TESTAMENT; however, after the death of the survivor of the two, we and each of us do hereby constitute and appoint ALEXANDER E. COOK and LACY S. COLLIER as Executors of

this, OUR LAST WILL AND TESTAMENT, hereby giving and granting unto the said Executors full power to do all things necessary to properly execute this, OUR LAST WILL AND TESTAMENT, according to the true intent and meaning of the same, hereby revoking and declaring utterly void any other wills and testaments by us, or either of heretofore made.

IN THE EVENT, HOWEVER, that either ALEXANDER E. COOK or LACY S. COLLIER be not living at the time of the death of the survivor of us, or either declines to serve, or either dies before the estate is fully administered, then, and in any of said events, we hereby appoint JAMES R. NANCE, of Fayetteville, as co-EXECUTOR, to act in conjunction with the remaining one, with all the duties, power and authority herein given to the originally named Executors.

IN WITNESS WHEREOF, we, and each of us, have hereunto set our hands and seals, this the Feb 25 day of February, 1965."

The instrument was signed by Robert M. Olive, Sr., and Ruth Sedberry Olive and properly attested by three witnesses in the form and manner required by G.S. 31-3.3.

Plaintiff entered into a written contract to convey to defendants George Biggs and Christine Biggs one lot which had been owned by the deceased wife and one lot which had been owned by plaintiff and the deceased wife as tenants by the entireties.

The legatees and devisees under the will, or their representatives, were made parties to this action. Defendant Jean McKay Olive Tolar (Tolar) is the remarried widow of plaintiff's deceased son, Robert M. Olive, Jr., and is the sole beneficiary named in the will of Robert M. Olive, Jr., who died 23 December 1965.

Upon calling the case for hearing, a trial by jury was waived by all the parties.

The parties offered evidence and made stipulations. The court made extensive findings of fact and conclusions of law. From the facts found and conclusions reached, the court ordered, adjudged, decreed and declared:

"(1) That the plaintiff acquired a fee simple absolute title to the properties of his decedent wife, Ruth Sedberry Olive, under the joint will of February 25th, 1965.

(2) That there was no contract between the plaintiff and his decedent wife, Ruth Sedberry Olive, to enter into the joint will of February 25th, 1965, nor does said will constitute a contract

between plaintiff and his said wife, Ruth Sedberry Olive, requiring that said joint will remain in effect as the will of the survivor at the time of his death.

(3) That the plaintiff is under no disability to convey title to the property described in Exhibit 'D' to the defendants, Biggs, by reason of the execution and existence of said joint will of February 25th, 1965."

From this judgment, Tolar appealed to the Court of Appeals.

McCoy, Weaver, Wiggins, Cleveland & Raper by L. Stacy Weaver, Jr., for plaintiff appellee.

Quillin, Russ, Worth & McLeod by Joe McLeod for defendant Jean McKay Olive Tolar, appellant.

MALLARD, C.J.

[1] Appellant's first assignment of error is to the admission of certain evidence. The questions and the answers which are assigned as error are as follows:

"Q Mr. Cook, referring to Plaintiff's Exhibit A, I will ask you if you have any knowledge of any agreement, apart from this suit, that is, apart from the will, itself, between Dr. Olive and his decedent wife, respecting the execution of this will?

A I have no knowledge of any agreement.

Q Do you have any knowledge, sir, of any agreement, apart from this Exhibit A, between Dr. Olive and his decedent wife, Mrs. Olive, whereby they may have agreed that this will could not be changed by one without the consent of the other?

A I know of no such agreement.

Q Do you have any knowledge, sir, of any agreement between Dr. Olive and his decedent wife, Mrs. Olive, apart from this Exhibit A, whereby each might have undertaken to have kept this exhibit as their only will?

ATTORNEY WORTH: As what?

ATTORNEY WEAVER: As their only will.

Objection by Attorney McLeod.

COURT: Overruled.

Q You may answer.

A Any agreement that this would be their only will?

Q Yes, sir.

A No agreement, other than what is contained in this will."

All of these questions and answers related to what knowledge, if any, the witness may have had with respect to the existence of a contract between Robert M. Olive, Sr., and his deceased wife. The question of whether there was such a contract in existence was material to the inquiry in this case. The court did not commit error in the admission of such testimony.

[2] Tolar excepted and assigned as error the finding of fact numbered 10, which reads as follows:

> "That there was no contract, apart from the joint will of February 25th, 1965, which was executed by the plaintiff and his decedent wife, Ruth Sedberry Olive, respecting the execution of the aforesaid joint will, nor any contract between such parties that the aforesaid joint will of February 25th, 1965, could not be changed by one without the consent of the other, or any such contract that the aforesaid joint will of February 25th, 1965, was to be the only will of the plaintiff and his decedent wife, Ruth Sedberry Olive."

In 97 C.J.S., Wills, § 1364, it is said:

> "A conjoint will implies that the testators own the property in common."
>
> * * *
>
> "A joint will is a single testamentary instrument constituting or containing the wills of two or more persons, and jointly executed by them."
>
> * * *
>
> "A joint will wholly reciprocal in its provisions and providing that the survivor shall succeed, at the death of the maker first to die, to all of the latter's estate is, in effect, only the separate will of the one dying first."
>
> * * *
>
> "Mutual wills are the separate wills of two or more persons which are reciprocal in their provisions, or wills executed in pursuance of a compact or agreement between two or more persons to dispose of their property, to each other or to third persons, in a particular mode or manner."
>
> * * *
>
> "Reciprocal wills are those in which each of two or more testators makes a testamentary disposition in favor of the other or others."

The will before us is a single instrument, jointly executed, pur-

porting to contain the wills of Robert M. Olive, Sr., and his deceased wife. It thus has some of the characteristics of a joint will.

This will attempts to devise, after the death of the survivor, certain property owned by Robert M. Olive, Sr., and his deceased wife as tenants by entirety. This causes it to contain some of the characteristics of a conjoint will.

Further, the will before us makes a testamentary disposition in favor of the two persons who executed it. It thus has some of the characteristics of a reciprocal will.

Appellant Tolar contends that the court committed error in ruling as a matter of law that the paper writing under consideration in this case did not contain or constitute a contract to enter into such a will or a contract that said will is to remain in effect until the death of the survivor and thereby become the will of the survivor.

In *Godwin v. Trust Co.*, 259 N.C. 520, 131 S.E. 2d 456 (1963), it was held that a trust agreement executed by the husband and wife prior to the execution by them of separate wills was incorporated by reference in the wills. It was also held that the respective wills were executed pursuant to an agreement entered into by the husband and wife and that their mutual agreement was sufficient consideration to bind them and that the trust agreement took effect as a part of each will respectively, even though the trust agreement was void because not executed in conformity with the provisions of G.S. 52-12 as it then was. (Similar provisions are now contained in G.S. 52-6.) The Court said:

> "In our opinion, when the wills of the Griffins are considered in light of the provisions contained in the trust agreement, which agreement was incorporated by reference in both wills as containing the provisions for the disposition of their respective estates, the wills themselves establish the existence of the contract and the plaintiff is entitled to specific performance for the benefit of the beneficiaries named in the mutual wills, and we so hold."

In the case of *Walston v. College*, 258 N.C. 130, 128 S.E. 2d 134 (1962), it is said:

> "It is stated in Anno — Joint, Mutual, or Reciprocal Wills, 169 A.L.R., at page 22, 'The general rule is that a will jointly executed by two persons, being in effect the separate will of each of them, is revocable at any time by either one of them, at least where there is no contract that the joint will shall remain in

effect * * *,' citing *Ginn v. Edmundson,* 173 N.C. 85, 91 S.E. 696.

In *Ginn v. Edmundson, supra,* where a husband and wife made a joint will disposing of property held as tenants by the entireties, it was held that the survivor could revoke the will at pleasure and take the property free of the will. The Court said: 'A joint or conjoint will is a testamentary instrument executed by two or more persons, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons, and a mutual or reciprocal will is one in which two or more persons make mutual or reciprocal provisions in favor of each other.

'* * * (I)n the absence of contract based upon consideration, such wills may be revoked at pleasure. * * *

'The will before us belongs to the class of joint or conjoint wills, as it is a disposition of the property owned by the husband and wife by the entireties to third persons, and there is no reason why the wife could not, after the death of her husband, revoke the will and dispose of the property as if it had not been signed by her.'

In *Clements v. Jones,* 166 Ga. 738, 144 S.E. 319, the Court said: 'The general rule is * * * that if two persons executed wills at the same time, either by one or two instruments, making reciprocal dispositions in favor of each other, the mere execution of such wills does not impose such a legal obligation as will prevent revocation. * * * (T)o enable one to invoke the intervention of equity, it is not sufficient that there are wills simultaneously made, and similar in their reciprocal provisions; but the existence of a clear and definite contract must be alleged and proved, either by proof of an express agreement, or by unequivocal circumstances.'

It is said in 97 CJS., Wills, section 1367, page 301: '* * * (T)he agreement, in order to make the wills mutual, and to be enforceable, must be more than a mere agreement to make wills, or to make the wills which in fact are made: it must involve the assumption of an obligation to dispose of the property as therein provided, or not to revoke such wills, which are to remain in force at the death of the testators.' "

[3] The general rule is that, in the absence of a valid contract, the concurrent execution of a joint, conjoint, or reciprocal will, with

full knowledge of its contents by those executing, is not enough to establish a legal obligation to forbear revocation, either before or after the death of a party thereto. *Godwin v. Trust Co., supra; Walston v. College, supra; In re Davis' Will,* 120 N.C. 9, 26 S.E. 636 (1897); 169 A.L.R. 68.

[2] We are of the opinion and so hold that the trial court, in view of the admissions by appellant in the pleadings, together with the stipulations, and the evidence, made appropriate findings based thereon and correctly adjudged that there was no contract between Robert M. Olive, Sr., and his deceased wife relating to making the will in question and that the instrument itself did not constitute a contract between them.

Appellant assigns as error the ruling of the court that plaintiff acquired a fee simple title to the properties of his decedent wife, Ruth Sedberry Olive, under the will dated 25 February 1965.

[4] There is an apparent conflict between the provisions of item two and the provisions of items three through twelve. In item two, the property is given to the survivor in fee simple, and items three through twelve attempt to deal with the same property devised and bequeathed in item two in addition to the property owned by entirety.

The language in item two of the will is clear. It devises and bequeaths "all of his or her property, unconditionally and in fee simple, to the survivor, in the event that one of us survives the other." Robert M. Olive, Sr., became the survivor upon the death of Ruth Sedberry Olive.

The real property described in the will in items three, four, seven, and subparagraphs numbered 1, 2, and 3 in item five, and one of the lots described in item six, were owned by them as tenants by entirety. Ruth Sedberry Olive owned the house and lot on Grove Street described in subparagraph number 4 under item five and one of the lots described in item six. Robert M. Olive, Sr., owned the two houses and lots on Bell Street and one vacant lot on New York Street described in subparagraph number 4 under item five.

[5] "The first great rule in the construction of wills is that the intention of the testator must prevail, provided it can be effectuated within the limits which the law prescribes." *Raines v. Osborne,* 184 N.C. 599, 114 S.E. 849 (1922). In the case of *McCain v. Womble,* 265 N.C. 640, 144 S.E. 2d 857 (1965), the Supreme Court said:

> "This Court has repeatedly held that the intent of the testator is the polar star that must guide the courts in the interpretation

of a will. This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given effect *unless contrary to some rule of law* or at variance with public policy."

[6] Another general rule is that when the primary purpose and a secondary purpose of a testator conflict and are inconsistent with each other, that which is primary will control that which is secondary. *Moore v. Langston,* 251 N.C. 439, 111 S.E. 2d 627 (1959); *Coffield v. Peele,* 246 N.C. 661, 100 S.E. 2d 45 (1957).

In the case of *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777 (1951), the Supreme Court said:

"In construing a will, the entire instrument should be considered; clauses apparently repugnant should be reconciled and effect given where possible to every clause or phrase and to every word. 'Every part of a will is to be considered in its construction, and no words ought to be rejected if any meaning can possibly be put upon them. Every string should give its sound,' *Edens v. Williams,* 7 N.C. 27. *Williams v. Rand, supra; Lee v. Lee,* 216 N.C. 349, 4 S.E. 2d 880; *Bell v. Thurston,* 214 N.C. 231, 199 S.E. 93; *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451. But, where provisions are inconsistent, it is a general rule in the interpretation of wills, to recognize the general prevailing purpose of the testator and to subordinate the inconsistent provisions found in it."

Appellee contends, and we agree, that to preserve the dominant purpose of the testator, give meaning to all parts of the will and to prevent irreconcilable repugnancies, the dominant purpose of Robert M. Olive, Sr., and his wife, Ruth Sedberry Olive by the language used was: (1) to provide for the survivor; and (2) to provide that if the two of them should die simultaneously, the disposition of all of their property was to be as set out in items three through twelve of the instrument.

Applying the applicable rules to the will under consideration, we are of the opinion and so hold that the dominant or primary purpose of the testator, Ruth Sedberry Olive, was to devise and bequeath all of her individual property in fee simple to her husband, Robert M. Olive, Sr., which she did under item two of the will. No reason has been shown why Robert M. Olive, Sr., could not dispose of the real property devised to him under the will of Ruth Sedberry Olive.

After careful consideration of all of appellant's assignments of

error, we are of the opinion that no prejudicial error is made to appear. The judgment entered by the Superior Court herein is

Affirmed.

MORRIS and HEDRICK, JJ., concur.

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR, C.T.A. OF THE ESTATE OF HERBERT GILLESPIE BARNES, DECEASED v. WESTCHESTER FIRE INSURANCE COMPANY

No. 6910DC479

(Filed 22 October 1969)

1. Insurance § 6— construction of policies

Insurance policies should be given reasonable interpretation, and if they are not ambiguous, they should be construed according to their terms and the ordinary and plain meaning of their language.

2. Insurance § 6— construction of policies

An insurance policy should be construed as a whole so as to give a consistent meaning to all its terms.

3. Insurance § 6— construction of policies — ambiguities

Any ambiguity in an insurance contract should be construed strictly against the insurer and in favor of increased coverage for the insured.

4. Insurance §§ 68, 79— family automobile policy — liability coverage — medical payments coverage — two automobiles insured

The liability coverage of a family automobile policy is entirely different from the medical payments provision and is treated differently, the limitation provision of the liability coverage being controlling no matter how many different automobiles are designated in the policy.

5. Insurance § 68— family automobile policy — medical payments — struck by an automobile

The medical payments provision of a family automobile policy for injuries received "through being struck by an automobile" is not limited to a pedestrian situation and does not require actual physical contact between the injured person and the striking automobile.

6. Insurance § 68— family automobile policy on two automobiles — medical payments coverage — limits of liability

Where insured paid separate premiums for two vehicles under a family automobile policy which provided medical payments coverage of $5,000 per person for injuries received (1) while occupying an owned vehicle, (2)

while occupying a non-owned vehicle, or (3) through being struck by an automobile, and insured was injured in a collision with another vehicle while operating one of the insured vehicles, the $5,000 medical payments limitation applies separately to each vehicle covered by the policy so that the limit of the insurer's liability is the aggregate amount of $10,000, $5,000 under coverage for the "owned" vehicle involved in the collision, and $5,000 under coverage for the other insured vehicle for injuries "through being struck by an automobile."

APPEAL by plaintiff from *Ransdell, District Judge,* 6 August 1969 Session, WAKE County District Court Division.

In the trial court a demurrer filed by the defendant to the complaint for failure of the complaint to state a cause of action was sustained and plaintiff's action dismissed.

There is no dispute as to the facts involved, and this appeal presents a question of law as to the meaning and interpretation of an automobile insurance policy issued by the defendant.

Herbert Gillespie Barnes (Barnes) died on 16 December 1966 as a result of injuries received in a head-on collision on 12 August 1966 involving a 1960 Pontiac automobile owned and driven by Barnes and another automobile proceeding in the opposite direction.

On 1 October 1965 the defendant issued to Barnes a Family Automobile Policy No. EA 82 62 88. This policy was for a period from 1 October 1965 to 1 October 1966 and was in full force and effect on the date of the collision on 12 August 1966. As a result of the injuries sustained in the collision, Barnes incurred reasonable expenses for necessary medical care within the terms of the policy in an amount of $13,389.37. Claim was duly filed with the defendant for payment of medical expenses in the amount of $10,000.00. The defendant paid the sum of $5,000.00 without prejudice to plaintiff's claim for an additional sum of $5,000.00 if and when it should be determined that under the terms and provisions of the insurance policy plaintiff was entitled to the additional $5,000.00.

The relevant provisions of the policy are:

"DECLARATIONS

* * * *

ITEM 3. The insurance afforded is only with respect to such of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto."

PREMIUMS		LIMITS OF LIABILITY	COVERAGES
Car 1 *	Car 2		
26.11	38.08	$25,000 each person $50,000 each occurrence	A — Bodily Injury Liability
13.44	20.16	$25,000 each occurrence	B — Property Damage Liability
8.80	8.00	$ 5,000 each person	C — Medical Payments
4.00	4.00	$ 5,000 each person $10,000 each accident	J — Family Protection
$122.59		Total Premium	

* Car 1: 1960 Pontiac; Car 2: 1957 Ford Pickup

"Part I — Liability

* * * *

'[O]wned automobile' means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded * * *"

[Applicable to Part II — Expenses for Medical Services.]

"Part II — Expenses for Medical Services

Coverage C — Medical Payments: To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', caused by accident,

(a) while occupying the owned automobile,

(b) while occupying a non-owned automobile, but only if such person has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission, or

(c) through being struck by an automobile or by a trailer of any type;

* * * *

Limit of Liability: The limit of liability for medical payments stated in the declarations as applicable to 'each person'

is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

Other Insurance: If there is other automobile medical payments insurance against a loss covered by Part II of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible automobile medical payments insurance; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance."

"CONDITIONS

* * * *

4. Two or More Automobiles — Parts I, II and III: When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto."

Dupree, Weaver, Horton, Cockman & Alvis by F. T. Dupree, Jr., and John E. Aldridge, Jr., for plaintiff-appellant.

Young, Moore & Henderson by B. T. Henderson, II, and John B. Regan, III, for defendant-appellee.

CAMPBELL, J.

This is a case of first impression in North Carolina.

[1-3] Insurance policies should be given reasonable interpretation, and if they are not ambiguous, they should be construed according to their terms and the ordinary and plain meaning of their language. *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1966); *Williams v. Insurance Co.*, 2 N.C. App. 520, 163 S.E. 2d 400 (1968); *Clemmons v. Insurance Co.*, 2 N.C. App. 479, 163 S.E. 2d 425 (1968). A policy should be construed as a whole so as to give a consistent meaning to all its terms. *Stanback v. Insurance Co.*, 220 N.C. 494, 17 S.E. 2d 666 (1941). The meaning of the policy should be found by reference to the provisions of the contract with the in-

tention of the parties being the controlling guide. *White v. Mote,* 270 N.C. 544, 155 S.E. 2d 75 (1967); *Kirk v. Insurance Co.,* 254 N.C. 651, 119 S.E. 2d 645 (1961). If there is ambiguity in the insurance contract, it should be construed strictly against the writer of the policy, that is, the insurer, and in favor of increased coverage for the insured. *Insurance Co. v. Insurance Co.,* 266 N.C. 430, 146 S.E. 2d 410 (1965).

While these general principles could guide us in the instant case in the absence of North Carolina cases in point, a study of the decisions of other jurisdictions on the question in issue here is very instructive. In *Sullivan v. Royal Exchange Assurance,* 181 Cal. App. 2d 644, 5 Cal. Rptr. 878 (1960), the California District Court of Appeals held that the $2,000 limitation provision in that particular policy was controlling. The insured had two automobiles and had paid a premium on each. The limitation in the policy was for $2,000. A child of the insured was struck by another automobile, which automobile did not belong to the insured. An effort was made to recover $4,000, that is, $2,000 for each automobile covered in the policy. The California Appeals Court held that the limitation provision in the medical payment portion prevailed over the general condition. The California court noted cases which had held that a maximum limitation of liability in the liability portion of the policy prevented pyramiding of liability coverage and thus by analogy reasoned that the medical payment provision could not be pyramided.

Only one other jurisdiction has followed the California case. The Louisiana court in *Guillory v. Grain Dealers Mutual Insurance Co.,* 203 So. 2d 762 (La. 1967) (Reh. den. *en banc,* November 27, 1967; writ refused 251 La. 687, 205 So. 2d 605 (1968)) considered a policy with the exact wording of the policy in the instant case. The insured owned two automobiles and both were covered under the policy, and a separate premium had been paid for each. The policy provided for $500 medical payment. He was riding in one of these automobiles when it was involved in a collision with a third automobile. The insured incurred medical expenses of approximately $870.00. The claim for this amount was paid up to the asserted limit of coverage for injuries to one person while riding in an "owned" automobile, that is, $500.00. The additional amount of $370.00 was then sued for on the theory that the premium paid for the other vehicle owned by the insured and covered under the policy provided an additional coverage of $500.00 per person for medical expenses — even though the second car was not occupied by the insured at the time of the accident. The court denied recovery for the additional

$370.00. Shortly after this decision the same Louisiana court was confronted with a similar case in *Odom v. American Insurance Co.*, 213 So. 2d 359 (La. 1968) (Reh. den., August 20, 1968; writ refused by a divided court, 252 La. 955, 251 So. 2d 127 (1968)). In the *Odom* case, however, the composition of the court had changed. Judge Tate was the new member of the court. He wrote a separate concurring opinion in which he stated that he concurred with reluctance simply because of the recent decision in the *Guillory* case. Judge Tate further stated:

> "The writer thus concludes that, upon re-examination of the issue decided, the medical payments clause coverages should be construed so as to afford a combined total limit rather than as if only one medical payments coverage had been afforded. However, for the reasons stated he defers to his brethren's reluctance to overrule at this time so recent a decision of our court without first affording our high court an opportunity for full-scale study of the issue involved."

The Supreme Court of Louisiana does not appear to have written any opinion on the matter. In the light of the well-reasoned concurring opinion of Judge Tate, considerable doubt is cast upon the validity of the Louisiana position.

All other jurisdictions that have encountered this proposition have construed the policy so as to afford pyramided limits. Actually the limits are not pyramided, but the more exact expression is that each vehicle has a separate policy and a recovery is made for each policy.

In *Government Employees Insurance Company v. Sweet*, 186 So. 2d 95, 21 A.L.R. 3d 895 (Fla. 1966) (Reh. den., May 27, 1966), decided by the Florida District Court of Appeals for the Fourth District, the insurance company issued its policy covering two vehicles, a Chevrolet and a Ford. Under the medical payment provision a separate premium was charged for each vehicle, and the limit of liability was $3,000 for each person. The insured was riding in one of the automobiles when involved in an accident. The insurance company took the position that since the injuries were incurred while the insured was occupying one of the two automobiles there was coverage only under that part of the policy applying to the automobile in which the insured was riding. The court, however, refused to follow that theory, and stated that the medical payment provisions of the policy are closely akin to a personal accident policy and that recovery is completely independent of liability on the part of the insured. The court then treated each policy as a separate policy for

each automobile and found that the limit of liability for medical payments for each automobile was $3,000. The court went on to find that the terms of the policy were hopelessly irreconcilable, and, therefore, the court adopted the construction which provided the greater coverage. The court refused to follow the California decision in the *Sullivan* case and pointed out that other jurisdictions had likewise refused to follow the California case. The Florida court relied upon *Kansas City Fire & Marine Insurance Co. v. Epperson,* 234 Ark. 1100, 356 S.W. 2d 613 (1962); *Central Surety & Insurance Corporation v. Elder,* 204 Va. 192, 129 S.E. 2d 651 (1963); and *Southwestern Fire and Casualty Company v. Atkins,* 346 S.W. 2d 892 (Tex. Civ. App. 1961).

The Texas Court of Civil Appeals again considered the construction of a medical payments provision in an automobile insurance policy in the case of *Cockrum v. Travelers Indemnity Company,* 420 S.W. 2d 230, (Tex. Civ. App. 1967). In this case the policy involved was the new form policy similar to the policy in the instant case. The insured owned three automobiles, and the medical payment provision applied to only one of the three automobiles (a Cadillac). The daughter of the insured was riding in one of the automobiles (a Pontiac) which was not covered by the medical payment provision. The daughter was killed as a result of a head-on collision with another vehicle. The insured sought to recover under the medical payment provision on the Cadillac which was not involved in the accident. The court held that the daughter had been struck by another automobile even though she did not come in direct physical contact with the striking vehicle. The court further pointed out that the coverage under the medical payment provision as set out in subparagraphs (a), (b) and (c) were not mutually exclusive, but were overlapping in their terms. The Texas court stated:

> "* * * The insurance company is bound by the clearly expressed terms and provisions contained in such contract. While it did not collect a premium on the Pontiac automobile yet it did collect a premium for medical payment coverage on the Cadillac automobile which policy extended benefits to the insured, and his family, while being injured as a result of an accident 'through being struck by an automobile.' "

Other cases sustaining a recovery are:

Hale v. Allstate Insurance Co., 162 Tex. 65, 344 S.W. 2d 430 (1961);

Travelers Indemnity Company v. Watson, 111 Ga. App. 98, 140 S.E. 2d 505 (1965);

Lavin v. State Farm Mutual Automobile Ins. Co., 193 Kan. 22, 391 P. 2d 992 (1964); and

Bates v. United Security Insurance Company, ... Iowa ....., 163 N.W. 2d 390 (1968).

The views of the majority jurisdictions likewise find approval with the writers of works on insurance. In 8 Appleman, Insurance Law and Practice, Sec. 4896 — 1969 pocket parts, we find:

"Generally, medical payment clauses constitute separate accident insurance coverage. . . . Where a single policy covered two automobiles, a premium being established for each, insured was entitled to medical payments as on two separate policies."

"In an automobile liability policy, the medical payments coverage is a divisible and separable contract from the bodily injury liability coverage, and it is an absolute agreement to assume or pay the medical payments." 13 Couch, Insurance, § 48:71, page 564 (2d Ed. 1965).

[5] It is to be noted that the expression "being struck by an automobile" does not require physical contact between the individual person and the automobile doing the striking such as in an automobile-pedestrian situation. *Bates v. United Security Insurance Company, supra; Cockrum v. Travelers Indemnity Company, supra; Hale v. Allstate Insurance Co., supra.*

[4] Likewise, the liability coverage in the policy is entirely different from the medical payments provision and being entirely different is treated differently, and the limitation provision is controlling, no matter how many different automobiles are designated in the policy. *Rosar v. General Ins. Co. of America,* 41 Wis. 2d 95, 163 N.W. 2d 129 (1968); *Allstate Insurance Co. v. Mole,* (5th Cir., August 8, 1969); *Pacific Indemnity Company v. Thompson,* 56 Wash. 2d 715, 355 P. 2d 12 (1960); *Greer v. Associated Indemnity Corporation,* 371 F. 2d 29 (5th Cir. 1967).

In the instant case the insurance company takes the position that the three paragraphs (a), (b) and (c) in Division 1 (*supra*) are mutually exclusive, and since Barnes was riding in an owned automobile covered in paragraph (a), he is entitled to recover under that provision only and that the other two provisions should not be considered. Quoting from the Insurance Company brief:

"* * * Both the 1960 Pontiac four-door automobile and the 1957 Ford one half-ton pickup truck were 'owned automobiles' within the meaning of the provisions in this policy. No non-

owned automobiles were involved in this accident, nor was the plaintiff's intestate struck by an automobile in the sense of being a pedestrian.

Hence, directing the Court's attention to solely the 1957 Ford one-half-ton pickup truck, in applying the previous policy provisions and specifically the insuring agreement requiring that for recovery, the named insured must sustain bodily injury while occupying the owned automobile or a non-owned automobile, it becomes clear that the provisions of the expense for medical service insuring the non-involved automobile could not possibly be interpreted to extend coverage to plaintiff's intestate because his expenses did not arise as a result of sustaining bodily injuries while occupying the owned automobile — (the 1957 Ford one-half-ton pickup truck) (1) described in this policy and (2) for which a specific premium charge was made. Neither was the 1957 Ford one-half-ton pickup truck, designated Car #2 in the policy, a non-owned automobile since it was in fact owned by the insured, and for which a specific premium charge had been made."

[5] The fallacy in this reasoning is that it disregards paragraph (c) which reads "through being struck by an automobile or by a trailer of any type." The insurance company seeks to limit this paragraph (c) to a pedestrian situation. The trouble with that reasoning is that the paragraph (c) on its face is not limited to a pedestrian situation. It provides coverage to all situations where the insured incurs medical expense "through being struck by an automobile." As we pointed out above, this does not require actual physical contact between the injured individual and the striking automobile.

[6] We think, to allow recovery under the medical payment coverage afforded the Ford pickup, pursuant to the policy here involved, not only is in accordance with the majority view of the jurisdictions that have considered the matter, but that this interpretation gives consideration to all portions of the policy involved. The Pontiac automobile is covered under (a) since Barnes was injured in an accident "while occupying the owned automobile." Likewise (c) would be applicable because the expenses were incurred "through being struck by an automobile." This situation then calls for the application of the limitation provision of the policy and only $5,000 can be recovered insofar as insurance is afforded the Pontiac. This is so even though the Pontiac automobile in this situation meets

both the provisions of (a) and (c). With regard to the coverage afforded the Ford pickup truck, only the coverage in (c) is applicable.

If a situation is presented where a so-called one-automobile accident occurs, *i.e.*, striking a bridge abutment or a tree, or overturning, then in that situation only the automobile actually occupied would be covered since (a) or (b) would be applicable and (c) would not apply. If the insured is a pedestrian or riding on some type of vehicle other than an automobile, the medical expenses are incurred "through being struck by an automobile" and only (c) would be applicable and a recovery would be sustained up to the limits applicable to each automobile designated in the policy.

We think this is the correct construction of the policy. On the other hand, if this interpretation of the policy here involved is not in accordance with the risk the insurance company thought it was assuming in issuing the policy involved, then in our opinion the policy as written is ambiguous. In the situation of an ambiguity, it is to be construed against the insurance company. Therefore, in either event a recovery is warranted.

If the insurance company, on the other hand, desires to limit the coverage under (c) to a pedestrian situation, it can easily do so with appropriate language. Likewise, if the insurance company desires to limit the liability for medical payments, no matter how many automobiles are designated in the policy and for which premiums are paid, it can do so. An example of this appears in *Hansen v. Liberty Mutual Fire Insurance Company*, 116 Ga. App. 528, 157 S.E. 2d 768 (1967). Georgia is one of the jurisdictions which has construed the medical payment provisions, in accordance with views as herein expressed, in *Travelers Indemnity Company v. Watson, supra.* In this *Hansen* case, however, the insurance company placed a limit of liability on the medical payment provision, and the limitation so expressed was upheld by the Georgia court. No such limitation, however, was placed on an accidental death benefit coverage, and on that provision of the policy, more than one recovery was sustained. This decision offers a good review of the contrasting positions.

We prefer to follow the views expressed by the majority of the jurisdictions which have considered the problem here presented. Accordingly, the decision of the District Court is

Reversed.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. WALTER LEON HUGHES

No. 6927SC71

(Filed 22 October 1969)

1. Automobiles § 3— driving while license suspended — elements of the crime

To constitute a violation of G.S. 20-28(a) there must be (1) operation of a motor vehicle by a person (2) on a public highway (3) while his operator's license is suspended or revoked.

2. Automobiles § 3— certified copy of driver's license record — admissibility — form used by Department of Motor Vehicles disapproved

In a prosecution of defendant for operating a vehicle on a public highway while his license was suspended or revoked, copy of the driver's license record of defendant on file with the Department of Motor Vehicles, certified as a true copy by a proper official of the Department and bearing the seal of the Department, is admissible into evidence. G.S. 20-42(b). Form of driver's license record used by the Department of Motor Vehicles is disapproved as not being sufficiently clear to dispense with the necessity of interpretation.

3. Automobiles § 2— re-examination of licensee under G.S. 20-29.1 — suspension of license — notification to licensee

In any case in which a license is suspended after re-examination of the licensee under the authority of G.S. 20-29.1, the Commissioner of Motor Vehicles is required to notify the licensee of such suspension, although no requirement for notice appears in the statute.

4. Automobiles § 3— driving while license suspended — notification of suspension — sufficiency of evidence

In this prosecution of defendant for operating a motor vehicle on the public streets while his license was revoked or suspended, defendant's motions for nonsuit should have been sustained where there was no competent evidence that any notice of the license suspension had been given to defendant, by ordinary mail or otherwise, on or prior to the date on which he was charged with having committed the offense, a notation in the certified copy of defendant's driving record of the figures "06 26 68" which appear in the column headed "Mail Date of Suspension Mth Day Yr" being insufficient to show such notification.

APPEAL by defendant from *Grist, J.*, 30 September 1968 Criminal Session of GASTON Superior Court.

Defendant was tried in the Gastonia Municipal Court on his plea of not guilty to a warrant charging him with operating a motor vehicle on the public streets of the City of Gastonia on 28 July 1968 while his operator's license was revoked or suspended, in violation of G.S. 20-28. He was found guilty, and from judgment imposing sentence appealed to the Superior Court, where he again pleaded not guilty and was tried *de novo*.

At his trial in Superior Court the only witness for the State was a Gastonia City Policeman who testified in substance as follows: On Sunday afternoon, 28 July 1968, he investigated a collision at the intersection of 74 East and Cox Road in Gastonia, where he saw the defendant, who told him he was operating one of the automobiles. He asked to see defendant's driver's license and defendant did have a valid North Carolina driver's license. He gathered the necessary information and released both parties and saw defendant drive his car away. Later he wrote the Department of Motor Vehicles for a license check and received from the Department a "Driver's License Record Check for Enforcement Agencies," pertaining to the defendant. On 4 September 1968 he swore to the warrant against defendant.

Over objection by defendant, the State was permitted to introduce in evidence as its Exhibit 1 a certified copy of a record of the North Carolina Department of Motor Vehicles which is entitled "Driver's License Record Check for Enforcement Agencies," and which is certified by an official of the Department of Motor Vehicles, designated by the Commissioner of Motor Vehicles as an officer empowered to certify copies of records of the Department in accordance with the provisions of G.S. 20-42, to be a true copy of the driver's license record of the defendant on file with the North Carolina Department of Motor Vehicles. This document contains the following: Within a block entitled "Name and Address" appears "Walter Leon Hughes 313 S Vance St Gastonia, N. C." Within a block entitled "Operator Issue Date Mth Day Yr" appear the figures "11 18 65." Within a block entitled "Operator Expiration Date Mth Day Yr" appear the figures "11 22 69." Within a block entitled "Search Date" appears "Aug. 09, 1968." There are nine columns immediately below these blocks. The first column is entitled "Mail Date of Suspension Mth Day Yr" and contains the figures "06 26 68." The second column is entitled "Effective Date of Suspension Mth Day Yr" and contains the figures "07 01 68." The third column is entitled "Date Eligible for Reinstatement Mth Day Yr" and contains the figures "07 01 69." The fourth column is entitled "Suspension or Revocation" and contains the word "Suspension." The fifth column is entitled "Nature of Record or Reason for Suspension or Revocation" and the first line within the fifth column contains the words "Failed reexamination — G.S. 20-29.1." The second line in the fifth column contains the words "Special Examination." In the sixth column, which is headed "Occurrence Date Mth Day Yr," immediately opposite the words "Special Examination" in the fifth column, appear the figures "06 12 68." The remaining blocks and

columns on the State's exhibit are not relevant to questions presented on this appeal.

At the close of the State's evidence the defendant moved for judgment of nonsuit, which motion was overruled. The defendant then testified in substance as follows: He had been involved in an accident in Gastonia on 28 July 1968, on which date he had a valid North Carolina driver's license with expiration date on his license of 22 November 1968. He showed the license to the investigating officer. A little over a year previously he had moved from 313 S. Vance Street to 828 S. Jackson Street and he had had difficulty getting his mail if sent to his former address. He had received a letter dated 4 June 1968 from the North Carolina Department of Motor Vehicles at his address at 828 S. Jackson Street in Gastonia. In response to this letter he did go on 12 June 1968 to the driver's license examination office in Gastonia for a reexamination and was given a test. The examiner told him that he had failed the examination, but gave him his license back, and he left with his driver's license in his pocket. He was later given another examination on 30 August 1968, at which time he still had his driver's license with him. After the examination on 30 August 1968 the examiner kept his license and gave him a receipt for it and told him he was not to drive until his license had been approved. About twelve or thirteen days later he received his driver's license back from Raleigh and had it with him at the trial. Prior to 30 August 1968 he had never received notice from Raleigh or any other source that his license was suspended.

The jury returned a verdict of guilty, and from judgment thereon sentencing defendant for a term of six months, suspended for a period of two years, and imposing a fine of $200.00 and costs, defendant appealed, assigning errors.

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

Frank P. Cooke and Jeffrey M. Guller for defendant appellant.

PARKER, J.

[1] Defendant appeals from judgment imposed on his conviction of violating G.S. 20-28(a) and assigns as error the overruling of his motions for nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. G.S. 20-28(a) in pertinent part provides:

> "Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in

this chapter, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor; . . ."

Interpreting this statute, our North Carolina Supreme Court has stated that "(t)o constitute a violation of G.S. 20-28(a) there must be (1) operation of a motor vehicle by a person (2) on a public highway (3) while his operator's license is suspended or revoked." *State v. Cook,* 272 N.C. 728, 731, 158 S.E. 2d 820, 822. In the present case there is no question as to the first two elements; appellant admits that on 28 July 1968, the date charged in the warrant, he drove his automobile on a public highway. Defendant challenges the sufficiency of the State's evidence to establish the third element, that on the date in question his operator's license was suspended.

[2] All of the evidence is to the effect that on 28 July 1968 defendant had in his possession a valid North Carolina driver's license which was not expired. The only evidence offered by the State to establish that defendant's license was suspended on that date was the State's Exhibit 1. This was a copy, certified by an authorized official of the North Carolina Department of Motor Vehicles to be a true copy, of the driver's license record of defendant on file with the North Carolina Department of Motor Vehicles. [The copy of this exhibit filed with the record on appeal does not indicate whether it was under the seal of the Department of Motor Vehicles. If it was, then by virtue of G.S. 20-42(b) it was "admissible in any proceeding in any court in like manner as the original thereof, without further certification." Appellant has raised no question as to its being under seal and has conceded it was admissible.] Exactly what this exhibit establishes is, however, not altogether clear. It requires considerable interpretation to establish anything. The North Carolina Supreme Court, in an opinion by Winborne, C.J., in the case of *State v. Moore,* 247 N.C. 368, 101 S.E. 2d 26, had the following to say concerning a somewhat similar exhibit which had been introduced in evidence in that case:

"The language of the Exhibit is susceptible of the inference that it is a certified copy of the record of the North Carolina Department of Motor Vehicles Highway Patrol, signed by a proper official and bearing the seal of the Department, which is 'admissible in any proceeding in any court in like manner as the original thereof, without further certification.'

"(Nevertheless, note is taken of the figures in the record, for instance figures 1, 2 and 3 each appearing 4 times on the left margin presumably relating to first, second and third revoca-

tions, and other figures separated by dashes, such as '11-10-49' presumably indicating date of 'November 10, 1949.' *This practice in judicial records ought not to be followed, and it is not approved. A form sufficiently clear to dispense with necessity of interpretation should be adopted by the Department.)*" (Emphasis added.)

Examination of the State's Exhibit 1 in the present case would indicate that the North Carolina Department of Motor Vehicles has not yet heeded the admonition of the Supreme Court that it should adopt a "form sufficiently clear to dispense with necessity of interpretation."

[3] Giving the State's Exhibit 1 in the present case the benefit of a liberal interpretation, it is susceptible of the inference that the records in the North Carolina Department of Motor Vehicles indicate that defendant's driver's license had been suspended effective 1 July 1968, that the license would become eligible for reinstatement on 1 July 1969, and that the reason for the suspension was that defendant had failed a re-examination given him on 12 June 1968 pursuant to G.S. 20-29.1. The question remains as to whether the exhibit will support an inference that the license had been suspended *as provided in Chapter 20 of the General Statutes,* which is required before a conviction under G.S. 20-28(a) may be sustained.

G.S. 20-29.1 in pertinent part provides:

> "The Commissioner of Motor Vehicles, having good and sufficient cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a re-examination to determine his competency to operate a motor vehicle. Upon the conclusion of such examination, the Commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions. . . ."

This section does not expressly require the Commissioner of Motor Vehicles, prior to suspending a license under its provisions, to give notice of such suspension to the operator. Such a requirement for notice is made by G.S. 20-16(d) in all cases in which a license is suspended under the authority of that section. Even though a similar requirement for notice does not appear in G.S. 20-29.1, a reading of Chapter 20 of the General Statutes, in which both sections appear, makes it clear that the Legislature intended that notice be given to the licensee when the Commissioner suspends a license under G.S.

20-29.1 as well as when suspension is made under the authority of G.S. 20-16. For instance, G.S. 20-20 provides that whenever any vehicle operator's license is suspended under the terms of Chapter 20, "the licensee shall surrender to the Department all vehicle operator's licenses and duplicates thereof issued to him by the Department which are in his possession." It is difficult to see how the licensee could be called upon to surrender his license because it had been suspended unless he is given notice of the suspension. Further, G.S. 20-25 provides that any person whose license has been suspended shall have a right to file a petition within 30 days thereafter for a hearing on the matter in the superior court. Again, the right to court review of the Department's action in suspending a license would be futile if the licensee received no notification that the license had been suspended. Therefore we think it clear, and so hold, that in any case in which a license is suspended under the authority of G.S. 20-29.1, the Commissioner of Motor Vehicles is required to notify the licensee of such suspension. That such notice is required is made more apparent when it is realized that even a failure to pass a re-examination conducted under G.S. 20-29.1 does not necessarily result in suspension of the license; the Commissioner may permit the person to retain his license and take such other "action as may be appropriate." In the present case the examiner on 12 June 1968 permitted the defendant to retain his license even after informing him he had failed the examination.

G.S. 20-48 provides:

> "Whenever the Department is authorized or required to give any notice under this chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Department. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Department or affidavit of any person over twenty-one years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof."

The North Carolina Supreme Court in *Carson v. Godwin,* 269 N.C. 744, 153 S.E. 2d 473, expressed dissatisfaction with the use of

ordinary mail as a means of notification of Departmental actions with reference to driver's licenses. In that case, the Court said:

> "An open letter to a former address may or may not be delivered, especially if there is a change of address. If the mails are to be employed for the transmission of notice, it would seem that a registered letter or a return receipt showing delivery would be a more complete compliance with the requirements of notice — *essential of due process.*" (Emphasis added.)

Our Supreme Court in *Carson v. Godwin, supra,* made no reference to G.S. 20-48 and did not rule definitively whether, in view of that statute, notification by ordinary mail would be considered as an acceptable, even if minimal, compliance with the requirements of due process. Nor do we find it necessary to make such a determination in the case now before us. Moreover, in the present case we do not find it necessary to decide, and we do not decide, the question argued in the briefs of the parties as to whether in a prosecution for violation of G.S. 20-28(a) the State must in any event prove that defendant, at the time he drove a motor vehicle on the public highways of the State, had actual knowledge that his license had been suspended. [For decisions of courts of other states interpreting their statutes making it a criminal offense to drive after license is revoked or suspended and holding that actual knowledge of revocation or suspension is not required to sustain a conviction where proper notice by mail has been given, see: *State v. Baltromitis,* 5 Conn. Cir. 72, 242 A. 2d 99 (certified mail); *State v. Garst,* 175 Neb. 731, 123 N.W. 2d 638 (registered or certified mail); *State v. Wenof,* 102 N.J. Super. 370, 246 A. 2d 59 (ordinary mail); *State v. Johnson,* (Supreme Ct. of N.D.), 139 N.W. 2d 157 (opinion does not specify whether ordinary, certified or registered mail); *State v. Hebert,* 124 Vt. 377, 205 A. 2d 816 (certified mail).]

[4] Even if it be conceded *arguendo* that proof of actual knowledge is not required and that constructive notice by ordinary mail is sufficient, there was in the present case no competent evidence that any notice of the license suspension had been given to defendant, by ordinary mail or otherwise, on or prior to the date on which he was charged with having committed the offense. The only evidence which even remotely bears on this question was the notation in the State's Exhibit 1 of the figures "06 26 68" which appear in the column headed "Mail Date of Suspension Mth Day Yr." It would require far too many inferences drawn from other inferences to conclude from this evidence that notice had been given to the defendant "by deposit in the United States mail of such notice in an envelope with

postage prepaid, addressed to such person (defendant) at his address as shown by the records of the Department." G.S. 20-48.

Defendant has been charged with a criminal offense, punishment for which is a mandatory fine of $200.00 and a possible prison sentence in the discretion of the court for as long as two years. Conviction also rejuires a further suspension of his driver's license for an additional year. G.S. 20-28(a). Our Legislature went a long way just for the purpose of easing administrative burdens of the Department of Motor Vehicles when, in G.S. 20-48, it authorized notification by ordinary mail. It would be harsh enough to hold, as courts of other states have held in the cases cited *supra,* that the defendant might lawfully be found guilty of driving while his license was suspended in the absence of evidence that at the time he is alleged to have committed the offense he had actual knowledge that his license was suspended. To hold in addition that a conviction might be sustained in the absence of competent evidence of adequate constructive notice would be unconscionable. There was no such competent evidence in this case, and defendant's motions for nonsuit should have been sustained.

The judgment appealed from is

Reversed.

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

STATE HIGHWAY COMMISSION, PLAINTIFF v. E. P. YARBOROUGH, ADMINISTRATOR OF THE ESTATE OF ZULA MATHEWS AND WILLIAM E. MATHEWS, ATTORNEY IN FACT, DEFENDANTS

No. 6916SC427

(Filed 22 October 1969)

1. Eminent Domain § 5— highway condemnation — interest on damages — instructions

In highway condemnation proceeding to determine the issue of landowners' damages, trial court did not err in failing to instruct the jury that they were not to consider the question of interest in determining damages, where no special request was made for such instruction.

2. Eminent Domain § 5— amount of compensation — interest — duty of court

It is the duty of the court to add interest to an award of damages for the taking of property pursuant to G.S. Ch. 136.

3. Eminent Domain § 5— highway condemnation — damages — interest

In highway condemnation proceedings under G.S. Ch. 136, interest is an

element of recovery that is separate from and in addition to the measure of damages to be used by the jury in arriving at just compensation.

4. Eminent Domain § 5— determination of compensation — house as separate item of damages — evidence

In highway condemnation proceeding to determine the issue of landowners' damages, testimony by landowners' witness that a dwelling house located on the land condemned by the Highway Commission had a fair market value of $12,000 prior to the taking, *is held* not susceptible to interpretation by the jury that the destruction of the house was compensable as a separate item of damage, when the testimony is considered in the light of the witness' entire testimony and in connection with the court's instructions on the proper measure of damages.

5. Eminent Domain § 6— determination of compensation — buildings on land — evidence of improvements

Where land upon which buildings have been erected and affixed to the soil is taken by eminent domain, so far as the buildings add to the market value of the land, they must be considered in determining the compensation to be awarded to the owner; and it is therefore competent for a witness to explain the value he placed on improvements in arriving at the total value of the property before the taking.

6. Eminent Domain § 5— market value — assessment of land and improvements

Market value in eminent domain proceedings may not be arrived at by assessing separately the value of land and improvements and adding the two together.

7. Eminent Domain § 5— determination of compensation — drainage easement — increased flow of water — evidence

In highway condemnation proceeding to determine landowners' damages, it was proper to allow the landowners' witnesses to express their opinion that the drainage easements acquired by the Highway Commission would result in an increased flow of water onto portions of landowners' remaining property and thereby lessen its value, since the size of the easements and the resultant increased flow of water were elements of damages to be considered by the jury.

8. Eminent Domain § 7; Witnesses § 9— highway condemnation — redirect examination

Where landowners' witness in highway condemnation proceeding admitted on cross-examination that property adjoining the condemned property had not been developed for residential use since the condemnation, trial court properly allowed the witness to explain on redirect examination that the property had no access whatsoever to any public road.

9. Eminent Domain § 7; Witnesses § 9— highway condemnation proceeding — redirect examination

Where landowners' witness in highway condemnation proceeding testified on cross-examination that prior to the condemnation the adjoining property had not been available for residential development, trial court properly permitted the witness to explain on redirect examination that he had

reached this conclusion after unsuccessfully trying to purchase the property for residential development.

10. Eminent Domain § 2— landowner abutting highway — common law right of access — "taking"

At common law the owner of land abutting a highway, although not entitled to access at all points along the boundary between his land and the highway, has a special right of easement for access purposes, and substantial interference with this free and convenient access to the highway is a "taking" of a property right for which he may recover just compensation.

11. Eminent Domain § 2— highway condemnation — acts constituting a "taking"

While a substantial or unreasonable interference with an abutting landowner's access constitutes the taking of a property right, the restriction of his right of entrance to reasonable and proper points so as to protect others who may be using the highway does not constitute a taking, such reasonable restrictions being within the police power and *damnum absque injuria.*

12. Eminent Domain § 2— acts constituting a "taking"

If the interference with landowner's access to an abutting highway is not substantial and if reasonable means of ingress and egress remains or is provided, there has been a legitimate exercise of the police power, but if the interference is substantial and no reasonable means of ingress and egress is provided, there has been a taking of a property right under the power of eminent domain.

13. Eminent Domain § 2— what constitutes a "taking" — controlled-access highway — residential development

Upon the completion of a controlled-access highway project both sides of the highway extending through the landowners' property were fenced and no service roads parallel to the highway were constructed. The landowners' evidence was that the highest and best use for the property before the taking was for residential development, but that with access on both sides of the highway now controlled it would be necessary to construct streets up to 1858 feet in length on both sides of the highway in order to render the property accessible for development. *Held:* The restriction of the landowners' access to the highway was a taking of a property right for which compensation must be paid.

14. Trial § 37— instructions on interested witness — request

In a highway condemnation proceeding to determine the issue of damages, it was not incumbent upon the trial court, absent a request, to instruct the jury that an heir to the property in question was an interested witness, this being a subordinate feature of the case.

15. Trial § 51— motion to set aside verdict

Motion to set aside the verdict is addressed to the sound discretion of the trial court, and its denial of the motion is not subject to review in the absence of an abuse of discretion.

APPEAL by plaintiff from *Braswell, J.*, 31 March 1969, Special Civil Session of SCOTLAND County Superior Court.

Condemnation proceedings were instituted under Chapter 136 of the General Statutes to condemn additional right-of-way over defendants' property for use in connection with the widening and relocation of U.S. Highway No. 74 (No. 74) around the Town of Laurinburg in Scotland County (Highway Project 8.16793). The plaintiff Highway Commission instituted the proceedings on 3 June 1963 and deposited with the court on that date $9,466.00 as its estimate of just compensation.

The property affected by the taking consisted of 87.76 acres of cleared and wooded land approximately one and one-half miles west of the corporate limits of Laurinburg. No. 74, as it existed prior to the taking, extended for 1858 feet through the northern portion of the property. A high voltage power line was located on a 75 foot wide easement 374 feet south of No. 74 and parallel with it. The property was in effect divided into three parts: a 22.82 acre tract on the north side of the highway, an 18.86 acre tract between the highway and the power line easement, and a 39.66 acre tract beyond and south of the power line easement. The property was bounded on the west by a state maintained rural paved road (RPR 1321) which intersected and crossed No. 74 at a point known as "Elmore."

The interests acquired by the plaintiff consisted of the following: (1) a permanent right-of-way over a 3.79 acre strip of land alongside the southerly boundary of the existing highway right-of-way and approximately parallel with it; (2) a permanent right-of-way over an .02 acre tract north of the existing highway right-of-way and in the triangle formed by the intersecting of the rights-of-way of No. 74 and RPR 1321; (3) two drainage ditch easements totaling .28 acre; (4) the right to control access along the right-of-way. A one-story dwelling house located on the south side of No. 74 was included within and appropriated along with the 3.79 acre strip. This strip was used to widen the highway from two lanes to its present four lanes.

Before the taking there was unrestricted access from defendants' property to U.S. Highway No. 74 along both the north and south sides. After the taking fences were constructed along both sides of the highway and no direct access was permitted.

By consent order the parties waived the appointment of commissioners, settled all issues other than the issue of damages and proceeded directly to trial before a jury. The jury assessed damages

in the amount of $44,799.00 and from the entry of a judgment that the defendant recover that amount plus interest assessed by the court in the amount of $12,434.93 the plaintiff appeals assigning error.

Robert Morgan, Attorney General, by Harrison Lewis, Deputy Attorney General; Charles M. Hensey, Trial Attorney; and Claude W. Harris, Trial Attorney, for the State Highway Commission.

Mason, Williamson & Etheridge by James W. Mason and Kennieth S. Etheridge for defendant appellee.

GRAHAM, J.

[1] The trial court did not instruct the jury that they were not to consider the question of interest in determining damages since it would be added by the court to their verdict. No special request was made for such an instruction but the plaintiff nevertheless insists that the court's failure to so charge was error.

[2, 3] Since the enactment of G.S. 136-113 in 1959, it has been the duty of the court to add interest to an award of damages for the taking of property pursuant to Chapter 136 of the General Statutes. Prior to that time, it was the jury's function to award interest as just compensation for a delay in the payment for the property taken and it was necessary for the court to charge as to that duty. *DeBruhl v. Highway Commission*, 247 N.C. 671, 102 S.E. 2d 229. The plaintiff contends that since it was formerly the duty of the court of its own motion and without request to instruct the jury to award interest as an additional sum, it should follow that it is now the duty of the court to instruct the jury not to do so. We do not agree. Interest is an element of recovery that is separate from and in addition to the measure of damages to be used by the jury in arriving at just compensation. The court accurately instructed the jury as to the measure of damages as set forth in G.S. 136-112. We have no reason to speculate that the jury went beyond the measure of damages given by the court and added a separate and distinct element of damages. If the plaintiff was concerned that the jury might deliberate about a matter outside of its province, special instructions should have been requested as provided under G.S. 1-181. In the absence of such a request we find that no prejudicial error resulted.

[4] The plaintiff further assigns as error the admission of testimony by the defendants' witness Rorie that in his opinion the dwelling house located on the property taken had a fair market value of $12,000.00 prior to the taking on 3 June 1963.

[5] "Where land upon which buildings have been erected and affixed to the soil is taken by eminent domain, so far as the buildings add to the market value of the land, they must be considered in determining the compensation to be awarded to the owner." 27 Am. Jur. 2d, Eminent Domain, § 291; *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479. It is therefore competent for a witness to explain the value he placed on improvements in arriving at the total value of the property before the taking. The plaintiff obviously recognizes this rule, for its own witnesses were questioned and testified as to the value each of them placed on the house. The plaintiff contends, however, that the testimony of Rorie was prejudicial because he did not express an opinion as to the total value of the property, and thus his testimony stands alone as evidence concerning the value of the house as a separate and distinct item of damage.

[4, 6] It is true that market value in a condemnation case may not be arrived at by assessing separately the value of land and improvements and adding the two together. 27 Am. Jur. 2d, Eminent Domain, § 291; 1 A.L.R. 2d 881, *et seq.* But considering the testimony of the witness Rorie in its entirety we think it clear that the value he placed on the house was his opinion as to how much its presence enhanced the market value of the land. This was consistent with the manner in which all witnesses testified without objection, and in our opinion his testimony could not have left the jury with the impression that the destruction of the house was compensable as a separate item of damage. This is particularly true when considered in connection with the court's instruction to the jury as to the proper measure of damages. *Highway Commission v. Privett,* 246 N.C. 501, 99 S.E. 2d 61. Under the circumstances the testimony complained of was not harmful to the plaintiff.

[7] The court permitted certain of defendants' witnesses to express their opinion that the drainage easements would result in an increased flow of water onto certain portions of the remaining land and would lessen its value. The plaintiff assigns this as error. The drainage easements acquired by the plaintiff are considerably larger than the farm ditches which served the property before the taking. The size of the easements and the fact the flow of water onto remaining portions of the property would be increased was competent evidence and could be considered by the jury as elements of damage. It was proper for qualified witnesses to express their opinion as to the effect of these elements on the value of the remaining property. "In condemnation proceedings our decisions are to the effect that damages are to be awarded to compensate for loss sustained

by the landowner. . . . 'The compensation must be full and complete and include everything which affects the value of the property and in relation to the entire property affected.' *Abernathy v. R. R.*, 150 N.C. 97, 63 S.E. 180." *Highway Commission v. Phillips*, 267 N.C. 369, 374, 148 S.E. 2d 282.

[8, 9] The plaintiff's assignments of error numbers 4 and 5 relate in part to admission of testimony on redirect examination which tended to explain certain testimony elicited on cross-examination. The defendants' witness Williamson admitted on cross-examination that certain property adjoining the condemned property had not been developed for residential use since the taking of defendants' property on 3 June 1963. He was permitted to explain on redirect examination that this property had no access whatsoever to any public road. Also, another witness testified on cross-examination that prior to 1963 the adjoining property had not been available for residential development. On redirect examination he explained that he had reached this conclusion after unsuccessfully trying to purchase the property for residential development. In each instance the question and the response tended to explain and to clarify matters raised by the plaintiff on cross-examination. As was once observed, "[t]he purpose of redirect examination is to uncross matter that has been crossed up on cross-examination." See Stansbury, N.C. Evidence 2d, p. 73 n. 91; also, *State v. Oxendine*, 224 N.C. 825, 32 S.E. 2d 648. This evidence was further competent to rebut the plaintiff's contention that the highest and best use of defendants' property was not for residential purposes as evidenced by the fact that no residential building had occurred on the adjoining property since the date of the taking.

Plaintiff's further exceptions encompassed by its fourth assignment of error attack the admission of evidence that no direct access remained to No. 74 from the defendants' property after the taking. Also challenged is the court's charge to the jury that in arriving at the fair market value of the property immediately after the taking, defendants' evidence that their easement of access to Highway 74 had been substantially interferred with could be considered. These exceptions present for decision the following question: In determining the value of their land remaining after the taking, are the defendants entitled to compensation for the diminution in the value thereof, if any, caused by the fact that they now have no direct access to No. 74?

[10] "At common law the owner of land abutting a highway, while not entitled to access at all points along the boundary between

his land and the highway, has a special right of easement for access purposes, and substantial interference with this free and convenient access to the highway is a 'taking' of a property right for which he may recover just compensation." 3 Strong, N.C. Index 2d, Eminent Domain, § 2, p. 506; *Highway Commission v. Phillips, supra; Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129.

[11] The question of what constitutes a taking of a landowner's right to access has been the subject of numerous decisions in this jurisdiction, all to the effect that while a substantial or unreasonable interference with an abutting landowner's access constitutes the taking of a property right, the restriction of his right of entrance to reasonable and proper points so as to protect others who may be using the highway does not constitute a taking. Such reasonable restriction is within the police power of the sovereign and any resulting inconvenience is *damnum absque injuria. Highway Comm. v. Rankin,* 2 N.C. App. 452, 163 S.E. 2d 302; *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772; *Highway Commission v. Phillips, supra; Wofford v. Highway Commission,* 263 N.C. 677, 140 S.E. 2d 376, *cert. denied,* 382 U.S. 822; *Highway Commission v. Farmers Market,* 263 N.C. 622, 139 S.E. 2d 904; *Snow v. Highway Commission,* 262 N.C. 169, 136 S.E. 2d 678; *Moses v. Highway Commission,* 261 N.C. 316, 134 S.E. 2d 664, *cert. denied,* 379 U.S. 930; *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732.

For example, a landowner is entitled to no compensation for the restriction of access where he is provided with a freely accessable service road connecting with the highway on which his property formerly abutted. *Highway Comm. v. Rankin, supra; Highway Commission v. Nuckles, supra; Moses v. Highway Commission, supra.* Likewise, the construction of a median strip so as to limit landowners' ingress and egress to lanes for southbound travel when he formerly had direct access to both the north and southbound lanes has been held to be a valid traffic regulation adopted by the Highway Commission in the exercise of the police power vested in it by statutes. Injury, if any, caused thereby is not compensable. *Barnes v. Highway Commission, supra.*

When a road or street is closed or abandoned so as to leave the landowner's property on a *cul-de-sac* and increase the distance one must travel to reach points in one direction, such inconvenience is not compensable. *Wofford v. Highway Commission, supra; Snow v. Highway Commission, supra.* In the *Wofford* case Moore, J., speaking for the court at 680, stated as follows:

> "The landowner has an easement consisting of the right of reasonable access to the particular highway on which his land abuts. He has no constitutional right to have anyone pass by his premises at all; highways are built and maintained for public necessity, convenience and safety in travel and not for the enhancement of property along the route. An abutting landowner is not entitled to compensation because of circuity of travel to and from his property; such inconvenience is held to be no different in kind, but merely in degree, from that sustained by the general public, and is *damnum absque injuria.*"

The principle quoted above does not extend to a situation where the closing of a road, even though private in nature, cuts off the landowner's access to *any* public road. "To completely cut off one's access over a private way or neighborhood road to the nearest public road, without providing other reasonable access to a public road, may diminish the value of the land involved to the same extent as if access was denied to a public highway abutting the premises." *Highway Commission v. Phillips, supra,* at 371.

A landowner is entitled to compensation where there is a complete denial of access even if such access did not previously exist because the road in question is a newly constructed limited access facility. G.S. 136-89.52; *Highway Comm. v. Realty Corp.,* 4 N.C. App. 215, 166 S.E. 2d 469; *Highway Commission v. Gasperson,* 268 N.C. 453, 150 S.E. 2d 860. Also, compensation must be paid where under a right-of-way agreement the owner retains the right of access at a particular point and is subsequently refused access at that point. *Realty Co. v. Highway Comm.,* 1 N.C. App. 82, 160 S.E. 2d 83, *cert. denied,* 274 N.C. 185; *Petroleum Marketers v. Highway Commission,* 269 N.C. 411, 152 S.E. 2d 508; *Kirkman v. Highway Commission,* 257 N.C. 428, 126 S.E. 2d 107; *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782.

[12, 13] It is clear under the principles of the cases cited herein that when access has been interferred with by the state the question involved is one of "degree." If the interference is not substantial and if reasonable means of ingress and egress remains or is provided, there has been a legitimate exercise of the police power. If the interference is substantial and no reasonable means of ingress and egress remains or is provided, there has been a taking of a property right under the power of eminent domain. Applying these principles we hold as a matter of law that the restriction of the defendants' access to No. 74 in this case was a taking of a property right for which compensation must be paid.

It is undisputed that after the completion of the project both sides of No. 74 fronting on defendants' property were fenced and no service roads parallel to No. 74 were constructed. In its complaint and declaration of taking the plaintiff sought the right to control access. It now has that right under judgment, and it has been exercised so as to totally eliminate defendants' prior right of unlimited direct access onto No. 74.

[13] The plaintiff contends that reasonable access is still afforded through the use of RPR 1321 which intersects No. 74 west of defendants' property. Defendants still have access onto RPR 1321 for approximately 420 feet north of No. 74 and approximately 1980 feet on the south. Under the circumstances of this case, the defendants' right of access to No. 74 has nevertheless been interferred with substantially. The defendants' evidence was that the highest and best use for the property before the taking was for residential development. With access on both sides of No. 74 now controlled, a street up to 1858 feet in length would have to be constructed north of No. 74 for that tract to be developed. A similar street would have to be constructed on the south side to "open-up" the eastern portion of that tract. In *Highway Commission v. Farmers Market, supra,* a railroad intersected the defendant's property dividing it into two tracts. The southern tract had full access to U.S. Highway No. 1-A. The northern tract had access to 1-A through the use of Race Track Road. A non-access Belt-Line Road was constructed along Race Track Road depriving the defendant of access to No. 1-A from its northern tract unless an expensive 3000 foot road was constructed. The Supreme Court held that though the southern portion of defendant's property was unaffected and still had unlimited access to No. 1-A, defendant's access had nevertheless been substantially diminished. Compensation for the taking of this property right was allowed. The effect on the defendants here is not unlike that suffered by Farmers Market.

The plaintiff's assignment of error as to the admission of evidence concerning the taking of defendants' right of access to No. 74 and the court's charge relating thereto is overruled.

[14, 15] Plaintiff's two remaining assignments of error are also overruled. It was not incumbent upon the court, absent a request, to instruct the jury that an heir to the property in question was an interested witness, this being a subordinate feature of the case. 2 McIntosh, N.C. Practice 2d, § 1513. The plaintiff's motion to set aside the verdict involved no question of law or legal inference and was addressed to the sound discretion of the trial court. No abuse

of discretion has been shown and the court's denial of the motion is consequently not subject to review. *Pruitt v. Ray*, 230 N.C. 322, 52 S.E. 2d 876.

In the entire trial we find

No error.

CAMPBELL and PARKER, JJ., concur.

MILTON GRIMES v. SHERRILL S. GIBERT, CELIA GIBERT, EDWARD HARPER BROWN, ADMINISTRATOR OF THE ESTATE OF EDWARD M. BROWN, DECEASED, CHARLES BULLINS, RONALD W. MOORE AND HOWARD J. BEST

No. 6914SC388

(Filed 22 October 1969)

1. Negligence § 8— proximate cause defined

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

2. Negligence § 8— proximate cause — immediate cause

Proximate cause and immediate cause are not synonymous, since a proximate cause may be an act or omission which does not immediately precede the injury or damage.

3. Negligence § 8— several proximate causes

It is not required that the negligence of defendant be the sole proximate cause of the injury or the last act of negligence in sequence of time in order to hold defendant liable therefor, it being sufficient if defendant's negligence is one of the proximate causes.

4. Negligence § 9— foreseeability as element of proximate cause

Foreseeability, as an element of proximate cause, does not require that the tort-feasor should have been able to foresee the injury in the precise form in which it occurred, but only that in the exercise of reasonable care he could have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

5. Pleadings § 19— demurrer — construction of pleadings

Upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor.

6. Automobiles §§ 43, 87; Negligence § 10— demurrer on ground complaint shows intervening negligence — concurring negligence — sufficiency of allegations

In this action for personal injuries resulting from collisions of automobiles, the complaint is sufficient to show actionable negligence on the part of defendant Moore and does not disclose as a matter of law that the negligence alleged against Moore was insulated by the alleged negligence of the other defendants, where it is alleged that defendant Moore negligently parked his vehicle partially on the main-traveled portion of the highway in violation of G.S. 20-161 in order to illuminate the car of defendant Brown, that after Brown's car was started Moore's car became stalled, that defendant Moore negligently assisted Brown by directing Brown to turn around in the highway to a point behind his own vehicle, with the result that Brown's car was stopped diagonally across plaintiff's lane of travel, that defendant Moore failed to keep a proper lookout at a time when he, by the exercise of reasonable care, should have seen that his actions would affect oncoming traffic, that Moore failed to take safety precautions to warn oncoming traffic of the hazard he had created, that the automobile in which plaintiff was riding, driven by defendant Gibert, struck defendant Brown's automobile and then was struck by defendant Best's automobile, and that the negligence of defendant Moore joined and combined with the negligence of the other defendants in causing plaintiff's injuries, the complaint being sufficient to show that the alleged negligence of defendant Moore in illegally parking on the highway and in failing to warn of a hazard to which he contributed or created existed and was active at the time of the collisions.

7. Negligence § 10— intervening negligence

The test of whether the negligent conduct of one tort-feasor is insulated as a matter of law by the independent act of another is whether the intervening act and the resultant injury could have been reasonably foreseen and expected by the author of the primary negligence.

8. Negligence § 36— intervening negligence — jury question

The question of intervening negligence is ordinarily for the determination of the jury.

APPEAL by plaintiff from *Brewer, J.*, at the 19 May 1969 Session of DURHAM Superior Court.

This is a civil action to recover damages for personal injuries resulting from the collisions of motor vehicles alleged to have been caused by the negligence of the defendants. The complaint alleges that the following occurred:

On 25 May 1967, at approximately 12:24 a.m., plaintiff was riding as a guest passenger in an automobile co-owned and being driven by the defendant Sherrill S. Gibert (Gibert). They were traveling north in the easternmost lane on U.S. Highway #15 which contains two lanes for northbound traffic, and collided with a stopped Chevrolet being operated by Edward M. Brown (Brown), defendant

Brown's intestate, thereby propelling Brown's car into the stopped Chevrolet of the defendant Ronald Moore (Moore). Gibert's automobile then continued in a northern direction on U.S. Highway #15, spun around and came to rest facing south in the western northbound lane of U.S. Highway #15. Gibert's car was then struck by a Buick being operated by defendant Howard J. Best (Best), which was traveling in a northern direction on U.S. Highway #15. Adjacent to the easternmost lane for northbound traffic was a ten-foot paved shoulder.

Paragraphs 13 and 17 of the complaint are as follows:

13. "That as the plaintiff is informed, believes and so alleges that on May 25, 1967, at approximately 12:24 A.M. the Defendant, Ronald W. Moore, was operating a 1956 rust-colored Chevrolet automobile in a northern direction along the easternmost lane of U.S. Highway #15 in Durham County, North Carolina, and parked said automobile in a negligent manner partially on the main-travelled portion of the easternmost northbound lane of U.S. Highway #15 behind a 1956 Chevrolet black automobile owned by the Defendant, Charles Bullins, and being operated by the Defendant, Edward Harper Brown's intestate, Edward M. Brown, at a point located on said highway approximately 296 feet north of the U.S. Highway #70 overpass; that the Defendant, Ronald W. Moore did leave said 1956 rust-colored Chevrolet automobile standing upon the paved and main-travelled portion of U.S. Highway #15, outside of a business or residence district, at a time when it was practicable to park said vehicle standing off of the main-travelled portion of said highway; that while said 1956 rust-colored Chevrolet was negligently parked as aforesaid the Defendant, Ronald W. Moore did continue to use the Chevrolet vehicle to illuminate a stalled vehicle immediately in front of him; that thereafter the Defendant, Ronald W. Moore, was unable to start the engine of said rust-colored Chevrolet and in furtherance of the use of said vehicle and in order to start the engine of same negligently assisted the Defendant, Edward Harper Brown's intestate, Edward M. Brown, by directing the said Brown to turn the 1956 black Chevrolet automobile owned by the Defendant Charles Bullins, around in the two northbound lanes of U.S. Highway #15 to a point behind the Defendant, Ronald W. Moore's vehicle in order to push the Moore vehicle; that the said Ronald W. Moore failed to keep a proper lookout at a time when he saw or by the exercise of reasonable care should

have seen that his actions would affect oncoming traffic on U.S. Highway #15 headed north; and that as the Plaintiff is further informed, believes and so alleges the negligence of the Defendant, Ronald W. Moore, as hereinbefore alleged, joined and combined with the negligence of the other Defendants as hereinafter alleged in causing the Plaintiff's severe and serious injuries as hereinafter alleged."

17. "That as the Plaintiff is informed, believes and so alleges the Defendant, Ronald W. Moore, was careless and negligent at the time, date and place of the herein described collision in that:

(a) He did operate a motor vehicle under [sic] a public highway of the State of North Carolina and did park his vehicle upon the paved or main-travelled portion of the highway, outside of a business or residence district, when it was practicable to park said vehicle standing off of the paved or main-travelled portion of said highway, in violation of North Carolina General Statute State Section 20-161(a).

(b) He did operate a motor vehicle upon a public highway of the State of North Carolina without keeping a proper lookout.

(c) He did negligently use his vehicle to illuminate a stalled vehicle immediately in front of him and in furtherance of the use of his vehicle and in order to start same he did negligently assist the Defendant, Edward Harper Brown's intestate, Edward M. Brown, by directing him to turn his vehicle around in two northbound lanes of traffic of U.S. Highway #15 to a point behind his own vehicle.

(d) He did, while using his vehicle, fail to keep a proper lookout.

(e) He failed to take any safety precautions to warn oncoming traffic against the hazard he had created."

Plaintiff then alleged that Moore's negligence was one of the proximate causes of the collisions and plaintiff's resulting injuries and that Moore's negligence concurred with the negligence of the other defendants to proximately cause the collisions and injuries.

In paragraph 14 of the complaint, plaintiff alleged that Brown drove his vehicle partially behind Moore's parked vehicle, "leaving the rear portion of * * * [Brown's] automobile extended diagonally out into and across the easternmost northbound lane of U.S. Highway #15."

Moore demurred to the complaint for that "* * * the Complaint does not state facts sufficient to constitute a cause of action against this defendant in that it does not state facts sufficient to show any negligence on the part of this defendant which was a proximate cause of the collisions complained of or of the plaintiff's injuries."

From the sustaining of the demurrer as to defendant Moore, plaintiff appeals.

Powe, Porter & Alphin by Willis P. Whichard and W. Travis Porter for plaintiff appellant.

Spears, Spears, Barnes & Baker by Alexander H. Barnes for defendant appellee Moore.

BRITT, J.

The question for determination is whether the complaint states facts sufficient to show any negligence on the part of defendant Moore which was a proximate cause of the collisions in which plaintiff was injured. More specifically, does it affirmatively appear upon the face of the complaint, as contended by defendant Moore, that the negligence alleged against him by plaintiff was superseded and completely insulated by the intervening negligence of the other defendants involved so that his negligence did not constitute a proximate cause of the collisions? We think not.

[1-4] Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed. 6 Strong, N.C. Index 2d, Negligence, § 8, p. 18. A proximate cause may involve an act or omission which does not immediately precede the injury or damage, and therefore, proximate cause and immediate cause are not synonymous. *Stewart v. Gallimore,* 265 N.C. 696, 144 S.E. 2d 862. There may be more than one proximate cause of an injury, and it is not required that the negligence of the defendant be the sole proximate cause of the injury or the last act of negligence in sequence of time in order to hold defendant liable therefor, it being sufficient if defendant's negligence is one of the proximate causes. 6 Strong, N.C. Index 2d, Negligence, § 8, p. 19. Although foreseeability of injury is an essential element of proximate cause, 6 Strong, N.C. Index 2d, Negligence, § 9, p. 22, the

test of such foreseeability does not require that the tort-feasor should have been able to foresee the injury in the precise form in which it occurred. All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected. *Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894.

[5] It is elementary that upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. *Pardue v. Speedway, Inc.,* 273 N.C. 314, 159 S.E. 2d 857; *State Bar v. Temple,* 2 N.C. App. 91, 162 S.E. 2d 649. And a demurrer will not be sustained unless the pleading is wholly insufficient or fatally defective. *Givens v. Sellars,* 273 N.C. 44, 159 S.E. 2d 530.

[6] Here, the plaintiff alleges in essence that Moore parked his automobile in a negligent manner partially on the main-traveled portion of U.S. Highway #15 in order to illuminate the automobile of defendant Brown; that after Brown's car was started Moore's car became stalled; that Moore then directed Brown to turn his (Brown's) automobile around in the northbound lanes of the highway to a point behind Moore's automobile in order to push the Moore vehicle with the result that Brown's car was stopped diagonally across the easternmost northbound lane; and that Moore failed to keep a proper lookout at a time when he, by the exercise of reasonable care, should have seen that his action would affect northbound traffic on U.S. Highway # 15. Plaintiff further alleges the negligence of Moore joined and combined with the negligence of the other defendants in causing plaintiff's injuries. The complaint does allege acts or omissions on the part of Moore which show that had he exercised reasonable care he would have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

The complaint is also sufficient to withstand a demurrer on the ground that the negligence of the other defendants intervened and insulated the negligence of Moore. In *Riddle v. Artis, supra,* it is said:

> "* * * [A]n intervening cause which will relieve the original wrongdoer of liability must be a new cause intervening between the original negligent act or omission and the injury ultimately suffered, which breaks the chain of causation set in motion by

the original wrongdoer and becomes itself solely responsible for the injuries. It must be an independent force which turns aside the natural sequence of events set in motion by the original wrongdoer 'and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated.' [Citation]

* * * In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of nature and kind that the original wrongdoer had no reasonable ground to anticipate it. [Citation]

'The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another is, reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.' [Citations]"

[7, 8] As Denny, J. (later C.J.), said in *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241, and cited with approval in *Nance v. Parks,* 266 N.C. 206, 146 S.E. 2d 24: "The test of whether the negligent conduct of one tort-feasor is to be insulated as a matter of law by the independent act of another * * * is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected * * *. We think it the more correct rule that, except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act. * * *" In *Moore v. Beard-Laney, Inc.,* 263 N.C. 601, 139 S.E. 2d 879, it was held that the question of intervening negligence is ordinarily for the determination of the jury.

[6] The complaint alleges that Moore was negligent in assisting Brown by directing him to turn his vehicle around in the two northbound lanes of traffic to a point behind his own vehicle, resulting in Brown's car stopping diagonally across a northbound traffic lane. This would tend to show that defendant Brown's actions would not constitute an intervening independent force which turns aside the natural sequence of events which Moore set in motion and therefore would not insulate Moore. It also cannot be said as a matter of law that Moore had no reasonable ground to anticipate or foresee the intervening conduct of some or all of the other defendants. It is

reasonable to say that a man of ordinary prudence could foresee that by parking his vehicle partially on the traveled portion of the highway and by directing a second vehicle to a position in the highway behind his own vehicle and diagonally across a traffic lane could cause the collision and injury herein alleged.

We think that the elements of negligence alleged against Moore are sufficient to imply actionable negligence on his part and that the complaint does not disclose on its face that the negligence alleged against Moore was insulated by the alleged negligence of the other defendants.

In support of his contention that we should affirm the judgment sustaining his demurrer, Moore strongly relies on the decision of this Court in *Clarke v. Holman*, 1 N.C. App. 176, 160 S.E. 2d 552, affirmed by the Supreme Court by opinion in 274 N.C. 425, 163 S.E. 2d 783; also *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67, 86 S.E. 2d 780. We think those cases are distinguishable from the case at bar.

In *Clarke*, plaintiff and defendant Townsend were meeting each other in daylight hours on a two-lane paved highway. Townsend intended to turn left across plaintiff's lane of travel into an intersecting rural paved road. When Townsend stopped in his lane preparatory to making his left turn, plaintiff was 1700 feet away but other oncoming traffic made it necessary for Townsend to wait; defendant Holman, who was traveling in the same direction as Townsend, was nowhere in sight when Townsend stopped. Some thirty to forty-five seconds after Townsend stopped, Holman struck him from the rear, then crossed over into the left lane and struck the oncoming car occupied by plaintiff. Townsend's vehicle was visible to Holman at least 300 feet before reaching it. The Supreme Court affirmed this Court in holding the case should have been nonsuited as to Townsend. We quote from the Supreme Court opinion: "Plaintiff charges Townsend with negligence (1) in failing to signal his intention to stop, (2) in failing to give a signal of his intention to make a left turn, and (3) in failing to maintain such signal until the left turn was completed. * * * Neither plaintiff's vehicle nor Holman's vehicle were in any wise affected by (Townsend's) stopping or standing without giving the left turn signal. Holman later came upon the Townsend vehicle lawfully stopped on the highway and crashed into it because he was not keeping a lookout in his direction of travel. * * * Holman's negligence in this respect was the sole proximate cause of the collision and the resulting injury to plaintiff. * * * [T]he evidence warrants the inference that there was no causal con-

nection whatever between the failure * * * to give a hand signal and the subsequent collision."

In *Potter,* the only negligence alleged against the driver of the parked vehicle was that he failed to give a signal of his intention to stop and was driving carelessly and at an unlawful speed. The court's holding is succinctly stated in the third headnote to the opinion as follows: "Where a truck has been stopped on the highway for an appreciable length of time, the fact that the driver of the vehicle failed to give signal of his intention to stop cannot be a proximate cause of a rear-end collision." Of course, the allegations of reckless driving and excessive speed had no application to a vehicle parked on the highway.

In *Clarke* and *Potter,* the collisions occurred during daylight hours under favorable weather conditions. The negligence alleged against the drivers of the parked vehicles had become completely passive, therefore, such negligence did not concur with the intervening negligence of a third party in causing the collision. In the instant case, acts and omissions of negligence alleged — illegal parking on the highway and failure to warn of a hazard created or contributed to by Moore — existed and were active at the time of the collisions.

The judgment of the superior court is

Reversed.

MALLARD, C.J., and VAUGHN, J., concur.

STATE v. ROBERT ALLEN ROBERTS

No. 6912SC444

(Filed 22 October 1969)

1. Criminal Law § 84; Narcotics § 4— unlawful possession of drugs — admission of LSD tablets in evidence — search incident to lawful arrest

In a prosecution charging defendant with the unlawful possession of 57 tablets containing lysergic acid diethylamide (LSD), a narcotic drug, in violation of G.S. 90-88, the trial court properly admitted in evidence the LSD tablets found in defendant's possession by a search incident to a lawful arrest without a warrant, the officers who made the arrest having had reasonable ground to believe that the defendant had committed a felony and would evade arrest if not taken into immediate custody.

2. Arrest and Bail § 3— arrest without warrant — reasonable ground — felony — evasion of arrest — sufficiency of evidence

The arrest of defendant without a warrant on a charge of the unlawful possession of tablets containing the narcotic drug LSD *is held* lawful where the officers who made the arrest had reasonable ground to believe that defendant had committed a felony and would evade arrest if not immediately taken into custody, the evidence of the circumstances surrounding the arrest being to the effect that the officers received a telephone call from a reliable informant that defendant was selling LSD at a certain restaurant, that the officers found the defendant and a male companion in a lighted parking lot adjacent to the restaurant and observed the actions of defendant as he spoke to numerous persons, that the officers had previously observed similar actions in the restaurant vicinity which involved the selling of narcotics, that at the time the restaurant was to close defendant left the parking lot and went into a washerette, and that the officers, fearing defendant would evade arrest, promptly made the arrest. G.S. 15-41(2).

3. Arrest and Bail § 3— arrest without warrant — grounds

A peace officer may arrest a person without a warrant 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. G.S. 15-41(2).

4. Arrest and Bail § 3— arrest without warrant — determination of reasonable grounds

In determining whether officers had reasonable grounds to believe that defendant would evade arrest if not taken into immediate custody, the court must necessarily take into consideration the nature of the felony, the hour of the day or night, the character and reputation of the neighborhood where the arrest was made, the number of suspects, the number of officers available for assistance, and the likely consequences of the officers' failure to act promptly.

APPEAL by defendant from *Bickett, J.*, 24 February 1969 Criminal Session, CUMBERLAND Superior Court.

The defendant Robert Allen Roberts was arrested on 7 January 1969 by Special Agent Cuyler L. Windham, of the State Bureau of Investigation, for the unlawful possession of a narcotic drug commonly referred to as LSD. Special Agent Windham received a telephone call on 7 January 1969 shortly before 11:00 p.m., from a confidential informant with whom he had had prior contact, informing him that the defendant and another were at the Village Shoppe restaurant and that they were in possession of a quantity of LSD and were selling it. Special Agent Windham then telephoned Lt. R. A. Studer, of the Fayetteville Police Department, at his home, and requested that he meet him at the Hubbard Building immediately across the street from the restaurant where the defendant was allegedly engaged in the sale of narcotics. After Windham arrived

at the Hubbard Building, fifteen to twenty minutes after he received the telephone call from the informant, he found Lt. Studer already in the building. From their vantage point, the officers observed the defendant and his companion milling around the parking lot adjacent to the restaurant. The officers testified that numerous persons would approach the defendant and talk to him for a short while and the defendant would move from group to group and talk for a short period of time. The officers had previously observed the selling of narcotics in the vicinity and the actions of the defendant and his companion on this date were similar to the actions of those previously observed. At approximately 11:15, the defendant and his companion left the restaurant and went to a washerette a few doors away. The two officers followed them into the washerette, placed them under arrest, advised them of their constitutional rights, and searched them immediately. The search revealed 57 LSD tablets which had been concealed in a rubber tip in a finger of a pair of gloves worn by the defendant. The officers did not have a warrant for the defendant's arrest nor did they have a search warrant. Upon their voir dire examination of the officers, the trial judge made the following finding and ruling:

> "Let the record show, Mr. Worth, that, after hearing the evidence, in the absence of the jury on voir dire, the court finds as a fact that Cuyler L. Windham, Agent of the S.B.I., had reasonable grounds to believe that a felony was being committed, and that the Defendant Mr. Roberts, Robert Allen Roberts, was at the place committing the felony; that he had also had reasonable grounds to believe that unless he was apprehended and arrested that he would escape from the scene of arrest, and that the arrest was based on reasonable belief of the officer that a felony had been and was being committed and that the arrest was legal without a warrant, and that the search of the defendant Mr. Roberts was, at the instant of the arrest, and therefore was valid."

The 57 LSD tablets taken from the defendant were admitted into evidence. From a conviction upon indictment for the unlawful possession of LSD, a quantity of narcotic drugs, and judgment imposed thereon, the defendant appealed.

Robert Morgan, Attorney General, by William F. Briley and Robert G. Webb, for the State.

Nance, Collier, Singleton, Kirkman & Herndon, by Rudolph G. Singleton, Jr., Charles Lee Guy, and William J. Townsend, for defendant appellant.

HEDRICK, J.

[1] The appellant assigns as error the court's admission into evidence the 57 tablets containing LSD taken from the person of the defendant without a search warrant. G.S. 90-88 reads as follows: "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article." G.S. 90-111(a) states: "Any person violating any provision of this article or any person who conspires, aids, abets or procures others to do such acts shall upon conviction be punished, for the first offense, by a fine of not more than one thousand dollars ($1,000.00) or be imprisoned in the penitentiary for not more than five years, or both, in the discretion of the court." The defendant Robert Allen Roberts was indicted for the felony of possessing 57 tablets containing lysergic acid diethylamide (LSD), a narcotic drug.

[2] The determinative question arising on this appeal is whether the officer was justified under all of the circumstances in arresting and searching the defendant without a warrant.

[3] G.S. 15-41(2) reads as follows: "A peace officer may without warrant arrest a person . . . 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."

Our Supreme Court has applied G.S. 15-41(2) in numerous cases, which apparently prompted the appellant to state in his brief:

> "What reasonable ground the arresting officer had was to believe that the person to be arrested had committed a felony. In view of the decisions of our Court, appellant concedes at the outset that the information furnished to the arresting officers by a reliable, confidential informant, who had previously furnished reliable information, was sufficient to satisfy this requirement."

The appellant's sole contention is that the officers did not have reasonable grounds to believe that the defendant would evade arrest if he was not taken into custody immediately. We do not agree with this contention.

[4] In determining whether the officers had reasonable grounds to believe that the defendant would evade arrest if not taken into immediate custody, we necessarily must take into consideration the nature of the felony, the hour of the day or night, the character and reputation of the neighborhood where the arrest was made, the number of suspects, and of the officers available for assistance, and

the likely consequences of the officers' failure to act promptly. In this connection, Special Agent Windham, of the S.B.I., testified that he had a telephone call from a confidential informant at about 11:00 p.m. on 7 January 1969 informing him that the defendant was at that time selling LSD in the vicinity of the Village Shoppe restaurant in the City of Fayetteville, North Carolina. Officer Windham immediately called Lt. Studer at his home and asked him to meet him in a building near the restaurant. The officers testified that they observed the defendant and a male companion in a parking lot near the restaurant. Calculating the time from the officers' testimony, it was approximately 11:30 p.m., and the officers knew that the Village Shoppe restaurant would soon close. The officers had previously observed the selling of narcotics in the vicinity.

When the officers observed the defendant and his companion leave the lighted parking lot and go to the washerette, it then became necessary for the officers to follow and take prompt action. We think that the officers had reasonable grounds to believe that the defendant would have evaded arrest if not taken into custody immediately. It may be contended that the modern policeman has at his disposal means of rapid transportation and communication to facilitate his obtaining process to arrest and search felony suspects, but the same means are available to the violators of the criminal laws to facilitate their evasion if prompt action is not taken by the officer.

In *State v. Grier,* 268 N.C. 296, 150 S.E. 2d 443, the police had been informed that the defendant had committed a robbery, and had been given a description of the defendant and advised that he might be found at a certain house. The defendant was, in fact, found at the house and arrested without a warrant. The Court held that the defendant's arrest without a warrant was justified when the officer had information that the defendant had committed a felony, and articles of personal property seized incident to the arrest were properly admitted into evidence.

In *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269, the officers were informed that the felony of burglary with attempt to rape had been committed and they were given a partial description of a suspect by the victims. The police later the same night arrested the defendant without a warrant and seized certain items of personal property from the person of the defendant. Justice Lake, speaking for the Court, said:

> "There was no error in admitting in evidence the two cans of beer and the Amphetamine tablets found in the defendant's pockets. The police officer who searched the defendant had been

informed of the felony committed at the Patton residence and that a barefooted white man, wearing coveralls, was suspected to have been the perpetrator of it. He was looking for such a man. At about 3 a.m., he found the defendant, who answered the description, hiding behind a bush two blocks from the scene of the crime. Under these circumstances, it was lawful for him to arrest the defendant without a warrant. G.S. 15-41(2); *State v. Grier,* 268 N.C. 296, 150 S.E. 2d 443; *State v. Grant,* 248 N.C. 341, 103 S.E. 2d 339; *State v. Fowler,* 172 N.C. 905, 90 S.E. 408; Strong, N.C. Index 2d, Arrest and Bail, § 3. Police officers may search the person of a prisoner lawfully arrested as an incident to such arrest. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544. The officer may lawfully take from the prisoner any property which he has about him which is connected with the crime charged or which may be required as evidence. *State v. Ragland,* 227 N.C. 162, 41 S.E. 2d 285; *State v. Graham,* 74 N.C. 646. If otherwise competent, such article may be introduced in evidence by the State."

In *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506, an arrest without warrant was upheld when the evidence disclosed that the officer had information that the felony of breaking and entering had been committed, and the defendants fitted the description of the perpetrators of the crimes.

In *State v. Egerton,* 264 N.C. 328, 141 S.E. 2d 515, the victims of a robbery were able to identify the robber. Later the same night a "reliable informant" told the police where the defendant could be found. The police went to the location, found the defendant in bed and arrested him without a warrant. Citing G.S. 15-41, the Court held that the arrest of the defendant without a warrant was proper. In the above case it is interesting to note that the arrest was made some 5½ hours after the police had been given the information regarding the robbery and the defendants had been identified.

In *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741, the police officer had information of the commission of the felony of armed robbery and also had a description of the automobile being driven by the suspect. Upon stopping the automobile, the officer observed a pistol lying on the seat. Citing G.S. 15-41, the Court held that the arrest of the defendant without a warrant was justified when the officer had reasonable ground to believe that the defendant had committed a felony and would evade arrest if not taken into custody. Justice Branch then stated: "The search and seizure were so closely related

in time and circumstance to the arrest as to make the search and seizure reasonable."

In support of his contentions, the appellant cites *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100. The facts in this case are clearly distinguishable in that the defendant Mobley was arrested by an officer without a warrant for public drunkenness and was later charged with resisting that arrest. The defendant was acquitted of public drunkenness and convicted by the jury of resisting arrest. The Supreme Court held that a charge of resisting arrest could not be predicated on an unlawful arrest.

In *Neal v. Joyner,* 89 N.C. 287, also cited by the defendant, the plaintiff had been arrested without a warrant for robbery at the request of the defendant, a peace officer. The Court held that the request of the defendant to have the plaintiff arrested without a warrant was justified since the defendant had reasonable grounds to believe that the plaintiff had committed a felony and would evade arrest if not taken immediately into custody. We find nothing in this case to support the defendant's contention.

The appellant earnestly contends that *U. S. v. Coplon,* 185 F. 2d 629, 28 A.L.R. 2d 1041 (2 Cir. 1950), Cert. denied 342 U.S. 920, 72 S. Ct. 362, 96 L. Ed. 688, is authority to sustain his position. We do not agree. In *Coplon,* the defendant was suspected of having transmitted classified information to an agent for a foreign government. She had been under surveillance by agents of the F.B.I. for many weeks and had been observed meeting an agent of the foreign government on three occasions. On the day she was arrested without a warrant, 24 agents of the F.B.I. had been assigned to her case and it was known that upon this date she would meet with the agent of the foreign government and that she would have certain information in her possession. The F.B.I. had already assigned a matron to take custody of the defendant upon her arrest. Apparently everything had been planned for the defendant's arrest except obtaining a warrant. The Court held that the arrest of the defendant without a warrant under these circumstances was not justified since there was absolutely no reasonable ground to believe that the defendant would evade arrest if not immediately taken into custody, and that considering all of the circumstances, the formality of obtaining an arrest warrant ought not to have been overlooked.

In *Lee v. U. S.,* (C.A. Mo. 1966), 363 F. 2d 469, Cert. den. 87 S. Ct. 323, 385 U.S. 947, 17 L. Ed. 2d. 227, a confidential informant advised agents of the F.B.I. on 18 September 1964 that the defendant had in his possession securities taken from a bank robbed in

early May 1964. Relying on this information, agents of the F.B.I. placed the defendant under a "loose" surveillance for 10 days. On 29 September 1964, they were informed that the defendant was going to sell some of the stolen securities at the Saint Louis airport that night. The U. S. Attorney was advised of this fact but did not obtain either a search warrant or an arrest warrant from the U. S. Commissioner even though he had ample time and opportunity to do so. The defendant was arrested without a warrant, the stolen securities seized and his subsequent conviction was upheld by the Eighth Circuit Court of Appeals.

We consider the language from the opinion in *Churder v. U. S.*, (8th Cir. 1968), 387 F. 2d 825, to be appropriate: "We do not mean to imply or to negate the general rule that a warrant is the preferred route. At the same time, we are disinclined to raise almost insuperable barriers for the law enforcement officer who must act promptly upon freshly received information the value of which, if there is significant delay, will evaporate and be lost forever."

[1, 2] We believe that the nature of the felony in the instant case and that all of the facts and circumstances connected with its commission, along with all of the information available to the officers, justified the immediate arrest and search of the defendant, and that the superior court did not commit error in admitting into evidence the 57 tablets containing LSD over the objection of the defendant.

No error.

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

MARGRETTE ESTHER PARDUE KEARNS v. PAUL RUTHERFORD KEARNS

No. 6922SC331

(Filed 22 October 1969)

1. Appeal and Error § 6— orders appealable — temporary order in divorce case

An appeal to the Court of Appeals was properly taken from a temporary order awarding alimony *pendente lite*, child custody, counsel fees and possession of certain properties.

2. Divorce and Alimony § 18— subsistence pendente lite — insurance policies

In the wife's action for divorce without alimony, portion of the court's

order awarding alimony *pendente lite* and temporary child custody which required defendant husband to maintain in effect all policies of insurance without changing the beneficiaries was improper where the record is silent with respect to how much insurance defendant owned, the type of policies, or the beneficiaries thereof, and there is nothing in the record to show whether compliance with this portion of the order would benefit plaintiff wife and the minor children.

3. Divorce and Alimony § 18— subsistence pendente lite — temporary child custody — sufficiency of notice — notice before second hearing

In wife's action for alimony without divorce, order requiring defendant to pay subsistence and counsel fees *pendente lite* and awarding temporary child custody is not void for failure of plaintiff to give defendant five days' notice prior to the first hearing held on the wife's motion on 26 February as required by G.S. 50-13.5(d)(1) and G.S. 50-16.8(e), where both defendant and his counsel attended the first hearing, notice was given by the trial court at the first hearing of the further opportunity to be heard at another hearing held on 13 March, defendant's counsel was present at the second hearing, and the order was signed only after the second hearing, defendant having been given sufficient notice of the second hearing to enable him to present any further evidence he desired.

4. Divorce and Alimony § 24; Infants § 9— custody proceedings — testimony by minor children

In a hearing to determine custody of four minor children, the court erred in refusing to hear the testimony of the children upon request by counsel for defendant husband, the children having a right to have their testimony heard in custody proceedings.

5. Divorce and Alimony § 24; Infants § 9— custody — both parents fit — court's award

When there has been a finding that both parents are fit and suitable to have custody, the judge's order awarding custody is conclusive when supported by evidence.

6. Divorce and Alimony § 18— counsel fees pendente lite

In the wife's action for alimony without divorce, no abuse of discretion is shown in award of $1500 as counsel fees *pendente lite.*

7. Divorce and Alimony § 18— subsistence pendente lite

In the wife's action for alimony without divorce, an award of $750 per month *pendente lite* for the maintenance and support of plaintiff wife and the two children in her custody *is held* not to constitute an abuse of the court's discretion.

8. Divorce and Alimony § 18— subsistence pendente lite — furnishing of home for wife

In this action for alimony *pendente lite,* the court had authority to require defendant husband to provide for the furnishing of the residence where plaintiff and two children reside, but the court should have fixed a definite dollar amount for defendant husband to expend for this purpose.

9. Divorce and Alimony § 18— subsistence pendente lite — payment of debts

In this action for alimony *pendente lite*, the trial court had authority to order that defendant husband pay all debts of the parties as of the date of the order, such payment being associated with defendant's duty to support his wife.

10. Divorce and Alimony §§ 18, 23— order awarding support for minor and alimony — separate statement of each allowance

Where an order provides for payment for support of a minor child and for alimony or alimony *pendente lite*, the order must separately state and identify each allowance. G.S. 50-134.4(e), G.S. 50-16.7(a).

APPEAL by defendant from a temporary order by *McConnell, J.*, 20 March 1969, in chambers, DAVIDSON Superior Court.

Plaintiff filed suit on 21 February 1969 for alimony pendente lite, child custody, counsel fees and possession of certain properties. Plaintiff alleges that she and defendant were married on 26 June 1955 and, except for a time in 1967, when she separated herself from the defendant because of his actions, have lived together as husband and wife until 14 February 1969, at which time she and defendant again separated.

Since a detailed review of the allegations of plaintiff and counter allegations of defendant by affidavit and testimony are not necessary to decision, we deem it appropriate to omit them from the opinion. Suffice it to say that plaintiff's complaint, asked to be considered as an affidavit, is sufficient to support the facts found and order entered. Defendant was served on 22 February 1969 with notice of the hearing to be held on 26 February 1969, copy of the notice and complaint having been delivered to his counsel on 21 February 1969. At the hearing on 26 February 1969, defendant moved that plaintiff's action be dismissed for failure to comply with the statute as to notice. The motion was denied and the court proceeded to hear the parties. Both defendant and plaintiff testified and the court received some 25 affidavits for defendant, including the affidavits of his children by a previous marriage, and two affidavits for plaintiff. Counsel for defendant suggested to the court that the four minor children wished to be heard and twice requested the court to hear them. The court refused to hear the children. The court advised the parties that he would take the affidavits and make a decision later and if the parties wanted to put on oral evidence he would hear it but not the testimony of the children as to their wishes. The order reflects that the court, on 13 March 1969, heard further arguments of counsel.

In the order entered by the court it is found as facts that four

children were born of the marriage, presently aged twelve, eleven, nine, and seven years; that the parties were separated on 14 February 1969 and have lived continuously separate and apart since that date; that both plaintiff and defendant were fit and suitable persons to have the care, custody and control of the minor children; that plaintiff was without funds to support herself and defray the costs and expenses of the action, she having been dependent on defendant for maintenance and support; that plaintiff and defendant owned jointly a 300-acre farm in Iredell County and a residence in Statesville; that defendant had an interest in additional real estate in North Carolina and Florida; that defendant owned a Buick automobile, a Chevrolet automobile, a Chevrolet truck, an Apache Piper airplane, various stocks and bonds, life insurance policies, horses, farm machinery and equipment, and other personal property; that the residence in Statesville in which plaintiff was residing was not completely furnished and that it should be; that defendant had paid to plaintiff since the first hearing and prior to the entry of the order the sum of $500 for her care, maintenance and support and $300 for partial attorneys' fees; that it would be in the best interests of the two older children to be placed in the custody of defendant and in the best interests of the two younger children to be placed in the custody of the plaintiff. The court entered an order, effective until 28 May 1969 or as soon thereafter as hearing could be had, granting custody of the two older children to defendant with rights of visitation in plaintiff and custody of the two younger children to the plaintiff with visitation rights in the defendant, and granting plaintiff a writ of possession to the residence in Statesville. Defendant was ordered to transfer to plaintiff title to the Buick automobile, pay plaintiff $750 per month for the care, maintenance and support of plaintiff and the children in her custody; make mortgage payments, and pay insurance and taxes on the residence in Statesville; pay attorneys' fees of $1500 to plaintiff's counsel; maintain in effect all policies of insurance until further orders of the court without changing beneficiaries; pay all medical, dental, and hospital expenses of plaintiff and the minor children; and furnish plaintiff sufficient funds to be used in furnishing the residence in Statesville or, in the alternative, to furnish the residence to meet with plaintiff's approval.

Both parties excepted and appealed.

Collier, Harris and Homesley, by W. H. McMillan, for plaintiff appellee.

Chamblee and Nash, by M. L. Nash, for defendant appellant.

MORRIS, J.

Since plaintiff has brought forward no exceptions or assignments of error, her appeal is deemed abandoned under Rule 19(c), Rules of Practice in the Court of Appeals.

[1] The first question to be answered is whether the temporary order entered by the court is one from which an appeal may be taken. This question is raised by plaintiff's written motion in this Court to dismiss the appeal as being an appeal from a temporary order not affecting a substantial right. Under the totality of the circumstances of this case we hold that the case is properly before us.

[2] Defendant contends that the portion of the order relating to the beneficiaries in his insurance policies is in error. Defendant's financial statement indicates present cash value of life insurance to be $1700 and monthly premiums therefor to be $420.04. The record is otherwise silent with respect to how much insurance defendant owned, what type of policies, the beneficiaries thereof, etc. Nor does the order indicate whether plaintiff and the children, or any of them, are beneficiaries of life insurance. There is nothing in the record to show whether compliance with this portion of the order would benefit plaintiff and the minor children nor whether a failure on the part of defendant to comply would result in harm to them, or any of them. Obviously this part of the order was not for the purpose of charging the insurance with a lien for the enforcement of the award of alimony or support. Plaintiff's complaint did not ask for any order concerning insurance. This portion of the court's order, in our opinion, was not proper in this case.

[3] Defendant by assignments of error Nos. 1 and 2 contends that the court had no jurisdiction to enter the order because notice was not given in accordance with G.S. 50-13.5(d)(1) and G.S. 50-16.8(e), the former requiring five days' notice on a motion for custody and the latter requiring five days' notice before an order for alimony pendente lite can be issued, and that the order as signed is, therefore, null and void. On the facts of this case this contention is without merit. The first hearing was held on 26 February 1969 in Lexington and, as appears from the record, defendant was served on 22 February 1969. This notice obviously does not comply with the five-day statutory requirement. However, the record indicates that the court gave opportunity for either party to be heard the next week and did in fact hold another hearing, more than one week later, on 13 March 1969 in Statesville, North Carolina, which was attended by counsel for defendant. The order was signed on 14 March 1969 by Judge McConnell, the day after the second hearing. The defend-

ant had 14 days' notice, including Saturdays and Sundays, before the second hearing was held and 15 days' notice before the order was signed. In *Barnwell v. Barnwell,* 241 N.C. 565, 85 S.E. 2d 916 (1955), the facts are very similar to the case now before us. The Court in *Barnwell* entered an order on 18 May 1954 requiring defendant to pay subsistence and counsel fees pendente lite. In October it was shown by affidavit that defendant had failed to comply with the order, and an order to show cause why defendant should not be held in contempt was entered. Defendant argued that the order of 18 May was invalid because he had not been given notice. This lack of notice was admitted by plaintiff's counsel. It was also admitted that neither defendant nor his counsel had been present when the order was signed. The judge declined to hold the defendant in contempt but intimated that the plaintiff might make a new motion for temporary subsistence and counsel fees, which plaintiff did. Notice of that motion was reduced to writing, signed by the judge and accepted in writing by the defendant. On 2 December 1954 all the parties, with counsel, appeared before the court pursuant to the new motion. Defendant objected to the hearing on the ground that notice was without authority of law and therefore void. The objection was overruled and defendant excepted. On the facts found, defendant was ordered to pay $25 weekly for support of plaintiff and her infant child and the additional sum of $50 for counsel fees. Defendant excepted and appealed. He argued that the order appealed from was void because it was entered while the previous order of 18 May was in force. The Court in *Barnwell* stated:

> "The defendant's position is untenable. The original order was entered in May without notice to the defendant. This was conclusively established by judicial admission of the parties. Therefore the order was void. (Two citations omitted.) Judge Whitmire properly treated it as a nullity upon challenge by the defendant. True, no formal order was made adjudicating that the order was void, but the omission is inconsequential and may be remedied *nunc pro tunc.* It is so ordered. The record stipulates that the latter order was entered after 'due and proper notice' to the defendant. The hearing will be upheld."

The order was affirmed after modification to declare the order of 18 May a nullity.

In the case at bar both defendant and his counsel attended the first hearing. Notice was given at the first hearing of the further opportunity to be heard the next week and, since the record is not clear, it may be inferred from the order that counsel for defendant

was present at the second hearing. The only order entered to this date was signed the day after the second hearing, of which defendant had sufficient notice. The order in question was properly entered. Judge McConnell's notice of a further hearing, and defendant's counsel's subsequent attendance, was more than sufficient notice to enable defendant to present any further evidence he desired.

Defendant's assignment of error No. 3 is addressed to the refusal of the court to hear the testimony of the four minor children, who were tendered by defendant.

[4] Counsel for defendant twice requested the court to hear the testimony of the children and the court refused both times. This was error. The case of *Spears v. Snell,* 74 N.C. 210 (1876), established the right for a child to have his testimony heard. The Supreme Court said:

> "We think the boy was a competent witness, and ought to have been examined in that character. Indeed, we think, being the party mainly concerned, he had a right to make a statement to the court as to his feelings and wishes upon the matter, and that this ought to have been allowed serious consideration by the court, in the exercise of its discretion, as to the person to whose control he was to be subjected."

The *Spears* case was cited with approval in *In Re Gibbons,* 247 N.C. 273, 101 S.E. 2d 16 (1957). In *Gibbons* the Court stated:

> "There is nothing in the findings of fact to indicate that Judge Carr gave any consideration to the wishes of this ten-year old boy as to the person to whose custody he was to be given, though under the facts here the boy, being the party mainly concerned, had a right to have his wishes and feelings taken into especial consideration by the judge in awarding his custody. It seems that the learned Judge felt so 'cramped by his opinion that in law' the respondent had a primary right to the custody of the boy, that he overlooked the interest and welfare of the boy. This was error."

These two cases leave no doubt that a child has a right to have his testimony heard. It is still, however, within the discretion of the trial judge as to the weight to be attached to such testimony. 3 Lee, N.C. Family Law (1963), § 224; *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73 (1966); *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759 (1955).

[5] Defendant's assignment of error No. 5 questions the court's authority to change the custody of two of the children when de-

fendant was found by the court to be a fit and proper person to have custody and control of the children. Defendant cites no authority for this position. When there has been a finding that both parents are fit and suitable to have custody, the judge's order is conclusive when supported by evidence. See *Wilson v. Wilson*, 261 N.C. 40, 134 S.E. 2d 240 (1964). This assignment of error is overruled.

[6] Defendant's assignment of error No. 6 challenges the amount awarded as counsel fees as excessive. Such an award comes within the discretion of the trial judge and will not be disturbed in the absence of an abuse of discretion. See *Stadiem v. Stadiem*, 230 N.C. 318, 52 S.E. 2d 899 (1949). There is no evidence that plaintiff has any separate estate. There is evidence that she had consulted her attorneys prior to leaving the home. We do not deem the fee beyond the defendant's ability to pay from the evidence presented. We find no abuse of discretion.

[7] By assignment of error No. 7 defendant contends that the amount ordered for maintenance and support was excessive and contrary to the evidence of defendant's ability to pay. This is another area which falls within the sound discretion of the trial judge. This is not a final order. From the evidence, we cannot say that there is abuse of discretion. See *Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5 (1968), and cases there cited. This assignment of error is overruled.

[8] Defendant's assignments of error Nos. 9 and 10 question the court's authority to provide for the furnishing of the residence where plaintiff resides and the payment of all debts as of 14 March 1969. There can be no question as to a husband's duty to support his wife. See *Wilson v. Wilson, supra.* The court found as a fact that the home presently occupied by plaintiff was not completely furnished. Furnishing a house for his wife and children is within the purview of a husband's duty of support. However, we hold that in this case the judge should have fixed a definite dollar amount for the husband to expend for this purpose.

[9] The provision for the payment of debts contemplates payment only to 14 March 1969, the date of the order. This payment is not disassociated from the defendant's duty of support. See generally 2 Lee, N.C. Family Law (1963), Chapter 14, Support and Family Expenses. This assignment of error is overruled.

[10] Although the question is not raised on this appeal, we note that the order does not comply with the provisions of G.S. 50-13.4(e) and G.S. 50-16.7(a). The former requires that "[i]n every case in

which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.", and the latter requires that "[i]n every case in which either alimony or alimony pendente lite is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance."

For the reasons herein stated the case is remanded for rehearing in compliance with this opinion.

MALLARD, C.J., and HEDRICK, J., concur.

STATE OF NORTH CAROLINA v. JAMES FRANK CULBERTSON AND FRED CULBERTSON

No. 6920SC456

(Filed 22 October 1969)

1. Indictment and Warrant § 10— identification of accused — variance in name — idem sonans

Where the surname of the two defendants, who were brothers, was spelled "Cuthbertson" in the arrest warrants and in the bills of indictment, but the surname of the defendants was spelled "Culbertson" in the remainder of the record, including the signature of each defendant on the affidavits of indigency, the doctrine of *idem sonans* is applicable, and defendants' motions in arrest of judgment will be denied.

2. Robbery § 4— armed robbery — nonsuit

In a prosecution for armed robbery, evidence of defendants' guilt *held* sufficient to be submitted to the jury.

3. Criminal Law § 95— evidence competent for restricted purpose — duty of trial court — instructions

Absent a special request, the trial court is not required to restrict the admission of evidence offered for impeachment purposes or to instruct the jury as to the effect of testimony offered for impeachment purposes.

4. Criminal Law § 163— assignment of error to the charge

An assignment of error to the charge must be based on a proper exception.

5. Criminal Law § 42— armed robbery — pistol connected with crime — admissibility

Where witness in armed robbery prosecution testified on direct exami-

nation that the pistol proffered as an exhibit by the State was the pistol the defendants "held" on him, the pistol was properly admitted in evidence even though the witness stated on cross-examination that he could not positively identify the pistol.

6. Criminal Law § 84— admission of search warrant in evidence

Defendants in armed robbery prosecution were not prejudiced by the admission in evidence of the search warrant used to search the automobile in which the robbery shotgun was discovered.

7. Criminal Law § 162— motion to strike evidence — instructions to jury to disregard evidence

Where the trial court allows the defendant's motion to strike the answer of a witness, failure of the court to instruct the jury not to consider the answer of the witness is harmless when the record discloses that the jury must have understood that the witness' answer was to be disregarded as evidence in the case.

8. Criminal Law § 162— assignment of error to evidence — proper exceptions

In armed robbery prosecution, question on appeal relating to victim's identification of the defendants in the sheriff's office *is held* not properly presented where the only exception to such evidence appeared under the assignments of error.

9. Criminal Law § 89; Witnesses § 5— corroborative evidence — admissibility

Evidence which tends to corroborate a party's witnesses is competent and is properly admitted upon the trial for that purpose, even though otherwise incompetent.

10. Criminal Law §§ 60, 61— evidence of footprints — tire tracks

Evidence of footprints and tire tracks found at the scene of a crime is competent, and the probative force, if any, of such evidence is for the jury.

11. Criminal Law § 89— impeachment testimony — discrediting alibi witness

In a prosecution of two brothers for armed robbery, testimony of the officer who sought to arrest defendants that the defendants' father had stated to him on the night of the robbery, in reply to his questions as to the whereabouts of the sons, that he did not know where they were and that "they have been in so much trouble that I have got tired of looking for them," *held* competent to impeach the father's testimony that one of his sons was at home on the night of the robbery.

APPEAL by defendants from *Beal, S.J.*, 5 May 1969 Criminal Session of Superior Court held in UNION County.

Defendants were charged in separate bills of indictment with the felony of armed robbery.

Defendants, who were indigent, were each represented at the trial and on this appeal by court-appointed counsel.

Upon pleas of not guilty, trial was by jury, and the verdict was guilty.

From judgment of imprisonment, each defendant appealed to the Court of Appeals.

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

Robert L. Huffman for defendant James Frank Culbertson.

Robert B. Clark for defendant Fred Culbertson.

MALLARD, C.J.

[1] Defendants, although represented by different attorneys, filed a joint brief. Defendants are brothers. In the warrants upon which they were arrested and also in the bills of indictment upon which they were tried, the last name of the defendants was spelled "Cuthbertson." In the remainder of the record, including the signatures of each defendant on the affidavits of indigency, the last name of the defendants was spelled "Culbertson." The defendants were tried under the bills of indictment without challenging the way the name is spelled, and they do not at this time specifically refer to the spelling of the last name. However, in view of defendants' motions in arrest of judgment, we deem it proper to advert to this fact and hold that the doctrine of *idem sonans* is applicable. In the case of *State v. Vincent,* 222 N.C. 543, 23 S.E. 2d 832 (1943), the Court said:

> "The term *'idem sonans'* means sounding the same. Here, the two names, 'Vincent' and 'Vinson,' sound almost alike. No point was made of the variance, if such it be, on the trial, and, of course, the defendant will not now be heard to say that his real name is 'Furgerson.' He was tried under the name of Vincent, without objection or challenge, and sentenced under the same name. There being no question as to his identity, he may retain the name for purposes of judgment."

[2] The evidence for the State tended to show that on the 18th day of November 1968 the two defendants, James Frank Culbertson (James) and Fred Culbertson (Fred) entered the store owned and operated by the witness Lynn Crook at about 7:30 p.m. Lynn Crook, George Hegge and Maurice Trull were present in the store at the time the defendants entered. The defendant James had the .22-

calibre pistol which was introduced into evidence and pointed it at Lynn and told him, "We're serious. We will kill you. . . . We want all your money." Lynn Crook further testified, "I gave them the money because they said they would kill us." The defendants had stockings pulled over their faces which partially obscured the view of the defendants' facial characteristics. The defendants took a shotgun that Hegge had brought for Lynn Crook to sell and $150 in cash from Lynn Crook.

James did not testify and offered no witnesses. Fred offered testimony tending to show that on this occasion he and James were at the home of their parents in Polkton, North Carolina, and did not leave their home that night nor commit the robbery. Defendants' brother, Robert Culbertson, Jr., testified as a witness for Fred that the .22 pistol and .410 shotgun-.22 rifle combination introduced into evidence by the State, and which were identified as the pistol used by James in the robbery and the gun owned by Hegge, were purchased by him for $25 at a poolroom in Monroe from a man he had never seen before and had not seen since. He further testified that the weapons were kept by him in his red convertible automobile.

There was ample evidence to require submission of the case to the jury, and the judge properly overruled the motions for nonsuit.

Is should be observed that in defendants' brief the references to the pages in the record where the assignments of error and exceptions are supposed to be found are, in the main, incorrect. The State in its brief points out apparent confusion in the record proper in the following language: "The Record on appeal is confusing because the State's evidence is printed together even though some testimony was obviously offered by the State after the defendant rested."

Defendants contend that the court committed error because it failed to instruct the jury that certain testimony of Officers Norton and Dutton was being received for impeachment purposes. The narrative of this testimony comes in the record before the testimony of Robert Culbertson, Jr., and Robert Culbertson, Sr., but from the colloquy between counsel for the defendants and the court, it appears from the record that both of the Culbertsons had already testified. In connection therewith, the following occurred:

> "MR. CLARK: I feel that it is improper under these circumstances, since the only reason I can see for them offering these witnesses is for the purpose of impeaching Culbertson's testimony.
>
> COURT: That is one purpose.

MR. CLARK: I don't feel like they could offer to any other purpose.

COURT: If you want instruction on it, if you will give me your reasons for it, I will instruct the jury that they will consider it only for the purpose of impeaching him. Of course, the court in its discretion can — let the jury come back in."

[3] Counsel for the defendants did not request that this evidence be limited to the purpose of impeachment and did not request the court to instruct the jury as to the effect of evidence tending to impeach the testimony of a witness. Absent such a request, it was not error to fail to restrict the testimony and to fail to instruct the jury as to the effect of evidence received for impeachment purposes. The rule with respect to the admission of evidence for a restricted purpose is stated in 7 Strong, N.C. Index 2d, Trial, § 17, where it is said:

"The general admission of evidence competent for a restricted purpose will not be held reversible error in the absence of a request at the time that its admission be restricted."

[4] Assignments of error numbered 66, 67, 68, 69 and 70 are to portions of the charge of the court. When the charge is considered as a whole, no prejudicial error is made to appear. In addition, the assignments of error relating thereto are not based on proper exceptions. The exceptions to the charge appear only under the purported assignments of error. "The assignments of error must be based on exceptions duly noted, and may not present a question not embraced in an exception. Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered." 1 Strong, N.C. Index 2d, Appeal and Error, § 24.

[5] The witness Lynn Crook testified on direct examination that the pistol introduced into evidence was the pistol the defendants "held" on him. On cross-examination, however, he appears to contradict this when he stated he could not positively identify the pistol. Defendants excepted and assigned as error the admission of the pistol. Under these circumstances, the court did not commit error in admitting the pistol in evidence.

[6] The search warrant used to search the automobile of Robert Culbertson, Jr., which resulted in the officers obtaining possession of the shotgun owned by Hegge and taken by the defendants during the robbery, was introduced into evidence over defendants' objection. Defendants do not cite any authority for their contention that its admission was error. The search warrant was not included as a

part of the record on appeal. No prejudicial error is made to appear in connection with its introduction into evidence.

[7] The defendants assign as error the failure of the court on two occasions to instruct the jury not to consider the answer of the witness after allowing the motion to strike the answer. We hold that the jury must have understood that the answer of the witness was not to be regarded as evidence in the case. In 7 Strong, N.C. Index 2d, Trial, § 16, the applicable rule is stated:

> "Where, immediately upon motion to strike an irresponsive question, the court, in the presence of the jury, allows the motion, the fact that the court fails to instruct the jury to disregard the answer of the witness will not be held prejudicial error when the record discloses that the jury must have understood that the answer of the witness was not to be regarded as evidence in the case."

[8] Defendants also contend that the court committed error in admitting the testimony of Lynn Crook concerning the identification of James Frank Culbertson at the office of the Sheriff of Union County. We do not agree. The witness Lynn Crook testified, without objection, that the two defendants were the ones who robbed him. The witness Lynn Crook testified, upon cross-examination by each of defendants' attorneys, without objection, that he identified James Frank Culbertson and Fred Culbertson from seeing the defendants in his store, and in court; that he later saw them on separate occasions; and that he knew them in the sheriff's office after being called to come there for the purpose of identifying defendants. No objection was made or exception taken to this questioning which was done in an apparent effort of the attorneys for defendants to attack the credibility of the witness and impeach his testimony. No motion was made to strike this testimony elicited on cross-examination by the defendants. These assignments of error are not supported by exceptions. The only exceptions in the record to the testimony relating to the identity of the Culbertsons in the sheriff's office appear under the assignments of error. This is not sufficient to present properly the question sought to be presented. See *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968); 7 Strong, N.C. Index 2d, Trial, § 15.

[9] The defendants also assign as error the admission of certain evidence which tended to corroborate the testimony of the witnesses. These assignments of error are overruled. The rule with respect thereto is stated in 7 Strong, N.C. Index 2d, Witnesses, § 5, as follows:

"Evidence which tends to corroborate a party's witnesses is

competent, and is properly admitted upon the trial for that purpose, even though otherwise incompetent. . . ."

* * *

"The admission of corroborative evidence rests largely in the discretion of the trial court to keep its scope and volume within reasonable bounds."

The defendants have assignments of error based on exceptions to the admission of and failure to strike testimony of the witnesses relating to where the gun and pistol were found. We hold that such evidence was competent.

[10] Defendants also complain that the court committed error in permitting the State's witness to testify concerning footprints and tire tracks found near the store where the robbery occurred. Evidence of footprints and tire tracks found at the scene of a crime are competent. The probative force, if any, of such evidence is for the jury. *State v. Brown*, 263 N.C. 327, 139 S.E. 2d 609 (1965); *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572 (1951); *State v. Warren*, 228 N.C. 22, 44 S.E. 2d 207 (1947); 5 Strong, N.C. Index 2d, Larceny, § 7.

State's witness Lynn Crook testified that at the time of the robbery James had on a "red banlon sweater" or a "red shirt." The witness Hegge testified that James, at the time of the robbery, had on a "red long sleeved banlon knit shirt." Simpson testified that he (Simpson) operated a general merchandise store which was located seven or eight miles from Lynn Crook's store. On the evening of 18 November 1968, James and Fred came to his store in a red convertible, and James purchased from him a box of .410-gauge shells and a box of .22-calibre cartridges.

We do not think, as contended by defendants, that the court committed prejudicial error in permitting the State's witness Simpson to testify that Deputy Sheriff Dutton, the day after the robbery, found a red shirt "laying in the side ditch" near the point where he told Mr. Dutton he had seen the defendants park the red convertible after James had purchased ammunition. This witness on cross-examination testified that, "I did not see this shirt lying in the ditch." The admissibility of such evidence was a question of law for the court; the probative force thereof, if any, was for the jury.

[11] Deputy Sheriff Dutton testified that when he went to the home of defendants with the warrant for their arrest, the father of the defendants said, in reply to his question as to the whereabouts of defendants:

"Mr. Officer, I don't know where them boys of mine is half the time." He said, "They have been in so much trouble that I have got tired of looking for them." Said, "Just take him on and lock him up."

Defendants assign as error the failure of the court, upon motion, to strike the above testimony. We hold that the mere statement of the father telling the officers that he did not know where Fred was and that "(t)hey have been in so much trouble that I have got tired of looking for them" is not prejudicial error in this case. The father, Robert Culbertson, Sr., testified for the defendant Fred Culbertson and in doing so offered testimony in support of the alibi of Fred, that he was at home the night of the robbery. The record is not clear whether the statement complained of was made by the witness before or after Robert Culbertson, Sr., had testified. We hold that whether made before or after he testified, the statement complained of was competent for the purpose of impeaching the defendants' witness, Robert Culbertson, Sr. No request was made to limit it for such purpose.

We have carefully considered all of defendants' other assignments of error that are properly presented on this record and find no error which we think is prejudicial to the defendants.

No error.

MORRIS and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. JEROME PASCHAL

No. 6912SC473

(Filed 22 October 1969)

1. Criminal Law § 104— motion for nonsuit — consideration of evidence

Upon motion for nonsuit, the evidence is to be considered in the light most favorable to the State, and the State is entitled to have the benefit of every reasonable inference to be drawn therefrom.

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

If a motion for nonsuit challenges the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

3. Automobiles §§ 66, 113— manslaughter — identity of driver — sufficiency of evidence

In this prosecution for manslaughter resulting from a collision which occurred while defendant's car was being pursued by two police cars, the State's evidence of defendant's identity as the driver of the pursued automobile *is held* sufficient for submission of the case to the jury, where it tends to show that defendant's automobile collided violently into the side of another automobile, that defendant was found pinned beneath the steering wheel moments after the collision, and that the person who defendant contended was driving was found wedged in the right front seat with the hood on the right side protruding through the windshield into his neck, a reasonable inference from the evidence being that the bodies of the occupants of defendant's automobile were immediately affixed in the wreckage by the impact in substantially the same position they occupied immediately before the collision.

4. Automobiles §§ 66, 113— manslaughter — identity of driver — conflicting evidence — jury question

In this prosecution for manslaughter growing out of an automobile collision, conflict in evidence of the State and of the defendant as to who was driving defendant's automobile at the time of the collision presented a question for the jury.

5. Automobiles §§ 45, 112— manslaughter — speed of car 1½ miles prior to accident — admissibility

In this manslaughter prosecution resulting from an automobile collision which occurred while defendant's automobile was being pursued by two police cars, the trial court properly admitted testimony by the pursuing police officers as to the speed of defendant's automobile approximately one and one-half miles from the point of the collision.

6. Criminal Law § 117— instructions — credibility of witnesses

In this manslaughter prosecution, the trial court properly instructed the jury regarding the credibility of witnesses.

7. Automobiles § 114; Criminal Law § 112— instructions — circumstantial evidence

In this manslaughter prosecution growing out of an automobile collision, the jury was sufficiently instructed on circumstantial evidence where the court explained the nature of circumstantial evidence, how it was to be weighed and that defendant should be acquitted unless the evidence was clear, convincing and conclusive and excluded all doubt that defendant was the driver of the automobile at the time of the collision.

8. Criminal Law § 166— abandonment of assignments of error

Assignments of error are deemed abandoned where no reference, argument or citation relating thereto is brought forward in the brief. Rule of Practice in the Court of Appeals No. 28.

APPEAL by defendant from *Bickett, J.*, 19 May 1969 Regular Criminal Session of Superior Court of CUMBERLAND County.

The defendant was charged in four separate bills of indictment with manslaughter. The cases were consolidated for trial and the defendant entered a plea of not guilty in each case.

It was stipulated at the trial that the death charged in each indictment resulted from personal injuries received and sustained as a result of a collision between the defendant's 1968 Chevrolet automobile and a 1967 Renault automobile at approximately 9:30 P.M., 5 November 1968, at or near the intersection of Kensington Circle and Ramsey Street in the City of Fayetteville.

Fayetteville police officer Ernest McCoy testified for the State that he saw the defendant's automobile exit from the parking lot of Vick's Drive-In minutes before the accident. The automobile turned north on Hillsboro Street at a high rate of speed, "fish-tailing," squealing tires and making a loud roar. Officer McCoy turned on his blue light and siren and gave chase. The automobile continued down Hillsboro Street for approximately 2/10 of a mile, attaining, in the opinion of the officer, a speed of 60 miles per hour. It then turned right on Chance Street and proceeded approximately 4/10 of a mile to Ramsey Street where it turned left and proceeded north about a mile to the intersection of Ramsey Street and Kensington Circle where it collided with a 1967 Renault automobile which was in the process of turning left from Ramsey Street onto Kensington Circle and across the path of the defendant's automobile. In Officer McCoy's opinion, his police car was travelling in excess of 100 miles per hour on Ramsey Street. "I was about, I guess, two hundred feet behind the Chevrolet when we came off of Chance Street — and he was leaving me. When we came to the crest of the hill, I slowed down a little bit because I knew there was a red light on the other side of the hill. . . . When I got to the top of the hill the impact had already taken place. The cars were still sliding down the side." Except for a period of "possibly one second" when he slowed at the crest of the hill immediately before the collision, Officer McCoy kept the Chevrolet automobile within his vision. During this time the automobile proceeded without stopping through three stop signs. It swerved and almost hit a truck at the intersection of Hillsboro and Chance Street. At no time did the automobile stop or appreciably slow down in response to the blue light and siren of the police car.

Daniel H. DeVane testified that on the night of the collision he was on duty as a police officer for the City of Fayetteville. He went to Vick's Drive-In in response to a call and as he arrived there he saw the defendant's Chevrolet automobile leave at a high rate of speed. DeVane radioed to Officer McCoy to "stop the blue Chevelle"

and he then joined in the pursuit immediately behind Officer McCoy's police car. His further testimony corroborated that of Officer McCoy.

Both of the police officers arrived immediately at the scene of the collision. The vehicles involved were completely demolished. The pavement was torn up at the intersection. The Renault had come to rest 115 feet past the intersection and the Chevrolet had come to rest 246 feet from the intersection. Mr. and Mrs. Furman Lee Ennis, who had been riding in the Renault, were outside the car and appeared to be dead. Their bodies were badly mangled. The four occupants of the Chevrolet were still inside the car. Officers McCoy and Devane positively identified the defendant as the person whom they found in the left front seat. The steering wheel was pushed up and bent down in his lap, holding him in the car. He was dressed in army fatigues. The person on the right front seat, later identified as Wallace Oakman, was wearing civilian clothes. The hood on the right side had come through the windshield and was still down in Oakman's throat. The right front seat was pushing him onto the dash. The Chevrolet automobile had bucket seats with a console and gear shift lever separating the two front seats.

The State also offered the testimony of Jimmy Ray Cook who testified that he witnessed the collision from a service station lot 250 or 300 feet away. He observed the Chevrolet automobile travelling north on Ramsey Street for approximately three-quarters of a mile with the two police cars in pursuit 150 or 200 feet behind it. In his opinion the Chevrolet was travelling in excess of 100 miles an hour as it collided with the Renault. He further testified that the traffic light at the intersection of Ramsey Street and Hillsboro Street (about 60 to 75 feet south of the intersection where the collision occurred) was red facing south on Ramsey Street when the defendant's car went through it. On cross-examination Cook admitted that he had signed a written statement two days after the accident which contained statements in apparent conflict with his testimony. He insisted, however, that his testimony was the more accurate account of his recollection about the collision.

It was stipulated that the speed limit along most of the route followed by the defendant's automobile was 35 miles per hour. It was 45 miles per hour at the point of the collision.

The defendant testified in his own behalf that on 5 November 1968 he was a member of the Army stationed at Fort Bragg. Just after he got off duty that day he, Wallace Oakman, William H. Coleman and Larry Browder drove in the defendant's car to the

home of defendant's cousin in Fayetteville where they drank some wine. About 8:30 P.M. they proceeded to Vick's Drive-In. On the way the defendant was given a traffic citation for exceeding a safe speed. At Vick's Drive-In the party consumed a six-pack of beer. Two of the passengers in defendant's car started some "commotion" and they all left as someone went inside to call the police. The defendant was driving and Wallace Oakman was riding in the right front seat. As they were traveling on Murchison Boulevard toward Fort Bragg Oakman complained about the defendant's driving and reminded him that he had received a traffic citation earlier that evening. The defendant thereupon surrendered the steering wheel to Oakman and moved to the right front seat. The defendant stated "[a]fter I gave him the steering wheel, I noticed he was going north and I immediately fell asleep. I will say I passed out." The defendant denied ever getting in the driver's seat again or remembering anything further until he awoke some time later in an ambulance.

Larry Browder, the only person in addition to the defendant to survive the collision, was in the courtroom at the trial but did not testify.

The jury returned a verdict of guilty as to the charges contained in all four bills of indictment, and from judgment on the verdict imposing active prison sentences the defendant appealed assigning error.

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

Barrington, Smith & Barrington by Carl A. Barrington, Jr. for defendant appellant.

GRAHAM, J.

The defendant does not contend that the State's evidence was insufficient to show that the crime of manslaughter was in fact committed. He argues, however, that the State failed to offer sufficient evidence to prove his identity as the driver of the automobile involved in the collision and that the court therefore erred in refusing to allow his motion for judgment of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence.

[1, 2] It is fundamental in this State that upon motions for nonsuit, the evidence is to be considered in the light most favorable to the State, and the State is to have the benefit of every reasonable inference to be drawn therefrom. *State v. Lipscomb,* 274 N.C. 436,

163 S.E. 2d 788; *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. If the motion challenges the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. "If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland,* 263 N.C. 353, 358, 139 S.E. 2d 661, 665; *State v. Cook, supra.*

[3] Two witnesses for the State positively identified the defendant as the person they found pinned beneath the steering wheel in a "bucket seat" moments after the collision. Officer McCoy was quite specific in his identification: "I am absolutely certain that the man I pulled out from under the steering wheel was Paschal. I knew there was going to be a court case, and I wanted to take a good look at him. I was going to be sure I knew the driver." These same witnesses testified that Oakman, whom the defendant contended was driving, was wedged in the right front seat with the hood on the right side protruding through the windshield and into his neck. There was nothing in the evidence to suggest that the wreck here involved was the type where a car overturns or spins in such a way as to possibly rearrange its occupants. On the contrary, the evidence indicates that the front of the Chevrolet collided violently into the side of the Renault. From all the evidence presented a reasonable inference is that the bodies of the occupants were immediately affixed in the wreckage by the impact in substantially the same position they occupied immediately before the collision. To hold otherwise would be to completely disregard the physical evidence.

The civil case of *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258, involved a collision where the bodies of the occupants were wedged in the wreckage in a manner similar to those of the defendant and Oakman in this case. There Parker, J. (now C.J.), made the following observations at 247 N.C. 47, 53, 54, 100 S.E. 2d 258, 262, 263:

> "When the automobile struck the tree at tremendous speed, and the front seat was brought forward almost as far as it could possibly go, and the back seat was pulled loose and thrown up against the windshield on top of the occupants of the front seat, it would seem that there was no opportunity for the occupants of the front seat to have changed the position in which they were sitting immediately prior to the crash. It would further seem that the crash hurled Donald Wilson's head partially out of the windshield on the right side and with his head in that

position his body could not have changed from the position it was in immediately prior to the collision with the tree. It would seem that all the evidence tends to show that Bonnie Patrick was driving the automobile at the time of the fatal wreck."

[4] It is true that the defendant's testimony created a conflict in the evidence. However, this was a matter for the jury to solve and the jury obviously accepted the version of the State. *State v. Turberville,* 239 N.C. 25, 79 S.E. 2d 359.

[5] The defendant challenges the testimony of the police officers as to the speed of defendant's car along Hillsboro Street approximately one and one-half miles from the point of the collision, contending that this evidence was too remote in time and distance to have been relevant. This contention is without merit. The manner and speed in which the automobile was operated from the moment it left Vick's Drive-In until the instant of the collision describes a continuous unbroken attempt by the driver to avoid the pursuing officers irrespective of the consequences. To restrict evidence in such a case to the time immediately preceding the impact would be an unreasonable limitation. See *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555; *State v. Leonard,* 195 N.C. 242, 141 S.E. 736.

[6] The defendant's third and fourth assignments of error relate to the court's charge to the jury. He contends that the jury was not adequately instructed regarding the credibility of witnesses. The record indicates His Honor clearly instructed the jury that it was the sole judge of the credibility of witnesses and could believe all, a part, or none of what a witness said.

[7] The defendant also contends that the court did not sufficiently define and instruct the jury on circumstantial evidence. This contention is not supported by the record. The court explained to the jury the nature of circumstantial evidence, how it was to be weighed, and that unless it was clear, convincing and conclusive and excluded all doubt that the defendant was the driver of the car at the time of the collision he should be acquitted. Furthermore, the court charged that standing alone circumstantial evidence would not justify an identification. The charge was favorable to the defendant. Absent a request, no further instructions were necessary. *State v. Bridgers, supra; State v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409; *State v. Flynn,* 230 N.C. 293, 52 S.E. 2d 791; 3 Strong, N.C. Index 2d, Criminal Law, § 113.

[8] The defendant's remaining assignments of error are deemed

abandoned since no reference, argument or citation relating thereto is brought forward in the brief. Rule 28, Rules of Practice in the Court of Appeals; *State v. Pulley,* 5 N.C. App. 285, 168 S.E. 2d 62.

In the trial below, we find no error.

No error.

CAMPBELL and PARKER, JJ., concur.

OLIVER B. RACINE v. FREDERICK D. BOEGE

No. 6912SC458

(Filed 22 October 1969)

1. Trial § 21— nonsuit — consideration of evidence

On motion to nonsuit, all the evidence which tends to support plaintiff's claim must be taken as true and must be considered in the light most favorable to him, resolving all contradictions and discrepancies in his favor and giving him the benefit of every reasonable inference which may legitimately be drawn therefrom.

2. Automobiles § 16— law of the road — vehicles traveling in same direction

The relative duties automobile drivers owe one another when they are traveling along a highway in the same direction are governed ordinarily by the circumstances in each particular case.

3. Automobiles § 56— rear-end collision — evidence of negligence — nonsuit

Although the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent, this rule is by no means to be mechanically applied in every rear-end collision case; whether there is sufficient evidence of negligence to carry that issue to the jury must still be determined by all of the unique circumstances of each individual case, the evidence of a rear-end collision being but one of those circumstances.

4. Negligence § 29— sufficiency of evidence of negligence — nonsuit

If all of the evidence, even when considered in the light most favorable to the plaintiff, negatives any actionable negligence on the part of defendant, or if the evidence still leaves the question of defendant's negligence as a matter of mere speculation and conjecture, nonsuit is proper.

5. Automobiles § 56— rear-end collision — fog — exceeding safe speed — nonsuit

In an action to recover damages for personal injuries sustained by

plaintiff when the automobile in which he was riding as a passenger was struck in the rear by a pickup truck operated by defendant, the collision occurring in early morning in a fogbank so thick that visibility had been reduced almost to zero, plaintiff's evidence *is held* sufficient to support an inference that at the time of the collision defendant was driving at a speed greater than was reasonable and prudent under the conditions then existing, there being evidence that defendant was driving at a speed in excess of 25 miles per hour notwithstanding he had penetrated approximately 1,000 feet into the fogbank. G.S. 20-141(a), G.S. 20-141(c).

APPEAL by plaintiff from *Canaday, J.*, 12 May 1969 Civil Session of CUMBERLAND Superior Court.

This is a civil action to recover damages for personal injuries sustained when the Plymouth station wagon in which plaintiff was riding as a passenger was struck in the rear by a Chevrolet pickup truck owned and driven by defendant. The collision occurred in a heavy fog about 6 a.m. on the morning of 9 December 1967 while both vehicles were traveling northwardly on Interstate Highway 95 in the City of Fayetteville, N. C. At the scene I-95 has two lanes for northbound and two for southbound traffic, with the northbound and southbound traffic lanes being divided by a grass median. Immediately east of the easternmost, or outside, traffic lane for northbound traffic there is a grass shoulder. The highway is approximately straight, level, and is unobstructed. The posted speed limit was 65 miles per hour.

Plaintiff alleged his injuries were proximately caused by the negligence of defendant in driving at a speed greater than was reasonable and prudent under the existing circumstances, in failing to reduce his speed when faced with the special hazard created by the fogbank, in following too closely, and in failing to keep a proper lookout and failing to keep his vehicle under proper control.

Defendant answered, denying he was negligent, and alleging that at the time and place of the collision the highway had been completely covered by a thick fog which was so dense as to make it impossible to see more than a few feet ahead; that immediately after being suddenly confronted by the fogbank, he rapidly decreased speed and was then suddenly confronted with the rear of the station wagon, which was either stopped or moving very slowly in the outside northbound lane directly in the path of defendant's truck; that he immediately applied the full force of his brakes, but was unable to stop before colliding with the rear of the station wagon. Defendant further alleged that until he had entered into the fogbank there was no warning or indication that such existed or that he would be suddenly confronted with a fog almost completely

obscuring his vision, and pleaded that the collision was unavoidable and occasioned by an act of God.

At the trial plaintiff testified in substance: At about 6:15 in the morning of 9 December 1967 he was riding as a passenger in the station wagon which was being driven by his stepson, who had since died from causes unrelated to the accident. They were traveling north on the outside northbound lane of I-95. When they saw the fog, he told his stepson to "pull over and we will wait until it rises." They were going about 30 miles per hour when they first got into the curtain of fog. The station wagon slowed to 20 or 25 miles per hour and started turning off the traveled portion of the highway onto the grass shoulder. When they were partially off of the traveled portion of I-95 and half on the grass, the left rear of the station wagon was struck by the front of defendant's truck, injuring the plaintiff. It was daytime, and the station wagon did not have any lights on at the time. Plaintiff also testified: "We could see the pavement before we hit the fog. After we hit the fog we couldn't see nothing then. We were in the fog when he hit us." Plaintiff also testified that when they got into the fog they immediately began to slow down and were not very far into the fog when they were hit. Plaintiff did not at any time see defendant or his truck or hear any noise before the collision.

Two police officers, who had investigated the collision, also testified for the plaintiff. E. G. Brown, one of these police officers, testified in substance: He and Officer McAlister were in their patrol car at a filling station when a passing motorist informed them of the accident. They went to investigate the wreck at approximately 6:05 a.m. As they drove to the scene of the accident, visibility on I-95 was pretty good until they reached the Cape Fear River bridge. As they got onto the south side of the bridge, they hit a heavy fogbank and the curtain of fog continued some 2,000 feet north and beyond the bridge. As they got onto the bridge, visibility dropped 85 percent. The fog was like as if "you would pull a curtain down in front of you." As the patrol car entered the fogbank, it was traveling approximately 60 miles per hour and immediately slowed to about 10 miles per hour. The scene of the accident was approximately 1,000 feet north of the Cape Fear River bridge. They were "right on" the station wagon before they saw it. At the scene of the collision, the roadway was straight and level and the only obstruction at the time was the thick fogbank. The first vehicle they came to was the station wagon, which was completely off of the pavement on the right-hand shoulder of the road. Defendant's truck was also off the pavement directly north of the station wagon. Some 25 or 30

feet north of the station wagon, still sitting on the pavement, was a tractor trailer. The left rear of the station wagon was damaged. There was debris on the pavement just south of the station wagon. Officer Brown saw no tire marks or skid marks. The right front and the rear of defendant's truck were damaged. The officers determined there were three vehicles involved in the collision in the northbound lane, and defendant's pickup truck had been struck in the rear by the tractor trailer. The driver of the station wagon told Officer Brown "they had hit the fogbank and had slowed down almost to a stop." When the officers arrived at the scene, defendant was in process of putting out flares.

Officer McAlister testified there was minor debris, dirt and mud on the pavement in the right-hand lane going north, and that he would agree with Officer Brown's description of the fogbank; that to the south of the Cape Fear River, visibility was 80 to 85 percent and "as you went onto the bridge it dropped almost to zero."

At the close of plaintiff's evidence, the court directed an involuntary nonsuit and plaintiff appealed.

Williford, Person & Canaday, by N. H. Person, for plaintiff appellant.

Anderson, Nimocks & Broadfoot, by Henry L. Anderson, for defendant appellee.

PARKER, J.

[1] The sole question presented is whether the trial court erred in entering judgment of nonsuit. In passing on this question it is elementary that all the evidence which tends to support plaintiff's claim must be taken as true and must be considered in the light most favorable to him, resolving all contradictions and discrepancies in his favor and 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.

Plaintiff alleged that defendant was negligent in several respects, including that he drove his vehicle at a speed greater than was reasonable and prudent under the existing circumstances, in violation of G.S. 20-141(a), and that he failed to reduce speed when a special hazard existed, in violation of G.S. 20-141(c). Plaintiff presented no direct evidence as to the manner in which defendant was operating his vehicle at the time of the collision; he was himself the only eyewitness who testified to the actual collision, and he neither saw

nor heard defendant's truck before the collision occurred. Therefore, the question before us resolves itself into whether, under all of the circumstances of this case, the fact that defendant's truck collided with the vehicle ahead of it provided by itself sufficient evidence of negligence on the part of the defendant to require submission of that issue to the jury.

[2-4] "The relative duties automobile drivers owe one another when they are traveling along a highway in the same direction, are governed ordinarily by the circumstances in each particular case." *Beaman v. Duncan,* 228 N.C. 600, 604, 46 S.E. 2d 707, 710. "Ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout." *Clark v. Scheld,* 253 N.C. 732, 737, 117 S.E. 2d 838, 842. This is, however, by no means an absolute rule to be mechanically applied in every rear-end collision case. Whether in a particular case there be sufficient evidence of negligence to carry that issue to the jury must still be determined by all of the unique circumstances of each individual case, the evidence of a rear-end collision being but one of those circumstances. *Powell v. Cross,* 263 N.C. 764, 140 S.E. 2d 393; *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62; *Clark v. Scheld, supra.* If all of the evidence, even when considered in the light most favorable to the plaintiff, negatives any actionable negligence on the part of the defendant (as in *Jones v. Atkins Co.,* 259 N.C. 655, 131 S.E. 2d 371), or if the evidence when so considered still leaves the question of any negligence on the part of the defendant as a matter of mere speculation and conjecture (as in *Clark v. Scheld, supra*), nonsuit is proper.

G.S. 20-141(a) provides that "(n)o person shall drive a vehicle on a highway . . . at a speed greater than is reasonable and prudent under the conditions then existing." G.S. 20-141(c) provides that when special hazards exist by reason of weather or highway conditions, "speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

[5] In the present case, accepting plaintiff's evidence as true, considering it in the light most favorable to him, resolving any contradictions and discrepancies therein in his favor, and giving him the benefit of every legitimate inference to be drawn therefrom, as we are required to do in passing on the correctness of the trial court's

judgment of involuntary nonsuit, plaintiff's evidence permits a legitimate inference by a jury that the collision and plaintiff's injuries were proximately caused by defendant's negligence in driving his truck at a speed greater than was reasonable and prudent considering the conditions then and there existing. There was evidence of a fog so dense that visibility was almost zero. While plaintiff himself testified they were "not very much" into the fog when the collision occurred, the investigating police officer testified that the fog commenced on the south side of the Cape Fear River bridge and the collision occurred approximately 1,000 feet north of the bridge. While there is some discrepancy in the evidence as to the time the officers went to the scene to investigate as it related to the time the collision occurred, one officer testifying they went at 6:05 a.m. and plaintiff himself testifying the collision occurred at 6:15 a.m., it is a legitimate inference that the officers arrived on the scene very shortly after the collision occurred and that in the meantime there had been no material change in the location or physical characteristics of the fogbank. It was, therefore, a legitimate inference that the vehicles had actually progressed at least 1,000 feet into the fog before the collision occurred. Plaintiff testified that the car in which he was riding was moving "20 or 25 miles per hour" when it was struck in the rear by defendant's truck. Since necessarily defendant's truck must have been traveling faster than the car in which plaintiff was riding, it would be a legitimate inference for the jury to conclude that defendant was still driving at a speed in excess of 25 miles per hour even after he had penetrated approximately 1,000 feet into a fogbank so thick that visibility therein had been reduced practically to zero. Obviously this presents a different situation than was present in the case of *Clark v. Scheld, supra,* in which the motorists were confronted without any prior warning by an artificially created chemical fog and it did not appear there was sufficient reaction time or space within which to stop after defendant discovered the foggy condition.

While it is entirely possible that the defendant in the present case was exercising every care which a reasonable and prudent driver would have exercised under the circumstances confronting him, and while certainly the evidence does not compel any finding of negligence on his part, we hold that under all of the circumstances there was sufficient evidence to require that the jury determine the issue, and the judgment of nonsuit is

Reversed.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT MILLS

No. 6910SC410

(Filed 22 October 1969)

1. Criminal Law § 75— confession — admissibility — police interrogation — repeated request for counsel

Where defendant at the time of his arrest unequivocally requested that he be permitted to contact his lawyer but the request was denied by the arresting officers, and where defendant repeated his request in the interrogation room of the police station and was permitted to make two telephone calls to an attorney, which calls were unsuccessful, the defendant had clearly indicated his decision to remain silent and to exercise his privilege against self-incrimination; and the confession obtained during the subsequent interrogation of defendant is not admissible in evidence in the absence of a showing by the State that defendant properly waived his right to counsel.

2. Criminal Law § 76— confession — prerequisites of admissibility

In order that a confession resulting from an in-custody interrogation be properly admitted into evidence, the State must show that (1) the defendant knowingly and intelligently waived his right to retained or appointed counsel and (2) the defendant knowingly and intelligently waived his privilege against self-incrimination.

3. Criminal Law § 75— admissibility of confession — mental coercion

A confession can be obtained by mental as well as physical coercion.

4. Constitutional Law § 32— right to counsel — waiver

Defendant's waiver of right to counsel may not be presumed from the fact that a confession was obtained or that the record is silent concerning such a waiver.

APPEAL by defendant from *McKinnon, J.*, Second April 1969 Regular Session of Superior Court held in WAKE County.

Defendant was tried upon a proper bill of indictment charging him with the felonies of breaking and entering with intent to steal, larceny, and receiving. The first two counts in the bill of indictment charge, in substance, that the defendant on 28 March 1969 did break and enter a building occupied by George Johnson, with intent to steal, and did steal money and other valuables therefrom. The case was submitted to the jury on the charges of breaking and entering with intent to steal and larceny. The verdict was guilty as charged.

From judgment of imprisonment as a youthful offender, the defendant appealed to the Court of Appeals.

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

Hatch, Little, Bunn, Jones & Liggett by Thomas D. Bunn for defendant appellant.

MALLARD, C.J.

[1] Defendant's only assignment of error is to the admission into evidence of his own confession.

The evidence tended to show that defendant, 18 years of age, and his brother, 22 years of age, were both arrested at about the same time on separate warrants for participation in the same crime, which was alleged to have been committed on 28 March 1969. Both were on probation. At the time he was arrested, defendant requested that he be permitted to contact his lawyer. This request was denied at that time. Then the defendant and his brother were taken to a car by the arresting officers, warned of their rights against self-incrimination and right to counsel, and then transported to the police station. At the police station each was placed in a separate interrogation room. The defendant was again advised of his constitutional rights against self-incrimination and to counsel, after which he again asked that he be permitted to call an attorney. Permission was granted and defendant made at least two futile attempts to contact his attorney. Thereafter, the defendant was placed in the interrogation room again, and the following occurred.

The officers questioned defendant's brother in another interrogation room and obtained a confession from him. The defendant's brother was then placed in an interrogation room with the defendant. After this, Mr. Castleberry, a witness used by the State at the trial, brought in and placed on a table in the interrogation room a coin collection which had been stolen from George Johnson's home and which Castleberry had purchased from defendant's brother. According to the record, Mr. Castleberry did not say anything to the defendant or his brother. Defendant and his brother were in such a position that they could see Mr. Castleberry when he came in the interrogation room. The officers were not present at that time. After Mr. Castleberry left, the officers returned. Then the defendant's brother, in the presence of the defendant, told the officers what happened. Apparently this was the second time that defendant's brother had confessed. After this and before carrying the defendant to jail, the officers asked him if he had anything he wanted to say about it. The defendant thereupon confessed. He admitted that he took part in the commission of the crime charged and received part of the stolen coins. This confession was used against the defendant at the trial.

The trial court found upon the evidence presented on *voir dire* that:

"[T]he facts to be as testified by Mr. Pierce and in addition as stipulated by the counsel; and will find that the defendant was adequately warned of his right to remain silent; that anything he said could be used against him, of his right to counsel, and of his opportunity to have counsel appointed if unable to employ counsel, his right to stop answering questions and to have a lawyer present during questioning and will find that after such warnings and after efforts to call an attorney, the defendant made statements to the officers and the Court will find those statements were voluntarily and understandingly made after warning and advice as to his rights and without duress or coercion or promise and will find that the statements are admissible in evidence. . . ."

In *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the Supreme Court of the United States said:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." [Emphasis Added.]

[1] The defendant, immediately upon arrest and thereafter as he was afforded opportunity, continued to assert his desire to contact an attorney. We think under the facts in this case that the defendant, by asking to be permitted to contact his attorney, clearly indicated his decision to remain silent and exercise his Fifth Amendment privilege against self-incrimination. The United States Supreme Court said clearly in *Miranda,* "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

In the case before us the officers did not cease to interrogate the

defendant who was under arrest. In fact, from this record it seems as if they set the actors in motion with the interrogation room as the stage to bring about the confession obtained. This consisted of returning the 18-year-old defendant to the interrogation room after he was unable to contact his lawyer. Then the brother, who had confessed upon being interrogated separately, was brought into the same interrogation room with the defendant, and the two were left alone. The record is silent as to how long the two of them remained alone there in the interrogation room or what, if anything, they said to each other. While they were alone in the interrogation room, Mr. Castleberry, the purchaser from defendant's brother of the stolen coins, came in and without saying anything put the stolen coins on a table and left. After that the officers returned, and the defendant's brother repeated to the officers, in the presence of the defendant, what had happened. The officer testified, "*I asked him* or his brother told me in front of him what happened, and *I asked him* if he had anything he wanted to say about it and that is when he told me." [Emphasis Added.] Clearly, this amounted to an interrogation of the defendant, in the absence of an attorney, after the defendant had expressed a desire for and made an effort to obtain an attorney. In the absence of a showing by the State of a proper waiver of his right to an attorney, the confession thus obtained may not be used against the defendant at the trial.

In *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964), the defendant was denied the right to see and talk to his attorney and was not informed of his right to remain silent. In addition, his attorney was present and repeatedly requested and was denied permission to contact his client. The defendant made incriminating statements which were admitted into evidence. The court held that the police investigation had focused on the accused as a suspect rather than a general investigation, and the refusal to honor the accused's request to consult with his attorney was a denial of his constitutional rights. The court also held that the incriminating statements obtained by the officers under such circumstances should not have been admitted into evidence.

In *Frazier v. Cupp,* 394 U.S. 731, 22 L. Ed 2d 684 (1969), the defendant was given a "somewhat abbreviated description of his constitutional rights" and then questioned. During the questioning, the defendant said, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." The court, after distinguishing the factual situation from *Escobedo,* said:

"Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in Escobedo."

Frazier is distinguishable from the case before us. In *Frazier* the defendant did not unequivocally assert his desire to contact a lawyer. Moreover, *Frazier* was tried subsequent to the decision in *Escobedo* and prior to the effective date of the decision in *Miranda.* Concerning this, the Court said:

"Petitioner argues that his statement about getting a lawyer was sufficient to bring Escobedo into play and that the police should immediately have stopped the questioning and obtained counsel for him. We might agree were Miranda applicable to this case, for in Miranda this court held that '[i]f . . . [a suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.' "

The defendant here, from the moment of arrest, unequivocally asked and repeated the request that he be permitted to contact his lawyer.

The investigation was conducted with dispatch. The questioning of defendant was continued, and before the defendant could contact a lawyer to represent him, he had confessed.

In the case of *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171 (1968), the defendant was described as "a dull, retarded, uneducated, indigent boy 20 years old who had left school before he completed the third grade." The Supreme Court of North Carolina held that his failure to request a lawyer was not a waiver of his right to be represented by counsel at his in-custody interrogation.

In *State v. Thorpe, supra,* the Supreme Court said:

"The Court, at the conclusion of the voir dire examination, did not make any findings with respect to counsel. The evidence before the Court was not sufficient to justify a finding that counsel at the interrogation was offered, or the defendant's right thereto was understandably waived. In concluding the defendant was entitled to have counsel at his interrogation, and the right was not waived, we are no longer permitted to rely on the presumption that a confession is deemed to be voluntary until and unless the contrary is shown. Our rules to that effect

have been discussed and applied in many decisions. *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *State v. Bines,* 263 N.C. 48, 138 S.E. 2d 797; *State v. Goff,* 263 N.C. 515, 139 S.E. 2d 695; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363.

Recent decisions of the United States Supreme Court, however, have forced us to re-examine our trial court practice with respect to counsel in cases in which constitutional rights against self-incrimination are involved. Not only is the accused entitled to representation at the trial, but under certain circumstances, he is entitled to counsel at his in-custody interrogation. *If the accused is without counsel, and is indigent, counsel must be provided by the authorities, or intelligently waived.*" [Emphasis Added.]

On 4 April 1969 defendant was adjudged to be an indigent and counsel was appointed to represent him. We may assume, therefore, that the defendant was an indigent at the time he was arrested and interrogated. The record does not disclose the mental ability of the defendant. It is noted that the defendant did not request the officers to supply counsel. His request was that he be permitted to contact counsel. However, the authorities did not offer to provide counsel for him and there was no evidence or finding that his right to counsel during his in-custody interrogation was intelligently waived.

In *Miranda v. Arizona, supra,* the Court also said:

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo v. Illinois,* 378 US 478, 490, note 14, 12 L ed 2d 977, 986, 84 S Ct 1758. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst,* 304 US 458, 82 L ed 1461, 58 S Ct 1019, 146 ALR 357 (1938), and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a

statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."

[2-4] Applying the above rule in this case, the State had to demonstrate compliance with two requirements before the confession, resulting from this in-custody interrogation, could be properly admitted into evidence. The first was that the defendant knowingly and intelligently waived his privilege against self-incrimination. The second was that this was done after the defendant had knowingly and intelligently waived his right to retained or appointed counsel. Even though the defendant was advised of his rights as required by *Miranda,* we think that the circumstances here indicate that there was an overbearing of the will of the defendant in such a subtle way that it resulted in overcoming the free choice of the defendant, and the statement became the product of compulsion. A confession can be obtained by mental as well as physical coercion. *Blackburn v. Alabama,* 361 U.S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274 (1960). See also concurring opinion in *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344 (1965). Moreover, there was no evidence of, and no specific finding by the judge that the defendant knowingly and intelligently waived his right to retained or appointed counsel. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968). Such may not be presumed from the fact that a confession was obtained or that the record is silent concerning such a waiver. *Miranda v. Arizona, supra.*

For error committed in the admission of the confession, the defendant is awarded a

New trial.

MORRIS and HEDRICK, JJ., concur.

GLENN I. HODGE v. FIRST ATLANTIC CORPORATION

No. 6910SC362

(Filed 22 October 1969)

1. Judgments § 34— motion to set aside default judgment — conclusiveness of findings

Findings of fact by the trial court upon the hearing of a motion to set aside a judgment under G.S. 1-220 are conclusive on appeal when supported by any competent evidence.

2. Judgments § 24— setting aside default judgment — excusable neglect

The exceptional relief of G.S. 1-220 to set aside a judgment for mistake, inadvertence, surprise or excusable neglect will not be granted where there is inexcusable neglect on the part of the litigant.

3. Judgments § 25— setting aside default judgment — excusable neglect — failure to file answer — employment of counsel

Where a defendant has employed reputable counsel and has turned the matter over to such counsel, neglect of the attorney in failing to file answer will not ordinarily be imputed to defendant, provided defendant has not also been negligent in failing to give his defense that attention which a man of ordinary prudence usually gives his important business.

4. Judgments § 25— excusable neglect — knowledge that attorney is unable to conduct case

When a party knows or is chargeable with notice that his attorney will be unable to conduct his case on account of the attorney's departure from the state, extended serious illness, mental incompetency or death, the litigant's inaction will amount to inexcusable neglect.

5. Judgments § 25— excusable neglect — failure of attorney to file answer — imputation to defendant

In this hearing on defendant's motion to set aside a default judgment, the trial court properly found that negligence of defendant's attorney in failing to file answer was not imputable to defendant where defendant had employed counsel in apt time and had furnished counsel with all information necessary to file answer.

6. Judgments § 25— excusable neglect — test of client's negligence

While a client has the duty to protect himself from the negligence of his attorney, the test of negligence of the client is whether he acted as a man of ordinary prudence while engaged in transacting important business and does not require a set pattern of contacts with and inquiries of his counsel.

7. Judgments §§ 29, 34— meritorious defense — necessity for specific findings

On motion to set aside a default judgment, where the trial court found that defendant had asserted a meritorious defense, specific findings on this point were not necessary.

APPEAL by plaintiff from *McKinnon, J.*, at the 24 February 1969 Regular Civil Session of WAKE Superior Court.

Plaintiff instituted this civil action on 9 February 1968. After adverse examination, the filing and service of the complaint, and the filings and determinations of two separate motions to strike matter from the complaint, an order was entered on 13 November 1968 granting the last of the motions to strike and allowing defendant to and including 12 December 1968 to file answer to the complaint as modified.

Defendant First Atlantic Corporation did not answer, demur or otherwise respond to the complaint by 12 December 1968, and on 13 December 1968, judgment by default and inquiry in favor of the plaintiff was entered against defendant by the clerk of superior court. The defendant moved to set this judgment aside under G.S. 1-220, and a hearing was held on the motion. Plaintiff appeals from the order setting aside the judgment.

John V. Hunter, III, for plaintiff appellant.

Allen, Steed & Pullen by Arch T. Allen, III, and Thomas W. Steed, Jr., for defendant appellee.

BRITT, J.

The question presented by this appeal is: Did the trial court err in setting aside the default judgment because of excusable neglect? Our answer is no.

In *Brown v. Hale,* 259 N.C. 480, 130 S.E. 2d 868, in an opinion by Denny, C.J., it is said:

> "What duty does the law impose upon a defendant in a civil action with respect to filing answer or other pleading?
>
> The decisions on the subject now before us are not entirely satisfactory with respect to their consistency. In fact, many of them are irreconcilable. *Sutherland v. McLean,* 199 N.C. 345, 154 S.E. 662. However, the general rule seems to be that where a defendant employs reputable counsel and is guilty of no neglect himself, and the attorney fails to appear and answer, the law will excuse the defendant and afford relief. *Stallings v. Spruill,* 176 N.C. 121, 96 S.E. 890; *Gunter v. Dowdy,* 224 N.C. 522, 31 S.E. 2d 524; *Rierson v. York,* 227 N.C. 575, 42 S.E. 2d 902; *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507."

[1] Fully supported by affidavits introduced at the hearing, the trial court found:

> "* * * [T]hat the defendant First Atlantic Corporation, in defense of this cause, employed competent counsel in apt time, that said defendant furnished counsel all the information necessary for counsel to file an Answer and set up defenses to the action, that the judgment by default and inquiry was taken because no Answer was filed within the time allowed, that the judgment by default and inquiry was taken solely by reason of the neglect of defendant's attorneys, that there was no dereliction or neglect on the part of defendant and the neglect of its

attorneys is not imputable to it; that there has been excusable neglect on the part of the defendant within the meaning of G.S. 1-220, and that the defendant has and has asserted a meritorious defense in this cause;

* * *"

The findings of fact by the trial court upon the hearing of a motion to set aside a judgment under G.S. 1-220 are conclusive on appeal when supported by any competent evidence. *Moore v. Deal, supra.*

[2] The exceptional relief of G.S. 1-220 to set aside a judgment for mistake, inadvertence, surprise, or excusable neglect will not be granted where there is inexcusable neglect on the part of the litigant. "A lawsuit is a serious matter. He who is a party to a case in court 'must give it that attention which a prudent man gives to his important business.' [citations]" *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906. "When a man has a case in court the best thing he can do is to attend to it. If he neglects to do so he cannot complain because the other party attended to his side of the matter." *Pepper v. Clegg, supra.* Thus, a defendant's leaving the complaint against him with an unknown person whom defendant thought to represent his insurer, *Ellison v. White,* 3 N.C. App. 235, 164 S.E. 2d 511, or with his wife, *Jones v. Fuel Co.,* 259 N.C. 206, 130 S.E. 2d 324, is not excusable neglect.

The necessity that litigation must ordinarily be conducted by counsel, *Gaster v. Goodwin,* 259 N.C. 676, 131 S.E. 2d 363, raises the problem of agency and the possible imputation of inexcusable neglect to the principal so as to bar relief under G.S. 1-220. North Carolina at an early date recognized the distinction between the negligence of the litigant and that of his attorney and ruled that the negligence of the attorney — whether excusable or gross — would not be imputed to the litigant. *Griel v. Vernon,* 65 N.C. 76. The rule of nonimputation is a departure from the general agency doctrine which holds the principal responsible for the acts of his agent. 26 N.C.L.R. 84. The attorney is no mere agent; "[t]he attorney is an officer of the court, and acts under its direction and control, and the client employs him, because of his learning and skill, to do something he cannot do for himself * * *." *Schiele v. Insurance Co.,* 171 N.C. 426, 88 S.E. 764. "When an attorney is licensed to practice in a state it is a solemn declaration that he is possessed of character and sufficient legal learning to justify a person to employ him as a lawyer." *Moore v. Deal, supra.*

[3] Our Supreme Court has held in many cases that a defendant who has employed reputable counsel and has turned the matter over

to counsel has the right to rely on that counsel to file an answer within the time allowed; and, if the attorney fails to appear and answer, the law will excuse the defendant and afford relief. *Brown v. Hale, supra; Moore v. Deal, supra*

Numerous exceptions to this rule have arisen where the party has obtained counsel who has been neglectful but, in addition, the client also has been neglectful; that is, he has failed to give his defense "that attention which a man of ordinary prudence usually gives his important business." 5 Strong, N.C. Index 2d, Judgments, § 25, p. 46; *Meir v. Walton,* 2 N.C. App. 578, 163 S.E. 2d 403. The nonimputation rule will not apply where the client is himself in default; rather, the neglect of the attorney will then be imputed to the client so as to bar relief under G.S. 1-220.

[4] In such cases it has been held that "the mere employment of counsel is not enough," that the client "may not abandon his case on employment of counsel, and when he has a case in court he must attend to it." *Meir v. Walton, supra.* When a party knows or is chargeable with notice that his attorney will be unable to conduct his case on account of the attorney's departure from the state, extended serious illness, mental incompetency, or death, the litigant's inaction will amount to inexcusable neglect. *Gaster v. Goodwin, supra,* and cases cited therein.

In *Meir v. Walton, supra,* the defendants failed to execute the deed required by a boundary line arbitration agreement entered into 21 April 1966, and a temporary restraining order was granted 21 November 1967. Plaintiffs agreed to an extension of time to 20 December 1967 to file an answer. The parties discussed the possibility of a settlement and verbally agreed the answer would not be due until such possibilities had been explored. On 5 March 1968, plaintiffs' attorney, in a letter addressed to defendants' attorney, demanded an acceptance or rejection of the settlement proposal. Defendants' counsel then sent a photocopy of the letter to the defendants and urged "very strongly that the original offer of compromise settlement should be accepted." Defendants' counsel's letter further stated: "We had previously agreed in conference * * * to this offer of compromise settlement. Also, I do not believe that we have any reasonable chance of upsetting the arbitration contract or the resulting arbitration * * *. Since you agreed to the compromise proposal * * * which was basically accepted by them, I do not feel that we can represent you further in the event of litigation. * * *" Defendants turned the case over to a new attorney on 13 March 1968. Default judgment was entered for failure to answer on

28 April 1968. Defendants did not communicate with the new attorney in any way after 13 March; they heard nothing from the new attorney until on or about 2 May 1968 when that attorney advised defendants by letter that he would not represent them.

This Court held that where defendant had been dealing with the matter for almost two years, had been defending the action for six months, was apprised of the demand to settle or answer, chose not to settle, obtained a new attorney to proceed with the litigation, "and thereafter made no inquiry as to whether anything had been done, the neglect of the attorney is imputable to him, and he has shown no excusable neglect."

[5] The case at bar is free of the complicating factors which removed *Meir v. Walton, supra,* from the operation of the general rule of nonimputation. Here, we have a purely procedural matter of filing a pleading, and "[t]he client is not supposed to know the technical steps of a lawsuit." *Moore v. Deal, supra.* There was no need for the attorney to await instructions from the client. There was no change of legal horses in midstream. Furthermore, defendant had furnished counsel with all information necessary for the answer.

Plaintiff contends that the trial court omitted to make findings of fact essential to the legal conclusion of excusable neglect. Plaintiff assigns as error the trial court's order finding as true but dismissing as irrelevant certain requested findings of fact, particularly that "[t]here is no evidence before the Court that the defendant, at any time since the commencement of this action, and prior to the entry of judgment, contacted or had any communications with any of its counsel with respect to the case, or otherwise attended to the case or attempted to keep itself informed as to the proceedings, or made any inquiry of its counsel as to whether anything had been done by them."

[6] While there have been numerous cases expressing the duty of the client to protect himself from the negligence of his attorney, the test of the negligence of the client is whether he acted as a man of ordinary prudence while engaged in transacting important business and does not require a set pattern of contacts and inquiries. In the case at bar, defendant's reliance on counsel to file a timely answer suggests no such inattention or default as might make such a suggested finding of fact relevant and essential.

[7] In his order, Judge McKinnon found that defendant had as-

served a meritorious defense. Specific findings on this point were not necessary. *Godwin v. Brickhouse,* 220 N.C. 40, 16 S.E. 2d 403.

The order appealed from is

Affirmed.

BROCK and VAUGHN, JJ., concur.

CATHERINE T. HERRING v. BETTIE RIDLEY McCLAIN AND JOHN S. HERRING, JR.

No. 6910SC443

(Filed 22 October 1969)

1. Appeal and Error § 47— harmless error rule

It is the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error.

2. Automobiles § 90; Negligence § 37— automobile accident case — instruction on aspects of negligence

Although trial court's instruction in automobile accident case was erroneous in requiring an affirmative answer to the issue of negligence if the jury should find the driver of an automobile guilty of the failure to keep a proper lookout *and* of the failure to keep his vehicle under proper control, this instruction on two aspects of negligence in the conjunctive was not prejudicial to appellant where there was insufficient evidence to support a verdict against the driver upon either aspect standing alone.

3. Automobiles § 90— instructions in automobile accident case — excessive speed — conflict with physical facts

Trial court did not err in failing to charge the jury with reference to excessive speed on the part of additional defendant in an automobile accident case, where appellant's testimony that the defendant was traveling 35 mph in a 20 mph zone was in conflict with the indisputable physical facts established by appellant's other evidence.

4. Negligence § 29; Trial § 22— nonsuit — evidence in conflict with physical facts

Evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury.

APPEAL by defendant Bettie Ridley McClain from *Carr, J.,* at the April 1969 Session of WAKE Superior Court.

This is a civil action to recover for personal injuries arising out

of an automobile collision with a cross-action for contribution. Mrs. Herring brought the action against Mrs. McClain who asserts the cross-claim against Mrs. Herring's husband, Dr. Herring.

On 1 December 1967 at approximately 6:04 p.m., Mrs. Herring was a passenger in an automobile being operated by her husband in a southerly direction on Woodburn Road in Cameron Village in the City of Raleigh; the defendant Mrs. McClain was operating an automobile in a westerly direction on Cameron Street. There was a collision between the Herring and McClain cars in the intersection of these two streets. Woodburn Road runs north and south, is thirty feet wide and has three traffic lanes, the westernmost lane being for southbound traffic. Mrs. McClain testified: "Dr. Herring was on the outside or west lane of Woodburn going south and I was in the right lane of Cameron going west and stayed in that right lane. I was not able to see up Woodburn because of cars parked in the parking lot. At the time I entered the intersection Dr. Herring was entering the intersection. I stayed in my lane of traffic and it occurred in my lane. * * * There were Christmas decorations on the poles near the traffic lights and also in the trees and all around the buildings and everywhere. They were red, green, and white lights." Dr. Herring testified: "My wife and I were talking about the traffic condition and the condition of the lights and the Christmas decorations and I distinctly remember slowing at that point to determine where the traffic light directing my travel was located." Mrs. McClain testified that "[t]he traffic light that was facing me was green and as I entered the intersection the light was still green." Dr. Herring testified: "I noticed the sign saying 'Stop here for red' immediately before I noticed the light. I was some two car lengths north of the sign. After I determined that the particular light directing my lane of traffic was green, I proceeded on toward the intersection * * *."

The testimony of both witnesses established that a parking lot on the northeast corner was filled with cars, making the intersection a blind one. Neither saw the other until the Herring car was in the intersection and the McClain car was almost in the intersection. The Herring car, a station wagon, was pushed laterally to the side approximately a car length or more from the point of impact. Mrs. Herring provided evidence of a flexion-extension injury of her neck, commonly referred to as a whiplash injury, and of suffering intermittent pain and impairment of movement. The passenger in each car testified to the effect that his driver had the green light. The investigating officer testified that Mrs. McClain "told me that because of the Christmas lights she didn't know whether she had a

red light or a green light." The testimony of the two drivers approaching the intersection on Woodburn in a northerly direction, that is, meeting the Herring car, tended to indicate that Dr. Herring had the green light.

The jury answered the issues as follows:

"1. Was plaintiff injured by the negligence of defendant Bettie Ridley McClain, as alleged in the complaint?

ANSWER: Yes

2. What amount of damages, if any, is plaintiff entitled to recover for injuries to her person?

ANSWER: $6,000.00

3. Was plaintiff injured by the negligence of the additional defendant, John S. Herring, Jr., as alleged in the cross-action of defendant Bettie Ridley McClain and did such negligence concur with the negligence of the defendant Bettie Ridley McClain in causing plaintiff's injuries?

ANSWER: No."

From judgment providing that plaintiff recover $6,000.00 of defendant McClain and that McClain recover nothing on her cross-action, defendant McClain appealed.

Sanford, Cannon, Adams & McCullough by J. Allen Adams and E. D. Gaskins, Jr., for plaintiff appellee.

Maupin, Taylor & Ellis by William W. Taylor, Jr., for defendant appellee Herring.

Smith, Leach, Anderson & Dorsett by Willis Smith, Jr., for defendant appellant McClain.

BRITT, J.

All of the assignments of error brought forward and argued in appellant's brief relate to the trial judge's charge to the jury. Appellant contends that the court erred in certain instructions which it gave and also erred in failing to give certain instructions.

[1] It is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error or for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of was erroneous but that it was material and prejudicial, amounting to a denial of some sub-

stantial right. *In Re Ross,* 182 N.C. 477, 109 S.E. 365, and cases therein cited.

[2] Appellant assigns as error the following portion of the instructions regarding Dr. Herring's liability for contribution in the cross-action:

> "* * * [E]ven if you find that he had the green light, which the defendant McClain denies, but if you find that to be true, if she has satisfied you by the greater weight of the evidence that Dr. Herring did not under the circumstances keep a lookout that a reasonable prudent person would have kept and did not control his vehicle under those circumstances as a reasonable prudent person would have controlled it in order to avoid a collision with the McClain car in the intersection and that that negligence on his part was a proximate cause * * * it will be your duty to answer the third issue 'yes,' but if the defendant McClain has failed to satisfy you * * * then you would answer that issue 'no.'"

Appellant contends this instruction fits into the line of cases holding prejudicial error where the court charged in the conjunctive as to all the specific allegations of negligence upon which the plaintiff relied, the effect being to require the jury to find the defendant guilty of all the acts of negligence detailed by the court in order to answer in favor of the plaintiff. *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560.

In *Andrews v. Sprott, supra,* the Supreme Court criticized a conjunctive charge which required "the jury to find the defendant guilty of all the acts of negligence detailed by the court" in order to answer the issue for the plaintiff. The charge placed upon the plaintiff the burden of showing speed, defective brakes, failure to keep a proper lookout, and failure to keep his car under control.

In *Widenhouse v. Yow,* 258 N.C. 599, 129 S.E. 2d 306, the court held that the instruction on contributory negligence was erroneous and prejudicial to defendant Helms in that its effect was to require the jury to find plaintiffs guilty of all the acts of negligence detailed by the court in order to answer the issue on contributory negligence in favor of defendant Helms.

In *Farmer v. Reynolds,* 4 N.C. App. 554, 167 S.E. 2d 480, this Court adhered to the principle followed in the cases above cited. However, we do not think the quoted portion of the charge constituted prejudicial error in this case for the reason that it was not material.

In the case at bar, appellant alleged that Dr. Herring was negligent in that he (1) ran a stop light, (2) failed to keep a proper lookout, (3) failed to keep his automobile under proper control, (4) drove at excessive speed, (5) operated with improper brakes, and (6) failed to yield the right-of-way.

Appellant contends that the quoted portion of the charge on the cross-claim was prejudicial error because the jury was thereby prevented from holding the additional defendant liable under either one of two acts of negligence alleged, that is, either "that Dr. Herring did not under the circumstances keep a lookout that a reasonable prudent person would have kept" *or* that he "did not control his vehicle under those circumstances as a reasonable prudent man would have controlled it in order to avoid a collision with the McClain car in the intersection." Had the jury found that Dr. Herring had run a red light as alleged by appellant, it would have answered "yes," as his act would have been negligence *per se* and the jury was so instructed.

Thus, appellant's contention that to instruct upon these two aspects of the case in the conjunctive was prejudicial error assumes that the evidence would support a verdict against Dr. Herring upon either of these grounds standing alone. In fact, neither would support a verdict against Dr. Herring because the evidence on each of these aspects is insufficient for submission to the jury. All the evidence is to the effect that Dr. Herring saw the McClain car at the earliest point in time and space that it was possible for any motorist proceeding southwardly on Woodburn to have seen it. Dr. Herring testified: "After I determined that the particular light directing my lane of traffic was green, I proceeded on toward the intersection and intended to look to the left and the right but it was not possible for me to see across the Colonial Store's parking lot because it was filled with cars. So at the point by the sign I was unable to see any oncoming traffic traveling west on Cameron. I looked to the left immediately after I had seen the sign that said stop here on red and after I had determined that the light was green. The only time I was able to look to my left to see traffic coming was after I had begun to enter the intersection. That was the first time I could see traffic to my left." The collision then occurred in a matter of seconds. Mrs. McClain testified: "We were both in the intersection when I saw him."

As to the alleged failure to "control his vehicle under those circumstances as a reasonable prudent man would have controlled it in order to avoid a collision with the McClain car," there was no evidence to support this allegation.

We hold that under the evidence appellant was not entitled to any instructions on her allegation that Dr. Herring failed to keep a proper lookout or that he failed to keep his automobile under proper control; therefore, appellant was not prejudiced by the instructions complained of.

[3] Appellant assigns as error the failure to charge with reference to excessive speed on the part of defendant Herring. The only evidence as to excessive speed of the Herring car was the opinion expressed by appellant McClain that it was traveling 35 in a 20 mph zone. Appellant's additional testimony and the physical facts tell a different story: (1) The Herring car was in the intersection when Mrs. McClain first saw it; (2) according to Mrs. McClain's testimony, she was entering the intersection when she first saw the Herring car; (3) while the Herring car traveled something less than eighteen feet, the McClain car traveled a minimum of twenty-two feet into the intersection. Appellant testified that she was driving approximately 20 mph.

[3, 4] In *Douglas v. Booth* (No. 6918SC445), filed 17 September 1969, this Court said: "'As a general rule, evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature 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.' *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105; *Hardy v. Tesh,* 5 N.C. App. 107, 167 S.E. 2d 848." We hold that appellant failed to offer evidence, consistent with the undisputed physical facts, of excessive speed on the part of Dr. Herring, therefore, the trial court did not commit error in failing to charge with respect to excessive speed.

We have carefully considered the other assignments of error discussed in appellant's brief, all of which pertain to the charge to the jury, but finding them without merit they are overruled. Considered contextually, as a whole, the charge is free from prejudicial error.

No error.

BROCK and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. LINWOOD K. HILL

No. 6910SC488

(Filed 22 October 1969)

1. Criminal Law § 162— general objection to testimony competent in part

In this prosecution for assault with a deadly weapon, the trial court did not err in overruling defendant's general objections to testimony by the prosecutrix which showed that defendant had previously been convicted of assaulting her, where in each instance the prosecutrix testified at length in response to proper questions by the solicitor and portions of the statements objected to were admissible.

2. Criminal Law § 162— general objection to testimony competent in part

General objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not.

3. Criminal Law § 169— admission of incompetent testimony — offer of like evidence by defendant

In this prosecution for assault with a deadly weapon upon defendant's wife, admission of testimony by the prosecutrix to the effect that defendant had previously been convicted of assaulting her was rendered harmless when defendant thereafter testified on direct examination that he had previously been convicted of assaulting his wife on two occasions and that he was under court order not to "contact" his wife, and defendant's testimony did not tend to contradict or explain the testimony by the prosecutrix.

4. Criminal Law § 169— waiver of objection — admission of like evidence for impeachment

The rule that an objection to the admission of testimony is waived when like evidence is thereafter admitted without objection or is subsequently offered by the objecting party himself is not applicable where the objecting party offers the evidence for the purpose of impeaching the credibility or establishing the incompetency of the evidence in question.

5. Assault and Battery § 16— assault with deadly weapon — failure to submit simple assault

In this prosecution for assault with a deadly weapon, the trial court did not err in failing to instruct the jury that it might return a verdict of simple assault where defendant testified that he was 24 years old and the evidence tended to show that defendant pushed and struck the prosecutrix before jabbing a knife at her throat.

6. Assault and Battery § 7— assault on a female

An assault on a female committed by a male over 18 years of age is not a simple assault, but is a misdemeanor punishable in the discretion of the court.

7. Assault and Battery § 16— assault with a deadly weapon — necessity for submission of simple assault

Where in a prosecution for assault with a deadly weapon the evidence

tends to show assault on a female at least, it is not error to fail to submit the question of guilt of simple assault.

8. Assault and Battery § 4— common law

Criminal assault is governed by common law rules in this State.

9. Assault and Battery § 4— assault defined

A criminal assault may occur either by an intentional offer or attempt by force and violence to do injury to the person of another or by a show of violence causing the reasonable apprehension of immediate bodily harm or injury whereby another is put in fear and thereby forced to leave a place where he has a right to be.

10. Assault and Battery § 15— assault by violence begun to be executed — instructions as to apprehension of victim and another person

In this prosecution for assault with a deadly weapon wherein the State's evidence tended to show a completed assault by violence begun to be executed, defendant was not prejudiced by instructions of the court relating to the apprehension of the victim and the person who shoved her out of the area of danger.

APPEAL by defendant from *Carr, J.*, 11 June 1969, Regular Criminal Session of WAKE Superior Court.

The defendant, Linwood K. Hill, was charged with assault with a deadly weapon, "to wit, a knife, by attempting to cut or stab the said Sandra Hill."

On 5 March 1969, Sandra Hill, wife of the defendant, was separated from the defendant and was living at 909 Brookside Drive, Raleigh, North Carolina. The evidence presented by the State tended to show that at about 8:00 p.m. on 5 March 1969, the defendant came to the home of Sandra, who was then in the company of one Christie. When Sandra partially opened the door, the defendant shoved the door and knocked her back against the television set and the wall. He then lunged at Christie and a fight ensued. Sandra attempted to call the police, but the defendant jerked the telephone from her and slapped her, knocking her glasses off. The defendant then got a knife from the kitchen and began jabbing or pointing it at her. The blade of the knife was described as being about six inches long with a sharp point and edge. Sandra began to cry and shake, having recently been to the hospital for her nerves. She moved away from the defendant. Christie shoved her into the bathroom, closed the door and remained there with her until after the defendant left.

Christie, a witness for the State, testified that the defendant had the knife "right at her throat"; the defendant was holding it "right in Sandra's face"; the defendant said "he was going to kill us both"; "he asked me if I would love her as much if she wasn't so pretty";

he made a movement toward her with the knife; "I thought he was going to hurt her, cut her in the face. That is why I took her into the bathroom."

The defendant testified that: he did not go to the home of Sandra Hill on 5 March 1969; he did not even know where she lived until several days after that date; on 5 March 1969 he stopped at a small grocery store to use the telephone and saw Sandra and Christie drive up; as he walked by their car Christie got out and an argument ensued; he knocked Christie back up against the car and left. While testifying as a witness in his own behalf, the defendant testified on direct examination that he had been convicted of assaulting his wife on two previous occasions and that he was under a court order not to "contact" his wife and not "to go around her."

The jury found defendant guilty as charged, and from the prison sentence imposed he appealed to this Court.

Attorney General Robert Morgan by Staff Attorney Eugene A. Smith for the State.

Russell W. DeMent, Jr., for defendant appellant.

VAUGHN, J.

[1] The defendant brings forward an assignment of error based on the failure of the court to strike certain portions of Sandra's testimony. The witness was asked to relate what happened immediately before and after she saw the defendant. She described his entrance, the scuffle with Christie and then said, "I ran to the telephone — See, I was going to call the police. That is all I can ever do to get him out." At another point the witness was testifying as to what happened after the defendant left. She stated that ". . . half my furniture was turned over and I called the police, and the police came out then and told me what I could do and I did it and went to court about it and he was found guilty and they gave — he was already on two years suspension. . . ." On each of these occasions counsel for defendant objected and moved to strike. The testimony which the defendant finds objectionable was not solicited by the State. In fact the Solicitor admonished the witness to "Stop right there!" The court did not rule on either of the objections, therefore, in effect they were overruled.

Shortly thereafter the witness testified, "He would cut me because he had tried to kill me several times before. He has been found guilty on assault charges before." Upon objection by the defendant,

the court instructed the jury to disregard the statement and erase it from their minds.

[1, 2] The record before us indicates that in each of the above instances the witness testified at length in response to proper questions by the Solicitor. Most of the statement objected to was clearly admissible. The rule is well settled that general objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such case the objector must specify the grounds of the objection, and it must be confined to the incompetent evidence. Unless this is done he cannot afterwards single out and assign as error the admission of that part of the evidence which was incompetent. *State v. Tyson,* 242 N.C. 574, 89 S.E. 2d 138; *Nance v. Telegraph Co.,* 177 N.C. 313, 98 S.E. 838; *State v. Ledford,* 133 N.C. 714, 45 S.E. 944.

[3, 4] Even if we were to assume that the objection had been properly taken, the admission of the testimony was rendered harmless when the defendant offered similar testimony. It is a well-established rule in the courts of this State that an objection to evidence, even though seasonably made upon a sound ground, is waived when like evidence is thereafter admitted without objection, and especially so where like evidence is subsequently offered by the objecting party himself. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353; *State v. McDaniel,* 272 N.C. 556, 158 S.E. 2d 874. It is true that one does not waive an objection or motion to strike otherwise sound and seasonably made, by offering evidence for the purpose of impeaching the credibility or establishing the incompetency of the testimony in question. *State v. Aldridge,* 254 N.C. 297, 118 S.E. 2d 766. Here, however, the defendant on direct examination as a witness for himself testified that he had previously been convicted of assault on his wife on two occasions and that he was under a court order not to "contact" his wife. He further testified that he had been "charged six or seven times. . . . [E]very time I was in contact with her, I was in court."

[3] The defendant's evidence does not tend to contradict or explain evidence to which he had earlier objected. On the other hand it confirms and goes beyond that which the prosecutrix related. Other testimony of the defendant tended to show: he was very interested in obtaining custody of the children; he had gone to great lengths to avoid contact with his wife since being placed under the court order; and, "she would have to break his leg to catch him the next time." It may well be that the defendant reasoned that evidence as to his previous legal encounters as a result of being in con-

tact with his wife would tend to convince the jury that he had ample reason to avoid her presence. His defense was that he not only did not go to her home on the night in question but did not even know where she lived. At any rate his testimony had the effect of curing any possible error in the admission of the testimony by the prosecutrix as to the previous convictions for assault upon her.

[5] The defendant assigns as error the failure to instruct the jury that it might return a verdict of simple assault. This contention is without merit.

[6] The defendant testified that he was twenty-four years old. There was evidence tending to show that the defendant pushed and struck the prosecutrix prior to picking up the knife. An assault on a female, committed by a man or boy over eighteen years of age, is not a simple assault; it is a misdemeanor punishable in the discretion of the court: *State v. Floyd,* 241 N.C. 298, 84 S.E. 2d 915; *State v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706.

[7] The defendant was convicted of an assault with a deadly weapon, which is also a misdemeanor punishable in the discretion of the court. G.S. 14-33. Therefore, if it be conceded that the evidence did warrant an instruction to the effect that the jury might return a verdict of guilty of an assault on a female, prejudicial error has not been shown. Where in a prosecution for assault with a deadly weapon the evidence tends to show assault on a female at least, it is not error to fail to submit the question of guilt of simple assault. *State v. Church,* 231 N.C. 39, 55 S.E. 2d 792.

The defendant's final assignment of error relates to a portion of the judge's instructions to the jury on the law of assault.

[8, 9] In North Carolina, there is no statutory definition of assault and the crime remains one governed by the rules of the common law. The judge correctly instructed the jury on the general common law rule that an assault is an intentional offer or attempt by force and violence to do injury to the person of another. *State v. Hefner,* 199 N.C. 778, 155 S.E. 879. Under this definition the emphasis appears to be on the actions and state of mind of the accused.

Court decisions in this and other states have developed a second and broadened rule so that "[a] show of violence, causing 'the reasonable apprehension of immediate bodily harm' . . . whereby another is put in fear, and thereby forced to leave a place where he has a right to be, is sufficient to make out a case of an assault." *State v. Allen,* 245 N.C. 185, 95 S.E. 2d 526.

Thus there are two rules under which a person may be prosecuted

for assault in North Carolina. *State v. Roberts,* 270 N.C. 655, 155 S.E. 2d 303. It is difficult in practice to draw the precise lines which separate violence menaced from violence begun to be executed. In *State v. Allen, supra,* the Supreme Court, speaking through Parker, J., (now C.J.), stated: "The rules of law in respect to assaults are plain, but their application to the facts is sometimes fraught with difficulty. Each case must depend upon its own peculiar circumstances." Where, as under the circumstances of this case, the defendant slaps his victim and then takes a knife and jabs it at her throat, this is violence begun to be executed and the assault is complete.

[10] The defendant could not have been prejudiced by the additional instructions of the court relating to the apprehension of the victim and the person who shoved her out of the area of danger. This is especially true since the defendant does not attempt to mitigate, excuse or explain the actions attributed to him but instead contends that he was not in the presence of his wife and that nothing took place between them on the night in question.

An examination of the entire charge of the court reveals that the judge committed no prejudicial error in declaring and explaining the law arising on the evidence in this case.

In the entire trial we find

No error.

BROCK and BRITT, JJ., concur.

STATE HIGHWAY COMMISSION v. MATTIE MILLER FRY

No. 6916SC428

(Filed 22 October 1969)

1. Jury § 5; Eminent Domain § 7— highway condemnation — jurors who served in action involving adjacent land — qualification to serve

In this highway condemnation action, the trial court did not err in overruling a motion by the Highway Commission to dismiss jurors who had served in a highway condemnation action tried immediately before the present action and involving land next to the land in the instant case, the facts and issues in the two cases being different, and the trial court having questioned the two jurors who served in both cases as to whether they could give the Highway Commission a fair trial in the instant case.

2. Jury § 3— qualifications — service in similar case

The fact that a juror has served in a case which has some similarity to the case in which he is later asked to serve does not automatically disqualify him as to the latter trial.

3. Jury § 2— special venire — discretion of court

Whether a special venire should be called rests in the sound discretion of the trial judge.

4. Jury § 7— objection to juror — exhaustion of peremptory challenges

Ordinarily, all peremptory challenges must be exhausted before an objection to a juror will lie.

5. Eminent Domain § 6— testimony as to value — opinion of landowner's son

In this highway condemnation action, the trial court did not err in refusing to strike testimony by the landowner's son as to the value of the land where the son had sufficient opportunity to become familiar with the land through management of his mother's property and visiting the land about four times a year, notwithstanding the son had not bought or sold any land in the area, did not engage in the buying and selling of land as a general practice, and had no training in appraisal.

6. Trial §§ 37, 38— interested witness — request for instructions

In this highway condemnation action, the trial court did not err in refailing to instruct the jury that the landowner's son was an interested witness and that his testimony as to the value of the land should be scrutinized with care absent a request for instructions on this subordinate feature of the case.

7. Eminent Domain § 7; Trial § 51— setting aside verdict as against greater weight of evidence

In this highway condemnation action, the trial court did not err in refusing to set aside a verdict awarding the landowner $73,200 as being against the greater weight of the evidence.

APPEAL by plaintiff from *Braswell, J.*, 31 March 1969 Special Civil Session, SCOTLAND County Superior Court.

This is an eminent domain civil action involving the property of Mattie Miller Fry (landowner), which was taken by the State Highway Commission (Commission) in connection with Project 8.16793, Scotland County (U.S. Route 74 By-Pass around Laurinburg). The property taken consisted of the following: Permanent right of way (12.7 acres) and drainage easement (0.0849 acre); temporary borrow pit easement (3 years, 10.885 acres) and access haul road (to the borrow pit, 3 years, 0.47 acre). Just compensation for these estates taken was estimated by the Commission in connection with eminent domain proceedings herein to be $11,129.00. Disbursement of this sum, under G.S. 136-105, was made to landowner. This proceeding

was brought to determine the amount of just compensation for the properties taken. The issue was submitted to the jury, a verdict of $73,200.00 was returned, and a judgment entered thereon.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorneys Charles M. Hensey and Claude W. Harris for the State.

Mason, Williamson and Etheridge by James W. Mason and Kennieth S. Etheridge for defendant appellee.

CAMPBELL, J.

Commission asserts as error (1) the judge's overruling of its motion to dismiss jurors who had served in a condemnation case tried just before this case and involving land next to the land in the instant case; (2) the judge's refusal to allow a motion to strike testimony of the son of the landowner regarding the value of the land in question; (3) failure of the judge to instruct that the son of the landowner was an interested witness and that his testimony should be scrutinized with care; (4) failure of the judge to set aside the verdict as being against the greater weight of the evidence; and (5) the signing of the judgment by the judge.

[1] Immediately prior to the trial of this case another highway condemnation case was tried. (*State Highway Commission v. Yarborough,* Administrator of Mathews [Mathews] 6 N.C. App. 294.) At the commencement of this trial, there were 16 persons on the jury panel, together with the 12 jurors who had served in the Mathews case. The landowner passed on the jurors first. A jury was not selected from the 16 by the landowner, and the panel had one of the jurors from the Mathews case on it when the Commission began to pass on jurors. The Commission excused one juror and then another juror from the Mathews case joined the panel. Thus the jury as finally selected had 2 members from the jury in the Mathews case.

The Commission in apt time moved that additional jurors be summonsed. The trial judge refused this motion and the record shows:

> "The court further states that if in the examination of the first or any of the other jurors of the twelve from the Matthews [*sic*] case it should appear to the court's satisfaction that any one or more of the jurors cannot be fair and impartial to the State Highway Commission and the State of North Carolina

by virtue of having served in the Matthews [*sic*] case, that it will then disqualify all of the Matthews [*sic*] twelve and order a special venire."

The basis of an objection to a juror serving in cases which are similar or involve the same parties is bias or prejudice resulting from the prior association with the facts and issues of the second case. The juror is supposed to have formed an opinion under oath about the particular set of facts which were placed before him in the first case. 31 Am. Jur., Jury, § 226. However, we feel that this rationale is not persuasive in the present circumstances before us. The facts are distinguishable from those in *Baker v. Harris,* 60 N.C. 271 (1864).

For one thing, the facts and issues of the two cases are different. Although the properties involved in the two cases adjoin each other, the value of each is a separate and distinct question. It cannot be denied that the Commission was a party to each proceeding. The thrust of this objection by the counsel for the Commission seems to be, however, that the information imparted to the jurors in the Mathews case about the loss of access in the taking of the Fry property would cause these jurors to be prejudiced against the Commission in the Fry case if they served again — especially in view of the fact that a large verdict was rendered against the Commission in the Mathews case. This contention is weakened, however, by the fact that the Commission stipulated "that prior to the taking . . . the property in question had access along Highway 74 for its full length . . . that after the taking there was no access to the property from Highway 74. . . ."

[1-3] Secondly, the judge very carefully questioned the two jurors concerning what they remembered about the Fry property from the Mathews trial. Mrs. Carlyle stated that she did not remember anything which would keep her from giving a fair trial to the State Highway Commission in the Fry case. Mrs. Starling said that she remembered the Fry property being mentioned in the Mathews case but that this would not prevent her from giving a fair trial in this case. The fact that a juror has served in a case which has some similarity to the case in which he is now asked to serve does not automatically disqualify him as to the latter trial. We feel that whether a special venire should have been called was a matter resting in the sound discretion of the trial judge, and no abuse of that discretion has been shown. On the contrary the judge conducted a searching examination to make certain that a fair and impartial jury was empanelled.

". . . Whether a juror's knowledge is likely to bias him is a question addressed to the sound discretion of the court, and if the inference is strong, or the presumption great, that the knowledge on the part of the juror is such as will affect the verdict, a challenge for cause should be sustained, and the juror excused. . . ." 31 Am. Jur., Jury, § 175, p. 152.

"The competency of jurors is a question to be passed upon by the trial judge in the exercise of his discretion, and his rulings thereon are not subject to review unless accompanied by some imputed error of law. Thus, objection of alleged bias or misconduct affecting a juror is addressed to the discretion of the trial court, and its finding, after investigation, that the incident or circumstance resulted in no prejudice, is conclusive." 5 North Carolina Index 2d, Jury, § 6, p. 126.

[4] In view of our holding we do not pass on the question whether this assignment of error must in any event be overruled because the Commission had not used all of its peremptory challenges. It is normally the case that all peremptory challenges must be exhausted before an objection to a juror will lie. *State v. Corl*, 250 N.C. 258, 108 S.E. 2d 615 (1959).

This assignment of error is without merit.

[5] As to the son of the landowner testifying about the value of the land, we feel that this objection goes to the weight of the evidence rather than to its admissibility. Mrs. Fry's son, Homer, managed his mother's property, visiting the land about four times a year. He spent about a day there upon each visit. He had not bought or sold any land in the area. He did not engage in the buying and selling of land as a general practice. He had no training in appraisal. Homer did, however, have sufficient opportunity to become familiar with the property. This was sufficient to allow him to give an opinion as to the value of the property.

"Any witness familiar with the land may testify as to his opinion of the value of the land taken, and as to the value of the respondent's contiguous lands before and after the taking." 3 North Carolina Index 2d, Eminent Domain, § 6, p. 525.

The jury decides what credence to give to this testimony in view of the relative lack of qualifications for appraisal of land.

This assignment of error is without merit.

[6] The judge must charge the jury on every substantial and essential feature of a case. However, if a subordinate feature is desired by a party to be presented specifically to the jury, then the

party must request such an instruction. G.S. 1-180; *State v. Brady*, 236 N.C. 295, 72 S.E. 2d 675 (1952); 2 McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1513, p. 46. We feel and hold that a request for jury scrutiny of Homer Fry's testimony, as that of an interested party, involved a subordinate feature of this case and should have been specially requested by the Commission if desired. No substantial prejudice to the Commission resulted from this omission in the charge.

[7] The assignments of error to the trial judge refusing to set aside the verdict as being against the greater weight of the evidence and to signing the judgment are without merit.

There was great variation between the values as testified to. They varied from a difference in before and after value from $86,000 to $4,000. The jurors had the opportunity to see and hear the witnesses and their respective qualifications to make valuations. The jurors were taken on a jury view of the premises. The trial judge ably and carefully instructed them on the law to be applied. In addition to the jurors the judge himself had an opportunity to observe and see the land and the witnesses. If he had been shocked by the amount of the verdict, as being out of line, he could and doubtlessly would have used his authority to set aside the verdict and order a new trial before another jury.

In the absence of any prejudicial error in law an appellate court is bound to follow the system established by the legislature to compensate a landowner for property taken in eminent domain proceedings.

No error.

PARKER and GRAHAM, JJ., concur.

IN THE MATTER OF THE CUSTODY OF TRACY MARLENE GRIFFIN

No. 6911DC462

(Filed 22 October 1969)

1. Infants § 9; Habeas Corpus § 3; Evidence § 28.5— child custody proceeding — use of affidavits — competency

In a habeas corpus proceeding instituted by the mother of a minor child against the paternal grandparents to determine the custody of the child,

the court erred in admitting in evidence, over the mother's timely objection, twenty-one affidavits offered by the grandparents which related to the mother's bad reputation and misconduct, the affidavits depriving the mother of her right to cross-examination.

2. Infants § 9; Habeas Corpus § 3— custody of child — award to grandparents — use of affidavits

In a hearing upon petition of the mother, the surviving spouse, to determine the custody of her minor child, order of the court awarding custody to the child's paternal grandparents is erroneous, where the sole basis for the court's finding of fact as to the unfitness of the mother was contained in affidavits admitted in evidence over the mother's timely objection.

3. Evidence § 28.5— affidavits — inherent weakness as proof — cross-examination

Although made under oath, an affidavit is inherently weak as a method of proof, the main reason being that the affiant's statements cannot be subjected to that searching light of cross-examination which provides the best instrumentality yet devised for assessing the true value of testimony.

4. Evidence § 28.5— affidavits — proper uses

Despite the inherent weakness of affidavits, their use has been considered proper in certain limited situations in which the weakness of this method of proof is deemed substantially outweighed by the necessity for expeditious procedure.

5. Infants § 9; Habeas Corpus § 3— child custody proceeding — temporary custody — use of affidavits

If the circumstances of a particular case require, the court may enter an order for temporary custody of a child, even pending service of process or notice, G.S. 50-13.5(d)(1), and the use of affidavits as a basis for finding necessary facts for such purpose may be appropriate.

6. Habeas Corpus § 3— custody of child — change of circumstances

While the order awarding child custody is not final and may be subsequently modified, this may be done only upon a showing of changed circumstances. G.S. 50-13.7(a).

7. Parent and Child § 6— custody of minor child — right of surviving spouse

Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children; and although this right is not absolute, it will be interfered with or denied only for the most compelling reasons.

APPEAL by petitioner, Cathy M. Griffin, from *Godwin, District Judge,* 7 July 1969 Session of LEE District Court.

This is a proceeding by writ of habeas corpus to determine custody of an infant child, brought by the mother against the paternal grandparents of the child. The father is deceased. The only witnesses

who appeared and testified in person at the hearing were the petitioning mother and the two respondents. Over petitioner's objection the court admitted in evidence 21 affidavits offered by respondents. A number of these affidavits contained allegations in almost identical language to the effect that affiant knew the petitioner's reputation and "that her reputation is bad and specifically her reputation is bad for looking after and caring for her minor child; that she has never properly looked after and cared for said child"; and that in the opinion of affiant she should not have custody of her child. Other affidavits contained statements as to misconduct of petitioner with a married man. Upon consideration of all the evidence the court entered judgment making findings of fact substantially as follows:

Petitioner was married to John W. Griffin, Jr., and had one child, Tracy Marlene Griffin, born of this marriage on 21 November 1968. Petitioner and her husband separated on 1 March 1969, and on 5 March 1969 entered into a written separation agreement under the terms of which exclusive custody and control of the child was vested in John W. Griffin, Jr., the petitioner to have the right of visitation provided the same did not interfere with the child's health, education and welfare. The father, John W. Griffin, Jr., was killed in an automobile accident on 31 May 1969. Since 1 March 1969 the child has resided in the home of the respondents, who are her paternal grandparents, except for a period of approximately one day following the death of the father. Findings of fact numbers five, six and ten are as follows:

> "5. That prior to March 1, 1969, petitioner was going with R. J. Holder, a married man.
>
> "6. That petitioner is a woman of bad character and reputation in the community and is not a fit and proper person to have the care, custody and control of her minor child.
>
> * * * * *
>
> "10. That the best interest of said Tracy Marlene Griffin will be served by denying the petition of the said Cathy M. Griffin, the petitioner, and awarding her custody, tuition, care and control to respondents with reasonable visitation rights assured to petitioner."

On these findings of fact, the court entered an order denying the petition of the mother and awarding custody of the infant child to the respondents, with limited visitation rights granted the mother. From this order, the mother-petitioner appealed.

Hoyle & Hoyle, by J. W. Hoyle, for petitioner appellant.

Pittman, Staton & Betts, by William W. Staton, and Ronald T. Penny, for respondent appellees.

PARKER, J.

[1, 2] Appellant assigns as error the admission in evidence over her objection of 21 affidavits against her and the making of findings of fact on the sole basis of these affidavits. In particular she challenges findings of fact numbers five, six and ten as being unsupported by any evidence other than the affidavits and therefore as being unsupported by any competent evidence. The record on appeal discloses that at the hearing the appellant made timely objection when the affidavits were offered by the respondents, objecting both to the entire group of affidavits and to each of them singly. The record further discloses that she demanded the right to be allowed to cross-examine the affiants. Thus, this appeal presents squarely for decision the question whether in a child custody hearing affidavits may properly be received in evidence over timely objection of an interested party.

[3] Although made under oath, an affidavit is inherently weak as a method of proof. It is prepared without notice and under circumstances which afford ample opportunity to lead the witness; it normally includes only matters deemed helpful by the party who prepares it, omitting all matters deemed detrimental; it may be entirely true as far as it goes, and yet constitute the misrepresentation of a half-truth because of matters omitted. The source and extent of the affiant's knowledge of the facts concerning which he swears are seldom adequately disclosed; any weakness in his memory or hesitancy to testify are not revealed; his motives and bias are not uncovered; his demeanor while testifying cannot be known. Most important of all, the affiant's statements cannot be subjected to that searching light of cross-examination which provides the best instrumentality our experience has yet devised for assessing the true value of testimony. "Affidavits on the same side are sometimes as uniform in appearance as eggs in the shell; but, if one of them be prodded with the point of a cross-question or two, the yoke is at once exposed." Lumpkin, J., in *Robertson v. Heath,* 132 Ga. 310, 64 S.E. 73.

[4-6] Despite their inherent weakness, use of affidavits has been considered proper in certain limited situations in which the weakness of this method of proof is deemed substantially outweighed by the necessity for expeditious procedure. 6 Wigmore, Evidence 3rd, §§

1709, 1710. For example, in determining preliminary or interlocutory motions, in ruling on applications for alimony *pendente lite*, and in finding facts as a basis for issuing temporary restraining orders, use of affidavits has been considered proper. In all of these situations there is a compelling need for expeditious procedure. In most of them in the normal course of the litigation opportunity is subsequently afforded the opposing party to refute the affidavits or to cross-examine the affiants. However, we perceive in the normal circumstances which attend child custody proceedings no such compelling necessity for speedy action as warrants action based upon inferior evidence. If the circumstances of a particular case require, the court may enter an order for temporary custody, even pending service of process or notice, G.S. 50-13.5(d)(1), and use of affidavits as a basis for finding necessary facts for such purpose may be appropriate. Awarding custody on a permanent basis is quite another matter. Such a determination always involves the welfare and future development of the child; it frequently involves the lives and happiness of other persons as well. While the order awarding custody is not final and may be subsequently modified, this may be done only upon a showing of changed circumstances. G.S. 50-13.7(a); *Stanback v. Stanback*, 266 N.C. 72, 145 S.E. 2d 332. Therefore, in the first instance the order should be entered only after the most careful consideration and only after the court has had the benefit of more reliable evidence than is usually afforded by affidavits. The question to be determined in child custody hearings is certainly as important as any presented in the usual contract or tort litigation. Affidavits are not, as a rule, admissible in the trial of contract and tort cases as independent evidence to establish facts material to the issues being tried, 3 Am. Jur. 2d, Affidavits, § 29, p. 404, and we see no more justification for resort to inferior evidence in child custody proceedings than in such other litigations.

[1, 2, 7] In the present case the appellant is the mother of the infant child whose custody she seeks. The father is dead. "Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." *James v. Pretlow*, 242 N.C. 102, 104, 86 S.E. 2d 759, 761. In the present case the trial judge has denied the mother's petition and awarded custody of her infant daughter to the paternal grandparents. The crucial finding of fact made by the court to support its decision is that the mother is unfit. The sole support for

this finding in the record is contained in the affidavits. In admitting these affidavits in evidence over appellant's objection and in making its crucial finding of fact on the basis of these affidavits, there was error.

We are advertent to the past practice in North Carolina of hearing child custody matters upon affidavit. However, we find no decision of our Supreme Court which sanctions this practice where, as here, timely objection has been made and the objecting party will be deprived of his right of cross-examination. *In Re Hughes,* 254 N.C. 434, 119 S.E. 2d 189, held that a party to a child custody proceeding must object when affidavits are offered or ask permission to cross-examine, else his silence gives consent. By implication, if timely objection is made, affidavits should not be received, at least not without affording an opportunity for cross-examination. *Gustafson v. Gustafson,* 272 N.C. 452, 158 S.E. 2d 619, was an action for alimony without divorce under G.S. 50-16 as it existed prior to its repeal in 1967. Child custody was involved and the court approved the use of *ex parte* affidavits, but stressed that in that case "(t)he ultimate right of cross-examination will be afforded the parties at the trial of the cause . . ." While not directly concerned with the question presented by the case now before us, our Supreme Court has held in a number of cases that time-tested methods for assuring an adequate and fair hearing must be applied in child custody proceedings. See, for example, *Raper v. Berrier,* 246 N.C. 193, 97 S.E. 2d 782; *In Re Gibbons,* 245 N.C. 24, 95 S.E. 2d 85; and *In Re Custody of Gupton,* 238 N.C. 303, 77 S.E. 2d 716. Courts of other states have passed upon the exact question with which we are here concerned and have held affidavits inadmissible in child custody hearings if timely objection is made. *Pavaroff v. Pavaroff* (Cal. App.) 130 P. 2d 212; *Camp v. Camp,* 213 Ga. 65, 97 S.E. 2d 125; *Cornelison v. Cornelison,* 53 Ida. 266, 23 P. 2d 252; *Hays v. Hays,* 219 Ky. 284, 292 S.W. 773; *cf.,* cases cited in Annotation, 35 A.L.R. 2d 629. We find the reasoning of those decisions persuasive.

For error in admitting the affidavits in evidence over the petitioner's objection, the case is remanded to the District Court of Lee County for rehearing.

Error and remanded.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. JOSE RIERA

No. 6912SC396

(Filed 22 October 1969)

1. Criminal Law § 159— statement of evidence in narrative form

Effective 1 July 1969 for appeals docketed for hearing in the Court of Appeals at the Fall Term 1969 and thereafter, the appeal is subject to dismissal for failure of appellant to provide a statement of the evidence in the record on appeal in narrative form. Court of Appeals Rule No. 19(d).

2. Narcotics § 4— possession for purpose of sale — prima facie case — sufficiency of evidence

In this prosecution for possession of narcotic drugs for the purpose of sale, the State's evidence *is held* sufficient to be submitted to the jury under the provision of G.S. 90-113.2(5) making the possession of 100 or more capsules prima facie evidence that such possession is for the purpose of sale, where it tends to show that 205 capsules were found in defendant's home, that three or four of the capsules were tested and found to contain barbiturates, and that all of the capsules were of the same color, and had the same manufacturer's name, code letter and number.

3. Narcotics § 1— unauthorized possession — possession for sale — separate offenses

The misdemeanor of unauthorized possession of barbiturates, G.S. 90-113.2(3), is not a lesser included offense of the felony of possession of barbiturates for the purpose of sale set forth in G.S. 90-113.2(5).

4. Criminal Law § 101— motion for mistrial — entry of outsider into jury room

In this prosecution for possession of barbiturates for the purpose of sale, the trial court did not err in the denial of defendant's motion for mistrial for the reason that a person who was not a juror entered the jury room while the jury was deliberating, where the record shows that when the person entered the jury room the jurors became silent and nothing was said.

APPEAL by defendant from *Canaday, J.*, 3 February 1969 Session of Superior Court held in CUMBERLAND County.

Defendant, upon his plea of not guilty, was tried by a jury on the following bill of indictment:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Jose A. Riera, late of the County of Cumberland, on or about the 14th day of October, 1968, with force and arms, at and in the County aforesaid, unlawfully, willfully and feloniously did possess and have under his control at 312 Elizabeth Street, Fayetteville, North Carolina, a barbiturate drug, to wit: 205 capsules of a barbiturate preparation known as Tuinal, for the purpose of sale, barter, exchange, supplying,

giving away and furnishing, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State."

Upon returning a verdict of guilty of the offense of possession of narcotic drugs for the purpose of sale, the jury, on motion of the defendant, was polled and all the jurors assented to the verdict. From judgment of imprisonment for not less than two nor more than four years, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan, Trial Attorney J. Bruce Morton, and Staff Attorney James E. Magner, Jr., for the State.

Downing, Downing & David by Edward J. David for defendant appellant.

MALLARD, C.J.

[1] The State properly moved to dismiss the appeal of the defendant for his failure to comply with the requirements of Rule 19(d) of the Rules of Practice in the Court of Appeals in that he failed to provide a statement of the evidence in the record on appeal in narrative form within the time allowed for docketing his appeal. Rule 19(d) was prescribed and adopted as an amendment to Rule 19 by the Supreme Court of North Carolina, in conference, on 11 February 1969, pursuant to the authority contained in G.S. 7A-33, and reads as follows:

"(d) Evidence — How Stated. The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with this Court will, in its discretion, hear the appeal, dismiss the appeal or remand for a settlement of the case on appeal to conform to this rule. The stenographic transcript of the evidence in the trial court may not be used as an alternative to narration of the evidence."

The foregoing rule became effective on 1 July 1969 and applies to all appeals docketed for hearing in the Court of Appeals at the Fall Session 1969 and thereafter.

Defendant by addendum to the record filed part of the testimony of the witnesses in narrative form on 29 August 1969 in addition to having filed the entire transcript of the testimony at the time he docketed the record on appeal on 19 June 1969. The solicitor stipulated that the testimony of the witnesses contained in the addendum "is accurate according to the transcript of the record of trial

prepared in the case of North Carolina versus Jose Riera." Under these circumstances, we decide the appeal on its merits.

[2] The evidence for the State tended to show that on 14 October 1968 the defendant and his wife were at home in Spring Lake, North Carolina, when officers arrived with a search warrant to search for marijuana. Upon searching the defendant's home, the officers found two hundred and five capsules and a quantity of envelopes in the top left drawer of a chest of drawers in the only bedroom in the house. Each capsule was half reddish-orange and the other half blue. The capsules were described in the evidence as Tuinal. "Tuinal" is the brand name of capsules manufactured by Eli Lilly and Company containing a combination of amytal sodium and seconal sodium. Three or four of these capsules were chemically tested and found to contain the barbiturates, seconal and amytal. The remainder of the capsules were not chemically tested. The addendum to the record containing the stipulated narrative of the evidence does not so indicate, but the transcript of the testimony reveals that the name "Eli Lilly" appeared on each capsule, and each capsule contained Lilly's code letter and number. These type capsules are sometimes referred to as "blue bonnets or red bonnets."

The defendant offered evidence tending to show that he was in the army stationed at Fort Bragg; that three or four weeks before the sheriff and other officers searched his home he found the capsules, along with the envelopes, behind the service club at Fort Bragg; that he did not know what they were; that he did not intend to sell or use them; and that he was going to keep them until he found out what they were and eventually throw them out.

Defendant assigns as error the failure of the court to allow his motion for judgment as of nonsuit. Defendant contends that the witnesses did not testify that all of the capsules contained barbiturates, and, therefore, the prima facie rule set forth in G.S. 90-113.2(5) is not applicable. We hold that the testimony that all of the capsules were of the same color, had the same manufacturer's name, code letter and number is some evidence that all of the capsules contained barbiturates.

The applicable rule is stated in *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968), as follows:

> "Motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Cook,* 273 N.C. 377, 160 S.E. 2d

49; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44. Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled."

Applying this rule to the factual situation in this case, we are of the opinion and so hold that there was ample evidence to require submission of this case to the jury.

The pertinent parts of the statute, G.S. 90-113.2, under which the defendant is indicted, reads:

"It shall be unlawful:

* * *

"(5) For any person to possess for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing any barbiturate or stimulant drugs; and, provided, the possession of one hundred or more tablets, capsules or other dosage forms containing either barbiturate or stimulant drugs, or a combination of both, shall be prima facie evidence that such possession is for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing."

The punishment is set out in G.S. 90-113.8(a) which provides that one who violates G.S. 90-113.2(5), relating to the illegal possession of barbiturate drugs "for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing," shall be guilty of a felony. Section (b) of this statute provides that all other violations of G.S. 90-113.2 shall be misdemeanors.

[3] Defendant assigns as error the failure of the judge to charge the jury that they could return a verdict against the defendant of guilty of a lesser included offense. The defendant argues that G.S. 90-113.8 sets forth two categories of penalties. The first category, says the defendant, deals with the possession for the purpose of sale, etc., which makes the violation a felony, and "(t)he second category deals with unauthorized possession of same which is a misdemeanor. The defendant submits that the second category (G.S. 90-113.8(b) is a lesser included offense of the first category. (G.S. 90-113.8(a)."

G.S. 90-113.8(b) reads as follows:

"(b) Any person who violates, or conspires with, aids, abets, or procures another to violate, any provision of this article, other than G.S. 90-113.2(5), shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more

than one thousand dollars ($1,000.00), or by imprisonment for not more than two years, or both, in the discretion of the court. Upon a second or subsequent conviction for a violation of any provision of this article, other than G.S. 90-113.2(5), the defendant shall be guilty of a felony and shall be fined or imprisoned, or both, in the discretion of the court."

This section does not provide that the misdemeanor of "unauthorized possession" is a lesser included offense of the felony defined in G.S. 90-113.8(a). What G.S. 90-113.8(b) refers to is "any provisions of this article, other than G.S. 90-113.2(5)." There is a separate provision [G.S. 90-113.2(3)] of this article, a violation of which, under the provisions of G.S. 90-113.8(b), it is made a misdemeanor:

"(3) For any person to possess a barbiturate or stimulant drug unless such person obtained such barbiturate or stimulant drug in good faith on the prescription of a practitioner in accordance with subdivision (1) a or in accordance with subdivision (1) c of this section or in good faith from a person licensed by the laws of any other state or the District of Columbia to prescribe or dispense barbiturate or stimulant drugs."

The Supreme Court has held in *State v. Cofield,* 247 N.C. 185, 100 S.E. 2d 355 (1957), that:

"G.S. 18-50 makes the possession for the purpose of sale of illicit liquor a general misdemeanor. G.S. 18-48 provides that the possession of whisky upon which the taxes imposed by the laws of Congress of the United States or by the laws of this State have not been paid is a general misdemeanor. Each statute creates a specific criminal offense, and a violation of G.S. 18-48 is not a lesser offense included in the offense defined in G.S. 18-50."

We think that the situation in this case is analogous to the rule set forth above in *Cofield.* G.S. 90-113.2(5), which was enacted in 1965, makes the possession of barbiturates for the purpose of sale a felony. G.S. 90-113.2(3), which was enacted in 1959, provides that the possession of barbiturates is a misdemeanor. Each of these sections of this statute was enacted at different sessions of the General Assembly, and each creates a specific criminal offense, and the violation of G.S. 90-113.2(3) is not a lesser offense included in G.S. 90-113.2(5).

[4] Defendant assigns as error the failure of the court to allow his motion for a mistrial for the reason that another person was in

the jury room other than the twelve jurors during their deliberations. The record does not support defendant's contention. All the record shows in this connection is that "(a) female entered the jury room while the jury was in its deliberations. His Honor, the Judge, immediately instructed the bailiff to return the jury to the open courtroom. The Judge questioned the jurors in open Court and asked them what happened when this female person entered the jury room. The foreman answered that the jury became silent and nothing was said. The defendant at this point made motion for a mistrial. The motion was denied."

The record reveals that when the female entered the jury room, the jurors became silent. Nothing was said. Certainly the record does not show that this female person was in the jury room "during their deliberations." It is clear that there was an interruption of the deliberations of the jury by this female's entry, but there is nothing in the record to indicate any other improper conduct on the part of the female. She apparently just walked in the jury room without being aware that the jury was there. The trial judge investigated immediately and by his ruling found nothing prejudicial to defendant. In addition, no exception was taken to the denial of defendant's motion for a mistrial. Prejudicial error is not made to appear.

No error.

MORRIS and HEDRICK, JJ., concur.

MRS. LYNWOOD W. CALHOUN, WIDOW; MRS. LYNWOOD W. CALHOUN, NEXT FRIEND OF LINDA CALHOUN, PAM CALHOUN AND STEPHEN CALHOUN, CHILDREN OF LYNWOOD W. CALHOUN, DECEASED, EMPLOYEE, PLAINTIFFS v. KIMBRELL'S, INC., EMPLOYER AND EMPLOYERS MUTUAL CASUALTY COMPANY, CARRIER

No. 6912IC392

(Filed 22 October 1969)

1. Master and Servant § 55— workmen's compensation — death compensable — fall by employee — findings

Evidence that the employee was last seen sorting rugs on a balcony inside the employer's warehouse, that the balcony, which had no guard rail, was 10 feet above floor level, that stairs led from the warehouse floor to the balcony, that the employee was found in an unconscious condition at the foot of the stairs, and that medical examination revealed the employee

had sustained a linear skull fracture which resulted in his death, *is held* sufficient to support a finding and award by the Industrial Commission that the employee "in some unknown manner" sustained a fall arising out of and in the course of his employment; specific finding by the Commission that the employee fell "down the stairs leading from the floor to the balcony" is not supported by the evidence and is stricken.

2. Evidence § 49— examination of experts — hypothetical question

A hypothetical question to an expert witness may not be based on facts not in evidence.

APPEAL by defendants from an award of the North Carolina Industrial Commission filed 27 March 1969.

This is a proceeding under the Workmen's Compensation Act.

A claim was made by the widow and three infant children of Lynwood Calhoun for compensation for the death of Lynwood Calhoun who died 3 August 1967. On 21 July 1967 while engaged in his work with Kimbrell's, Inc., Lynwood Calhoun was found in an unconscious condition near the foot of some stairs leading to a balcony in the warehouse of Kimbrell's, Inc. He never regained full consciousness and died on 3 August 1967 at the North Carolina Memorial Hospital at Chapel Hill, North Carolina.

After hearing, Commissioner Shuford found the following facts:

"1. On 21 July 1967 deceased employee engaged in sorting and stacking carpets at defendant employer's establishment as part of his job with his employer. Plaintiff worked on a balcony which was approximately 10 feet above the level of the floor. There was no railing around the balcony but there were stairs leading to the balcony with a railing on one side of the stairs.

2. On the morning of 21 July 1967 plaintiff worked with Mr. W. E. Covington, assistant manager of defendant employer, in sorting the rugs. Plaintiff seemed normal and made no complaints during the morning. On the afternoon of 21 July 1967 plaintiff continued with the work of sorting the rugs on the balcony and was assisted in the work by Mr. Alvin Allen, a fellow employee. Mr. Allen was called away to help with a delivery, leaving deceased employee alone on the balcony.

3. After Mr. Allen left deceased on the balcony the deceased in some unknown manner fell down the stairs leading from the floor to the balcony. Deceased was found in a semiconscious condition lying at the foot of the stairs by Mr. Covington.

4. Deceased employee sustained an injury by accident arising out of and in the course of his employment with defendant employer.

5. Following his accident deceased was carried to the North Carolina Memorial Hospital at Chapel Hill where he was admitted under the service of Dr. Robert L. Timmons, neurosurgeon. Deceased was found to have sustained a linear skull fracture on the posterior left side. He was only semi-conscious and seemed to have some loss of motor function on the right side of the face.

6. On the fifth day of deceased's hospitalization he became much worse and was operated upon by Dr. Timmons. Such operation revealed that there had been a contusion or bruising of deceased's brain which had resulted in swelling of the brain. This caused compression of the brain stem and resulted in the death of deceased on 3 August 1967. The death of deceased was a direct result of the injury by accident giving rise hereto."

On appeal to the Full Commission the Full Commission adopted as its own the findings of fact, opinion and award of Commissioner Shuford with one additional finding of fact as follows:

"'8. The deceased did not suffer from any acute ulcerated condition or from peritonitis prior to and at the time of his injury on July 21, 1967. The acute ulcerated condition existed for not more than from four to six days prior to the death of the deceased on August 3, 1967. The peritonitis had not existed for more than from two to four days prior to the death of the deceased on August 3, 1967. The deceased on July 21, 1967, sustained a contusion or bruise of his brain due to some sort of trauma and as a result of this contusion or bruise of the brain there was swelling of the brain with ultimate compression of his brain stem and as a result the deceased came to his death on August 3, 1967.'"

Defendants appealed.

Lacy S. Hair for plaintiff-appellees.

Quillin, Russ, Worth & McLeod by G. S. Quillin for defendant-appellants.

CAMPBELL, J.

Defendants make several assignments of error asserting for the most part that there was no competent evidence to support the

findings of fact and conclusions of law made by the Commission. There was one other assignment of error regarding the admission of evidence in the form of a hypothetical question asked one of the medical experts.

> "To be compensable under the Workmen's Compensation Act an injury must result from an accident arising out of and in the course of the employment. * * * Claimant has the burden of showing such injury. * * *" *Taylor v. Twin City Club,* 260 N.C. 435, 132 S.E. 2d 865.

[1] The evidence in the instant case shows that on 21 July 1967 Calhoun, Covington, Page and Allen were working during the morning hours on a balcony in the warehouse rearranging and stacking rugs for the purpose of taking an inventory. There was no guard rail around the balcony. Steps led up to the balcony, and these steps had a guard rail on one side only. About noon they stopped work for lunch. About 1:30 p.m. Calhoun and Allen returned to the balcony. At this time Covington and Page were talking at a point some 50 feet from the staircase. Allen left Calhoun on the balcony while he, Allen, went to check out a truck. After the passage of some 8 to 10 minutes Allen returned and found Calhoun at the foot of the steps leading up to the balcony. He was lying partly on his left side with his head leaning against an upright. Calhoun was unconscious at this time. His clothes were not torn and there were no marks about his face and no bleeding. Without ever regaining consciousness Calhoun died 3 August 1967. Dr. Timmons, a medical expert and an associate professor of surgery in the Division of Neurosurgery at the University Hospital testified that Calhoun had a linear skull fracture on the left side posterior. He expressed an opinion to the effect that Calhoun "sustained contusion or bruise of the brain due to some sort of injury, apparently on the left side. As a result of this, there was swelling of the brain which ultimately caused compression of the brain stem that caused cessation of breathing."

This evidence was ample to sustain all of the findings of fact with the exception of these words in Findings of Fact No. 3, "down the stairs leading from the floor to the balcony." There was no evidence to show that Calhoun fell down the stairs. The only evidence is to the effect that he was found lying near the foot of the stairs on the floor with his head "leaning against an upright." The question is thus presented as to whether this evidence would sustain the award. We are of the opinion that it does.

When Calhoun was found lying on the floor with his head against an upright and it later developed that he had a linear skull fracture,

this alone was sufficient to support a finding of fact that he had sustained a fall. It is not necessary that a witness observe the actual fall. In *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97, the employee was in the washroom on the eleventh floor of the Security Bank Building in Raleigh. He was heard to say, "Please help me to the window, I am about to faint." Thereafter his body was found on an adjacent roof some nine floors below. No one saw him fall. A recovery was sustained.

In the case of *DeVine v. Steel Co.*, 227 N.C. 684, 44 S.E. 2d 77, the employee was discovered in an unconscious condition at the bottom of a sign and flagpole. One of the duties of the employee required him to stand on a cement platform and lower a flag from the flagpole each day. The exact cause of the fall was not determined. The Commission found that the fall was an accident arising out of the employment and a recovery was sustained.

In *Robbins v. Hosiery Mills*, 220 N.C. 246, 17 S.E. 2d 20 the employee was observed falling. The reason for the fall was unknown. A recovery was sustained.

In *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 the employee was a waiter who fell at a doorway leading into the kitchen. His head struck a sharp edge of the door producing an injury which resulted in death. The record does not indicate whether anyone actually saw the fall or not. The Court stated:

> "It has been suggested that this result in unexplained-fall cases relieves claimants of the burden of proving causation. We do not agree. The facts found by the Commission in the instant case permit the inference that the fall had its origin in the employment. There is no finding that any force or condition independent of the employment caused or contributed to the accident. The facts found indicate that, at the time of the accident, the employee was within his orbit of duty on the business premises of the employer, he was engaged in the duties of his employment or some activity incident thereto, he was exposed to the risks inherent in his work environment and related to his employment, and the only active force involved was the employee's exertions in the performance of his duties."

We think the above authorities sustain the award made in this case.

[1, 2] The words previously quoted in Finding of Fact No. 3, namely, "down the stairs leading from the floor to the balcony," should be eliminated as not supported by the evidence. It also fol-

lows that the hypothetical question asked Dr. Krigman was improper as it included words indicating some type of fall down the stairs. Since there was no evidence in the record to sustain that hypothetical question, it was improper. *Petree v. Power Company,* 268 N.C. 419, 150 S.E. 2d 749. Even after eliminating that question and the answer, however, the award in this case was proper.

Other jurisdictions, in substantially similar instances, have sustained a recovery. In *Leichleitner v. Coal Township School District, et al.,* 147 Pa. Super. Ct. 276, 24 A. 2d 50, a janitor was observed on a ladder at the third rung from the top repairing a cord on the window blinds. Some fifteen minutes later he was found face down on the floor at the foot of the ladder. He had a brush burn on his hand, a lump on his right shoulder, and a small contusion on his head. He had been in good health earlier in the morning. The cause of death several hours later was a cerebral hemorrhage. The court found that circumstantial evidence was sufficient to establish a fall and allow the inference of an accident.

In *Jochim v. Montrose Chemical Co.,* 4 N.J. Super. 157, 66 A. 2d 552, Affirmed, 3 N.J. 5, 68 A. 2d 628, an employee's duties required him to open the plant before work and to check a vat from a platform some distance from the floor. He was found in his work clothes by others coming to work, at the foot of the ladder leading to the platform. He had a fractured skull which caused death. No one saw what happened. The court stated:

> "We are satisfied from the evidence presented that the petitioner satisfactorily carried the burden of establishing the probability that while the decedent was engaged in his work, he slipped and fell and his fall resulted in a fractured skull which caused his death."

The defendants rely upon the following cases:

Vause v. Equipment Co., 233 N.C. 88, 63 S.E. 2d 173;
Cole v. Guilford County, 259 N.C. 724, 131 S.E. 2d 308;
Jackson v. Highway Commission, 272 N.C. 697, 158 S.E. 2d 865;
Crawford v. Warehouse, 263 N.C. 826, 140 S.E. 2d 548.

In each of those cases the employee had an idiopathic condition — that is, one arising spontaneously from the mental or physical condition of the particular employee — and the idiopathic condition was the sole cause of the injury.

In the instant case there was no evidence of any pre-existing idiopathic condition which in any way contributed to the fall of

Calhoun, to say nothing of such an idiopathic condition being the *sole* contributing factor.

With the modification of Finding of Fact No. 3 as indicated above by the elimination of the words "down the stairs leading from the floor to the balcony," we think the award should be

Modified and affirmed.

PARKER and GRAHAM, JJ., concur.

HERBERT P. ALLEN v. JOHN SCHILLER, COLLECTOR OF THE ESTATE OF MILDRED EULENE MANUS, AND CHARLES DAVID FORMYDUVAL

No. 695DC237

(Filed 22 October 1969)

1. Automobiles § 105— liability of nondriver owner — evidence of agency of driver — G.S. 20-71.1

G.S. 20-71.1 applies when the plaintiff, by appropriate allegations, seeks to hold an automobile owner liable under the doctrine of respondeat superior for the negligence of a nonowner operator.

2. Automobiles § 105— liability of nondriver owner — agency of driver — G.S. 20-71.1

Under G.S. 20-71.1, proof of ownership and registration of a motor vehicle involved in a collision while being driven by a nonowner is prima facie evidence that at the time and place of the injury caused by it the motor vehicle was being operated with the authority, consent and knowledge, and under the control of a person for whose conduct the owner was legally responsible, and is sufficient to carry the case to the jury on the issue of agency.

3. Negligence § 29— proof of negligence

Negligence need not be established by direct evidence but may be inferred from the attendant facts and circumstances.

4. Automobiles §§ 44, 56— crossing center line and hitting parked vehicles — res ipsa loquitur — sufficiency of evidence

In this action for damages caused to plaintiff's parked automobiles when they were struck by another automobile, plaintiff's evidence *is held* sufficient to go to the jury on the issue of the driver's negligence under the doctrine of *res ipsa loquitur* where it tends to show that plaintiff's two automobiles were lawfully parked in front of his home, and that at approximately 5 a.m. the other automobile went across the center line from its path of travel and struck the front of one of plaintiff's automobiles, knocking it into plaintiff's other automobile.

5. Automobiles § 66— proof of identity of driver

The identity of the driver of a vehicle at the time of an accident need not be established by direct evidence, but may be established by circumstantial evidence or by a combination of direct and circumstantial evidence.

6. Automobiles § 66— identity of driver — sufficiency of evidence

Plaintiff's evidence *is held* sufficient to support the inference that defendant's intestate was the driver of an automobile which struck plaintiff's parked automobiles, where it tends to show that shortly after the collision defendant's intestate, bleeding from a deep cut on her forehead, was on plaintiff's front porch and then went into his living room, that the windshield of the automobile was cracked on the driver's side and on the steering wheel, and that there was a trail of blood from the automobile to plaintiff's front porch and from the front porch to the living room.

APPEAL by plaintiff from *Tillery, J.*, at the January 1969 Civil Session, District Court, NEW HANOVER Division of the General Court of Justice.

This is a civil action wherein the plaintiff seeks to recover property damages he sustained when his two parked automobiles were damaged in a collision with a 1966 Ford Mustang which plaintiff alleges was owned by the defendant Formyduval and was driven by the intestate of the defendant Schiller.

Plaintiff's evidence tended to show: On the evening of 15 December 1967, plaintiff's 1963 Pontiac and 1958 Chevrolet were lawfully parked facing north on the east side of the street in front of his house. The Pontiac was parked in front of the Chevrolet. At approximately 5 a.m. the next morning, plaintiff heard a collision in front of his house. He dressed quickly and went outside. The Mustang was across the center line from its path of travel, directly in front of the Pontiac, facing and touching it ("sitting almost in it"), and had sustained heavy front-end damage. The Pontiac was damaged both front and rear; it was jammed back against the Chevrolet which also sustained front-end damage. The Mustang's motor was running, the lights burning, and the radio playing. After turning off the motor and radio, plaintiff saw Eulene Manus, the decedent, on his front porch. They went into the house.

There were no eyewitnesses to the collision; there was no evidence that other persons were involved. The windshield was cracked on the driver's side only, and Eulene Manus was bleeding from her forehead. There was blood in the car on the driver's side and on the steering wheel; also a trail of blood from the car to the front porch and from the porch to the living room. Eulene Manus told the investigating officer that defendant Formyduval owned the car; certi-

fied copies of the certificate of title and registration card indicated that he was both the owner and the registrant. She died several days after the collision.

At the conclusion of plaintiff's evidence, defendants moved for judgment as of nonsuit. The motion was allowed as to both defendants and plaintiff appealed.

Addison Hewlett, Jr., and Jerry L. Spivey for plaintiff appellant.

James, James & Crossley, by John F. Crossley for defendant appellees.

PARKER, J.

[1] Plaintiff has joined as defendants the collector of the estate of the alleged driver and the owner of the Mustang, seeking to hold the owner liable for the negligence of a nonowner operator. G.S. 20-71.1 applies when, as in this case, the plaintiff, by appropriate allegation in the complaint, seeks to hold the owner liable under the doctrine of *respondeat superior. Howard v. Sasso,* 253 N.C. 185, 116 S.E. 2d 341, citing *Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462. That statute provides:

> "(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.
>
> "(b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment."

In *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309, our Supreme Court first considered this statute and recognized the power of the General Assembly to declare that "proof of certain related preliminary facts shall be regarded as *prima facie* evidence of the ultimate fact at issue, and hence as affording sufficient basis for the consideration of the jury."

[2] Plaintiff offered into evidence properly certified copies of a certificate of title and a registration card which indicated both ownership and registration of the Mustang lay in defendant Formyduval. Such evidence of ownership and registration of the motor vehicle involved in the collision must, by force of the statute, be regarded as prima facie evidence that at the time and place of the injury caused by it the motor vehicle was being operated with the authority, consent and knowledge, and under the control of a person for whose conduct the defendant Formyduval was legally responsible. *Travis v. Duckworth, supra.* By reason of this statute, the agency issue is for determination by the jury. *Moore v. Crocker,* 264 N.C. 233, 141 S.E. 2d 307.

[3, 4] Defendant owner contends there was insufficient evidence of actionable negligence. Although no presumption of negligence arises from the mere fact there has been an accident and injury, *Jones v. Atkins Co.,* 259 N.C. 655, 131 S.E. 2d 371, if the evidence, construed in the light most favorable to the party with the burden of proof is sufficient to make out a prima facie case of actionable negligence, a motion for nonsuit should be denied and the issue submitted to the jury. *Maynor v. Townsend,* 2 N.C. App. 19, 162 S.E. 2d 677. "Direct evidence of negligence is not required; it may be inferred from the attendant facts and circumstances." *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521; *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477. As in *Maynor v. Townsend, supra,* the facts in the case at bar are similar to the facts in *Greene v. Nichols, supra,* in which our Supreme Court in a comprehensive opinion by Sharp, J., after reviewing prior decisions in this jurisdiction and other authority, "applied the doctrine of *res ipsa loquitur,* which simply means that the nature of the occurrence itself furnishes circumstantial evidence of driver-negligence."

In *Greene v. Nichols, supra,* an automobile crossed the center line, left the two-lane highway on a curve, and collided head-on with a stationary object, a tree about five feet from the asphalt surface. The night was clear and the road was dry. There were no eyewitnesses, all the occupants of the automobile dying from head and body injuries sustained in the wreck. The plaintiff administrator introduced no evidence tending to show why the car deviated from its course and from a judgment as of nonsuit appealed to the Supreme Court. The Court held the circumstantial evidence sufficient to present a jury question with respect to the actionable negligence of the driver. Sharp, J., explaining the Court's reasoning:

"It is generally accepted that an automobile which has been

traveling on the highway, following 'the thread of the road,' does not suddenly leave it if the driver uses proper care. . . .

"The inference of driver-negligence from such a departure is not based on mere speculation or conjecture; it is based upon collective experience, which has shown it to be the 'more reasonable probability.'"

In the light of *Greene v. Nichols, supra,* and *Maynor v. Townsend, supra,* plaintiff was entitled to have a jury pass on his evidence.

[6] Defendant Schiller contends there is insufficient evidence that Eulene Manus was the driver to take the action against her estate to the jury. It is well settled that in passing on a motion for judgment of involuntary nonsuit, plaintiff is entitled to have his evidence taken in the light most favorable to him and to the benefit of every reasonable inference to be drawn therefrom. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499.

[5] Direct evidence as to who was driving the automobile at the time it was wrecked is not required. The identity of the driver may be established by circumstantial evidence or by a combination of direct and circumstantial evidence. *Maynor v. Townsend, supra; Greene v. Nichols, supra; King v. Bonardi,* 267 N.C. 221, 148 S.E. 2d 32. Circumstantial evidence alone is sufficient to establish this crucial fact. *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115. The ultimate inquiry is whether the circumstantial evidence is such as might "reasonably conduce to its conclusion as a fairly logical and legitimate deduction." Stansbury, N.C. Evidence 2d, § 210, p. 539.
[6] Plaintiff's testimony included the following:

"When I heard the collision, I heard a door slam and when I got up, I heard somebody coming up on the porch. I went right on to the car. . . .

"The motor was running, lights burning, radio playing real loud, and I cut the radio off, cut the motor off and disremember whether I cut out the lights or not, and I looked back and she was standing outside by my door . . . and she walked in the house and there was a chair sitting there and she sat in the chair and I told my wife to call the law and call an ambulance."

The windshield was cracked on the driver's side only. Eulene Manus had a deep cut on her head, "gushing blood real bad." There was blood in the car, on the driver's side only, and on the steering wheel. The investigating officer testified there was a "trail of blood from the car to the front porch, from the porch to the living room." The officer asked Eulene Manus who owned the car. She told him. Neither

the officer nor the plaintiff asked her who was driving. It appears to us that the likelihood she was driving is no mere suspicion, conjecture, guess, possibility or chance; it is a legitimate deduction sufficient to merit determination by the jury.

The judgment as of nonsuit entered by the district court is

Reversed.

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

STATE OF NORTH CAROLINA v. CHARLES EARL COUNCIL AND NICK DONALD McIVER

No. 6914SC496

(Filed 22 October 1969)

1. Indictment and Warrant § 14— sufficiency of indictment — motion to quash

A motion to quash is a proper method to raise the question of the sufficiency of the bill of indictment.

2. Robbery § 1— common-law robbery — armed robbery — G.S. 14-87

G.S. 14-87 does not change 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.

3. Robbery § 1— common-law robbery defined

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation.

4. Robbery § 2— indictment — description of property taken

An indictment for robbery must contain a description of the property sufficient to show that such property is the subject of robbery.

5. Robbery § 1— property taken — subject to larceny

To constitute the offense of robbery the property taken must be such as is the subject of larceny.

6. Robbery §§ 2, 4— indictment — proof — property taken

In a robbery prosecution it is not necessary or material to describe accurately or prove the particular identity or value of the property other than to show that it was property of the person assaulted or in his care and had a value.

7. Robbery § 2— indictment — description of property taken

An indictment for armed robbery which alleges that the property taken was "personal property of the value of ....." is fatally defective in failing to describe the property taken in the robbery.

APPEAL by defendants from *Ragsdale, S.J.*, 26 May 1969 Criminal Session of DURHAM Superior Court.

Defendants, along with one Matthew Turrentine were indicted for armed robbery. Evidence for the State tended to show that at about 10:30 p.m. on 23 January 1969, Council and McIver, along with two others, accosted one Lee Ray Bergman and Eleanor Louise Schaffer as they walked toward a parking lot adjacent to the grocery store operated by Bergman where Miss Schaffer was employed as a clerk. Bergman testified that he had just closed his store and had with him a bag containing, among other things, his day's receipts. Bergman did not recognize any of the defendants except McIver who, he said, approached him with a pistol and demanded his money. Upon Bergman's refusal McIver shot him in the neck, grabbed the bag containing the money and ran away. Miss Schaffer, who was walking some ten or fifteen feet ahead of Bergman, testified that of the four in the group she could recognize only the defendant Council. She stated that after she heard a gunshot one of the three boys who had remained with her grabbed her pocketbook and the group ran in the direction of a nearby community center. The State also offered Henry Smith, a fourteen year-old boy, who testified that at about 10:30 p.m. on 23 January 1969, while he was on the playground of the community center he heard a gunshot and shortly thereafter saw Turrentine, Council and McIver and another person running through the alley.

Each of the defendants offered evidence tending to show that they were elsewhere at the time of the alleged robbery.

Each of the defendants made motions for nonsuit at the close of the State's evidence and at the close of all the evidence. The motion was granted as to Turrentine and denied as to Council and McIver. The jury returned a verdict of "guilty of attempted armed robbery" as to McIver and as to Council a verdict of "guilty of aiding and abetting Nick Donald McIver of attempted armed robbery on the person of Lee Ray Bergman." From judgment on the verdict both defendants appeal.

Attorney General Robert Morgan by Trial Attorney Charles M. Hensey and Staff Attorney James E. Magner for the State.

A. H. Borland for defendant appellant Council.

Joe C. Weatherspoon for defendant appellant McIver.

VAUGHN, J.

Upon the call of the case and the reading of the bill of indictment the defendants moved to quash the bill of indictment on the grounds that it did not express within itself a description or value of the property alleged to have been taken. The motions were denied. To the denial of the motions to quash and the denial of the motions for judgment of nonsuit the defendants assign error.

A motion to quash is a proper method to raise the question of the sufficiency of the bill of indictment. *State v. Walker,* 249 N.C. 35, 105 S.E. 2d 101. The part of the indictment for armed robbery which is pertinent to this appeal alleges that the defendants "did . . . take, steal and carry away personal property of the value of ..... from the presence, person, place of business and residence of Lee Bergman . . ."

In the case of *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917, the Supreme Court considered the validity of a bill of indictment and Parker, J., (now C.J.) stated:

> "The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883."

[2] The statute under which the State attempts to indict the defendants, 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. Hare,* 243 N.C. 262, 90 S.E. 2d 550.

[3-5] Robbery is merely an aggravated form of larceny. It is the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his

will, by violence or intimidation. *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194. In order to commit robbery, property must be taken, which is larceny; thus the taking or attempted taking of property is an essential element of robbery. An indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. To constitute the offense of robbery the property must be such as is the subject of larceny. *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688.

In *State v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781, we find the following with reference to indictment for larceny:

> "As to the sufficiency of description of property in an indictment for larceny, this is stated in a note to *Jones v. State,* 64 Fla. 92, 59 So. 892, L.R.A. 1915 B 71, in the L.R.A. volume: 'To apply the rules deducible from the cases it seems that property alleged to have been taken should be described by the name usually applied to it when in the condition it was in when taken, and where possible to state the number or quantity, kind, quality, distinguishing features, etc., thereof.' "

It is true, as the State contends, that in numerous cases the Supreme Court has stated that in an indictment for robbery, unlike an indictment for larceny, the kind and value of the property taken is not material — the gist of the offense is not the taking but a taking by force or putting in fear. However, as was pointed out in *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14, in those cases the objection was not that there was no description but that the description was insufficient. The indictments described the property in general terms such as "money." In that case the pertinent part of the indictment for robbery alleged:

> "That Lawrence Guffey . . . unlawfully, wilfully, and feloniously did make an assault on Ben Hudson and him in bodily fear and danger of his life did put, and take, steal and rob him of the value of One Thousand Dollars, from the person and possession of the said Ben Hudson, then and there did unlawfully, wilfully, feloniously, forcibly and violently take, steal and carry away. . . ."

[6] This indictment was held to be fatally defective for insufficient description and failure to allege that property was taken. In robbery it is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show that it was the property of the person assaulted or in his care, and had a value. *State v. Mull,* 224 N.C. 574, 31 S.E. 2d 764. Although value need not be averred by a specific allegation, it must appear

from the indictment that the article taken had some value. 77 C.J.S., Robbery, § 37, p. 474.

[7] The allegation in this bill of indictment that the property taken was "personal property of the value of ....." is insufficient to charge the offense of robbery. We therefore hold that the indictment is fatally defective. The defendants, however, are not entitled to discharge. The State may put them on trial under a proper bill of indictment if it so elects.

We find it unnecessary to discuss the remaining assignment of error relating to the denial of defendants' motions for judgment as of nonsuit except to state that there was ample evidence introduced by the State to repel the motions.

Judgment arrested.

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

JOYCE MANN ROTHMAN v. JACOB ROTHMAN
AND
JACOB ROTHMAN v. JOYCE MANN ROTHMAN, ISRAEL MANN AND RUTH MANN
No. 6912DC469

(Filed 22 October 1969)

1. Divorce and Alimony § 24— custody of the child — welfare as consideration

The primary consideration in custody cases is the welfare of the child or children involved.

2. Divorce and Alimony § 24— modification of custody order — change of circumstances

A change in circumstances must be shown before an order relating to custody, support, or alimony may be modified.

3. Divorce and Alimony § 22— modification of child-custody decree entered by foreign court

In order that a court in this state may be entitled to modify a child-custody decree entered by a court in another state, the court in this state must gain jurisdiction, and a change of circumstances must be shown. G.S. 50-13.7(b).

4. Divorce and Alimony § 22— modification of child-custody order entered by foreign court — jurisdiction

When a child is physically present within the boundaries of this state,

a court in this state has jurisdiction, upon a proper showing, to modify a decree entered by the court of another state which pertains to the custody of the child. G.S. 50-13.5(c)(2)(a).

5. Divorce and Alimony § 22; Constitutional Law § 26— foreign child-custody decree — modification — full faith and credit

A decree awarding the custody of a child, entered by the court of another state in an action for divorce from bed and board, is entitled to full faith and credit in the courts of this state, unless a change of circumstances is shown which would justify a modification of the decree. U. S. Constitution, Art. IV, § 1.

6. Divorce and Alimony § 22— modification of foreign child-custody decree — res judicata

In a proceeding in this state to determine the custody of a child who had been awarded to one parent by a custody decree of a court of another state, the doctrine of *res judicata* is inapplicable to bar an inquiry as to whether circumstances had changed since the date of the decree.

7. Divorce and Alimony § 24— modification of child-custody decree — change of circumstances

To justify the modification of a child-custody decree, it must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified.

APPEAL by defendant Jacob Rothman from *Stuhl, District Judge,* 29 May 1969 Civil Session, HOKE District Court.

Jacob Rothman was served with notice on 4 May 1969 of an action by Joyce Mann Rothman, filed on 4 May 1969, wherein she prayed for child custody, reasonable child support and alimony, both pendente lite and permanent. In turn Joyce Mann Rothman and her parents, Israel and Ruth Mann, were served with notice of a writ of habeas corpus on 14 May 1969. The writ was initiated by Jacob Rothman on 13 May 1969 wherein he sought custody of Charles Hyam Rothman, minor child of the marriage. The two actions were consolidated for hearing in the Hoke County District Court and, by stipulation, for appeal to this Court. Hereafter, Joyce Mann Rothman will sometimes be referred to as plaintiff and Jacob Rothman will sometimes be referred to as defendant.

From the record, it appears that defendant had obtained a valid divorce from bed and board from plaintiff on 25 April 1969 in the Law and Equity Court of the City of Richmond, Virginia, and was awarded temporary custody of Charles Hyam Rothman. The action was initiated by Jacob Rothman in that court on 10 January 1969. Both parents and the child were residing in Richmond, Virginia, at the institution of the action, and Joyce Mann Rothman appeared both personally and through counsel in the proceedings therein. In

the Virginia decree the court found as facts, *inter alia,* that the parties were lawfully married in Richmond, Virginia, on 31 December 1967, that one child, Charles Hyam Rothman, was born of the marriage on 12 October 1968 and that Jacob Rothman had satisfied the residence requirements requisite to instituting the action. The judge further found that the charge of cruelty and constructive desertion of Jacob Rothman by Joyce Mann Rothman had been fully proved by the evidence and that Jacob Rothman was entitled to the relief prayed for.

During the course of the Virginia proceedings Joyce Mann Rothman received the court's permission to leave temporarily the State of Virginia and take the minor child to Raeford, North Carolina, to the home of her parents upon the condition that she return for a hearing in the matter scheduled for 17 March 1969. She did not return for the hearing and an order was issued on 18 April 1969 finding her to be in contempt of court.

On or about 4 May 1969 defendant came to Raeford, North Carolina, to pick up Charles Hyam Rothman pursuant to the Virginia decree of 25 April 1969. He was thereupon served with notice of the present action. He in turn instituted an action seeking a writ of habeas corpus for custody of the child based on the Virginia decree.

At the hearing, before any evidence had been introduced, defendant moved that the Virginia decree be given full faith and credit and introduced portions of the records of the Virginia proceeding to support his position. Judge Stuhl denied this motion. Defendant then moved that the action be dismissed under the doctrine of *res judicata* on the ground that the Virginia decree was binding as to all matters and things which transpired before 25 April 1969, the date of the Virginia decree, and that plaintiff had not alleged any change of condition upon which an order could be based to alter the terms of the Virginia decree. Judge Stuhl also denied this motion and indicated that he would proceed to hear the case as if it were before the court for the first time. Defendant objected and was overruled.

After the hearing Judge Stuhl made the following findings of fact: that the parties were married on or about 31 December 1967 in Richmond, Virginia, that Charles Hyam Rothman was born of the marriage on 12 October 1968 and that plaintiff was a fit and proper person to have custody of the minor child. From these findings Judge Stuhl made the following conclusions of law: that plaintiff is a fit and proper person to have custody of the child, that de-

fendant should be required to assist in the support, maintenance and subsistence of the minor child and that defendant should be allowed visitation rights. Judge Stuhl then ordered that defendant's writ of habeas corpus be denied, that plaintiff be given sole custody of the child, that defendant pay plaintiff $75 per month for child support, that defendant have reasonable visitation rights with the child, to take place exclusively in Hoke County, and that the cause be retained pending further orders of the court.

Defendant appealed to this Court.

Moses and Diehl, by Philip A. Diehl, for plaintiff appellee.

Bryant, Lipton, Bryant and Battle, by James B. Maxwell, and Minor, Thompson, Savage and Smithers, by Joseph B. Bendetti, of Richmond, Virginia, for defendant appellant.

MORRIS, J.

This is an alimony and child custody proceeding which raises questions of conflicts of laws. Defendant presents four assignments of error. The first is directed to the refusal of the court to grant full faith and credit to the Virginia decree, the second is directed to the refusal of the court to dismiss the action under the doctrine of *res judicata,* the third is to the court's receiving evidence at the hearing and to the court's findings of fact and conclusions of law, and the fourth is to the signing of the order. We will consider these assignments of error collectively.

[1-3] The cases are legion on the point that the primary consideration in custody cases is the welfare of the child or children involved. It is well established in North Carolina that a change in circumstances must be shown before an order relating to custody, support or alimony may be modified. *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357 (1968); *In Re Marlowe,* 268 N.C. 197, 150 S.E. 2d 204 (1966); *Elmore v. Elmore,* 4 N.C. App. 192, 166 S.E. 2d 506 (1969) and statutes, texts and cases there cited. G.S. 50-13.7, cited in *Elmore,* entitled "Modification of order for child support or custody" states:

> "(b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support."

The facts of this case dictate that this statute must be applied and that in order for the Hoke County District Court to modify the Virginia decree, that court must gain jurisdiction and a change of circumstances must be shown.

[4, 5] By virtue of the physical presence of the child within the boundaries of this State, the Hoke County District Court has jurisdiction, upon a proper showing, to modify the Virginia decree as it pertains to the custody of the child. G.S. 50-13.5(c)(2)a. It is apparent from the record that plaintiff neither alleges nor proves any change of circumstance which would justify the Hoke County District Court in modifying the Virginia decree as it did by awarding custody of the minor child to plaintiff. Plaintiff cites in her brief *In Re Craigo,* 266 N.C. 92, 145 S.E. 2d 376 (1965), and *Cleeland v. Cleeland,* 249 N.C. 16, 105 S.E. 2d 114 (1958), on the point that the full faith and credit clause of the United States Constitution, Article IV, Section 1, does not conclusively bind the North Carolina courts to give greater effect to a decree of another state than it has in that state or to treat as final and conclusive an order of a sister state which is interlocutory in nature. We agree. However, those cases are applicable only in determining that the courts of North Carolina may hear matters in a custody proceeding. There must still be a showing of changed circumstances before our courts may modify the order of a sister state, a fact which plaintiff admits in her brief.

[5] Section 20-108, Code of Virginia (1950), provides:

> "The court may, from time to time after decreeing as provided in the preceding section (power to confer custody), on petition of either of the parents, or on its own motion or upon petition of any probation officer or superintendent of public welfare, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require."

It is obvious that both Virginia and North Carolina permit modification of custody decrees. Whatever Virginia may do in this respect, North Carolina may do. See *New York ex rel Halvey v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); *Dees v. McKenna,* 261 N.C. 373, 134 S.E. 2d 644 (1964). For the North Carolina courts to modify a Virginia child custody decree would not give any greater effect to the laws of Virginia. In this case the full faith and credit clause requires that the Virginia decree be honored unless a change

of circumstance is shown which would justify our courts in modifying the decree.

We must conclude from the record before us that the Law and Equity Court of the City of Richmond, Virginia, had jurisdiction to hear the divorce action filed by Jacob Rothman, that the decree entered was valid and that said decree is entitled to full faith and credit by the courts of North Carolina in the absence of a change of circumstances.

[6] The doctrine of *res judicata* is not applicable in this case since it would only bar relitigation of issues as they existed on 25 April 1969, the date of the Virginia decree, and would not bar a hearing to determine whether circumstances had changed since the date of that decree. *New York ex rel Halvey v. Halvey, supra.* See also *Thomas v. Thomas,* 248 N.C. 269, 103 S.E. 2d 371 (1958).

[7] Professor Lee points out in his treatise on North Carolina Family Law that there must generally be a substantial change of circumstances before an order of custody is changed. 3 Lee, North Carolina Family Law, (1963), § 226. This indicates that more must be shown than a removal by one parent of a child from a jurisdiction which may enter an adverse decision to the removing parent. It must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified.

For the reasons stated herein, the order of Judge Stuhl must be vacated, and the cause is remanded for the entry of an order placing custody of Charles Hyam Rothman in Jacob Rothman in accordance with the Virginia decree.

Reversed and remanded.

MALLARD, C.J., and HEDRICK, J., concur.

STATE OF NORTH CAROLINA v. THOMAS JACKSON AND WILLIE UTLEY
No. 6910SC352

(Filed 22 October 1969)

1. Constitutional Law § 32— right to counsel — appointment of counsel four weeks after arrest

In this armed robbery prosecution, defendants have failed to show that they were prejudiced by the fact that counsel was not appointed to represent them until approximately four weeks after their arrest.

2. Constitutional Law § 32— right to counsel — critical stages of proceeding

The right of a defendant in a criminal action to be represented by counsel does not apply literally to every stage of the proceedings, but only to the "critical stages."

3. Criminal Law § 105— introduction of evidence by defendant — waiver of prior motion for nonsuit

When a defendant offers evidence after his motion for nonsuit is overruled, he thereby waives his motion for nonsuit made before introduction of his evidence. G.S. 1-183.

4. Robbery § 4— sufficiency of evidence

The evidence *is held* sufficient to be submitted to the jury as to defendants' guilt of armed robbery.

5. Robbery § 5— indictment for armed robbery — verdict of common law robbery

An indictment for armed robbery under G.S. 14-87 will support a verdict of guilty of common law robbery. G.S. 15-170.

6. Criminal Law § 163— broadside exception to charge

An assignment of error that "the court erred in his charge to the jury" is broadside and ineffectual.

ON certiorari from *Bickett, J.*, 16 September 1968 Session of WAKE Superior Court.

The defendants, Willie Utley and Thomas Jackson, were charged in a single bill of indictment with armed robbery. Both defendants pleaded not guilty. In substance, the evidence for the State was as follows: Monn Hiawatha Smith, a resident of Raleigh, North Carolina, was returning to his home on the night of 12 July 1968 when he was stopped by the defendant Utley, who asked him for a match, as he started to cross the street at the corner of Davie Street and Patterson Lane. While Utley was talking to Smith, Thomas Jackson walked up behind Smith and grabbed him. The defendants then forced Smith to accompany them some forty to fifty yards up the street to the home of the defendant Utley. Upon entering the house, Smith was held by Jackson while Utley went through his pockets and removed the following items: one pen knife, one pair of gold cuff links and cash amounting to $47.00 in the following denominations — two twenty dollar bills, one five dollar bill and two one dollar bills. They also took a sport coat from him that he had recently purchased. Smith shoved the defendant Utley when he started to search his pockets, causing Utley to strike at him several times with a meat cleaver. Smith testified that the defendants took his property after he saw the meat cleaver and after they struck at

him with the meat cleaver. On cross-examination, Smith stated that he was not afraid of anyone on the street but that on this occasion he was afraid for his life. As soon as he was released, Smith ran to the corner of East Street and Davie Street and called the police. Smith signed a warrant for the arrest of the defendants and accompanied the officers to the defendant Utley's house. Detective A. E. Morris testified that they were admitted by the defendants and that a search of the premises, with the permission of the defendants, revealed the following items: the sport coat identified by Smith as having been taken from him by the defendants, $8.00 found on the person of Jackson and $25.00 found on the person of Utley.

The sole witness for the defendants, Miss Justina Banks, testified that she resided at the Utley house and that on the day in question she saw Smith and a girl friend at the Utley house. She testified that the defendants and Smith were drinking wine and that Smith took a short nap and upon awakening made a statement about some money being gone. She observed no fight nor did she see anyone strike at Smith with a meat cleaver or take any property from him. Neither of the defendants testified.

A motion for judgment as of nonsuit was denied at the close of the State's evidence. The motion was renewed following the presentation of evidence by the defendants and was again denied.

Judge Bickett charged the jury that they could find the defendants guilty of armed robbery as charged in the bill of indictment, guilty of common law robbery or not guilty. The jury found each defendant guilty of common law robbery and each was sentenced to not less than nine nor more than ten years in the State's Prison. The defendants appealed.

Robert Morgan, Attorney General, by Harry W. McGalliard, Deputy Attorney General, for the State.

Malcolm B. Grandy for the defendant appellants.

HEDRICK, J.

The appellants' first assignment of error reads as follows:

"1. That warrant issued on the 12th day of July, 1968 and was served upon the defendants on the 12th, 13th day of July, 1968; that counsel was appointed in the Superior Court on the 8th day of August, 1968; that defendants' constitutional rights were thereby violated."

[1, 2] The foregoing purports to be based on an exception to the orders appointing counsel. The appellants in their brief make the statement that: "Defendants charged with felony are entitled to counsel at all stages of proceedings against them from their arrest until the conclusion of the case." Appellants in their brief cite no authority for this statement. There has been no showing that these defendants were in any manner prejudiced by the failure of the court to appoint counsel at the moment of arrest nor is there any contention that there was insufficient time allowed to prepare for trial. The right of a defendant in a criminal action to be represented by counsel does not apply literally to every stage of the proceedings, but only to the "critical stages". *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740, cert. den. 390 U.S. 1030, 20 L. Ed. 2d 288, 88 S. Ct. 1423; *State v. Bentley,* 1 N.C. App. 365, 161 S.E. 2d 650. In the instant case, no showing has been made that any "critical stage" of the proceedings had been reached before counsel was appointed. The appellants' contentions with respect to the appointment of counsel are without merit.

[3] The appellants' second assignment of error challenges the ruling of the trial court denying the motion for judgment as of nonsuit made at the close of the State's evidence. It is elementary that when a defendant offers evidence after his motion for judgment as of nonsuit is overruled, he thereby waives all right to urge that denial as error upon appeal. G.S. 1-183; *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897; *State v. Fikes,* 270 N.C. 780, 155 S.E. 2d 277; *State v. Howell,* 261 N.C. 657, 135 S.E. 2d 625.

[4] The appellants' third assignment of error challenges the ruling of the trial court denying the motion for judgment as of nonsuit renewed at the close of all of the evidence.

In the case of *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969), the Court said:

> "On such a motion 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."

G.S. 14-87 provides:

> "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."

The evidence presented by the State was sufficient to require the submission of the case to the jury upon the charge of armed robbery; therefore, the motion for judgment as of nonsuit was properly overruled. *State v. Reid,* 5 N.C. App. 424, 168 S.E. 2d 511.

[5] The jury found each of the defendants guilty of common law robbery. An indictment for armed robbery under G.S. 14-87 will support a verdict of guilty of common law robbery. G.S. 15-170; *State v. Stevenson,* 3 N.C. App. 46, 164 S.E. 2d 24; *State v. McLean,* 2 N.C. App. 460, 163 S.E. 2d 125; *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834.

[6] The appellants' fourth and final assignment of error was as follows:

"4. For that the court erred in his charge to the jury."

This is an exception to the entire charge of the court. This is a "broadside exception" and presents no question for review upon appeal. G.S. 1-180; *State v. McCaskill,* 270 N.C. 788, 154 S.E. 2d 907; *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729; *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364.

In the trial of the defendants in the superior court, we find

No error.

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

WILLIAM DELANCE BLAKE v. ELIZABETH WILSON BLAKE

No. 6911DC486

(Filed 22 October 1969)

1. Divorce and Alimony § 18— alimony pendente lite — former G.S. 50-16 — necessity for findings of fact

Under former G.S. 50-16, the trial court, when making an award of alimony *pendente lite,* was not required to set forth in his order any findings of fact where there was no allegation of adultery by the wife.

2. Divorce and Alimony § 18— alimony pendente lite — new statute — G.S. 50-16.1 et seq.

The provisions of G.S. 50-16.1 *et seq.* control an application for alimony *pendente lite* in the wife's cross action to her husband's suit for divorce commenced after 1 October 1967, the effective date of Ch. 1152 of the 1967 Session Laws.

3. Divorce and Alimony § 18— alimony pendente lite — necessity for findings of fact — G.S. 50-16.8(f)

G.S. 50-16.8(f) requires the trial judge to make findings of fact when an application is made for alimony *pendente lite.*

4. Divorce and Alimony § 18— alimony pendente lite — findings of fact required

In making findings of fact after a hearing upon an application for alimony *pendente lite,* it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented, but he must find the ultimate facts sufficient to establish that the defendant spouse is entitled to an award of alimony *pendente lite* under the provisions of G.S. 50-16.3(a).

5. Divorce and Alimony § 18— alimony pendente lite — determination of amount

The determination of the amount and the payment of alimony *pendente lite* is to be made in the same manner as alimony, except that alimony *pendente lite* shall be limited to the pendency of the suit in which the application is made. G.S. 50-16.3(b).

6. Divorce and Alimony § 18— alimony pendente lite and counsel fees — failure to find facts

In this hearing upon the wife's motion for alimony *pendente lite* and counsel fees in her cross action for alimony without divorce, the trial court erred in directing the husband to pay alimony *pendente lite* and counsel fees of the wife without making findings of fact from the evidence presented at the hearing as required by G.S. 50-16.8(f).

7. Divorce and Alimony § 18— alimony pendente lite — determination of amount

Amounts awarded as alimony *pendente lite* and counsel fees should be based upon the evidence presented at the hearing and should be determined in the sound discretion of the trial judge having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case. G.S. 50-16.5(a).

APPEAL by plaintiff from *Godwin, District Judge,* 29 May 1969 Session of HARNETT District Court.

This civil action for absolute divorce was brought by plaintiff-husband on the ground of one year's separation. In his complaint, filed 19 March 1969, plaintiff alleged: That the parties were married on 19 October 1954 and lived together as man and wife until

September 1967, when they separated; that no children were born to this marriage; that the separation was caused by no fault on his part; and that the parties had lived separate and apart from each other continuously since September 1967.

Defendant answered, alleging as a defense that in September 1967 the plaintiff had wrongfully and willfully abandoned her without just cause and without fault or provocation on her part and that since such abandonment plaintiff had failed to support her. Defendant pleaded the abandonment as a bar to plaintiff's right to a divorce and prayed for an award of permanent alimony, for alimony *pendente lite,* and counsel fees.

After a hearing set for determination of defendant's claim for alimony *pendente lite* and counsel fees, the district judge entered an order dated 6 June 1969 directing plaintiff to pay his wife $250.00 per month as alimony *pendente lite* and to pay $350.00 to her attorneys "as reasonable counsel fees to date." The order contains no findings of fact, stating merely that both parties were present in court and represented by counsel, that the defendant "offered evidence to support her claim for alimony pendente lite and counsel fees," and that the court was "of the opinion that the defendant is entitled to alimony pendente lite and counsel fees."

From the order directing him to pay alimony *pendente lite* and counsel fees, plaintiff appealed.

J. T. Lamm, Wilson & Bowen, and R. Allen Lytch, by Wiley F. Bowen, for plaintiff appellant.

Bryan, Jones & Johnson, by K. Edward Greene, for defendant appellee.

PARKER, J.

On this appeal we are concerned solely with the sufficiency of the order awarding the defendant wife alimony *pendente lite* and counsel fees in her cross action to her husband's suit for divorce. Plaintiff appellant, by appropriate assignments of error, challenges the trial court's order on the grounds that (1) it is not supported by pleadings, affidavits, stipulated facts, or findings of fact; and (2) the court abused its discretion. The order appealed from recites that the defendant "offered evidence to support her claim for alimony pendente lite and counsel fees." The only reference to this evidence contained in the record on appeal is in a stipulation, dated 22 August 1969 and signed by counsel for both parties, that "the defend-

ant wife introduced the plaintiff husband's 1968 wage and tax statement from the post office where he is employed, attached hereto marked 'Exhibit A'; that there was no other evidence of income or assets introduced." The Exhibit A referred to is a Federal Internal Revenue Service Form W-2, which indicates that in 1968 the husband received from his employer wages subject to withholding in the amount of $7,835.98, from which Federal income taxes in the amount of $1,203.42 and State income taxes in the amount of $245.44 were withheld. Except for the statement in the stipulation that "there was no other evidence of income or assets introduced," the record on appeal does not reveal what other evidence, if any, was presented at the hearing before the district judge.

[1, 2] If the present litigation had been pending on 1 October 1967, it would be controlled by G.S. 50-16 as it existed prior to the effective date of Chapter 1152 of the 1967 Session Laws. Chap. 1152, § 9, 1967 Session Laws; *Brady v. Brady,* 273 N.C. 299, 160 S.E. 2d 13. When interpreting G.S. 50-16 as it existed prior to the effective date of the 1967 Act, our Supreme Court had many times held that the trial judge, when making an award of alimony *pendente lite,* was not required to set forth in his order any findings of fact where, as here, there was no allegation of adultery by the wife. *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24; *Creech v. Creech,* 256 N.C. 356, 123 S.E. 2d 793; *Vincent v. Vincent,* 193 N.C. 492, 137 S.E. 426. In such case when the judge, after hearing the evidence, either made an award of temporary alimony or declined to make one, it was "presumed that he found the facts from the evidence presented to him according to his convictions about the matter and that he resolved the crucial issues in favor of the party who prevailed on the motion." *Williams v. Williams,* 261 N.C. 48, 55; 134 S.E. 2d 227, 232. In so holding, however, the Supreme Court had from time to time admonished that it was better practice, where the facts were in dispute, that findings of fact be made and set forth in the order. *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5; *Williams v. Williams supra; Price v. Price,* 188 N.C. 640, 125 S.E. 264.

The present case was commenced on 19 March 1969. Effective 1 October 1967, Chapter 1152 of the 1967 Session Laws repealed G.S. 50-14, G.S. 50-15, and G.S. 50-16, and insofar as alimony is concerned enacted in their place G.S. 50-16.1 through G.S. 50-16.10. (Insofar as the repealed sections related to custody of minor children, they and certain other statutes were replaced by G.S. 50-13.1 through G.S. 50-13.8, enacted by Chapter 1153 of the 1967 Session Laws.) Since the present action was commenced after the effective date of the 1967 Act, the provisions of G.S. 50-16.1, *et seq.* here control.

[3-5] G.S. 50-16.8(f), which governs in this case, provides that "(w)hen an application is made for alimony pendente lite, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, and *the judge shall find the facts from the evidence so presented.*" (Emphasis added.) Under this statute the judge must now "find the facts from the evidence so presented." Under the old statute, the Supreme Court had admonished that this be done; the new statute now commands it. In making such findings of fact it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. It is necessary that he find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony *pendente lite* under the provisions of G.S. 50-16.3(a). The determination of the amount and the payment of alimony *pendente lite* is to be made in the same manner as alimony, except that alimony *pendente lite* shall be limited to the pendency of the suit in which the application is made. G.S. 50-16.3(b). Alimony, both permanent and *pendente lite,* "shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." G.S. 50-16.5(a).

[6, 7] In the order appealed from in the present case the trial judge did not comply with the requirements of G.S. 50-16.8(f) that "the judge shall find the facts from the evidence." This he now must do. Since in any event the cause must be remanded for rehearing on defendant's motion for alimony *pendente lite* and counsel fees, it is not necessary for us to consider appellant's further contention that the trial judge abused his discretion in fixing the amount of the awards which he made. The amounts which may be awarded upon the rehearing should be based on the evidence then presented and should be determined in the sound discretion of the trial judge having due regard to the factors referred to in G.S. 50-16.5(a).

Error and remanded.

CAMPBELL and GRAHAM, JJ., concur.

EZRA MEIR AND WIFE, VIOLET S. MEIR v. RUSSELL C. WALTON, JR., AND WIFE, MARGIE G. WALTON

No. 6910SC365

(Filed 22 October 1969)

1. Pleadings § 2— complaint — demand for relief

The complaint must contain a demand for the relief to which the plaintiff supposes himself entitled. G.S. 1-122.

2. Pleadings § 7— prerequisites for relief — allegations and proof

The relief to be granted does not depend upon that asked for in the complaint, but it depends upon whether the matters alleged and proved entitle the complaining parties to the relief granted, and this is so in the absence of any prayer for relief.

3. Judgments § 15— nature of relief in default judgments

Where no answer is filed, the relief granted cannot exceed that actually demanded somewhere in the complaint when considered in its entirety. G.S. 1-226.

4. Judgments § 15— effect of default judgment — plaintiff's right to relief — objection by defendant

The failure of the defendants to answer within the statutory time prevents them from denying any fact set forth in the verified complaint and is an admission that plaintiffs are entitled to such relief as the law gives them upon the facts alleged; but defendants may be heard to object to the judgment by default on the ground that the judgment does not strictly conform to, and is not supported by, the allegations.

5. Judgments § 15; Boundaries § 15— boundary dispute — judgment by default — nature of plaintiff's relief

In a hearing upon a judgment by default and inquiry that was obtained by plaintiffs in an action arising out of a boundary line dispute between plaintiffs and adjoining landowners, plaintiffs are not entitled to an order permanently restraining the defendant landowners from using portion of a dirt path that lies upon plaintiffs' lands, where there was no demand for relief in plaintiffs' complaint which would empower the court to issue a permanent restraining order.

APPEAL by defendants from *McKinnon, J.*, March 1969 Civil Session, WAKE County Superior Court.

This action arose out of a dispute over the boundary between land owned by the parties. The true boundary was established by the court below and that aspect of the case is not involved in this appeal.

Involved in the controversy is a ten-foot dirt path. Although the survey is not a part of the record, it appears that for some distance the path lies on property now determined to be owned by the plain-

tiffs. In addition to a judicial determination of the true and correct dividing line, the complaint sought damages for alleged acts of trespass by Russell C. Walton. The plaintiffs also asked that ". . . the Court issue its temporary order restraining the defendant Russell C. Walton from going upon the property of the plaintiffs and specifically from using that portion of the path located on the property of the plaintiffs and from threatening the plaintiffs," and that "the defendant Russell C. Walton . . . appear . . . and show cause . . . why said temporary restraining order should not be continued pending the trial of this action."

Upon the hearing on the show cause order, judgment was entered allowing both plaintiffs and defendants to use the dirt path and enjoining Russell C. Walton, Jr., from further tampering with the fence erected by the plaintiffs and from otherwise interfering with them in the use of their property.

Upon the defendants' failure to file answer, the plaintiffs obtained a judgment by default and inquiry. A judgment denying defendants' motion to vacate and set aside the judgment was affirmed in the decision of this Court reported in 2 N.C. App. 578. The Supreme Court denied *certiorari* in 274 N.C. 518.

Subsequently the matter came on for hearing before McKinnon, J., at the March 1969 Session of Wake Superior Court. Plaintiffs in open court waived their claim for damages. The judgment declared the boundary line as established by the surveyor to be the true and correct line between the parties, ordered the plaintiffs to convey all their interest in the land lying on the southeasterly side of the line to the defendants, ordered the defendants to convey all their interest in the land on the northwesterly side of said line to the plaintiffs and declared that the effect of the order was to transfer the respective interests in the property as though the conveyances ordered were in fact executed. The judgment further provided "that the defendants be and they are hereby permanently restrained from going upon the property of the plaintiffs and specifically from using that portion of the dirt path located on the property of the plaintiff . . ." The plaintiffs, by consent, were likewise restrained as to the defendants' property. Defendants appealed.

Manning, Fulton and Skinner by Jack P. Gulley for plaintiff appellees.

Jordan, Morris and Hoke by John R. Jordan, Jr., and Robert Gruber for defendant appellants.

VAUGHN, J.

The sole assignment of error brought forward by the defendants attacks the portion of the judgment which permanently restrains them from using that portion of the dirt path located on the property of the plaintiffs as shown on the map referred to by the court below when it determined the true and correct boundary between the parties. This exception is based on the fact that there was no demand for a permanent restraining order in the prayer for relief of the plaintiffs' complaint.

[1, 2] G.S. 1-122 provides that the complaint must contain ". . . demand for the relief to which the plaintiff supposes himself entitled." In applying the statute our courts have consistently followed the rule that the relief to be granted does not depend upon that asked for in the complaint, but upon whether the matters alleged and proved entitle the complaining parties to the relief granted, and this is so in the absence of any prayer for relief. *Griggs v. York-Shipley, Inc.*, 229 N.C. 572, 50 S.E. 2d 914. This continues to be true where answer is filed.

[3] Where no answer is filed, however, the relief which can be granted the plaintiff is limited by G.S. 1-226 which reads:

> "When limited by demand in complaint. — The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

The general rule elsewhere seems to be that ". . . relief granted in a judgment by default must be, not only within the fair scope of the allegations of the complaint, but also within the fair scope of the prayer thereof." 30A Am. Jur., Judgments, § 214.

Although we can find no case where the North Carolina courts have limited the relief to that demanded in the prayer for relief, it is very clear that where no answer is filed, the relief granted cannot exceed that actually demanded somewhere in the complaint when considered in its entirety.

In *Simms v. Sampson*, 221 N.C. 379, 20 S.E. 2d 554, the Supreme Court speaking through Denny, J., stated: "But if the respondent answers, the court may grant any relief which is consistent and embraced within the issues raised by the pleadings. Where, however, respondent does not answer, but makes default, the relief granted to petitioner cannot exceed that which he has demanded and that necessarily incident thereto."

[4] Defendants' failure to answer within the statutory time prevents them from denying any fact set forth in the verified complaint, and admits that plaintiffs are entitled to such relief as the law gives them upon the facts alleged, but they may be heard to object to the judgment by default final as not strictly conforming to and being supported by the allegations of fact in the verified complaint. *Collins v. Simms,* 254 N.C. 148, 118 S.E. 2d 402; *Pruitt v. Taylor,* 247 N.C. 380, 100 S.E. 2d 841.

The limitation on "the relief granted" cannot be said to be restricted to cases involving award of money damages. *Collins v. Simms, supra.* "Relief" is a general designation of the assistance, redress or benefit which a complainant seeks at the hands of a court. Black's Law Dictionary, 4th Ed. (1969).

[5] A careful study of the entire complaint discloses no demand for relief which would empower the court to permanently restrain the parties from going on the property of the other. The only injunctive relief demanded by the plaintiffs was an order to restrain Russell C. Walton, Jr., pending the trial of the action. The record discloses that even the temporary restraining order did not prohibit the defendants from going on the property in question but provided for the joint use by the parties pending the trial. It is also to be observed that although the plaintiffs sought only to temporarily restrain the male defendant, the judgment appealed from permanently restrains Margie G. Walton from going on the property of the plaintiffs.

The judgment is modified to the extent that the portion thereof permanently restraining either of the parties from going on the property of the other is vacated. The remainder of the judgment is affirmed.

Modified and affirmed.

BROCK and BRITT, JJ., concur.

WILLIAM E. ROBERTS, BEULAH C. ROBERTS, AND DIANNE ROBERTS SHORT, A MINOR, APPEARING HEREIN BY HER NEXT FRIEND WILLIAM E. ROBERTS v. WALTER VANCE SHORT, MYRTLE SHORT, AND JOHNNY SHORT

No. 699DC460

(Filed 22 October 1969)

1. Parent and Child § 6; Infants § 9— right of father to custody of minor child — abandonment by mother

Where the mother abandons any claim she may have to the custody of her daughter, the father alone has the natural and legal right to the custody of the child unless for substantial and sufficient reasons the interest and welfare of the child require that he be denied that right.

2. Parent and Child § 6; Infants § 9— custody of child — polar star rule — discretion of court

The welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and therefore the courts may within certain limits exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons.

3. Parent and Child § 6; Infants § 9— custody of child — contest between father and maternal grandparents — findings

Where the question of the custody of a minor child narrowed to a contest between the father and the maternal grandparents, the mother having abandoned her claim to the child, the trial court properly awarded custody to the father upon findings, supported by the evidence, that the father was a fit and suitable person to have custody of the child and that the mother had engaged in numerous acts of misconduct and was therefore not a suitable and proper person, and there existed the possibility that the mother would be the one caring for the child should custody be awarded to the grandparents.

4. Parent and Child § 6; Infants § 9— question of child custody — review of decision

The question of child custody is one addressed to the trial court and its decision will be upheld if supported by competent evidence.

APPEAL by plaintiffs, William E. Roberts, and Beulah C. Roberts, from *Banzet, District Judge,* 9 May 1969 Civil Session, District Court of VANCE County.

The plaintiffs brought this action on 14 February 1969 seeking custody of Teresa Jean Short who was born 23 February 1967 of the marriage of the minor plaintiff, Dianne Roberts Short, and the defendant, Walter Vance Short. The parents separated on 13 January 1969.

The plaintiffs, William E. Roberts and Beulah C. Roberts, are

the adoptive parents of the mother, Dianne Roberts Short. The defendants, Myrtle Short and Johnny Short, are the parents of the father, Walter Vance Short. The record does not disclose that the grandchild has ever been in the custody of the paternal grandparents nor does it appear that they have ever asserted any right to her custody.

During the course of the hearing on the issue of custody Dianne Roberts Short stipulated through her next friend that she was making no claim on her own behalf for the custody of her daughter. Thus, the question of who was to have the custody of the minor child narrowed to a contest between the defendant father and the plaintiff grandparents.

After hearing testimony for two days the court made appropriate findings and concluded that the child's father was a fit and suitable person to have custody of his minor daughter and that her best interest would be served by placing her in his custody. Judgment was entered granting the primary custody of the child to the father and reserving in the mother certain privileges of visitation. The plaintiff grandparents appeal, assigning as error the court's findings and conclusions respecting the fitness of the defendant father and the best interest of the child.

Bobby W. Rogers for plaintiff appellants.

James C. Cooper, Jr. for defendant appellees.

GRAHAM, J.

[1, 2] By stipulation during the hearing, the mother abandoned any claim she may have had to the custody of her daughter. It then followed that the father alone had the natural and legal right to the custody of the child unless for substantial and sufficient reasons it was determined that the interest and welfare of the child required that he be denied that right. *Wilson v. Wilson,* 269 N.C. 676, 153 S.E. 2d 349; *Holmes v. Sanders,* 246 N.C. 200, 97 S.E. 2d 683; *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759; *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144. ". . . [T]he welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons." *Tyner v. Tyner, supra,* at 779, 175 S.E. at 146.

[3] We fail to see where any good and sufficient reasons exist in

this case for denying the father his natural and legal right to the custody of his daughter. It is true that there is evidence in the record before us that would tend to indicate that the father is not an exemplary parent. Such evidence is not unusual in vigorously contested custody cases. There is also evidence, however, to show that the father is a man of good character and temperament; that he is experienced in caring for his child; and that he is a hard and regular worker who supports his family. His love for his daughter and his concern for her welfare are beyond question. He has made arrangements to live with the child in his parents' home. The home is modest, and as contended by the plaintiffs, it is crowded. The evidence, however, does not show it to be inadequate. The defendant's mother and married sister will assist in caring for the child. They are both experienced in caring for children and his mother was in fact licensed by the Virginia Welfare Department to do so.

The plaintiff grandparents strongly contend that even if the father is a fit and suitable person for custody, the child's welfare would best be served by placing her custody with them. The evidence does not compel any such finding, nor in our opinion would it support such a finding. The total testimony of Mr. Roberts as it appears in the record is as follows:

> "He came to my house when Beulah was in the hospital and he was drinking. I saw the baby with blood running out of a scar. I have lost a leg. I do not have high blood pressure."

The extent of Mrs. Roberts' testimony was that she had seen her son-in-law spank and hurt the child; she and her husband once signed a note for him; he drinks and she has seen him under the influence two or three times. The only statement having any bearing on her ability to care for the minor child is: "My health is fine." The only other witness for the plaintiffs was the child's mother. Her testimony consisted entirely of accusations against her husband plus a few admissions of her own misconduct. The record appears to us to be completely devoid of any information concerning the Roberts home, or the plans they have for looking after the child should she become their responsibility. The testimony of the defendant father suggests that at one time Mrs. Roberts operated a beauty shop in her home. There was no evidence offered as to the present employment of either Mr. or Mrs. Roberts, or whether either or both of them were at home during the day.

It may be inferred from the record that the child's mother intends to live with the Roberts and would be the one caring for the

child should her custody be awarded to them. In this connection it should be noted that the court found numerous facts relating to misconduct on the part of the mother and concluded that she was not a fit, suitable and proper person to have custody of her daughter. The evidence fully supports these findings. Certainly it would not be in the best interest of the child to be placed permanently in the same home with the unsuitable mother and perhaps to a large extent come under her continued control and influence.

[4] The question of custody is one addressed to the trial court and its decision will be upheld if supported by competent evidence. *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73; *In re McCraw Children,* 3 N.C. App. 390, 165 S.E. 2d 1. Judge Banzet heard testimony in this case for two days. He observed the parties and witnesses and had an opportunity to evaluate their testimony first hand. In our opinion the evidence fully supports his findings and his judgment will therefore not be disturbed.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN CARROLL WALL AND CLARENCE WALTON, JR.

No. 6910SC470

(Filed 22 October 1969)

1. Criminal Law § 92; Robbery § 2— armed robbery — motion for separate trials — reliance on different defenses

In a consolidated prosecution of two defendants for armed robbery in which one defendant presented the defense of alibi while the other defendant presented no evidence but relied on the weakness of the State's case, the trial court properly refused to try each defendant separately, since the defenses were not inconsistent.

2. Criminal Law § 92— motion for separate trial

The granting or refusing of the motion for a separate trial is a matter which rests in the sound discretion of the trial judge.

3. Criminal Law § 117— instructions — scrutiny of accomplice's testimony

It is within the sound discretion of the trial judge, in the absence of a request to do so, to voluntarily refer to the rule of scrutiny of an accomplice's testimony.

STATE *v.* WALL

APPEAL by defendants from *McKinnon, J.*, May Regular Session 1969, WAKE County Superior Court.

Defendants were indicted in separate bills of indictment for the crime of armed robbery. Each bill of indictment was proper in form and in the case of Wall, it was alleged that he used a pistol and in the case of Walton that he used a shotgun.

Each defendant entered a plea of not guilty. Over the objection of defendant Wall, the two cases were consolidated for trial. The jury found both defendants guilty as charged, and from a prison sentence of 15 to 20 years each defendant appealed.

The evidence reveals that on Saturday, 15 February 1969, about 8:30 in the morning, David N. Devaughn was manager of the A & P Company store located on Newcombe Road in Raleigh, North Carolina. He was engaged in taking trash to the dumpster at the rear of the store building when he observed a white automobile drive onto the parking lot. The automobile was occupied by four persons. Devaughn went back into the store for more trash, and on his return to the dumpster, two people — one from each side of the dumpster — accosted him and stated, "This is a holdup." Each person had on a ski hood or similar type mask. One person had a pistol, and the other person had a shotgun. Devaughn was ordered back into the store, and the one with the pistol directed Devaughn to the office portion of the store while the other person with the shotgun rounded up some 15 to 20 employees and customers who were in the store at the time. One customer, G. C. Jones, manager of the Southgate Plaza Laundry and Cleaners, which was located near the A & P Store, walked out of the A & P Store and back to his own place of business while the robbery was in progress. Devaughn placed the currency which was in the office safe in a bag at the direction of the robber with the pistol. The bag was then taken to the cashier at the checkout counter, and the currency there was likewise placed in the bag. The two robbers then left the store, with the bag containing some $800, and got into the white automobile occupied by two others. The automobile containing the four occupants drove away.

G. C. Jones testified that he had been in the A & P Store between 8:30 and 9:00 a.m. He made a purchase and then went back to the cleaning plant where he was manager. He had observed the robbery in progress and went back to his place for the purpose of telephoning police. While he was in the process of telephoning, a person entered with a shotgun and ordered him to return to the A & P Store, which he did.

Warren Reginald Dunston testified that he was 16 years old and knew each of the defendants and also LeRoy Harris. He testified that the four of them planned the robbery the night before; that Wall and Harris were the two who went into the store, Wall with a pistol and Harris with a shotgun; Dunston was the driver of the automobile, and Walton remained in the automobile with him. Walton got out of the automobile with a shotgun and went to the cleaning establishment, and when he came out, he had a man and woman in front of him whom he directed back to the A & P Store. Walton then got back into the automobile and waited until Wall and Harris came out and they left. Dunston testified to all of the plans that had been made and where the parties went after the robbery and how they divided the money.

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

Eugene Hafer for defendant Wall, appellant.

Crisp, Twiggs & Wells by Howard F. Twiggs for defendant Walton, appellant.

CAMPBELL, J.

The defendant Wall preserved and brought forward for review four questions.

1. The refusal of the trial court to try each defendant separately.

2. Error in the charge in defining the term "reasonable doubt."

3. Error in the charge in failing to properly explain to the jury the consideration to be given to the testimony of an accomplice.

4. Error in the charge with regard to the privilege of the defendants to remain off the witness stand and not testify.

The defendant Walton preserved and brought forward two questions:

1. Error in the charge in defining the term "reasonable doubt."

2. Error in the charge in failing to instruct the jury that the burden of proof throughout the trial is upon the State.

[1] The two defendants were each charged with the armed robbery of the A & P Store on 15 February 1969. Walton presented as a defense an alibi. Wall presented no evidence but relied on the weakness of the State's case. These defenses are not inconsistent.

[1, 2] The granting or refusing of the motion for a separate trial

was a matter which rested in the sound discretion of the trial judge. *State v. McCabe,* 1 N.C. App. 461, 162 S.E. 2d 66. In the instant case the defendant Wall fails to show any abuse of discretion by the trial judge or that he was in any way prejudiced by the consolidation of the cases.

[3] We have reviewed the charge given by the trial judge to the jury, including those portions to which each of the defendants has directed an exception. While the charge as to "reasonable doubt" did not use the exact language which the defendants say the court should have used, and was not the most adept wording, nevertheless, the wording did not prejudice the defendants. Also, it is within the sound discretion of the trial judge, in the absence of a request to do so, to voluntarily refer to the rule of scrutiny of an accomplice's testimony. *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165. There was no prejudicial error in the language used in this portion of the charge.

The remaining assignments of error are without merit. We are of the opinion that the charge, when read in its entirety, correctly presented the law to the jury, and that the trial judge applied the facts of the case to the law, and that the charge was fair and in no way prejudicial to the rights of either defendant. Each defendant had a fair and impartial trial, and the jury found the facts against them.

No error.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. ERNEST WHITE

No. 6912SC439

(Filed 22 October 1969)

1. Constitutional Law § 29; Jury § 7— racial discrimination — burden of proof

Defendant has the burden of proving his allegations of racial discrimination in the selection of prospective jurors.

2. Jury § 7— selection of tales jurors — racial discrimination — findings of fact

In this prosecution for driving under the influence of intoxicating liquor,

findings of fact by the trial court that the county sheriff made his selection of tales jurors from the telephone book without prejudice and without an effort to create a racial imbalance are supported by the evidence and are therefore conclusive on appeal.

3. Jury § 5— tales jurors — selection

There is no statute which prescribes the method by which tales jurors must be selected.

4. Jury §§ 3, 5— tales jurors — discretion of sheriff

The statute authorizing the court to order the sheriff to summon tales jurors does not set forth any discretionary restrictions to be placed on the sheriff in fulfilling the court's order. G.S. 9-11(a).

5. Jury §§ 3, 6, 7— tales jurors — qualifications — challenge

Tales jurors must possess the statutory qualifications and are subject to the same challenges as regular jurors and may be examined by both parties on *voir dire.*

6. Jury § 5— tales jurors — discretion of sheriff

Absent proof that the sheriff has violated the discretionary trust placed in him when summoning tales jurors, he should remain free to use his best judgment in carrying out the court's order.

APPEAL by defendant from *Beal, S.J.,* 20 May 1969 Criminal Session, HOKE Superior Court.

Defendant, a Negro, was tried in the Hoke County District Court on a valid warrant and convicted of driving under the influence of intoxicating liquor. He appealed and was convicted again in the Hoke County Superior Court by a jury having three tales jurors as members, those three having been selected from a panel of nine tales jurors, all of whom were white. Prior to the selection of the jury defendant's counsel had moved to challenge the panel of nine tales jurors, which motion was denied by the court after hearing testimony, not in the presence of the jury, of the Hoke County Sheriff, the summoning official.

Based on the sheriff's testimony the court found the following facts: that the sheriff used the telephone book as the method of selection, that he called some 60 different prospective jurors in the course of securing the nine tales jurors, that three of those called were Negro, none of whom was able to serve, (one requesting that she be excused and when her husband was requested to serve, she requested that her husband be "let off the hook" and be considered that he was not at home on the property at the time of the sheriff's phone call,) that the sheriff made an effort to secure prospective jurors from the three races in Hoke County, white, Negro and In-

dian, that he sought out men of good character, freeholders of the county and who had not served on the jury within two years and that the selection was made without prejudice and without an effort to create an imbalance of races.

From the verdict and imposition of judgment defendant appealed.

Attorney General Robert Morgan, by Assistant Attorney General Bernard A. Harrell, for the State.

Moses and Diehl, by Philip A. Diehl, for defendant appellant.

MORRIS, J.

Defendant's appeal is based on one assignment of error. He contends that it was error for the court to refuse to allow his challenge to the panel of nine tales jurors. Though it is not clear from the record or defendant's brief, this contention is apparently based on two grounds: that the panel of nine tales jurors was selected through a system involving racial discrimination; and that the sheriff, in excusing a prospective juror, usurped the power conferred on district and superior court judges by G.S. 9-6.

[1, 2] In alleging racial discrimination in the selection of prospective jurors, the defendant has the burden of proving his allegations. *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Corl,* 250 N.C. 258, 108 S.E. 2d 615 (1959). As said in *State v. Yoes, supra,* "[o]bviously it would be possible for a sheriff, sent out to execute such an order of the court, to discriminate in the selection of persons to be summoned. This mere possibility does not make the panel actually summoned by him objectionable where, as here, the record shows that he did not so discriminate." The court's finding of fact that the Hoke County Sheriff made his selection without prejudice and without an effort to create a racial imbalance is supported by the evidence and is conclusive on appeal. *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897 (1968); *State v. Reid,* 230 N.C. 561, 53 S.E. 2d 849 (1949).

[3] There is no statutory or case authority in North Carolina prescribing the methods by which tales jurors must be selected. G.S. 9-11(a) authorizes the court, without using the jury list, to order the sheriff to summon from day to day additional jurors to supplement the original venire. It further provides that jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list. The unchallenged

testimony of the Hoke County Sheriff shows that he substantially complied with the statutory provisions concerning the selection of prospective jurors.

[4-6] Nowhere in the statute is there a provision delineating discretionary restrictions to be placed on an officer in fulfilling the court's order. The statutory recognition that tales jurors may be needed and the statutory language used contemplates a system easily and expeditiously administered. To place procedural restrictions unnecessarily on their selection would defeat the purpose of the system, which is to facilitate the dispatch of the business of the court. Tales jurors are selected infrequently and only to provide a source from which to fill the unexpected needs of the court. They must still possess the statutory qualifications and are still subject to the same challenges as regular jurors and may be examined by both parties on *voir dire*. In order to retain the flexibility needed in the administration of such a system, the summoning official must be permitted some discretion, whether he be located in a relatively small community or a more heavily populated area, and to restrict the discretion placed in the summoning official, without proven cause, is to presume he is not worthy of the office which he holds. Such should not be the case.

> "Where an officer is empowered to select and summon talesmen he is vested with some discretion. It is his right and duty to use his best judgment in securing men of intelligence, courage, and good moral character, but he must act with entire impartiality." 50 C.J.S., Juries, § 186, p. 921.

Absent proof that an officer has violated the discretionary trust placed in him, he should remain free to use his best judgment in carrying out the orders of the court. No such proof appears in this record.

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

ANNIE MARTIN v. THE JEWEL BOX OF ASHEBORO, NORTH CAROLINA, INCORPORATED

No. 6919SC420

(Filed 22 October 1969)

1. Poisons; Negligence § 29— inhalation of powder from fluorescent tubes — nausea — proximate cause — nonsuit

Plaintiff's testimony that she became nauseated and was unable to eat for a long period of time as a result of inhaling the powder released from a fluorescent light tube that fell from defendant's garbage can and broke on the sidewalk while plaintiff was passing by, *held* insufficient to withstand defendant's motion for nonsuit, where there was no evidence relating to the contents of the tube or to the nature of plaintiff's illness, nor was there medical evidence that plaintiff's illness was of such a character that would probably, in the light of medical experience, be caused by inhaling the chemical components of the powder.

2. Negligence § 8— proximate cause

There must be causal relationship between the breach of duty by defendant and the injury received by plaintiff.

APPEAL by defendant from *Crissman, J.*, 7 April 1969 Civil Session Superior Court of RANDOLPH County.

This action was instituted on 4 November 1955 for the recovery of damages resulting from personal injury allegedly caused by defendant's negligence. The matter came on for trial at the 7 April 1969 Session of the Superior Court of Randolph County. The jury awarded plaintiff $1000 and defendant appealed.

Plaintiff alleged that on or about 3 December 1952, defendant through its agents and employees, deposited, in a careless and reckless manner, in a garbage can located on the sidewalk of North Street poisonous fluorescent light bulbs which had been burned out. Plaintiff, a seamstress, maintained her business in an upstairs room in the same building in which defendant operated its business. The garbage can is located immediately across from the stairway leading to the upstairs portion of the building. On 3 December 1952, after plaintiff had closed her shop and at about 6 o'clock p.m. "as she passed by said garbage can of the defendant, it had several dangerous used fluorescent light tubes negligently and carelessly stuck in the said garbage can with their ends sticking out at various angles. That these tubes were on the top of the other garbage, and as the plaintiff passed by the said garbage can one of the dangerous and poisonous tubes fell out and broke immediately in her presence, setting up phosphors light powder, which the plaintiff alleges upon information and belief, contained beryllium and other unknown poisonous sub-

stances. That when the poisonous used fluorescent tube fell to the sidewalk immediately beside the garbage can immediately in the presence of the plaintiff, it created a loud cracking sound which frightened the plaintiff, which caused her to inhale some of the fumes through her mouth, and thus, proximately caused her to become ill and sick . . ." Plaintiff further alleged that "the defendant, with full knowledge of the use of said sidewalk as aforesaid by the plaintiff, carelessly, negligently, wrongfully, and unlawfully, and in an unsafe and insecure manner, deposited these tubes or tube in such a manner that they were unsafe, unstable and created a dangerous condition for the plaintiff."

Plaintiff testified that she had been across the street and was coming back "and all these boxes and garbage was stacked up higher than your head, and one of those things fell out. It was a light bulb. It was a fluorescent light bulb. It just popped like a gun. I thought I was shot at. I screamed as loud as I could holler and I jumped, and by that time the policeman from across the street was hold of me. He cleaned up the glass. If I hadn't screamed, I wouldn't have inhaled it. It went into my stomach." No one ever put their garbage there except the Jewel Box. "I worked out there every day and saw them pack garbage out there."

On cross-examination plaintiff testified that the garbage was right up in front of her stair steps, just the width of the sidewalk from the entrance. The garbage was all along the edge of the sidewalk. "I certainly did see fluorescent light tubes." "I didn't hit the boxes with my arm. I didn't touch the boxes at all. I am sure of that. The fluorescent tubes were somewhere in those boxes. I don't know where. They were stuck up there." "I don't know how big the tube was. I don't know which tube fell." "I just know the tube fell, that's all I know. It fell from where they were stuck in the boxes or packages or wherever they were." "I was so sick I didn't never think of making a chemical analysis of the glass that was broken. . . . I just know I got sick from it that night." "I didn't count the number of tubes. There usually was one or two every now and then put out. There was always a garbage can right there in front of the steps. I couldn't tell you. They were somewhere. I don't know how they were stacked up. I didn't get down to see how they packed them up." Plaintiff further testified with respect to her medical expenses and that she had been treated by three doctors as the result of her illness.

Plaintiff offered no other evidence. Defendant moved for judgment as of nonsuit, which was denied. Defendant offered no evidence but renewed its motion which was denied.

Ottway Burton for plaintiff appellee.

Jordan, Wright, Nichols, Caffrey and Hill, by Karl N. Hill, Jr., for defendant appellant.

MORRIS, J.

Defendant, among others, assigns as error the overruling of his motion for judgment of nonsuit.

[1] Our review of the evidence leads us to the inescapable conclusion that the plaintiff has failed to show any causal connection between her alleged injuries and the alleged negligent act, if, indeed, she has shown any negligent act. Plaintiff produced no expert testimony, either medical or with respect to the contents of the fluorescent tube. She alleges in her complaint that the breaking of the tube set up phosphors light powder which contained beryllium and other unknown poisonous substances. Her evidence is completely devoid of any proof of what elements the tube, or powder, contained or whether whatever it contained was or could be harmful if inhaled.

[2] If it be conceded that plaintiff has sufficiently shown that defendant was negligent in placing the tubes in the garbage can, the question still remains as to whether this alleged negligence was the proximate cause of plaintiff's injuries. There must be causal relationship between the breach of duty by defendant and the injury received by plaintiff. *Reason v. Sewing Machine Co.*, 259 N.C. 264, 130 S.E. 2d 397 (1963).

In the *Reason* case, plaintiff had alleged that she received serious and permanent injury to her eyes from oil sprayed from a sewing machine. There was medical testimony that hot oil could have caused the disease or that unheated oil might, depending upon its chemical composition. There was no evidence that the oil was hot nor was there evidence of its chemical composition. The Court affirmed the trial tribunal's granting of motion for judgment as of nonsuit and quoted from the case of *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E. 2d 392 (1955), where plaintiff had alleged injury resulting from a poisonous substance in a hair rinse. There the Court, in sustaining a nonsuit, said, "It may be there was a poisonous substance in the hair rinse, but there is no evidence to support such a conjecture."

[1] There is no evidence of the nature of plaintiff's illness, except her own evidence that she was very nauseated and could not eat for a long period of time. Neither is there any medical evidence as to whether plaintiff's illness was of such character that it could or

would probably, in the light of medical experience, be caused by inhaling the chemical components of the fumes or powder resulting from the breaking of the fluorescent tube. *Reason v. Sewing Machine Co., supra.*

Defendant's other assignments of error are not discussed since we reach the conclusion that plaintiff's evidence is not sufficient to establish actionable negligence and the motion for nonsuit should have been granted.

Reversed.

MALLARD, C.J., and HEDRICK, J., concur.

A. GLENDON JOHNSON v. WILLIAM HARVEY HOOKS, JR., AND WACHOVIA BANK AND TRUST COMPANY OF GOLDSBORO

No. 6910DC406

(Filed 22 October 1969)

Banks and Banking § 11— loan transaction — agreement between plaintiff and bank — forwarding of debtor's note — allegations

Where plaintiff alleged that he volunteered to advance the defendant bank the amount owing defendant by a third person on an automobile loan and that he authorized the defendant to draw a sight draft on the plaintiff's account in another bank and instructed defendant to attach the loan papers to the draft, and where the draft was accepted and paid either by plaintiff personally or by plaintiff's bank in consideration of delivery to plaintiff of the certificate of title to the automobile, the unconditional acceptance and payment of the draft concluded the transaction between plaintiff and defendant, and plaintiff may not thereafter recover from defendant upon allegations that defendant failed to attach the note of the third person to the draft.

APPEAL by plaintiff from *Ransdell, District Judge,* 6 May 1969 Session, WAKE County District Court.

Plaintiff filed complaint reading as follows:

"1. That the Plaintiff is a citizen of Wake County, William Harvey Hooks, Jr., is a citizen of Wayne County, and The Wachovia Bank & Trust Co. is a corporation created by the Laws of North Carolina, with one of its principal offices in Goldsboro, Wayne County.

"2. That on or about the 25th of February, 1965, William

Harvey Hooks, Jr., became indebted to the Wachovia Bank of Goldsboro in the amount of $1,621.19 through a negotiable Note made payable to said Bank (or to a Fremont Motor Sales which in turn sold or endorsed the said Note to the Wachovia) on the purchase of an automobile for William Harvey Hooks, Jr.'s minor son, William Harvey Hooks, III.

"3. That the son, William Harvey Hooks, III, suggested difficulties in meeting the payment on said Note, and when the Assistant Cashier of the Wachovia in Goldsboro in charge of auto loans explained his inability to accept either installment payments or an extension of time on the payment of the Note for an extra endorsement, the Plaintiff volunteered to advance the money necessary to take the account off the hands of the Wachovia.

"4. That it was impractical to personally pick up the said Note and pertinent papers involved, but the Plaintiff authorized the Wachovia to draw a sight draft on the Plaintiff in care of the Bank of Fuquay and instructed the Wachovia to attach their loan papers to the draft.

"5. That said Draft was paid by the Bank of Fuquay, and the amount of $1,621.19 deducted from the account of Plaintiff on or about March 3, 1966; but the Wachovia had attached to said Draft only the minor son's Motor Vehicles Certificate of Title with the registered lien thereon endorsed as 'Released',— instead of assigned to the Plaintiff; the existing insurance policy was not assigned or attached; and the Note for which the Draft was issued and honored was neither enclosed nor subsequently supplied to the Plaintiff.

"6. That about 6 weeks after the payment of said Draft to the Wachovia the car in question was wrecked; Plaintiff then determined that William Harvey Hooks, III, was still a minor; and that the insurance on said car had been allowed to lapse.

"7. That in pursuit of the lapsed insurance angle, or responsibility therefor, the Plaintiff became aware of the fact that the Note which had been actually credited was that of William Harvey Hooks, Jr., (the father), who was unknown to the Plaintiff, and whose Note the Wachovia marked 'Paid' and returned direct to the defendant Hooks from the Wachovia's central office or vaults in Winston-Salem, N. C.,— but which should have been assigned and mailed to the Plaintiff herein, as part of the valuable consideration for the Draft.

"8. That the Plaintiff made known to both the defendants William Harvey Hooks, Jr., and the Wachovia the clerical mistakes of marking said Note 'Paid' and forwarding the same to the defendant Hooks; but the Wachovia protested its 'custom' of handling all such Notes when 'Paid', and the Father refused to accept any responsibility or liability for the money actually advanced for the benefit of his minor son, on the Father's Note, or to return the Note in question to the Plaintiff, as would have been properly due, where no obligation existed between the Plaintiff and Defendants.

"9. That through the Wachovia's mistakes of handling the papers in question and the refusal of the defendant Hooks to deliver to Plaintiff the Note which was inadvertently marked 'Paid' and wrongfully delivered to its maker, the Wachovia enabled defendant Hooks to enrich himself in the amount of said Note, $1,621.19, at the expense of Plaintiff.

"10. That by reason of the wrongful handling of said Draft, the Defendants herein caused the Bank of Fuquay to erroneously deduct from the Plaintiff's bank account the sum of $1,621.19 and appropriate said amount to the Wachovia Bank of Goldsboro, and which amount they now hold and have held since March 3, 1966, without delivering the aforesaid chattel Note, for which their Draft was honored; and that the defendant Wachovia is justly due this Plaintiff $1,621.19, which moneys they wrongfully collected; and which they still continue to refuse to return to the Plaintiff."

Wachovia Bank and Trust Company of Goldsboro demurred to the complaint for failure to allege a cause of action against it. The demurrer was sustained, and plaintiff appealed.

A. Glendon Johnson, pro se.

Taylor, Allen, Warren & Kerr, by John H. Kerr, III, for Wachovia Bank and Trust Company of Goldsboro.

BROCK, J.

Plaintiff does not allege a contract with Wachovia. He alleges ". . . Plaintiff volunteered to advance the money necessary to take the account off the hands of Wachovia." He further alleges ". . . Plaintiff authorized the Wachovia to draw a sight draft on the Plaintiff in care of the Bank of Fuquay and instructed the Wachovia to attach their loan papers to the draft." Just what was

meant by "their loan papers" is not clear. In any event, it is clear from the complaint that either the plaintiff accepted and paid the draft as it was drawn, or the Bank of Fuquay, acting as plaintiff's agent, accepted and paid the draft as drawn. If plaintiff personally accepted and paid the draft, he did so charged with knowledge that only the title certificate for the automobile was attached. If the Bank of Fuquay, acting as plaintiff's agent, accepted the draft, it did so charged with knowledge that only the title certificate for the automobile was attached. In either event the draft was accepted and the face amount thereof paid to Wachovia in consideration of delivery to plaintiff of the certificate of title for the automobile. If the Bank of Fuquay acted as agent for plaintiff, it is clear that either plaintiff failed to instruct the Bank of Fuquay upon what conditions it was to accept and pay the draft, or the Bank of Fuquay failed to follow plaintiff's instructions. There is no allegation of a promise on the part of Wachovia to deliver additional particular "papers," after acceptance of the draft, nor is there allegation of mutual mistake or fraud in the drawing and acceptance of the draft; therefore, the unconditional acceptance and payment of the draft on or about 3 March 1966 concluded the transaction between plaintiff and Wachovia.

The judgment of the District Court sustaining Wachovia's demurrer to the complaint is

Affirmed.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. CLAIBORNE LEE SHERRON

No. 6914SC493

(Filed 22 October 1969)

1. Criminal Law § 131— motion for new trial for newly discovered evidence — impeachment of prosecutrix — different result on retrial

Where defendant was convicted of assaulting his wife, defendant's motion for a new trial on the ground of newly discovered evidence was properly denied where such evidence tended to show that at the time of the trial defendant's wife was pregnant by another man and that she later falsely alleged in a divorce action that the child had been born of her marriage to defendant, since at most the evidence would tend only to impeach one of the witnesses against defendant and is not of such a

nature as to show that on another trial a different result would probably be reached.

2. Criminal Law § 131— new trial for newly discovered evidence — discretion of court

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and its refusal to grant the motion is not reviewable in the absence of abuse of discretion.

ON *Writ* of *Certiorari* to review an order of *Ragsdale, J.*, at the 26 May 1969 Criminal Session of DURHAM Superior Court.

On 12 June 1968 defendant was convicted in the Superior Court of Durham County of the crime of assault on a female, he being a male over eighteen years old. He was sentenced to prison for a term of 21-24 months. On appeal to this Court the judgment was affirmed by opinion certified to the clerk of Superior Court of Durham County on 12 May 1969. *State v. Sherron,* 4 N.C. App. 386, 166 S.E. 2d 836. At the next term of Superior Court following certification of the opinion of the Court of Appeals, defendant, through counsel, moved that the verdict against him he set aside and he be granted a new trial on the grounds of newly discovered evidence. From order denying his motion for a new trial, defendant gave notice of appeal to the Court of Appeals. After docketing the record in this Court, defendant moved that this matter be considered as upon petition for *writ* of *certiorari,* which motion was granted.

Attorney General Robert Morgan and Staff Attorney (Mrs.) Christine Y. Denson for the State.

John C. Randall for defendant appellant.

PARKER, J.

[1] The substance of the new evidence referred to in defendant's motion for a new trial was: First, a letter dated 7 August 1968 purportedly written by defendant's wife, who was prosecuting witness at the trial which resulted in his conviction and imprisonment, stating that at the time of the trial she was pregnant by another man; and second, the complaint in a divorce action verified by the wife on 18 March 1969, in which she alleged that the child had been born of her marriage to defendant. Defendant contends that this evidence would show that at the time of his trial the prosecuting witness had committed adultery, that this furnished a substantial reason for her to falsify her testimony in order to get rid of her husband, and that later she made a false allegation as to paternity of the child when she verified the complaint in the divorce action. De-

fendant argues that this evidence indicates that the prosecuting witness not only had reason to falsify her testimony against him but also had a propensity to do so.

The prerequisites for granting a new trial on the ground of newly discovered evidence were stated by Stacy, C.J., in the oft-cited case of *State v. Casey,* 201 N.C. 620, 161 S.E. 81. Among these prerequisites were that the newly discovered evidence "does not tend only to contradict a former witness or to impeach or discredit him," and "(t)hat it is of such a nature as to show that on another trial a different result will probably be reached." The evidence offered by defendant in support of his motion fails to meet these prerequisites. At most it would tend only to impeach one of the witnesses against him.

[2] Moreover, a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and its refusal to grant the motion is not reviewable in the absence of abuse of discretion. *State v. Morrow,* 264 N.C. 77, 140 S.E. 2d 767; *State v. Dixon,* 259 N.C. 249, 130 S.E. 2d 333; *State v. Williams,* 244 N.C. 459, 94 S.E. 2d 374; *State v. Bryant,* 236 N.C. 379, 72 S.E. 2d 750; *State v. Cox,* 202 N.C. 378, 162 S.E. 907. No abuse of discretion appears on this record, and this matter is therefore

Dismissed.

CAMPBELL and GRAHAM, JJ., concur.

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

No. 6911SC489

(Filed 22 October 1969)

1. Appeal and Error § 39— failure to aptly docket record on appeal

Appeal is dismissed by the Court of Appeals *ex mero motu* for failure to docket the record on appeal within 90 days after the order appealed from as required by Rule 5. Court of Appeals Rule No. 48.

2. Criminal Law § 131— new trial for newly discovered evidence — discretion of court

Motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and decision of the

trial court on such a motion is not reviewable absent an abuse of discretion.

APPEAL from *Hobgood, J.*, 31 March 1969 Session of JOHNSTON County Superior Court.

This is an appeal by the respondent from an order and a judgment entered on 5 May 1969. The order denied respondent's motion for a new trial on the grounds of newly discovered evidence. The judgment affirmed a prior judgment disbarring respondent from the practice of law and ordered that judgment into effect from 29 January 1969, the date an opinion of this court affirming the judgment of disbarment was certified to the Clerk of Superior Court of Johnston County.

Robert B. Morgan, Attorney General, for plaintiff appellee.

E. R. Temple in propria persona.

GRAHAM, J.

Judgment disbarring the respondent from the practice of law was entered 24 October 1967 after a jury had found him guilty of six separate acts of fraudulent and unprofessional conduct. The respondent's appeal was docketed and calendared but he did not appear in this court to argue. His appeal was nevertheless given thorough consideration and all assignments of error were disposed of in the opinion of Britt, J., *State Bar v. Temple*, 2 N.C. App. 91, 162 S.E. 2d 649. Thereafter the respondent petitioned for a rehearing, specifically requesting that oral arguments be directed. His petition was granted and the matter was duly docketed and calendared for hearing. Again the respondent did not appear to argue, nor did the attorney who signed his brief. The respondent's assignments of error were again found to be without merit. *State Bar v. Temple*, 3 N.C. App. 73, 164 S.E. 2d 13. On 3 December 1968 the respondent filed notice of appeal in the Supreme Court of North Carolina, alleging he was appealing as a matter of right. The appeal was dismissed by the Supreme Court on 21 January 1969. On 12 February 1969, the respondent filed a motion for a new trial in the Supreme Court on the grounds of newly discovered evidence. Upon being advised that the matter was not then pending in the Supreme Court, the respondent filed a similar motion in the Superior Court of Johnston County. The order denying that motion and the entering of the formal judgment of execution are the subject of this appeal.

[1] The order and judgment appealed from are dated 5 May 1969.

To properly effect this appeal it was necessary that the respondent docket the record on appeal in this court within ninety days after 5 May 1969. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. The ninetieth day was on Sunday, 3 August 1969, so the respondent had through Monday, 4 August 1969, to docket the appeal. However, the appeal was not docketed in this court until 26 August 1969. No order appears in the record before us extending the time within which the appeal could be docketed and in accordance with the practice of this court and pursuant to Rule 48, Rules of Practice, *supra,* this appeal is dismissed *ex mero motu* for failure to docket within the time prescribed by Rule 5.

[2] In dismissing this appeal we nevertheless note that the respondent's motion for a new trial was addressed to the sound discretion of the trial court. The decision of the trial court is not reviewable absent an abuse of discretion and no such abuse has been shown. *State v. Morrow,* 264 N.C. 77, 140 S.E. 2d 767; *Allen v. Gooding,* 174 N.C. 271, 93 S.E. 740. The defendant's motion and affidavits fall far short of establishing the necessary prerequisites for granting a new trial on the basis of newly discovered evidence. *State v. Casey,* 201 N.C. 620, 161 S.E. 81.

Appeal dismissed.

CAMPBELL and PARKER, JJ., concur.

MOBIL CHEMICAL COMPANY v. MEDICAL PLASTICS CORPORATION OF AMERICA

No. 6918SC417

(Filed 22 October 1969)

Sales § 10— action for goods sold and delivered — jury question

In this action for the purchase price of polyethylene film embossed to 8 mils allegedly sold and delivered to defendant, question of whether the parties contracted for film embossed to 8 mils or for film embossed to 6 mils was for the jury, where the evidence showed that defendant by telephone ordered from plaintiff film embossed to 8 mils, and that the purchase order sent by defendant to confirm the sale described the film as embossed to 8 mils but also specified that the product was to conform to an enclosed sample, which was embossed to 6 mils.

APPEAL by plaintiff from *Godwin, S.J.,* 24 March 1969 Civil Session of Superior Court held in GUILFORD County.

This is a civil action by plaintiff to recover the purchase price for a quantity of polyethylene film alleged to have been sold and delivered by it to defendant.

From the entry of judgment of nonsuit, plaintiff appealed.

Weinstein and Weinstein by Robert M. Weinstein; and Perry C. Henson and Daniel W. Donahue by Daniel W. Donahue for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd for defendant appellee.

MALLARD, C.J.

Plaintiff alleges that the defendant is indebted to it in the sum of $10,659.18 for the purchase price of polyethylene film sold, manufactured and delivered to defendant as ordered.

Defendant denies owing plaintiff any sum, alleging that the polyethylene film delivered to it by plaintiff did not conform to the characteristics of the sample attached to the purchase order.

The evidence taken in the light most favorable to plaintiff tends to show that after some preliminary negotiations, defendant, acting through its agent, by telephone on or about 17 October 1967, purchased from plaintiff 20,000 pounds of polyethylene film described as follows: The gauge of the film was 3 mils diamond embossed to 8 mils; the tint was defendant's Medi-Gard Green plus G-11 hexachlorophene additive; the width of the film was 36 inches on rolls having an outside diameter of 14 inches on 3-inch cores; the film was to be delivered within ten days to two weeks. Nothing was said by defendant at the time of the telephone order about submitting a sample film. Immediately upon receipt of the telephone order, plaintiff began work toward manufacturing the film.

After the telephone conversation, defendant prepared and sent to plaintiff its Customer Purchase Order to confirm the transaction. Attached to the purchase order was a small sample of polyethylene film which was 3 mils diamond embossed to 6 mils; colored Medi-Gard Green plus G-11 hexachlorophene additive. The purchase order described the product as:

> "20,000 lb. Polyethylene film 3 mil. diamond embossed to 8 mil., 0.25% G-11 content Medi-Gard Green color; film width, 36" on 3" core; 14" O.D."

Also on the defendant's purchase order below the foregoing words appeared the following: "Must conform to characteristics of en-

closed sample." Plaintiff in its manufacturing plant gave preference to defendant's order and manufactured and delivered it by truck as it had contracted to do. The film as manufactured and delivered was 3 mils diamond embossed to 8 mils. Defendant has not paid plaintiff for the film. Defendant offered no witnesses but cross-examined plaintiff's only witness in regard to its defense that the delivered film was of inferior grade and was "fully unsuitable for the purpose for which it was ordered"; that the tensile strength of the film and its resistance to tear was much lower than the sample attached to the order. The evidence also tended to show that the difference between the characteristics of the sample attached to the order and the film supplied defendant was in strength and tear resistance, the film supplied being "slightly weaker" than the sample film attached to the order. Plaintiff's witness testified: "The testing that we did indicated that this difference in strength and tear resistance was the result of a deeper embossing." From the evidence, it appears that the difference in strength and tear resistance of the film ordered resulted from the requirement of the defendant that the film be 3 mils embossed to 8 mils. The defendant's Customer Purchase Order differs from the order given on the telephone in that the characteristics of the sample of 3 mils diamond embossed to 6 mils is contradictory to the 3 mils diamond embossed to 8 mils according to the telephone order, as well as the written part of the defendant's purchase order. It is this difference, according to the evidence, that resulted in the film supplied being "slightly weaker" than the sample film.

In *Anderson Co. v. Manufacturing Co.*, 206 N.C. 42, 172 S.E. 538 (1934), Justice Brogden, speaking for the Court, said:

> "It is apprehended that the correct rule as pronounced by this Court is that in sales by sample the seller must deliver goods of the same kind, condition, quality, design and color *where any or all of these elements are of the essence of the contract.*" [Emphasis Added].

In the case before us, the sample attached to the purchase order was 3 mils diamond embossed to 6 mils. The telephone order and the wording in the purchase order required the film to be 3 mils diamond embossed to 8 mils. The film delivered was 3 mils diamond embossed to 8 mils. Whether the parties contracted for polyethylene film 3 mils diamond embossed to 6 mils as shown by the sample or for polyethylene film 3 mils diamond embossed to 8 mils as shown by the telephone order and the written part of the defendant's purchase order is a question of fact to be decided by the jury.

For the reasons stated, the judgment of the court allowing the defendant's motion for judgment as of nonsuit is

Reversed.

MORRIS and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. EVERETTE O. HERITAGE
No. 6915SC413

(Filed 22 October 1969)

Criminal Law § 23— guilty pleas — voluntariness

Questions asked defendant by the trial court and defendant's answers thereto given under oath *are held* sufficient to support the court's findings and conclusion that defendant's pleas of guilty to breaking and entering, larceny and safecracking were entered voluntarily, knowingly and understandingly.

APPEAL by defendant from *Thornburg, S.J.*, 8 April 1969 Criminal Session, ALAMANCE County Superior Court.

The defendant was charged in two bills of indictment. The first bill of indictment charged the defendant with feloniously breaking and entering a place of business belonging to Carl Needham and known as Needham Produce Market on 10 November 1968. This bill of indictment had a second count in it charging the defendant, after breaking and entering the place of business occupied by Carl Needham and known as Needham Produce Market, with the felony of larceny of money and merchandise of a total value of $738.50. The second bill of indictment charged the defendant with the felonious breaking open of a safe belonging to Carl Needham, wherein had been stored money and other valuables, by using an acetylene torch on 10 November 1968.

The defendant retained privately-employed counsel to represent him in the matter. In open court the defendant, through his privately-retained counsel, tendered a plea of guilty to all of the charges. Before accepting the plea of guilty to all of the charges, the court questioned the defendant extensively as to the circumstances pertaining to his plea of guilty.

Based upon the inquiry made by the trial judge in open court, the court ascertained, determined and adjudicated that the plea of

guilty entered by the defendant was freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency.

From a sentence of 10 years imprisonment on the charge of safecracking and a concurrent sentence of 2 years on the charges of breaking and entering and larceny, which were consolidated for the purposes of sentence, the defendant appealed to this Court.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

James C. Spencer, Jr., for defendant appellant.

CAMPBELL, J.

After the trial the privately-retained attorney for the defendant was permitted to withdraw from the case. The defendant was found to be an indigent, and the court appointed an attorney to represent him on this appeal. The appeal presents one question for determination, and that is whether the record is adequate and sufficient to sustain the adjudication that the defendant voluntarily, knowingly and understandingly pleaded guilty. The record discloses that the court, with considerable patience and understanding, questioned the defendant and made inquiry in an effort to ascertain whether or not the plea of guilty was submitted to the court voluntarily, knowingly and understandingly. The questions asked and the answers given by the defendant under oath are adequate and sufficient to support the court's findings and adjudication. No prejudicial error has been shown.

Affirmed.

PARKER and GRAHAM, JJ., concur.

JAMES WILLIAM YOUNG v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 6911SC472

(Filed 22 October 1969)

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

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed

in compliance with Rule 5, and there was no order extending the time for docketing, the Court of Appeals *ex mero motu* will dismiss the appeal for failure to comply with the Rules. Court of Appeals Rules Nos. 5 and 48.

APPEAL by plaintiff from *Hobgood, J.*, March 1969 Civil Session of JOHNSTON County Superior Court.

The plaintiff appeals from an order of Judge Hobgood denying his motion to set aside and declare void a final judgment in this cause entered by Judge Bailey at the 5 March 1966 Session of the Superior Court of Johnston County. The final judgment which the plaintiff now seeks to have declared void was affirmed by the Supreme Court. *Young v. Insurance Co.*, 267 N.C. 339, 148 S.E. 2d 226. The Supreme Court had previously considered other aspects of this same controversy. *Moore v. Young*, 263 N.C. 483, 139 S.E. 2d 704; *Moore v. Young*, 260 N.C. 654, 133 S.E. 2d 510.

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

Smith, Leach, Anderson & Dorsett by Willis Smith, Jr., for defendant appellee.

GRAHAM, J.

The order appealed from was entered 5 May 1969. The record on appeal was docketed in this court 15 August 1969 which was after the expiration of the time within which the appeal could be docketed in compliance with Rule 5, Rules of Practice in the Court of Appeals of North Carolina. In the record before us there is no order extending the time for docketing the record on appeal. Rule 48, Rules of Practice, *supra*, provides: "If these rules are not complied with, the appeal may be dismissed." The practice of this court has been to dismiss appeals for failure to docket the record on appeal within the time prescribed by Rule 5. *Laws v. Palmer*, 4 N.C. App. 510, 167 S.E. 2d 49; *Coffey v. Vanderbloemen*, 4 N.C. App. 504, 167 S.E. 2d 36; *State v. Ellisor*, 4 N.C. App. 514, 167 S.E. 2d 35; *Simmons v. Edwards*, 3 N.C. App. 591, 165 S.E. 2d 345; *In re Custody of Burchette*, 3 N.C. App. 575, 165 S.E. 2d 564; *Evangelistic Assoc. v. Bd. of Tax Supervision*, 3 N.C. App. 479, 165 S.E. 2d 67; *Kelly v. Washington*, 3 N.C. App. 362, 164 S.E. 2d 634. Accordingly, the appeal in this case should be and is dismissed, *ex mero motu*, for failure to docket within the time fixed by Rule 5.

We have nevertheless carefully considered the contentions of the plaintiff as set forth in his brief. In our opinion the order of Judge

Hobgood was properly entered, no good cause having been shown as to why the final judgment should be set aside and declared void.

Appeal dismissed.

CAMPBELL and PARKER, JJ., concur.

DANIEL OWEN BATTEN v. PAUL W. DUBOISE

No. 6922SC335

(Filed 22 October 1969)

Automobiles § 50; Negligence § 8— proximate cause of injury — sufficiency of evidence

In this action for injuries to plaintiff's right leg alleged to have been received in an automobile accident, the trial court erred in granting defendant's motion for nonsuit on the ground that plaintiff had failed to show that the injuries to his leg were proximately caused by the accident, where plaintiff testified that his leg had not been injured prior to the accident and that it had been discolored since the accident.

APPEAL by plaintiff from *McConnell, J.*, 17 February 1969 Session, DAVIDSON Superior Court.

Plaintiff brings this action to recover for injuries to plaintiff's right leg alleged to have been received in a one-car collision wherein plaintiff was a passenger.

Plaintiff lives in Thomasville, North Carolina, but at the time of the accident complained of he was visiting relatives in Columbus County.

At the close of plaintiff's evidence defendant's motion for nonsuit was allowed with the following remarks from the trial judge: "I'll sustain the motion. I think there is too much left to the imagination. . . . I am not sustaining the motion on contributory negligence. I granted it on the grounds that there is no evidence how the man's leg was hurt."

From the entry of judgment of nonsuit, plaintiff appealed.

Charles F. Lambeth, Jr., for plaintiff appellant.

Walser, Brinkley, Walser & McGirt, by Walter F. Brinkley, for defendant appellee.

BROCK, J.

To entitle plaintiff to have his case submitted to the jury he must, among other things, bear the burden of producing evidence from which the jury might draw a reasonable inference that the particular injuries of which he complained were the proximate result of the accident.

Plaintiff testified, concerning how the injury to his right leg was received, in part as follows: "When I started to get into the car nothing at all was wrong with my leg. Not to the best of my knowledge. It hadn't been cut any way or hurt any way as it was after the accident." And he further testified: "My leg was never discolored prior to the wreck. It's been that way since."

There were discrepancies and contradictions in the plaintiff's evidence, but such were for the jury, not the Court, to resolve. Whether plaintiff can prevail before the jury is another matter.

Considering plaintiff's evidence in the light most favorable to him, as must be done upon motion for nonsuit, we hold that plaintiff's evidence of lack of injury to his leg before the accident coupled with his evidence of injury to his leg after the accident, was sufficient to overcome motion for nonsuit upon this point.

Reversed.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. LINWOOD K. HILL

No. 6910SC487

(Filed 22 October 1969)

APPEAL by defendant from *Carr, J.*, at the 11 June 1969 Criminal Session, WAKE Superior Court.

On 30 October 1968 the defendant was convicted in the District Court of Wake County of assault upon his wife. The court suspended a six-month jail sentence upon several conditions, two of which were that he not assault his wife and not come in personal contact with his wife. On 15 April 1969 he was convicted in the same court of assaulting his wife with a deadly weapon, this assault having taken place on 5 March 1969. The district court imposed

a jail sentence for the latter assault and revoked the suspension of the earlier sentence. Both cases were appealed to the Superior Court of Wake County where he was found guilty of the second assault and the activation of the sentence previously suspended was affirmed. Both cases were appealed to this Court, the appeal in this case being from the judgment putting into effect the suspended sentence.

Attorney General Robert Morgan by Staff Attorney Dale Shepherd for the State.

Russell W. DeMent, Jr., for defendant appellant.

VAUGHN, J.

The only assignment of error in this appeal is that the judgment revoking the suspended sentence was in error because it was based solely upon a conviction for a subsequent assault which conviction the defendant contends was erroneous.

By opinion filed this day in the assault case, we have affirmed the conviction which the defendant contended was erroneous. The judgment putting into effect the suspended sentence is, therefore,

Affirmed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. PHILLIP M. WALKER AND SONNY D. FLEEMAN

No. 6918SC308

(Filed 19 November 1969)

1. Criminal Law § 92— consolidation of cases against two defendants for trial

The trial court did not err in consolidating for trial all cases against two defendants charged in separate indictments with the crimes of felonious breaking and entering, felonious larceny and safecracking, where the offenses charged were so connected in time, place and circumstances as to make one continuous criminal episode. G.S. 15-152.

2. Criminal Law § 92— motion to consolidate cases for trial — motions for separate trials — discretion of court

A motion by the State to consolidate for trial cases against two defend-

ants charged in separate bills of indictment with identical crimes, and motions by defendants for separate trials, are addressed to the sound discretion of the trial judge.

3. Criminal Law § 61— plaster cast of tire tracks — admissibility

In this prosecution for breaking and entering, larceny and safecracking, the trial court properly admitted plaster casts made a few hours after the crimes were committed of tire tracks found in an alleyway behind the building broken and entered, where there was evidence that the tire tracks corresponded in a number of respects with the treads on the tires found on defendant's automobile when it was impounded on the same night the crime was committed, the evidence being sufficient for the jury to find that the tire tracks (1) were found at or near the place of the crime, (2) were made at the time of the crime, and (3) corresponded to the tires on defendant's car at the time of the crime.

4. Criminal Law §§ 43, 61— photographs of tire tracks — admissibility

In this prosecution for breaking and entering, larceny and safecracking, the trial court did not err in the admission over defendant's general objection of photographs of tire tracks found at the crime scene and photographs of tires on defendant's car which were offered for the limited purpose of illustrating testimony of a police officer concerning the tire tracks.

5. Criminal Law § 162— general objection to evidence

When a general objection is interposed and overruled, it will not be considered reversible error if the evidence is competent for any purpose.

6. Criminal Law § 42— clothing removed from arrested defendant — admissibility

In this prosecution for breaking and entering, larceny and safecracking, the trial court did not err in the admission of articles of clothing removed from defendant shortly after his valid arrest and sent to the F. B. I. for laboratory analysis, such analysis having revealed the presence on the clothing of insulation of the type used in the safe which was stolen and broken open.

7. Burglary and Unlawful Breakings § 5; Larceny § 7; Safecracking— nonsuit — sufficiency of circumstantial evidence

In this consolidated trial of two defendants, the trial court properly overruled the first defendant's motions for nonsuit of charges of felonious breaking and entering, felonious larceny and safecracking, and properly overruled the second defendant's motion for nonsuit of a charge of safecracking, where the State's evidence tended to show that the first defendant's car was at the crime scene during the time the crimes were committed, that within two hours after the safe was stolen the first defendant's car, with three occupants, was seen near the point where the broken safe was discovered, that an hour later defendants and a companion were arrested in the car, that defendants' companion was wearing a sweater containing the same type of fibers as were found around the window through which entry to the building was gained, that safe insulation found on the clothing of all three occupants of the car and in the

trunk and interior of the car was of a type used only by the manufacturer of the stolen safe, that paint of the type and color of the stolen safe was found on tools in the trunk of the car, that a metal fragment stuck on the door of the stolen safe matched the broken end of a screwdriver found in the car, and the three occupants of the car were found to be in possession of cash totaling approximately the amount stolen.

ON *Certiorari* from *Fountain, J.*, March 1968 Session of GUILFORD Superior Court.

By separate bills of indictment each of the defendants, Phillip M. Walker and Sonny D. Fleeman, were charged with commission of the following criminal offenses: (1) Feloniously breaking and entering the building occupied by Stereo Products, Inc., on 10 December 1966; (2) larceny of one safe, valued at $200.00, and $780.26 in checks and cash, property of Stereo Products, Inc.; (3) receiving; (4) possession of burglary tools; and (5) "safe cracking" the safe of Stereo Products, Inc., used for storing money, in violation of G.S. 14-89.1. Over objection of the defendants, all cases were consolidated for trial. Each defendant pleaded not guilty in all cases.

Upon the trial the State introduced evidence tending to show: On the night of 9 December 1966 the owner of Stereo Products, Inc. was in his place of business in Greensboro, N. C., until approximately 11:40 p.m., when he left the premises. He returned approximately one hour later to find that a large Century safe containing checks and approximately $300.00 to $400.00 in cash, including at least one roll of pennies, had been removed from the premises. Entry to the premises had been made through a window in the rear of the building by removal of a heavy wire grille, a large door giving vehicular access to the building had been opened from the inside, and tire tracks of a mud-grip or snow-grip design were found on the floor inside the building and outside on the soft ground near the door. At approximately 12:20 a.m. on 10 December 1966 an employee at a nearby filling station observed a dark colored, old model, Plymouth automobile with a wide white sidewall tire on the left rear turn into a service alley adjoining the building occupied by Stereo Products, Inc. This witness could not identify the driver of the car or see how many persons were in the car. At approximately 3:25 a.m. on 10 December 1966 on Lee Street in the City of Greensboro, the police stopped and searched a 1949 dark green Plymouth with white sidewall snow tires on the rear. The defendant Walker was driving, and was ascertained to be the owner of the car. The defendant Fleeman and another man, named Jerry Kennett, were in the car. All three occupants of the car were arrested and the car was impounded. Tools in the car's trunk were later found to have on them

traces of paint similar to the paint on the stolen safe, and the tools' characteristics were similar to marks made on the safe. Particles of insulation material of the type used in the stolen safe were found in the trunk and inside the car and two rolls of pennies were found under the front seat. When arrested, defendant Walker had in his possession approximately $233.00 in cash, defendant Fleeman had $136.35, and Kennett had $135.02. Particles of the same type of material as used in the insulation of the stolen safe were found on the clothing of each of the occupants of the car. Cloth fibers taken from around the window through which entrance to the Stereo Products building had been obtained were of a type similar to those from the sweater worn by Kennett at the time he was arrested. The stolen safe was found on 11 January 1967 approximately thirteen miles from Greensboro and some three miles down the Rock Creek Dairy Road off of Interstate 85. A fragment of metal taken from the door of the safe exactly matched the broken end of a long-handled screw driver which was found among the tools in the trunk of defendant Walker's car. A witness saw the car at a service station on Interstate 85 about seven miles from Rock Creek Dairy Road at approximately 2:30 a.m. on 10 December 1966. He identified the car by license number and testified there were three people in the car, but he was not able to identify the occupants.

At the close of the State's evidence the court allowed defendant Walker's motion for nonsuit as to the charge of possession of burglary tools and allowed defendant Fleeman's motion for nonsuit as to the charges of possession of burglary tools and of breaking and entering, larceny, and receiving. The court overruled defendant Walker's motion for nonsuit as to the charges of breaking and entering and larceny and safe cracking, and overruled defendant Fleeman's motion for nonsuit as to the charge of safe cracking.

Neither defendant testified. Defendant Walker presented the evidence of the manager of a filling station in Greensboro where defendant Walker was employed on the night of 9 December 1966, who testified that there was an old safe at the filling station on which the door hinges had been bent, and that insulation came out from around the door when it was shut at night; that defendant Walker had been at the filling station on the night of 9 December 1966 until 9:00 p.m., but he did not close the station that night.

At the conclusion of all evidence, defendants renewed their motions for nonsuit as to the charges remaining against them, which motions were overruled. The jury found defendant Walker guilty of felonious breaking and entering, felonious larceny, and safe

cracking, and found defendant Fleeman guilty of safe cracking. From judgments imposing prison sentences on the verdict, each defendant gave notice of appeal. The appeal was not perfected within the time permitted by the Rules of the Court of Appeals and this Court subsequently granted defendants' petition for *certiorari* to perfect a late appeal.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, Trial Attorney William F. Briley, and Staff Attorney James E. Magner, for the State.

John F. Comer for defendant appellant Walker.

J. C. Barefoot, Jr., for defendant appellant Fleeman.

PARKER, J.

[1, 2] Defendants assign as error the denial of their motions for separate trials and the allowance of the State's motion to consolidate all cases against both defendants for purposes of trial. The two defendants were charged in separate bills of indictment with identical crimes. The offenses charged were so connected and tied together in time, place, and circumstances as to make one continuous criminal episode. In such cases there is statutory authority for a consolidation. G.S. 15-152; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506. Moreover, the motions were addressed to the sound discretion of the trial judge. *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Wright,* 270 N.C. 158, 153 S.E. 2d 883; *State v. Combs,* 200 N.C. 671, 158 S.E. 252. There being nothing in the record to suggest abuse of discretion, these assignments of error are without merit and are overruled.

[3] Defendant Walker assigns as error the trial court's allowing introduction in evidence over his objection of plaster casts of tire tracks made by an identification specialist employed by the Greensboro Police Department. These casts were made only a few hours after the crime had been committed; they were obtained from fresh tire tracks found in the alleyway behind the building which had been broken into and from which the safe had been stolen; and there was evidence that the tire tracks from which the casts were made corresponded in a number of respects with the treads on the tires found on defendant Walker's car when it was impounded on the same night the crime was committed. Thus, the jury could legitimately find that the tire tracks: (1) were found at or near the place of the crime, (2) were made at the time of the crime, and (3) corresponded to the tires on defendant Walker's car at the time of the crime.

Therefore, the evidence objected to met the three requirements set out in *State v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908, and there was no error in allowing the casts to be introduced into evidence.

[4, 5] There was also no error in the trial court's allowing in evidence photographs of the tire tracks found at the scene of the crime and photographs of the tires on defendant Walker's car. These photographs were offered in connection with testimony of a police officer concerning these tire tracks and were admitted over general objection. They were property admissible for the limited purpose of enabling the witness the better to explain, and the court and jury the better to understand and interpret, his testimony. When a general objection is interposed and overruled it will not be considered reversible error if the evidence is competent for any purpose. *State v. Casper,* 256 N.C. 99, 122 S.E. 2d 805; Stansbury, N.C. Evidence 2d, § 27, p. 52.

[6] Defendant Walker assigns as error the allowing into evidence of articles of clothing worn by him at the time of his arrest. He was arrested at approximately 3:30 a.m. on 10 December 1966, which was about three hours after the time when the crimes with which he was charged had been committed. He was taken to jail and his clothing removed in order that it might be sent to the F.B.I. headquarters for examination. The clothing of his codefendant, Fleeman, and of the third occupant of his car, Kennett, was similarly removed and inspected. This examination revealed the presence on the clothing worn by all three occupants of the car of safe insulation of the type used in Century safes, the same type of safe which had been stolen and broken open.

The case of *Robinson v. United States,* 283 F. 2d 508, presented a factual situation closely parallel to the facts in the present case. In that case the Court said (page 509):

> "Appellants Robinson and Williams complain that their clothing was removed at police headquarters, shortly after their arrest, and was subjected to tests at the laboratories of the Federal Bureau of Investigation. These tests revealed paint chips and other debris corresponding to like materials found at the scene of the burglary, and at a place where a safe stolen from the pharmacy had been opened. We think that this procedure was proper, since probable cause to believe appellants guilty of housebreaking and larceny had already appeared, and appellants were validly under arrest therefor. (Citing cases.)"

We agree with the conclusion of the Court in *Robinson v. United States, supra,* and find no merit in defendant Walker's assignment

of error relating to the allowance in evidence of the articles of clothing.

[7] Both defendants assign as error the overruling of their motions for nonsuit as to all of the cases against them. Considering the evidence in the light most favorable to the State, as we are required to do when passing upon a refusal of the trial court to sustain a motion for nonsuit interposed in a criminal case, if the record here discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this Court must affirm the trial court's ruling. It is immaterial whether the substantial evidence is circumstantial or direct, or a combination of both. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. In the present case no question has been raised but that the State offered substantial evidence to show that some person or persons committed the crimes of breaking and entering, larceny, and safe cracking. The only question raised by appellants is whether the State's evidence was sufficient to permit the jury to determine that the defendants were the persons who committed the crimes. We think that it was.

The owner testified that the safe was stolen from his premises at some time within the period of one hour following 11:40 p.m. on 9 December 1966. Eyewitness testimony and tire impressions provided evidence from which the jury could legitimately find that defendant Walker's car was at the scene of the crime during this period. The car, with three occupants, was placed by an eyewitness at a point in the neighborhood where the broken safe was later discovered and at a time within approximately two hours after the safe was stolen. Approximately one hour thereafter defendants Walker and Fleeman and their companion Kennett were arrested in the car. All of these events occurred within a three-hour time span and late at night when it would be unusual to engage in casual driving. This evidence tends to show defendants' activity in a time sequence, and at places, closely related to the accomplishment of the criminal acts.

The car was owned by defendant Walker and was being driven by him when defendants were arrested. Cloth fibers found around the window through which entry had been gained to the building from which the stolen safe was taken were of the same type as the fibers in the sweater worn by Kennett, one of the occupants of the car. This evidence tends to show Walker's control of the vehicle used in the crime and tends to show the association of both defendants, Walker and Fleeman, with a participant a short time after the crime was committed.

Safe insulation found on the clothing of all three occupants of the car and in the trunk and interior of the car itself was of a type used in the stolen safe. A special agent assigned to the Washington, D. C. Laboratory of the F.B.I. testified that this insulation was a vermiculite carbonate sand type which in his opinion was not found anywhere except in Century safes and that insulation used by other manufacturers of safes was quite different. Particles of this insulation were found on defendant Walker's shoes and socks and in the pockets and cuffs of his trousers. Particles were also found on defendant Fleeman's shoes, socks, shirt, sweater, sweat shirt and even on his underwear. Paint of the type and color on the stolen safe, as well as particles of safe insulation, were found on tools which were in the trunk of defendant Walker's car at the time he and his codefendant were arrested. A fragment of metal stuck on the door of the stolen safe was found on microscopic examination to match exactly the broken end of a long-handled screw driver which was among those tools. The owner of Stereo Products, Inc., testified there was at least one roll of pennies in the safe; two rolls of pennies were found under the front seat of the car. The three occupants were found to be in possession of cash totaling approximately the amount stolen. Thus, the State's evidence, considered in its totality, does tend to establish a large number of facts which, when fitted together, form a composite picture from which the jury might legitimately identify defendants as the perpetrators of the crimes. In our opinion this evidence was sufficient to require a jury decision on the issue of each defendant's guilt.

Appellants cite cases in which circumstantial evidence was held insufficient to survive a motion for nonsuit and argue that these cases are controlling here. In *State v. Burton,* 272 N.C. 687, 158 S.E. 2d 883, evidence of possession by defendant some three days after a safe had been forced open of tools which had been used to open the safe was held insufficient to be submitted to the jury on the issue of defendant's guilt of safe cracking. In *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655, evidence that defendant remained seated in the passenger's seat in a car while another went into and robbed a store was held insufficient to submit to the jury the issue of defendant's guilt as an aider and abettor in the commission of the armed robbery, there being no evidence that defendant moved from his position in the car, that he observed what was taking place in the store, or that he shared in the proceeds of the robbery. In *State v. Shu,* 218 N.C. 387, 11 S.E. 2d 155, evidence of customary use and possession of an automobile used in commission of a crime was held insufficient to be submitted to the jury, as it raised no more

than a suspicion or conjecture that defendant was present or actually participated in the crime. In each of these cases the limited circumstantial evidence tending to link the defendant with the crime for which he was being tried was held not sufficient to be submitted to the jury. In the case before us there is much more. Many circumstances detailed in the evidence in the present case, if considered standing alone, may have been of small moment. When fitted together, however, they complement each other in such manner as to render them sufficiently substantial to require consideration by the jury. It was for the jury to determine what the evidence actually proved or failed to prove. In overruling the motions for nonsuit in the present case, there was no error.

A number of defendants' assignments of error have not been brought forward and discussed in their briefs. These are therefore deemed abandoned. Rule 28 of Rules of Practice in the Court of Appeals.

We have examined the defendants' remaining assignments of error argued in their briefs and which were principally directed to admission of evidence and to portions of the court's charge to the jury, and find therein no prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. JERRY WADE PENLEY

No. 6925SC490

(Filed 19 November 1969)

1. Criminal Law § 15— change of venue — special venire — widespread publicity — fair trial

In a consolidated trial for kidnapping, armed robbery, and assault with intent to commit rape, defendant's motions for a change of venue or for a special venire from another county on the ground that he could not get a fair and impartial trial in the county because of extensive publicity and public discussion of the cases, *held* addressed to the sound legal discretion of the trial court, whose ruling in denying these motions will not be disturbed on appeal where (1) the newspaper articles filed in support of the motions were not unduly inflammatory in nature, (2) the articles were published three months prior to the trial and there was no evidence of repeated or excessive publication, and (3) the prospective jurors

who had read the newspaper accounts stated that they could return an impartial verdict. G.S. 1-84, G.S. 1-85, G.S. 9-12.

2. Criminal Law § 91— motion for continuance — change of testimony by codefendant

In a consolidated trial for kidnapping, armed robbery, and assault with intent to commit rape, defendant's motion for a continuance on the ground that his attorneys had learned only a few days prior to the trial that the codefendant had changed his story and implicated another person, rather than defendant, as a participant in the crimes, *held* properly denied where there was no suggestion in the record that, had the continuance been granted, defendant would have been able to develop any additional evidence as to the existence or whereabouts of the other person.

3. Criminal Law § 91— continuance — discretion of trial judge — review

A motion for a continuance is addressed to the sound discretion of the trial judge, whose ruling thereon is subject to review only in case of manifest abuse.

4. Criminal Law § 91— continuance — review — prejudicial error

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

5. Attorney and Client § 6— withdrawal of attorney from the case — grounds

An attorney of record is not at liberty to abandon his client's cause in court without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court.

6. Criminal Law §§ 67, 88— cross-examination — evidence of defendant's speech defect

In a consolidated trial for kidnapping, armed robbery, and assault with intent to commit rape, in which one of the prosecuting witnesses testified on cross-examination that the person who got into his car talked in a normal voice and with no unusual speech mannerisms, defense counsel should not be permitted to ask the witness "if the defendant has a speech defect and talks with a speech impediment, then he is not the man that got in the car, is he," where (1) at the time the question was asked there was no evidence that defendant had a speech defect, (2) the question was argumentative in nature, (3) the record did not disclose what the witness' answer would have been, and (4) defendant was given ample opportunity later in the trial to show that defendant did have a speech defect.

7. Criminal Law § 101; Constitutional Law § 31— right of defense counsel to interview codefendant — presence of codefendant's counsel

Trial court's refusal to permit defendant's attorneys to interview his codefendant without the presence of the codefendant's court-appointed counsel, such request being made at a time when the codefendant had not yet been sentenced upon his pleas of guilty and was still represented by

counsel, *held* without error, since the granting of defendant's request would have been a violation of the court's duty to see that the codefendant's rights were protected.

8. Criminal Law § 73— hearsay testimony — exclusion

In a consolidated trial for kidnapping, armed robbery, and assault with intent to commit rape, the questioning of the State's witness on cross-examination as to what the witness' mother had told him during the course of a conversation on the night of the offense, *held* properly excluded on the ground that it called for hearsay testimony.

9. Criminal Law §§ 43, 66— identification of defendant — photographs — admissibility

The photographs of defendant from which the prosecuting witnesses had identified defendant as the perpetrator of the offenses charged against him, *held* properly admitted in evidence where (1) there was no evidence that the photographic identification was conducted in such manner as to be unfairly suggestive to the witnesses and (2) the court clearly instructed the jury not to consider the fact that the photographs had been in the files of the sheriff's department prior to the commission of the offenses.

10. Criminal Law § 158— presumptions on appeal — unfairness in photographic identification

The Court of Appeals will not presume that the photographic identification of defendant by the prosecuting witnesses was unfairly made in the absence of any evidence to that effect, and certainly not when the contention of unfairness was first made in the Court on appeal.

11. Criminal Law § 60— evidence of fingerprints — scope of cross-examination

In a consolidated trial for kidnapping, armed robbery, and assault with intent to commit rape, which offenses took place in an automobile owned and operated by one of the prosecuting witnesses, trial court properly refused to permit the defendant to cross-examine a deputy sheriff in an attempt to show that defendant's fingerprints had not been found on the automobile, where the deputy sheriff testified that (1) he was not a fingerprint expert, had never qualified to read fingerprints, and (2) he had no knowledge of his own as to whose fingerprints had been found on the automobile.

12. Criminal Law §§ 36.1, 85— attacking evidence of alibi — issue of defendant's character

In a consolidated trial for kidnapping, armed robbery, and assault with intent to commit rape, in which the defendant had not taken the stand as a witness or introduced evidence of his good character, the solicitor could properly cross-examine the defendant's witness as to whether the defendant, a married man, had been "running around" with another of defendant's witnesses who had testified to facts tending to support an alibi, where (1) the evidence was relevant to show the nature of the association the defendant had with the alibi witness and (2) the court correctly admonished the jury not to consider the evidence as a reflection upon defendant's character.

13. Criminal Law § 85— admission of evidence competent for one purpose and incompetent for another — character of defendant

If specific acts are relevant and competent as evidence of something other than character, they are not inadmissible because they incidentally reflect upon character.

14. Criminal Law § 70— tape recording of defendant's speech — corroborative evidence — admissibility

Defendant was not prejudiced by the exclusion of a tape recording made by a speech therapist in an interview with the defendant, where the tape recording was merely corroborative of the lengthy testimony of the speech therapist that defendant had a speech defect.

15. Criminal Law § 163— broadside assignment of error to the charge

An assignment of error to "the failure of the court to properly charge the jury on the law applicable to kidnapping, armed robbery and assault with intent to commit rape, as shown by defendant's exception No. 15," the exception referred to appearing at the end of the entire charge, is broadside and will not be considered on appeal.

16. Kidnapping § 1; Robbery § 4; Rape § 18— sufficiency of evidence

In a consolidated trial for kidnapping, armed robbery, and assault with intent to commit rape, there was ample evidence of every essential element of the crimes charged, and trial court properly denied defendant's motions for judgment as of nonsuit.

APPEAL by defendant from *Copeland, J.,* 21 April 1969 Session of BURKE Superior Court.

At the February 1969 Session of Burke Superior Court the grand jury returned four true bills of indictment charging the defendant with kidnapping Frank Garland, Jr., kidnapping Wilma Radford, rape of Wilma Radford, and armed robbery of Frank Garland, Jr. At the same time indictments were returned charging Terry Veit with the same offenses. All cases were docketed for trial at the 21 April 1969 Session of Burke Superior Court, at which time Terry Veit entered a plea of guilty to the two indictments charging him with kidnapping and to the indictment charging him with armed robbery. The State thereupon took a *nol pros* with leave in the case against Terry Veit for rape. The four cases against the defendant, Jerry Wade Penley, were consolidated for trial. In connection with the indictment charging defendant with the crime of rape, the solicitor announced in open court that the State would not try defendant for rape, but would place him on trial for the lesser offense of assault with intent to commit rape. Defendant pleaded not guilty in all cases.

The State's evidence tended to show: At approximately 9:15 p.m.

on 2 January 1969 Frank Garland, Jr., and Wilma Radford, a sixteen-year-old girl, were parked in their car in an area known as Brentwood, near Morganton, N. C. Terry Veit came to the car and forced them at gun point to open the door. Veit got into the back seat and took Garland's pocketbook containing about $86.00 in cash. After Veit got in the car, a late model light blue Plymouth drove by, and Veit directed Garland to flash his lights off and on and to follow the Plymouth. Garland started following, but lost the car. After riding ten or fifteen minutes, Veit made them stop and pick up a man walking along the road near a bridge. The man was the defendant, Jerry Wade Penley. Penley got in the front seat with Garland and Miss Radford. Veit gave Penley the gun and the money, and Penley stated that he was already in trouble with the law and had to have a way to get out of town, that he had to meet someone at Linville River, and that he didn't have anything to lose by shooting them. Penley further stated that if Garland and Miss Radford would take him where he wanted to go, he wouldn't do anything to them. Penley then returned the pocketbook and money to Garland, and directed him to drive to a filling station, where Garland purchased gas. While at the service station, Penley kept the pistol pointed at Miss Radford. At Penley's direction they then drove about ten miles to the old Boy Scout Camp at Linville River. There Penley, still holding the pistol in his hand and pointing it at Garland, directed Garland to get out of the car, took back from him his pocketbook and all of his money, and locked him in the trunk of the car. Penley then raped Miss Radford in the car while Veit held the gun. Veit then gave the gun to Penley and attempted to have sexual intercourse with Miss Radford but made no penetration. Penley then released Garland from the trunk of the car and drove back to a graveyard near Glen Alpine. Penley and Veit left, after warning Garland and Miss Radford that they would be killed if they told anyone. On returning home that night Miss Radford told her mother what had happened, the matter was immediately reported to the police, and Miss Radford gave the Sheriff's Department a description of the men involved. Miss Radford was taken to the hospital where she was examined by a physician. The examination revealed facts corroborating her recital of what had occurred, and the physician testified that in his opinion she had not had sexual relations until that night immediately prior to the time he examined her.

Defendant Penley was arrested at his home about 4 a.m. on 6 January 1969, after Garland had identified a photograph of the defendant shown him by a member of the Sheriff's Department. At the time of Penley's arrest, a fully loaded pistol, identified as the weapon

used in the affair, was found on the nightstand beside his bed. Veit, who is Penley's brother-in-law, was arrested about two hours later when he came to the jail to inquire about Penley.

Evidence offered on behalf of defendant was substantially as follows: Beulah Burnette testified she had known defendant approximately sixteen months. On the night of 2 January 1969 she loaned him her 1966 blue Plymouth for his use in going to the hospital to see his sick father. On that night she picked him up at his home and drove to Gene's Drive-In where she worked and defendant left with her car at approximately 5 p.m. She next saw defendant five or ten minutes after 10 p.m., when he picked her up after she got off from work. She drove defendant to his home and let him out at his home at approximately 10:30 p.m.

Defendant's father testified that defendant had visited him in the hospital from 6 until approximately 8 p.m. on the evening of 2 January 1969.

Terry Veit, appearing as a witness for the defendant, testified in substance: His sister is defendant Penley's wife. On 2 January 1969 he went with defendant to the hospital in Beulah Burnette's car. While at the hospital he got into an argument with the defendant, as a result of which defendant hit him. After he was hit, he went to Beulah Burnette's car and took defendant's gun from the console in the car and also took defendant's coat. Veit intended to shoot defendant when he came out. When defendant didn't come out, Veit started walking and later thumbed a ride to Glen Alpine, where he saw a person by the name of James Smathers, whom he had met during the preceding summer. Veit had a conversation with Smathers and they planned to go to Brentwood to get a car, because Smathers wanted transportation to Linville Gorge. Veit and Smathers then walked toward Brentwood, where Smathers hid in a field near the Silver Creek Bridge. At the bridge Veit gave defendant's coat to Smathers because Smathers was cold. Veit then went up to Brentwood, saw the automobile with Garland and Miss Radford in it, went up to the car and stuck the pistol in and told them to open. Veit got into the car, took Garland's wallet and money, and forced them to drive away. They picked up James Smathers at the Silver Creek bridge. Smathers had the nickname of "Curley." After Smathers got in the car, they went for gas, and then Smathers told Garland to drive to Linville Gorge. Veit's testimony as to subsequent events was substantially the same as that given by the State's witnesses, except that Veit testified that it was James (Curley) Smathers, rather than the defendant, who had participated with him in com-

mitting the crimes. Veit testified that he did not know where Smathers lived and that the last time he had seen Smathers was on the night the crimes had been committed.

On cross-examination Veit admitted that after his arrest he had signed a statement implicating the defendant and that he had never told anyone that it was James Smathers, rather than the defendant who had participated, until he told the doctors at Dorothea Dix Hospital in Raleigh. Veit contended that he had at first implicated the defendant because he thought defendant had signed a statement implicating him and because the officers had promised to "let him off light."

Defendant did not testify.

The jury found defendant guilty of the two charges of kidnapping, the charge of armed robbery, and the charge of assault with intent to commit rape. From judgments imposing prison sentences, defendant appealed.

Attorney General Robert Morgan and Staff Attorney James E. Magner for the State.

Dan R. Simpson and Wayne W. Martin for defendant appellant.

PARKER, J.

[1] Before pleading to the indictments the defendant moved for a change of venue or, in the alternative, that a jury be drawn from another county. As grounds for these motions defendant asserted that because of the extensive publicity and public discussion of the cases against him, he could not get a fair and impartial trial from a jury composed of Burke County citizens. The court instructed the attorneys for defendant to reduce these motions to writing, and proceeded with the selection of the jury. In the course of examination of prospective jurors by the solicitor, the court instructed the solicitor to ask any juror if he had read about the case in some newspaper. The record indicates that three of the prospective jurors responded that they had read some newspaper article relating to the case, but each stated that he felt he could give the defendant and the State a fair and impartial trial. While the solicitor was still in process of examining the jury panel, the court recessed for the day. On the following day the attorneys for defendant filed their written motions for change of venue or for a special venire, supporting the same by affidavits of the defendant and of three citizens of Burke County and by copies of newspaper articles which had appeared in

the local newspaper at the time of defendant's arrest and preliminary hearing in January 1969. The court overruled defendant's motions, which action the defendant now assigns as error.

Defendant's motion for a change of venue and his alternative motion for a special venire from another county were addressed to the sound legal discretion of the trial court. G.S. 1-84, G.S. 1-85, G.S. 9-12; *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916; *State v. Ledbetter,* 4 N.C. App. 303, 167 S.E. 2d 68, (*cert.* denied in 275 N.C. 500). The record before us fails to disclose that the trial judge abused his discretion in denying these motions. The newspaper articles, copies of which were filed by defendant in support of his motions, contained a factual reporting of the events giving rise to the charges against defendant and, considering the nature of these events, were not unduly inflammatory in nature. These articles had been published three months prior to the date of the trial, and the record does not indicate there had been any repeated or excessive publication. Examination of the panel of prospective jurors by the solicitor revealed that only three members had read any newspaper account of the charges against defendant, and each stated that he felt he could give defendant and the State a fair and impartial trial. As was the case in *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39, the record before us fails to show that any juror objectionable to the defendant was permitted to sit on the trial panel or that defendant exhausted his peremptory challenges before he passed the jury. The following statement by Parker, C.J., in *State v. Ray, supra,* is particularly appropriate here:

> "There is nothing in the record to show or to suggest that any of the jurors had formed an opinion in respect to the guilt or innocence of the defendant. To hold that a prospective juror was disqualified for jury service in a particular case merely because he had read of it or listened to it over television or radio would mean that in a case that was given publicity in the newspapers or on the radio and television, only the most illiterate or ignorant jurors would be qualified. That would be an absurd result."

There is no merit in this assignment of error.

[2-4] Defendant assigns as error the overruling of his motion for a continuance made on the ground that his attorneys had learned only a few days prior to the trial that his codefendant, Veit, had changed his story and implicated one James "Curley" Smathers, rather than the defendant, as a participant in the crimes. There is

no merit in this assignment of error. A motion for a continuance is addressed to the sound discretion of the trial judge, whose ruling thereon is subject to review only in case of manifest abuse. *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617. The record reveals that the defendant's attorneys had been appointed to represent him on the day of his arrest, which was some three and one-half months prior to the trial. Nothing in the record suggests that, had the continuance been granted, defendant would have been able to develop any additional evidence as to the existence or whereabouts of the James "Curley" Smathers concerning whom his codefendant testified. No abuse of the trial court's discretion is shown in the refusal to grant the continuance. Furthermore, "(w)hether 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, supra.* Here, defendant has shown neither.

[5] Upon denial of the motion for continuance, defendant's court-appointed attorneys moved that they be allowed to withdraw from the case. There was no error in overruling this motion. An attorney of record is not at liberty to abandon his client's cause in court without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. *Smith v. Bryant,* 264 N.C. 208, 141 S.E. 2d 303. Here, no justifiable cause was shown and no prior notice had been given to the client. The court properly refused to grant the permission.

[6] On cross-examination, the State's witness, Garland, had testified that "the person that got into the car at the bridge talked in a normal voice," and that he could recall nothing "unusual about the talk or the manner of his speech." Counsel for defendant then asked the witness: "If this man (indicating the defendant) has a speech defect and talks with a speech impediment, then he is not the man that got in the car, is he?" The solicitor's objection to the question was sustained by the court, which action defendant now assigns as error. There is no merit to this assignment of error. At the time the question was asked no evidence had been presented to the effect that the defendant had a speech defect. The question was argumentative in nature, and the record does not reveal what the witness's answer would have been had he been required to answer the question. The record does reveal that subsequently in the trial the defendant did present testimony of a speech therapist and of other witnesses to the effect that defendant did have a speech defect, and defendant was given ample opportunity to develop this fact in his

effort to inject doubt as to his identity as a perpetrator of the crimes. No prejudicial error is shown by the court's action in sustaining the solicitor's objection to the argumentative question at the time the question was asked.

[7] Defendant next assigns as error the court's refusal to permit his attorneys to interview his codefendant, Veit, without the presence of Veit's court-appointed attorney. This assignment of error is without merit. Aside from the fact that no prejudice can be shown by virtue of the ruling complained of, since Veit's testimony could hardly have been more favorable to the defendant even had the defendant's attorneys been able to interview Veit at length and in private, there was no error in the court's ruling. At the time the request was made, Veit had pleaded guilty to three of the charges against him and the State had taken a *nol pros* with leave as to the fourth. However, Veit had not yet been sentenced and was still being represented by his court-appointed attorney, who, in open court, had advised Veit not to testify in behalf of Penley. It was the court's duty to see that Veit's rights, no less than those of the defendant, were protected. It would have been a violation of that duty for the court to have directed that defendant's attorneys should have the right to interview Veit without his attorney being present.

[8] While cross-examining the State's witness, Garland, defendant's attorney commenced to ask a question as to what the witness's mother had told him during the course of a conversation in which the witness had told his mother that he had seen a 1966 Plymouth at Brentwood on the night in question. This evidence as to what the witness's mother may have told him on the occasion in question was clearly hearsay, and there is no merit to defendant's contention that the court committed error in excluding it. Nor is there any merit in defendant's contention that the court, by excluding this incompetent evidence, thereby expressed an opinion as to the weight of the evidence. Furthermore, the record does not disclose what the witness's answer would have been and is totally devoid of any showing that the court's action resulted in any prejudice whatsoever to the defendant.

Defendant next assigns as error the court's action in permitting the doctor who had examined Miss Radford on the night she had been raped to testify that he may have made a statement to her concerning pain. In their brief, counsel for defendant admits that the doctor's answer, allowed in evidence over objection, was not prejudicial to defendant's case, and there is no merit to their contention that by allowing in evidence this admittedly non-prejudicial testi-

mony, the defendant's rights were thereby prejudiced before the jury.

[9, 10] There is no merit to the defendant's assignment of error directed to the admission in evidence of two photographs of the defendant which had been shown to the State's witnesses, Garland and Miss Radford, and by which they had identified the defendant. While there is some question from the record as to whether these photographs were ever introduced in evidence, we treat the matter as though they were. Defendant does not contend that the photographs were not a true likeness of the defendant, or that in themselves they were of such nature that they ought not to have been shown to the witnesses for purposes of identification. While the photographs had been in the files of the Sheriff's Department before the crimes for which defendant was tried were committed, the court clearly instructed the jury that they should not consider this fact against the defendant at any stage of the trial or during their deliberation. In oral argument on appeal, defendant's attorneys contend the photographs should not have been admitted in evidence because the record is silent as to whether these were the only photographs shown by the officers to the State's witnesses while attempting to establish the identity of the persons who had committed the offenses under investigation. Although it may be possible that photographic identification be conducted in such manner as to be unfairly suggestive to the witnesses and cause them to mistakenly identify a particular suspect as the perpetrator of a crime under investigation, evidence of any such unfairness is totally lacking in the record before us. If such had occurred, defendant's attorneys had ample opportunity to develop the facts when cross-examining the State's witnesses. We cannot presume that the photographic identification was unfairly made in the absence of any evidence to that effect, and certainly not when the contention to that effect is first made in this Court on appeal.

[11] There is no merit in defendant's assignment of error directed to the court's refusal to permit cross-examination of a sheriff's deputy in an attempt to show that defendant's fingerprints had not been found on Garland's automobile. On *voir dire* the sheriff's deputy testified that he was not a fingerprint expert, had never qualified to read fingerprints, and the only information he had ever received concerning fingerprints had come to him from the S.B.I. He further testified that he had no knowledge of his own as to whose fingerprints had been found on the automobile. Under these circumstances, there was clearly no error in sustaining objections to questions directed to this witness concerning fingerprints. Furthermore, the de-

fendant subsequently in the trial called as his own witness an investigator from the S.B.I. who testified that none of the fingerprints found on Garland's car compared with defendant's prints.

[12, 13] Defendant assigns as error the court's overruling his objection to the solicitor's question directed to defendant's witness, Veit, on cross-examination as to whether defendant, a married man and married to Veit's sister, had been "running around" with Beulah Burnette. Defendant contends that this was error in that, since he had not taken the stand as a witness and thereby subjected himself to impeachment, and had not introduced evidence of his good character to repel the charge of a crime, the State should not be permitted to show his bad character. In the case before us, however, the evidence was not admitted for the purpose of attacking the character of the defendant, and the court correctly admonished the jury not to consider it in any way as a reflection upon his character. The evidence was entirely relevant and competent to show the nature of the association the defendant had with the witness Beulah Burnette, who had testified to facts tending to support an alibi. "If specific acts are relevant and competent as evidence of something other than character, they are not inadmissible because they incidentally reflect upon character." Stansbury, N.C. Evidence 2d, § 111, p. 254.

[14] Defendant next assigns as error the court's refusal to permit the introduction into evidence of a tape recording made by a speech therapist who had interviewed the defendant at the jail shortly before the trial. This evidence was offered for the purpose of corroborating the testimony of the speech therapist to the effect that the defendant had a speech defect. The record reveals that the defendant examined the speech therapist at considerable length before the jury and that she testified fully to the nature of the speech defects of the defendant. Defendant suffered no prejudicial error by the court's action in refusing admission in evidence of the tape recording which at most corroborated his witness's testimony.

[15] Defendant assigns as error "the failure of the court to properly charge the jury on the law applicable to kidnapping, armed robbery and assault with intent to commit rape, as shown by defendant's exception No. 15." The exception referred to appears at the end of the entire charge in the record, and apparently applies to the charge as a whole. This assignment of error is broadside and will not be considered on appeal. 1 Strong, N.C. Index 2d, Appeal and Error, § 31, p. 166.

[16] Defendant's assignment of error directed to the court's re-

fusal of his motions for nonsuit is also without merit. There was ample evidence of every essential element of the crimes for which he was tried.

Defendant has been represented at his trial and on this appeal by court-appointed attorneys who have been conscientious and diligent to protect his rights in all respects. The witnesses for the State positively identified him as one of the perpetrators of the crimes for which he was tried. The evidence presented on behalf of defendant was in direct contradiction to that presented by the State. Obviously the jury did not believe the defendant's witnesses, but by their verdicts found him guilty of the vicious and brutal crimes for which he was tried. There was ample evidence to support the verdicts. Defendant has had a fair trial, free from any prejudicial error.

No error.

CAMPBELL and GRAHAM, JJ., concur.

ZURICH INSURANCE COMPANY AND TRAVELERS INDEMNITY COMPANY v. MULTI-PLY CORPORATION

AND

HOME INSURANCE COMPANY v. MULTI-PLY CORPORATION

AND

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD. v. MULTI-PLY CORPORATION

No. 6929SC518

(Filed 19 November 1969)

1. Fires § 3— negligence in causing fire — presence of inflammables — sufficiency of evidence

In this action by plaintiff fire insurers against the insured's tenant to recover for fire damage to the insured's building, plaintiffs' evidence is insufficient to be submitted to the jury on the issue of defendant tenant's negligence in causing the fire in question, where it tends to show only that defendant operated a plywood finishing plant in the building, that the fire began on a production line in defendant's plant, and that some 11 months prior to the fire several open drums of lacquer, a highly inflammable substance, were discovered in the production room upon inspection by the city fire department, which resulted in a recommendation by the fire department that empty lacquer drums be stored outside the building.

2. Negligence § 1— negligence defined

Negligence is the failure to exercise that degree of care for the safety of others or their property which a reasonably prudent man, under like

circumstances, would exercise, and may consist of acts either of commission or omission.

3. Fires § 3— negligence in causing greater fire — accumulation of inflammables

A defendant may be held liable for his accumulation of inflammables where it is in a place to which fire will foreseeably fall, leap, or be thrown by the defendant's operations, and fire is communicated to such inflammables which then cause a greater fire.

4. Fires § 3— negligence in causing greater fire damage — presence of inflammables — sufficiency of evidence

In this action by plaintiff fire insurers against the insured's tenant to recover for the destruction of insured's building by a fire which began on a production line of the plywood finishing plant which defendant operated in the building, plaintiffs' evidence, including opinion testimony that the fire would have been less intense if there had not been an overabundance of inflammable liquids inside the plant, *is held* insufficient to show that defendant was negligent in causing greater fire damage to the building than would have occurred had lacquer used in the plywood finishing process been properly stored, plaintiffs' evidence tending to show only that lacquer in the building was burned at some point during the fire, but failing to show that but for the presence of the lacquer the fire could and would have been extinguished at its source and that plaintiffs' damage would not have ensued.

APPEAL by plaintiffs from *Falls, J.*, at the 21 April 1969 Schedule "B" Civil Session of MECKLENBURG Superior Court.

The separate actions of the plaintiff insurance companies to recover damages from the insured's tenant under their right to subrogation were consolidated for trial. Plaintiffs insured a building leased to defendant and used by it to house a plywood finishing operation. The building was destroyed by fire on 16 May 1967.

Plaintiffs' evidence, including testimony of one of defendant's former officials, tended to show:

Defendant's plant operation consisted of converting unfinished plywood panels into prefinished building materials by a series of grooving and finishing processes. The plywood was moved along a production line approximately 350 feet long through machinery which coated it with lacquer and then dried the lacquer with forced air and infrared heat. The plywood was moved by hand at some points in the operation and by the machinery in others. The production line (four sets of machines of which three were in operation) was roughly in the center of the rectangular building, with crates of raw incoming plywood stacked up to fourteen feet high on one side of the building and finished outgoing plywood on the other. The coating process utilized rollers and overflow pans for the spillage of

lacquer which was pumped back for reuse. As lacquer is a volatile substance ("it is the fumes which burn"), a ventilating system was used to carry away the fumes. Fire fighting equipment located in the building included hand extinguishers and a foam system over the applicating machines. To avoid creation of sparks, employees wore rubber-soled shoes and used rubber hammers.

An inspection by Captain Prophet of the Charlotte Fire Department eleven months before the fire resulted in a letter dated 7 June 1966 to the Multi-Ply management regarding the presence of several open drums of lacquer in the production room and bad housekeeping in the form of soiled rags in the "sample testing room." He recommended that empty drums be stored outside the building and all soiled rags be put in metal containers. There was no further inspection; Captain Prophet testified that "[i]n my experience with Mr. Manus and Mr. Dickson [defendant's officials], I found them both to be cooperative and I cannot say whether all of my suggestions or some of them or any of them were carried out." Dickson, defendant's former vice-president called as a witness for plaintiffs, testified, "I am sure that all of these things were taken care of. We discontinued leaving empty drums and containers inside the building."

The drums were 55-gallon containers with a screw-type bung (or plug) which were used to bring the lacquer to the machines. One lacquer substance, "stock kilter," was piped in from an outside tank, but such a system was not used for lacquer in general because of the frequent changes in the exact color and type of finish used. Dickson explained, "You see, we ran possibly sixty different kinds of finishes so we were constantly changing." A pump would be attached to the drum in use at each machine and empty it of its contents in several hours. Two or three drums would be used for each machine in a day's time.

A fire of unknown origin broke out at approximately 9:15 on the morning of 16 May 1967. The only eyewitness to testify first saw it some unascertainable time after it began. He saw it on one of the production line machines. The employees almost extinguished the fire but it broke out again. The building was completely destroyed within about an hour and the fire smoldered in the plywood for about three weeks.

At the close of plaintiffs' evidence, defendant's motion for judgment as of nonsuit was allowed and from judgment predicated thereon, plaintiffs appealed.

Craighill, Rendleman & Clarkson by Hugh B. Campbell, Jr., and Francis O. Clarkson, Jr., for plaintiff appellants Zurich Insurance Company, Travelers Indemnity Company and General Accident, Fire & Life Assurance Corporation, Ltd.

Welling, Miller, Gertzman & Goldfarb by George J. Miller for plaintiff appellant Home Insurance Company.

Ruff, Perry, Bond, Cobb & Wade by James O. Cobb and William H. McNair for defendant appellee.

BRITT, J.

Plaintiffs contend that the trial court erred in granting defendant's motion for nonsuit for that (1) the defendant's negligence in causing the fire was sufficiently established by circumstantial evidence, and (2) the evidence was sufficient to show that defendant was negligent in causing damage substantially greater than would have been the case had due care been used in the handling and storage of the lacquer. We hold that the court did not err in granting the motion for nonsuit and will discuss plaintiffs' contentions in the order stated.

[1] (1) Plaintiffs' evidence failed to establish liability on the part of defendant for the initial fire first seen on the production line; the cause of the fire is unknown. We think the principles of law declared in *Phelps v. Winston-Salem*, 272 N.C. 24, 157 S.E. 2d 719, are applicable to the instant case. We quote the following from that opinion:

> "* * * [I]t is not sufficient to show that the circumstantial evidence introduced *could* have produced the result — it must show that it *did*."
>
> * * *
>
> "This is an 'unexplained fire.' Proof of the burning alone is not sufficient to establish liability, for if nothing more appears, the presumption is that the fire was the result of accident or some providential cause. There can be no liability without satisfactory proof, by either direct or circumstantial evidence, not only of the burning of the property in question but that it was the proximate result of negligence and did not result from natural or accidental causes. 5 Am. Jur. 2d, 836."

Plaintiffs heavily rely on the cases of *Hollar v. Telephone Co.*, 155 N.C. 229, 71 S.E. 316, and *Winkler v. Amusement Co.*, 238 N.C. 589, 79 S.E. 2d 185, in which cases the Supreme Court held that plaintiff owners introduced sufficient evidence of lessees' negligence

to survive motions of nonsuit. The case at bar is easily distinguishable from those cases. In *Hollar* pertinent facts do not appear in the opinion but a study of the record on appeal discloses that defendant's agents, after being cautioned not to do so, persisted in setting a kerosene burning lamp on a small shelf attached to a dry pine wall, that the lamp had scorched and "drawn paint" from the wall previous to the date of the fire, that on the night of the fire defendant's agent left the lamp burning on the shelf when he went to bed before 10:00 p.m., and around 2:00 a.m. the wall of the building was discovered on fire in the area where the lamp was situated; the circumstantial evidence was sufficiently strong to show that the lamp not only *could* have caused the fire damaging plaintiff's property but that it *did* cause the fire. In *Winkler* the evidence clearly showed that the fire which damaged plaintiff's building originated from a popcorn machine with an open-flame gas burner which defendant's agent left burning and unattended contrary to written instructions from the machine's manufacturer; the origin and cause of the fire were shown.

[2] It is well established that negligence is the failure to exercise that degree of care for the safety of others or their property which a reasonably prudent man, under like circumstances, would exercise, and may consist of acts either of commission or omission. 6 Strong, N.C. Index 2d, Negligence, § 1, pp. 3 and 4, and cases therein cited. Chief Blackmon of the Charlotte Fire Department was called as a witness for plaintiffs and his testimony included the following: "The fact of the business is that it's just true that a wood refinishing plant, insofar as fire conditions are concerned, is just a hazardous business. * * * I think insurance rates are adjusted accordingly." Plaintiffs' evidence failed to show that defendant, in the type of operation it was engaged in, failed to perform as "a reasonably prudent man, under like circumstances."

[4] (2) Plaintiffs contend that "had the lacquer been properly stored, that even if a fire did occur in the production line, that there would have been no damage or substantially less damage to the building." Plaintiffs give this theory form by relying heavily on the "spreading fire" cases. The frequency of fire loss to lands adjoining railroads led the court to establish several clear rules for liability, one of which provided as follows:

> "If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence

spreads to the plaintiff's premises, the defendant is liable." *Moore v. R. R.*, 124 N.C. 338, 32 S.E. 710; *Aman v. Lumber Co.*, 160 N.C. 369, 75 S.E. 931.

The prototype "spreading fire" case preceding the era of extensive railroad litigation is *Garrett v. Freeman*, 50 N.C. 78, where an accumulation of trash, including a dead pine tree, lay between a fire (set to burn logs cleared from new ground) and an adjoining fence and timber tract. The court said, "In our case, the dead pine, which was rendered combustible by the dryness of the atmosphere, caused the fire to get out."

In *Lawrence v. Power Co.*, 190 N.C. 664, 130 S.E. 735, an electrical power transmission company was held liable to a landowner where an accumulation of dry grass and vegetation which spread the fire was ignited by molten fragments of an insulator cup which burned and fell because of lightning. The court said: "If the right of way beneath the tower had been free of inflammable matter, the moulten mass and fragments of the shattered insulator would have quickly cooled, and no harm would have resulted to plaintiff."

In *Maguire v. R. R.*, 154 N.C. 384, 70 S.E. 737, the court indicated the causal connection which the plaintiff must prove: "The burden rested upon the plaintiff to establish by competent evidence two facts alleged in her complaint: first, that the defendant negligently permitted combustible matter to accumulate on its right of way, and, second, that the defendant communicated fire from its engine to its foul right of way, which fire was thence communicated to the lands of the plaintiff."

[3] The rationale seems to be that a defendant may be held liable for his accumulation of inflammables where it is in a place to which fire will foreseeably fall, leap, or be thrown by the defendant's operations; and in fact, fire is communicated to such inflammables which then cause a greater fire.

There is no direct evidence that the lacquer in controversy was ignited by the original fire at some point early enough in the conflagration to be anything more than a remote, rather that a proximate, cause. Proximate cause was defined succinctly in *Garland v. Gatewood*, 241 N.C. 606, 86 S.E. 2d 195, as "* * * a cause that produced the result in continuous sequence and without which it would not have occurred * * *." There is no direct proof that "but for" the presence of the lacquer drums the fire would not have spread. There was no direct evidence of an immediate explosion of the sort which would be expected if the initial fire had ignited the lacquer vapor.

The mere presence of the combustibles will not be actionable; the origin and spreading of the fire must be explained if plaintiffs are to recover on the theory expressed in the "spreading fire" cases. In *Maharias v. Storage Co.*, 257 N.C. 767, 127 S.E. 2d 548, there was an unexplained fire. The plaintiff showed only that there was an accumulation of oily rags in the room from which the fire spread. The plaintiff alleged that his loss "was proximately caused by the negligence of defendant in permitting a pile of rags covered by highly inflammable fluid to accumulate." However, the court affirmed the nonsuit because "[a] cause of action must be based on something more than a guess."

In *Phelps v. Winston-Salem, supra,* the court followed the *Maharias* case, saying, "* * * Although there is evidence that the fire started in the vicinity of the Blalock tomato shed and its roof was cluttered with combustible and flammable materials, the only evidence relating to the cause of the fire is that it was 'unknown.'" Also in that case the plaintiff's sought to recover on the theory that the defendant was negligent in not furnishing fire fighting equipment for the building and that its absence allowed the fire to spread. The court restated the "classical textbook terminology" in its analysis of "causal connection" or proximate cause. The plaintiffs must prove that "but for the lack of fire fighting equipment, the fire could and would have been extinguished at its source, and plaintiffs' damage would not have ensued."

In the case at bar, plaintiffs must prove that but for the presence of the inflammables in controversy, the fire could and would have been extinguished at its source and plaintiffs' damage would not have ensued.

The plaintiffs' strongest evidence is the expert testimony of Fire Chief Blackmon. He was asked the following question by plaintiffs' counsel: "Chief, do you have an opinion satisfactory to yourself, as to whether or not this fire could have been contained and substantially less damage done to this building had this lacquer not been stored next to the assembly line?" After stating that "[t]his is conjecture on my part," Chief Blackmon gave his opinion: "I would say that the fire would have been less intense if there had not been, and what we would consider, an overabundance of flammable liquids inside the plant." Such evidence falls far short of the test for proximate cause.

The evidence tends to show merely that some lacquer was burned at some point during the fire. Some 15 or 16 drums were determined to have a lacquer odor about them after the fire. Liquid lacquer

was still in some of them. There was no evidence which tends to show how many barrels were open before the fire and thus were even capable of feeding the fire in its early stages. The evidence tends to show that of 32 drums in the building after the fire only approximately one-half of them were open in any fashion; of these two had an end removed to be used for trash containers, some had the bung (or plug) removed, and others were ruptured by an explosion which would have been brought on only by intense heat. There is no specific correlation between drums with openings and those which had the lacquer odor. Thus, there is not even circumstantial evidence of just what contribution the lacquer made to the fire. Evidently, some lacquer from the drums fed the fire, as did the plywood, lacquer in the production machinery and air from the outside; the obvious fact, however, that one substance was among others which were consumed in a fire does not make its presence a proximate cause of that fire.

Part of the rationale of the "spreading fire" cases seems to be that the presence of combustibles in a place where they may foreseeably be ignited is a failure to exercise due care. The evidence shows that defendant's management had taken numerous precautions but as Chief Blackmon declared, "* * * a wood refinishing plant, insofar as fire conditions are concerned, is just a hazardous business." Although evidence of the common usage in the business, as to installations, equipment and manner of operation, is "a proper matter for consideration in determining whether or not reasonable care has been exercised," *Watts v. Manufacturing Co.*, 256 N.C. 611, 124 S.E. 2d 809, it is conspicuously absent from the plaintiffs' argument here. A poor housekeeping report eleven months prior to the fire which showed a number of drums stored inside the building, some of which had the plugs removed, was offset by the evidence that "[w]e discontinued leaving empty drums and containers inside the building."

The barrel count after the fire revealed as many as 32 drums inside the plant but that number included 2 or 3 which contained water base latex, several which contained sand, several which contained sweeping compound, two for trash, two for rags, and several for lacquer thinner. The evidence tended to show that 15 or 16 may have contained lacquer and that the usual production routine would require one each for three machines and usually three more to keep the production line running when the first three became empty. It is not shown that the presence of five or so additional ones on hand was unreasonable, and again, it was not shown that those which are

claimed to be there unreasonably were a proximate cause of the destruction of the plant.

[4] We hold that the evidence was not sufficient to show that defendant was negligent in the handling and storage of the lacquer thereby causing damage substantially greater than would have been caused under a reasonable and ordinary operation of such a finishing plant.

The judgment of the superior court dismissing the action as in case of nonsuit is

Affirmed.

BROCK and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM NORMAN BARROW

No. 6926SC497

(Filed 19 November 1969)

1. Criminal Law § 98— motion to sequester witnesses

Motion to sequester the witnesses is addressed to the discretion of the trial court, and the refusal of the motion is not reviewable.

2. Criminal Law § 43; Homicide § 20— homicide prosecution — photograph of body — admissibility

In a homicide prosecution, the trial court properly admitted in evidence the photograph used by a State's witness to illustrate his testimony relating to the location and appearance of the body of deceased, such testimony being offered for the purpose of refuting defendant's contention that he acted in self-defense, where the court instructed the jury that the photograph was admitted for the sole purpose of illustrating the testimony of the witness and not as substantive evidence.

3. Criminal Law §§ 75, 86, 89— impeachment of defendant — use of signed confession not admitted in evidence — waiver of objection

In a homicide prosecution in which the State offered evidence that defendant shot the deceased three times and defendant testified on direct examination that he shot the deceased one time in self-defense but could not remember shooting deceased a second and third time, the trial court did not err in allowing the solicitor, over objection, to cross-examine defendant from a signed statement, given by defendant to a police officer during an in-custody interrogation, in which defendant admitted he shot deceased three times, although the statement had not been admitted in evidence or found by the court to be in compliance with *Miranda v. Ari-*

zona, 384 U.S. 436, where (1) the record indicates defendant testified on cross-examination, without objection, that he gave a statement to the officer and (2) the trial court instructed the jury not to consider the solicitor's examination relating to the statement.

4. Criminal Law § 162— objection to evidence — time of objection

An objection to the admission of evidence is necessary to present defendant's contention that the evidence was incompetent, and defendant must ordinarily object to the question at the time it is asked and to the answer when given.

5. Criminal Law § 162— objection to answer of witness

Where objection is made not to the question but only to the answer of a witness, its exclusion is discretionary with the court.

6. Criminal Law § 169— admission of evidence — harmless error

The admission of testimony over objection is ordinarily harmless when testimony of the same import is theretofore or thereafter introduced without objection, or defendant introduces similar testimony himself, or the matter is proved by other competent evidence.

7. Criminal Law § 167— prejudicial error — burden of proof

The burden is on defendant not only to show error but also to show that the error complained of affected the result adversely to him.

BROCK, J., *dissenting.*

APPEAL by defendant from *Beal, S.J.*, at the 2 June 1969 Regular Schedule "D" Session of MECKLENBURG Superior Court.

By indictment proper in form, defendant was charged with the murder of one John Smith on 8 May 1969. Defendant pled not guilty. The evidence most favorable to the State tended to show:

Defendant resided in a rooming house at 204 N. McDowell Street in the City of Charlotte. On the afternoon of 8 May 1969, he was sitting in a chair on the front porch of the rooming house drinking Kool-Aid mixed with grain alcohol. Late in the afternoon, deceased, who lived next door, walked up to the edge of the porch, engaged the defendant in conversation, and then joined the defendant in sitting on the porch and drinking the spiked Kool-Aid. Between 7:30 and 8:00, leaving deceased sitting in a chair on the porch, defendant entered the house, went upstairs to his room, obtained a single-barreled shotgun, went back downstairs, went out through a side door and around to the front of the house, advanced to within twelve or fourteen feet of deceased who was still sitting in a chair on the porch, aimed the gun at deceased and shot him. Deceased arose from his chair and started in the front door of the house, at which time defendant reloaded his gun, moved closer to

deceased and shot him again. Defendant then went around the house, reentered at the side door, went upstairs and returned immediately to the front porch where he shot the deceased a third time as deceased lay on the floor in the doorway. Deceased died in the doorway from the gunshot wounds. No knife, gun or other weapon was found on or about the deceased's person.

Defendant, as a witness in his own behalf, testified to the following: Before defendant went upstairs the first time and got his gun, deceased asked defendant to loan him some money, and when defendant replied that he did not have any money, the deceased said, "I'm a pretty mean fellow. I'll take my knife and cut off your head if you don't give it to me." At that point, the deceased drew his knife but left and told the defendant he would be back in a few minutes. The deceased returned and continued to ask the defendant for money and threatened to do what he previously said he would do. Following this threat, defendant went upstairs, got his shotgun and returned to the front porch for purpose of scaring the deceased away. As defendant stopped at the steps to the front porch, deceased jumped out of his chair and "went for his pocket." Following this, defendant shot the deceased but did not remember firing any second or third shots.

The jury found defendant guilty of second-degree murder, and the court imposed a prison sentence of thirty years from which defendant appealed.

Attorney General Robert Morgan and Staff Attorney Mrs. Christine Y. Denson for the State.

T. LaFontine Odom and Wallace C. Tyser, Jr., for defendant appellant.

BRITT, J.

[1] Defendant assigns as error the refusal of the trial judge to grant defendant's motion to sequester the State's witnesses. In *State v. Love,* 269 N.C. 691, 153 S.E. 2d 381, in a *per curiam* opinion, our Supreme Court said: "The appellant's first assignment of error challenges the Court's refusal to sequester the witnesses upon the appellant's motion. The refusal was in the Court's discretion and not reviewable. *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670." The assignment of error is overruled.

[2] Defendant next assigns as error the admission as evidence for purpose of illustrating certain testimony a photograph taken

very soon after the shooting showing deceased's body as it lay in the doorway of the rooming house. Defendant contends that the photograph was not relevant and material and that its only purpose was to inflame the jury.

In *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, at page 311, our Supreme Court, in an opinion by Lake, J., said:

> "In the present case, the jury was properly instructed that the photographs in question were allowed in evidence for the sole purpose of illustrating the testimony of witnesses and not as substantive evidence. See: *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *State v. Perry,* 212 N.C. 533, 193 S.E. 727. The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony. [Citation]
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> 'Ordinarily, photographs are competent to be used by a witness to explain or illustrate anything it is competent for him to describe in words.' [Citation] * * * Thus, in a prosecution for homicide, photographs showing the condition of the body when found, the location where found and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray. *State v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196; *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7."

In the case before us the jury was properly instructed that the photograph complained of was admitted in evidence for the sole purpose of illustrating the testimony of the witness Walter Smith and not as substantive evidence. Testimony regarding the location of the body was relevant and material; defendant contended the deceased was advancing on him at the time of the shooting while the State contended the deceased, after the first shot was fired, was entering the house in an effort to get away from the defendant. The testimony of Walter Smith supported the State's contention and he was able to use the photograph to illustrate his testimony. The assignment of error is overruled.

[3] Defendant's assignments of error Nos. 10 and 11 (based on exceptions 10 and 11) are stated in his brief as follows: "The court committed error in allowing the solicitor to cross-examine the de-

fendant in regard to an allegedly incriminating statement made to Detective Fesperman of the Charlotte Police Department while the defendant was in custody without previously having determined in a hearing outside the presence of the jury that the defendant was warned of his constitutional rights and voluntarily waived them."

At the top of page 32, the record on appeal discloses that defendant on cross-examination and without objection testified to the following:

> "I talked to Mr. Fesperman about this case, I said some things to him. I talked to him about the case and signed a written statement, but it wasn't too many words. I suppose I told Mr. Fesperman that I got three shells, one of which I put in the chamber of the shotgun and the other two I put in my pockets. I know I told him this, I had three shells. One of them was in the chamber of this shotgun and the other two were in my pocket. * * *"

Near the bottom of page 32 and on page 33, a continuation of defendant's cross-examination, the record on appeal discloses the following:

> "* * * The only time I knowed anything about shooting him three times is when they said I shot him three times. Mr. Fesperman said that. He investigated the case. I don't remember telling Mr. Fesperman at 9:30 that night, which was within a hundred and twenty minutes after it happened, that after I shot him the first time I reloaded my gun, went on the porch, and shot him while he was lying down in the front door.
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> MR. ODOM: Objection. It appears the Solicitor is reading from a statement and trying to get in the back door what he couldn't get in the front door.
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> THE COURT: Objection overruled.
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> (DEFENDANT'S EXCEPTION #10)
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> I don't remember telling Mr. Fesperman that two hours after it happened. I don't remember whether I told Mr. Fesperman at the Charlotte Police Department that I had shot the man with this single-barreled shotgun the first time and then reloaded it and shot him a second time. I know I told him I shot the deceased one time. But this signature which I looked at a few minutes ago says William Norman Barrow. That's what I signed. This statement contains a sentence to the effect that after I had shot the man the first time, that I then reloaded the

shotgun and shot him the second time, I suppose, because I was still scared. * * * I was scared and too angry I suppose to remember shooting the man the third time. * * * I don't remember anything about shooting the man the third time. I don't remember whether I told Mr. Fesperman at the police station at 9:30 on the night of May 8, 1969, that I shot the man the third time."

Immediately thereafter, with further reference to defendant's cross-examination, the record on appeal reveals the following:

"Q. Well, let me show you this paperwriting and ask you whether or not it refreshes your recollection?

A. I know I—

MR. ODOM: I'm going to object to the paperwriting, your Honor, and move to strike.

THE COURT: Well, objection sustained.

MR. SCHWARTZ: Your Honor, we want to show if he made any prior inconsistent statements about this.

THE COURT: He said he didn't remember.

MR. SCHWARTZ: Well, I would like to see if I could refresh his recollection.

THE COURT: I'll let you ask him if it refreshes his recollection.

MR. SCHWARTZ: Yes, sir.

Q. (By Mr. Schwartz): This statement here with your signature on it at the bottom, do these last few lines on this statement refresh your recollection about it, starting right here? I then, and from there on.

MR. ODOM: I object again to the reference to the statement used by the Solicitor.

THE COURT: Overruled.

MR. ODOM: Exception.

A. These phrases here was supposed to be made what first happened.

THE COURT: Objection sustained.

Q. (By Mr. Schwartz): Well, did you tell Mr. Fesperman then that—

THE COURT: Wait just a minute. Now, members of the

jury, you will not consider any statements that the defendant has made about the paperwriting, whether it refreshes his memory or whether it doesn't.

Q. (By Mr. Schwartz): Well, what did you tell Mr. Fesperman the night that this happened at the police station, Mr. Barrow?

A. He told me that I didn't have to make any statements if I didn't want to, you know. I remember him telling me that. And he asked me some details on it, and I told him a few things. He asked me if I could think of any more to tell and I said no.

Q. (By Mr. Schwartz): What were those few things that you told him?

A. I told him when he first came up there —

THE COURT: Objection. The Court on its own motion sustains the objection and orders its stricken from the record, anything about that examination as to what's on that paper. Ladies and gentlemen of the jury, you will not consider any of the examination at all about what's on that paper.

(DEFENDANT'S EXCEPTION #11)"

Defendant contends that the foregoing violated his constitutional rights as declared in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); *State v. Edwards,* 274 N.C. 431, 163 S.E. 2d 767; and *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833. We adhere to the constitutional principles declared in these cases but do not think that they were violated in the instant case.

[4-6] An objection to the admission of evidence is necessary to present defendant's contention that the evidence was incompetent and defendant must ordinarily object to the question at the time it is asked and to the answer when given. 3 Strong, N.C. Index 2d, Criminal Law, § 162, pp. 114 & 115. Where objection is not made to the question but only to the answer of a witness, its exclusion is discretionary with the court. *State v. Fentress,* 230 N.C. 248, 52 S.E. 2d 795. The admission of testimony over objection is ordinarily harmless when testimony of the same import is theretofore or thereafter introduced without objection, *State v. Creech,* 265 N.C. 730, 145 S.E. 2d 6, or defendant introduces similar testimony himself, *State v. Adams,* 245 N.C. 344, 95 S.E. 2d 902, or the matter is proved by other competent evidence, *State v. Brannon,* 234 N.C. 474, 67 S.E. 2d 633.

[3] We are unable to determine from the record the question or answer that defendant's exception No. 10 relates to. On direct examination defendant admitted shooting deceased one time; on cross-examination the solicitor was attempting to get the defendant to admit that he knowingly shot deceased a second and third time. The record indicates that previous to and subsequent to the objection the defendant, without objection, was cross-examined regarding his statements to Officer Fesperman, thereby rendering harmless the specific question or answer exception No. 10 relates to.

[7] With respect to the specific questions and answers set forth above, we think the State derived no benefit, and defendant suffered no detriment, from them. Furthermore, we believe that any error indicated by exceptions 10 and 11 was cured by the instruction of the trial judge for the jury not to consider any of the examination relating to the paperwriting complained of. *State v. Atwood,* 250 N.C. 141, 108 S.E. 2d 219. The burden is on defendant not only to show error but also to show that the error complained of affected the result adversely to him. *State v. Garnett,* 4 N.C. App. 367, 167 S.E. 2d 63. Assignments of error Nos. 10 and 11 are overruled.

The remaining assignments of error brought forward and discussed in defendant's brief relate to the trial judge's charge to the jury. We have carefully reviewed the charge, particularly with reference to the portions and omissions complained of, but conclude that when the charge is considered contextually, it is free from prejudicial error.

No error.

VAUGHN, J., concurs; BROCK, J., dissents.

BROCK, J., dissenting:

I disagree with the holding of the majority with respect to defendant's assignments of error Nos. 10 and 11. If we are to follow the ruling of the Supreme Court of the United States in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, it seems to me that the State cannot impeach the defendant by showing prior inconsistent statements on the question of guilt in a confession which has not been found to have been voluntarily given under the *Miranda* requirements. See: *Proctor v. U. S.,* 404 F. 2d 819 (App. D.C. 1968); *U. S. v. Fox,* 403 F. 2d 97 (2d Cir. 1968); *Groshart v. U. S.,* 392 F. 2d 172 (9th Cir. 1968); *Wheeler v. U. S.,* 382 F. 2d 998 (10th Cir. 1967); *U. S. v. Armetta,* 378 F. 2d 658 (2d Cir. 1967); *Commonwealth v. Robinson,* 428 Pa. 458, 239 A. 2d 308 (1968);

Gœrtner v. State, 35 Wis. 2d 159, 150 N.W. 2d 370 (1967); *People v. Luna,* 37 Ill. 2d 299, 226 N.E. 2d 586 (1967); *State v. Brewton,* 247 Or. 241, 422 P. 2d 581 (1967); *U. S. v. Lincoln,* 17 U.S.C.M.A. 330, 38 C.M.R. 128.

In this case the cross-examination by the solicitor from the in-custody pre-trial statement given by defendant to the investigating officer went to the very heart of defendant's defense that he acted in self-defense, or in the heat of passion suddenly aroused. If the State had an admissible confession from defendant, it had ample opportunity to establish it as such. If the confession was inadmissible for failure of the *Miranda* requirements, the procedure followed by the solicitor perverted the law.

It seems clear that the trial judge later realized the error because he thereafter undertook to withdraw the evidence from consideration by the jury. However, what is involved here is not judicial supervision of rules of evidence, but constitutional rights of a defendant. The particular right involved is defendant's Fifth Amendment right against self-incrimination as it has been declared in *Miranda.* In my opinion a violation of a constitutional right cannot be cured by an instruction to the jury to disregard evidence that constituted the violation.

ROBERT D. YELTON, BY HIS NEXT FRIEND, O. M. YORK v. MARJORIE CONNER DOBBINS, NORRIS GREGORY DOBBINS, BY AND THROUGH HIS GUARDIAN AD LITEM, MARJORIE CONNER DOBBINS; LUCILLE CROOM PARKER AND HUSBAND, FLOYD E. PARKER, AND J. D. ROLAND

No. 6929SC449

(Filed 19 November 1969)

1. Automobiles §§ 50, 51— failure to keep proper lookout — speeding — sufficiency of evidence

In this action by plaintiff guest passenger against the driver and the owner of an automobile in which plaintiff was riding and the driver of a truck which allegedly caused the automobile to wreck, plaintiff's evidence *is held* sufficient to be submitted to the jury on the issue of the automobile driver's negligence in failing to keep a proper lookout, failing to keep the automobile under proper control, and driving in excess of the speed limit.

2. Automobiles § 90— instructions — cross-actions against co-defendant — negligence of co-defendant

In this action by plaintiff guest passenger against the driver and the

owner of the automobile in which plaintiff was riding and the driver of a truck which allegedly caused the automobile to wreck, wherein defendant automobile driver filed a cross-action against the truck driver for personal injuries and defendant automobile owner filed a cross-action against the truck driver for damages to her automobile, the trial court did not err in failing to instruct the jury that if they should find that plaintiff passenger was injured by the negligence of defendant truck driver, they should also find that defendant automobile driver was injured and that defendant automobile owner was damaged by the negligence of defendant truck driver.

3. Witnesses § 8— co-defendants — order of cross-examination of plaintiff's witnesses

In this action by plaintiff guest passenger against the driver and the owner of the automobile in which plaintiff was riding and the driver of a truck, the trial court did not err in permitting defendant automobile driver and defendant automobile owner to cross-examine witnesses offered by plaintiff before they were cross-examined by defendant truck driver, it being the duty of the court to determine the order of cross-examination when more than one party is entitled to cross-examine.

4. Witnesses § 7— leading questions

Whether counsel will be permitted to ask a leading question is within the discretion of the trial judge, and the exercise of such discretion will not be reviewed on appeal.

5. Trial § 10— questions by trial court — expression of opinion

In this action for injuries received in an automobile accident, the trial court did not express an opinion on the evidence or impeach or discredit the witnesses by questions which the court asked various witnesses.

6. Evidence § 31— police report — testimony as to contents of report

In this action for personal injuries resulting from an automobile accident, answer of police officer stating the name of one defendant, in response to a question as to whether he had any recollection from his investigation of who was listed in his accident report as driver number one, did not have the effect of permitting the officer to testify as to the contents of a report he had made.

7. Automobiles §§ 50, 57— failure to stop at stop sign — failure to keep proper lookout — sufficiency of evidence

In this action by plaintiff guest passenger against the driver and the owner of the automobile in which plaintiff was riding and the driver of a truck which allegedly caused the automobile to wreck, plaintiff's evidence *is held* sufficient to be submitted to the jury on the issue of defendant truck driver's negligence in failing to stop for a stop sign, failing to keep a proper lookout, and failing to keep her vehicle under control.

APPEAL by defendants Marjorie Conner Dobbins; Norris Gregory Dobbins, by and through his guardian ad litem, Marjorie Conner Dobbins; and Lucille Croom Parker from *Beal, S.J.*, April 1969 Session of Superior Court held in RUTHERFORD County.

Plaintiff alleged that the minor plaintiff, Robert D. Yelton (Robert), was injured by the actionable negligence of the defendants. Plaintiff offered evidence which, in substance, tended to show that on 17 November 1966 at about 4:00 p.m., Robert was riding as a guest passenger on the right front seat of a Ford automobile owned by Marjorie Conner Dobbins which was being operated on U. S. Highway #74 Bypass in Rutherfordton by Norris Gregory Dobbins (Gregory). Gregory, who was 16 years old, was driving North on U. S. Highway #74 Bypass at a speed of 50 miles per hour in a 45 mile per hour zone. The road was straight for two hundred yards south of the intersection of West Street and U. S. Highway #74 Bypass. Gregory was driving with one hand; his other hand was on the gearshift or the radio. When Gregory reached a point near the intersection of West Street and U. S. Highway #74 Bypass, a 1951 or 1961 International truck with a red cab operated by the defendant Lucille Croom Parker (Parker) and owned by J. D. Roland entered U. S. Highway #74 Bypass immediately in front of the automobile operated by Gregory. The red truck did not stop for a stop sign facing it at the entrance to the highway. The red truck stopped momentarily after entering the highway, partially blocking both lanes of travel, before it proceeded in a southerly direction down the highway. When the red truck entered the highway in front of him, Gregory put on brakes, turned to his right and skidded 216 feet before striking and breaking a utility pole. The license number of the red truck was obtained by plaintiff's witness, Howard Lane, who turned it over to police officers. The impact with the pole damaged the car Gregory was driving and injured both Gregory and Robert.

Gregory and Marjorie Conner Dobbins denied negligence and filed a cross action against their co-defendant Lucille Croom Parker. Gregory sought to recover of Parker for personal injuries, and Marjorie Conner Dobbins sought to recover of Parker for damages to her automobile.

The defendants Dobbins offered evidence which, in substance, tended to show that Gregory was not traveling at a speed in excess of the posted speed limit. That he was operating the automobile in a careful and prudent manner. Gregory was injured in the collision of the car with the utility pole. When Parker entered the highway in front of him, Gregory did all that a reasonable person in the exercise of due care could do to avoid colliding with it and oncoming traffic before hitting the utility pole and damaging the car he was driving to such extent that it was a total loss.

Parker denied negligence and offered evidence which, in substance, tended to show that she was hauling shelled corn on the date in question. She was driving a 1961 International truck with a red cab and black side boards. In traveling from her farm in Old Fort to Yelton Milling Company where she was carrying the corn, she traversed U. S. Highway #74 Bypass but did not at any time on that date go on West Street or drive out of West Street into the #74 Bypass. That she did not see an accident.

Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff Robert D. Yelton, injured by the negligence of the defendant Norris Gregory Dobbins, as alleged in the complaint?

ANSWER: Yes

2. Was the plaintiff injured by the negligence of the defendant Lucille Croom Parker, as alleged in the complaint?

ANSWER: Yes.

3. Was the defendant Mrs. Lucille Croom Parker, agent of the defendant J. D. Roland, as alleged in the complaint?

ANSWER: No

4. What amount, if any, is the plaintiff Robert D. Yelton entitled to recover?

ANSWER: $20,000

5. Was the defendant Norris Gregory Dobbins injured by the negligence of Lucille Croom Parker, as alleged in the cross-action?

ANSWER: No

6. Was the automobile of Mrs. Marjorie Conner Dobbins damaged by the negligence of the defendant Lucille Croom Parker, as alleged in the cross-action?

ANSWER: No

7. What amount, if any, is the defendant Norris Gregory Dobbins entitled to recover of the defendant Lucille Croom Parker on account of personal injuries?

ANSWER: .....

8. What amount, if any, is the defendant Marjorie Conner Dobbins entitled to recover of the defendant Lucille Croom Parker, for property damages?

ANSWER: ....."

From the entry of judgment based on the answers to the issues, the defendants Marjorie Conner Dobbins; Norris Gregory Dobbins, by and through his guardian ad litem, Marjorie Conner Dobbins; and Lucille Croom Parker appealed to the Court of Appeals.

Harry K. Boucher for plaintiff appellee.

Hamrick & Bowen by Fred D. Hamrick, Jr., for Marjorie Conner Dobbins and Norris Gregory Dobbins, by and through his guardian ad litem, Marjorie Conner Dobbins, defendant appellants.

Hamrick & Hamrick by J. Nat Hamrick for Lucille Croom Parker, defendant appellant.

MALLARD, C.J.

The record is not clear as to what disposition was made of the case as to the defendant Floyd E. Parker. He was not referred to in the issues submitted or in the judgment entered. He did not appeal.

Appeal of Marjorie Conner Dobbins
and Norris Gregory Dobbins, by and
through his guardian ad litem,
Marjorie Conner Dobbins

[1] Gregory and Marjorie Conner Dobbins assign as error the failure of the trial court to allow their motion for judgment of nonsuit. It was stipulated "that the car driven by Gregory Dobbins, and owned by Mrs. Marjorie Dobbins was a 'family purpose car' and was being used as such at the time of the accident." It was for the jury to say whether Gregory failed to keep a reasonable lookout, failed to keep the vehicle under proper control, or whether his speed was in excess of the maximum speed permissible under the statute, and if so, whether such was a proximate cause of the collision and injuries to plaintiff. We are of the opinion and so hold that there was ample evidence of negligence on the part of Gregory to require submission of the issue of his negligence to the jury.

[2] Defendants Dobbins assign as error the failure of the judge to instruct the jury that if they should answer the issue numbered 2 "yes" that it would be their duty to answer issues numbered 5 and 6 "yes." Issue number 2 required the jury to find that the *plaintiff,* Robert D. Yelton, *was injured* by the negligence of the defendant Parker. Issue number 5 required the jury to find that the *defendant* Norris Gregory Dobbins *was injured* by the negligence of the defendant Parker. Issue number 6 required the jury to find that the

automobile of the *defendant* Mrs. Marjorie Conner Dobbins *was damaged* by the negligence of defendant Parker. A finding by the jury that the plaintiff *was injured* by the negligence of Parker does not demand a finding that Gregory *was injured* or that the Dobbins automobile *was damaged* by the negligence of Parker. The judge did not commit error in failing to so instruct the jury.

The defendants Dobbins also contend that the answer to issue number 2 is inconsistent with the answers to issues numbered 5 and 6 and that the judge committed error in accepting the verdict, in failing to set the verdict aside, and in the entry of judgment on the verdict. In view of what has been said above, these contentions are without merit.

The defendants Dobbins and Parker were original defendants. No question has been raised or decided as to the right of Gregory and Marjorie Conner Dobbins to maintain such a cross action in this case under the rules of civil procedure applicable at this time. *Jarrett v. Brogdon,* 256 N.C. 693, 124 S.E. 2d 850 (1962).

Appeal of Lucille Croom Parker

[3] Defendant Parker contends that the trial court committed error in permitting the defendants Dobbins to cross-examine the witnesses offered by the plaintiff before they were cross-examined by the defendant Parker. The court, in the exercise of sound legal discretion, has the right to regulate and control the conduct of a trial. *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912 (1960). "And it is the duty of the court to control the examination and cross-examination of witnesses." 7 Strong, N.C. Index 2d, Trial, § 9. When there is more than one party entitled to cross-examine, it is the duty of the court to determine in what order the cross-examination is to be conducted. We hold that it was not error for the trial judge to permit the defendants Dobbins to cross-examine the witnesses offered by the plaintiff before they were cross-examined by the defendant Parker.

[4] Parker contends that it was error for the court to permit the defendant Norris Gregory Dobbins to ask the plaintiff, Robert D. Yelton, leading questions on cross-examination. This contention is without merit. "Whether the counsel shall be permitted to ask a leading question is within the discretion of the trial judge, and the exercise of such discretion will not be reviewed on appeal." 7 Strong, N.C. Index 2d, Witnesses, § 7.

[5] Defendant Parker's assignments of error 2, 5, and 7 relate to the judge asking questions of different witnesses. In 7 Strong, N.C.

Index 2d, Trial, § 10, there appears the following: "It is proper for the court to ask a witness questions for the purpose of clarifying the witness' testimony, but in so doing the court should be careful not to express an opinion on the facts or impeach or discredit the witness." It is the better practice for the trial judge to refrain from asking questions of the witnesses. However, after carefully considering the circumstances and the questions and statement complained of, we are of the opinion that such did not constitute an expression of opinion on the facts or impeach or discredit the witness and that such did not prejudice the defendant Parker.

[6] Defendants' assignment of error 4, based on defendant Parker's exception 9, asserts that the court permitted a police officer to testify as to the contents of a report he made. After the police officer was handed a copy of the report of the accident, upon redirect examination by counsel for the plaintiff, the following occurred:

> Q Who do you show there as being the driver in the number one there?
>
> MR. NAT HAMRICK: Objection, sir. Your Honor, this report is not competent under any circumstances.
>
> THE COURT: Well, he can use it if he has any knowledge — he can use it to refresh his recollection and for no other person (sic).
>
> Q All right, sir, do you have any recollection then from your investigation, who was the driver of what's listed here in this report as driver number one?
>
> MR. NAT HAMRICK: Now, your Honor, I object to that. He is talking about the course of his investigation. The man has been examined and cross examined about what he knows.
>
> THE COURT: Objection overruled. I think its's competent.
>
> EXCEPTION.
>
> Q Go ahead.
>
> A Lucille Parker."

The witness did not answer the first question propounded. The answer came after the second question, and we assume that it was in response to the second question. The lawyers in their conduct of the trial of this case were very vigorous and eager to protect the interests of their clients, and counsel in their zeal frequently appeared to be arguing with each other. Perhaps this resulted in the question not being clear. We do not think that the answer had the effect of

the police officer testifying "as to the contents of the report he made," nor did allowing the witness to answer the question result in prejudicial error so as to require a new trial.

[7] There was ample evidence for the jury to find that Parker was negligent in that she drove the truck out of West Street into U. S. Highway #74 Bypass immediately in front of the Dobbins vehicle, failed to yield the right of way after failing to stop for a stop sign facing her, failed to keep a proper lookout, and failed to keep the vehicle she was operating under control. The trial judge did not commit error in overruling the motion of Parker for a nonsuit.

Parker also assigns as error a portion of the charge, but when the entire charge of the court to the jury is considered contextually, no error prejudicial to defendant Parker is made to appear.

After careful consideration of all assignments of error of all the defendants, in the trial we find

No error.

MORRIS and HEDRICK, JJ., concur.

THOMAS LOYD MORRIS, ADMINISTRATOR OF THE ESTATE OF WALLACE LOYD MORRIS, DECEASED v. META H. BIGHAM, EXECUTRIX OF THE ESTATE OF HUGH BIGHAM, AND WHEELER DALE, ADMINISTRATOR OF THE ESTATE OF CECIL JAMES LEONHARDT

No. 6925SC421

(Filed 19 November 1969)

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

On motion for judgment of nonsuit in a civil case, the plaintiff is entitled to have the evidence considered in the light most favorable to him, and he is entitled to the benefit of every reasonable inference to be drawn therefrom.

2. Automobiles § 66— identity of driver

The identity of the driver of an automobile may be established by circumstantial evidence, either alone or in connection with direct evidence.

3. Automobiles § 94— contributory negligence of passenger — sufficiency of evidence

In this wrongful death action brought by the administrator of an automobile passenger against the administrator of the automobile driver, the

evidence does not show contributory negligence by the passenger as a matter of law, there being no evidence that either the driver or passenger was under the influence of intoxicating liquor, and there being no evidence that the driver improperly operated the automobile until an apparent race with another automobile immediately prior to the fatal wreck.

4. Death § 7— evidence of pecuniary loss

In this wrongful death action, reference in the record on appeal to the omission from the record of testimony as to the health, character, education and working habits of plaintiff's intestate is sufficient to show pecuniary loss in the death of plaintiff's intestate.

5. Automobiles § 105— agency of non-owner driver — G.S. 20-71.1

In this wrongful death action, plaintiff's evidence placing title to the automobile in question in the non-driver owner is sufficient to require submission of the case to the jury on the issue of the driver's agency. G.S. 20-71.1.

6. Automobiles § 66— identity of driver — sufficiency of evidence

In this wrongful death action arising out of an automobile accident, plaintiff's evidence *is held* sufficient to be submitted to the jury on the question of the identity of defendant's intestate as the driver of the automobile at the time of the accident, where it tends to show that immediately after the accident plaintiff's intestate was found in the right front seat of the automobile with his feet and legs under the dash and his head next to the right window, and that defendant's intestate was found with his feet under the brake and clutch pedals and his head and shoulders lying across the body of plaintiff's intestate.

APPEAL by plaintiff from *Bryson, J.*, 5 May 1969 Session of Superior Court held in BURKE County.

This is a wrongful death action. The plaintiff alleged that the death of his intestate was proximately caused by the negligence of Cecil James Leonhardt (Leonhardt) who was the operator of a 1964 Chevrolet automobile owned by Hugh Bigham (Bigham). In the complaint it is alleged, among other things, that Leonhardt was the agent of Bigham; that on 9 December 1966 the Bigham automobile, in which Wallace Loyd Morris (Morris) was riding, failed to go around a curve in the road on East Meeting Street in the Town of Morganton; that the automobile was being operated by Leonhardt in a reckless manner in violation of the reckless driving statute at an unlawful rate of speed in excess of 80 miles per hour in a 35 mile per hour speed zone and without keeping it under proper control; and that the automobile operated in such manner, after striking several parked automobiles, collided with a tree on the driver's left side of the road with such force that the car was demolished, and both occupants of the automobile were killed.

Wheeler Dale, administrator of the estate of Leonhardt, in his

answer denied the material allegations of the complaint and, in the alternative, alleged that Morris was contributorily negligent and that Morris was the driver of the automobile. Dale asserted a counterclaim against the plaintiff for the alleged wrongful death of Leonhardt.

Meta H. Bigham, executrix of the estate of Hugh Bigham, in her answer denied the material allegations of the complaint and alleged contributory negligence on the part of Morris if Leonhardt should be found to be the driver of the automobile. In the alternative, the executrix alleged that Morris was the driver of the automobile without permission of the owner.

After plaintiff had offered evidence and rested, the court allowed the motion of each defendant for judgment as of nonsuit. The defendant Wheeler Dale, administrator of the estate of Cecil James Leonhardt, took a voluntary nonsuit as to his claim against the plaintiff.

Plaintiff excepted to the entry of the judgment dismissing the action as of nonsuit and appealed to the Court of Appeals.

Corne & Warlick by Stanley J. Corne and Claude B. Sitton for plaintiff appellant.

Byrd, Byrd & Ervin by John W. Ervin, Jr., and Robert B. Byrd for defendant Wheeler Dale, Administrator of the Estate of Cecil James Leonhardt, appellee.

Patton & Starnes by Thomas M. Starnes for defendant Meta H. Bigham, Executrix of the Estate of Hugh Bigham, appellee.

MALLARD, C.J.

In an automobile collision, events which occurred immediately prior to and at the moment of impact may be established by circumstantial evidence, either alone or in combination with direct evidence.

The evidence here was ample to show that the driver was operating the 1964 Chevrolet automobile owned by Bigham on the streets of the Town of Morganton in a reckless manner in violation of G.S. 20-140, the reckless driving statute. He was driving at a speed in excess of 70 miles per hour in a 35 mile per hour zone and the automobile went out of control, skidded 326 feet and 9 inches, knocked a four-by-four post out of the ground, struck and damaged eight other automobiles, and came to a stop after colliding with a

tree with such force that the 1964 Chevrolet automobile was estimated to be a total loss. All the evidence tended to show that Morris and Leonhardt were the only occupants of the automobile at the time it collided with the tree and that they were killed in the collision. There is ample evidence, direct and circumstantial, that driver negligence proximately caused the death of both occupants.

The crucial questions presented on this appeal are: Is there sufficient evidence to require submission of the case to the jury that Leonhardt was the driver of the automobile at the time it collided with the tree? If so, is there sufficient evidence against Bigham to require submission of the case to the jury as to him?

[1] It is elementary that on a motion for judgment of nonsuit in a civil case, the plaintiff is entitled to have the evidence considered in the light most favorable to him, and he is entitled to the benefit of every reasonable inference to be drawn therefrom. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969).

> "Inferences as to who was driving the automobile at the time of the wreck cannot rest on conjecture and surmise. *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. The inferences permitted by the rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff. *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879. To make out this phase of the case plaintiff must offer evidence sufficient to take the question of whether defendant's intestate was driving the automobile at the critical moment out of the realm of conjecture and into the field of legitimate inference from established facts. *Parker v. Wilson, supra.*" *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115 (1958).

[2] The identity of the driver of an automobile may be established by circumstantial evidence, either alone or in connection with direct evidence. *King v. Bonardi,* 267 N.C. 221, 148 S.E. 2d 32 (1966); *Drumwright v. Wood,* 266 N.C. 198, 146 S.E. 2d 1 (1966); *Johnson v. Fox,* 254 N.C. 454, 119 S.E. 2d 185 (1961); *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492 (1957).

[6] Plaintiff's evidence is summarized, except where quoted, in part, as follows:

On the night of 9 December 1966 Hugh Bigham, Jr. (Hugh), Donald Sisk (Donald), Leonhardt and Morris were riding around in the Town of Morganton in a 1964 Chevrolet Super Sport automobile owned by Hugh Elliott Bigham. Hugh was driving the car

during the first part of the evening. Each of the four had consumed about "a beer and a half or two" about an hour and a half prior to the time Hugh and Donald got out of the Chevrolet and went with some girls. It was 11:10 p.m. when Donald and Hugh got into the girls' car. Then Leonhardt began driving the 1964 Chevrolet with Morris sitting in the passenger seat, and they went South on Sterling Street. Jackie David Brittain "about 11:00 or 11:30, somewhere in that neighborhood," saw someone operating the 1964 Chevrolet automobile on East Meeting Street going by Hardee's. He could not tell who was operating the car. He followed it and was stopped by a red light at Hendrick's Curb Market, a short block behind the 1964 Chevrolet which was stopped by a red light at "Wells and Seals." Another car, which looked like an Oldsmobile, was parked by the side of the 1964 Chevrolet. When the light changed, the Oldsmobile and Chevrolet left "at a high rate of speed." The witness Brittain testified:

> "I saw the Chevrolet from the time that it left the light at Wells and Seals. I saw it go into the curve at Burke Dairy and as it went into the curve at Burke Dairy the '64 Chevrolet was kind of sliding to the right the way the curve goes. . . . When I saw the Chevrolet automobile in the curve I could not see the Oldsmobile. It was way in front of the Chevrolet. I do not have an opinion as to how far it is from the light at Wells and Seals to the curve down at Burke Farmers Dairy, but it should be a short block and a half maybe or maybe a block.
>
> I observed the automobile during the entire time that it was traveling from the traffic light at Wells and Seals to the Burke Farmers Dairy. I have an opinion that the automobile was traveling 70 or 80 miles an hour at the time it went into the curve at Burke Dairies. When I got to the curve at Burke Farmers Dairy, I saw this 1964 Chevrolet parked out straight across in front of the road, the front end out in the road, back end was against a tree. At that time I saw steam coming off of the engine, out of the radiator I guess. At that time I did not see anything along the left side of the roadway back from where the automobile was in the roadway, but later I saw some kind of pole knocked down and some cars were torn up, looked like where he had hit them as he went down. I got out of my automobile and there was no one at the car when I got there.
>
> . . . When I got out of my car, I went over to the car and I saw James Leonhardt. At that time there was a boy in there whose name I didn't know. The boy that I didn't know was

down in the seat and James had him covered up. I couldn't see his face. The boy that I didn't know was in the passenger seat opposite from the driver. James Leanhardt was laying in a kind of upright position on the other boy's shoulders with his back on his shoulder. I paid attention to the feet and legs of James Leonhardt and they were under the brake pedal and clutch pedal. The automobile had bucket seats and had a console in the middle. The console was level with the seats. The buttocks of James Leonhardt was sitting on the console. The other boy was kind of over close to the door, he was kind of scooted down in on the seat about the end."

From the damage to the 1964 Chevrolet, it appeared that the right or passenger side hit the tree near the right front.

Plaintiff's witness Wade Buchanan testified that he heard the collision and that it occurred between 11:30 and 11:45 p.m. Then he went to the scene which was about 100 yards away from his home. He testified:

"Morris was sitting on the right side of the car slumped down in the seat sitting on the edge of the seat with his feet and legs under the dash and his head was lying over next to the right window. Leonhardt was sitting on the driver's seat and the console with his feet up under the steering wheel and pedals and his head and shoulders were lying on Morris' chest about right in here (indicating). Morris looked like he was breathing, but I did not touch these people at any time. I did not see anyone else around the car touch the boys. The right ear of the Morris boy was cut real bad. It was just about cut off. That was the one that was up against the window and door. He had some cuts about his face. I did not leave the scene until the ambulances came. Nobody moved the boys before the ambulance people came."

Plaintiff's witness Richard Elden Abernethy testified that on this occasion he was working for Kirksey Funeral Home and answered a call on 9 December 1966, arriving at the scene of this collision between 11:30 and 11:45 p.m. He testified:

"I went to the car and I saw James Leonhardt and Wally Morris in the autmobile. James was slumped over Wally Morris. James was on the lefthand side of the car, Wally was on the righthand side sloped down toward the floorboard. I paid attention to the feet and legs of James Leonhardt. His feet was under the clutch pedal and his waist was on the console between the driver's seat and the console. The buttocks or rear

portion of James Leonhardt was planted between the console and the driver's seat. He was half on the edge of the seat and the console."

Leonhardt, at the time the ambulance attendant arrived, showed no signs that he was breathing, and Morris "was unconscious and just gasping for breath like he was choking to death." Leonhardt and Morris both died that night as a result of injuries received in the collision.

Plaintiff's witness Bobby M. Stamey testified that he was a police officer of the Town of Morganton and arrived at the scene of this collision at about midnight on 9 December 1969. He found a 1964 Chevrolet automobile had been involved in the accident and measured skid marks extending from the vehicle for a distance of 326 feet and 9 inches. The 1964 Chevrolet bore license plate number EL 4972. He testified:

"I made an investigation of the automobile to determine the Motor Vehicle Number of the same. The Motor Vehicle Number was 41447Y178679."

Plaintiff introduced into evidence a certified copy of a Certificate of Title issued to Hugh Elliott Bigham for a 1964 model Chevrolet Coupe bearing Motor Number 6399418 and having Serial or Identification Number 41447Y178679.

[3] Defendants contend that the evidence shows that Morris was guilty of contributory negligence as a matter of law. This contention is without merit. There is no evidence that Leonhardt or Morris was under the influence of liquor. There is no evidence that Leonhardt was driving improperly until the apparent race with the Oldsmobile immediately prior to the fatal wreck. The contention of defendants as to contributory negligence of Morris, on this record, is without merit.

[4] Defendants also assert that the plaintiff failed to show pecuniary loss in the death of his intestate. This contention is without merit. The parties stipulated that the record constituted an agreed case on appeal. On pages 46 and 47 of the record on appeal, there is a reference to the omission from the record of testimony as to the health, character, education and working habits of plaintiff's intestate. This reveals that there was at least some evidence thereof. Perhaps this testimony should not have been omitted. However, we think this reference that there was such evidence was sufficient to show pecuniary loss under the rule stated in *Greene v. Nichols*, 274 N.C. 18, 161 S.E. 2d 521 (1968).

[5] Plaintiff relied upon the provisions of G.S. 20-71.1 in order to make out a case against Bigham. This statute provides that:

> ". . . (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment."

[5, 6] Considered in the light most favorable to the plaintiff, we are of the opinion and so hold that the evidence offered by plaintiff is sufficient to permit, but not compel, a jury to draw the legitimate inference from established facts that Leonhardt was driving the 1964 Chevrolet automobile owned by Hugh Bigham at the time of the fatal wreck. For a similar but not identical factual situation, see *Yates v. Chappell*, 263 N.C. 461, 139 S.E. 2d 728 (1965). We think the plaintiff also offered sufficient evidence, in view of the provisions of G.S. 20-71.1, to require submission of the case to the jury against Bigham. We hold there was error in allowing the motion of each defendant for judgment of nonsuit.

Reversed.

MORRIS and HEDRICK, JJ., concur.

ROAMIN BOWLER DORMAN, JR., TRUSTEE UNDER WILL OF R. B. DORMAN, DECEASED v. WAYAH VALLEY RANCH, INC.

No. 6930SC461

(Filed 19 November 1969)

1. Easements § 6— action to establish easement by implication upon severance of title — sufficiency of evidence

In an action seeking to require defendant to remove obstructions in a roadway extending across defendant's property from a highway to plaintiff's property and to have defendant permanently enjoined from placing further obstructions on the roadway, plaintiff's evidence is sufficient to support a finding of an easement by implication in the roadway upon severance of title, where (1) the lands now owned by plaintiff and defendant were part of a single title prior to 1937, in which year the separation of title occurred, (2) several witnesses, including the plaintiff, testified in detail as to the many and continuous uses of the roadway from

1919 to 1961, and (3) plaintiff needs the roadway to reach a summer cabin located on his land, but since the defendant's obstruction he has been unable to reach the cabin or keep it in repair.

2. Easements § 3— easement by implication upon severance of title

The essentials necessary to the creation of an easement by implication upon severance of title are: (1) a separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained.

APPEAL by defendant from *Martin, J., (Harry C.),* April 1969 Session, Superior Court of MACON County.

This is an action seeking to require defendant to remove obstructions in the roadway leading from a public road across lands of defendant to lands of plaintiff and asking that defendant be permanently enjoined and restrained from placing any further obstructions in the roadway and from interfering with the use of the roadway by plaintiff, his heirs, successors or assigns.

The complaint alleges, in substance, that the plaintiff owns a tract of land located some distance off the Wayah public road and defendant owns a tract of land lying between the plaintiff's land and the Wayah public road. Prior to 2 July 1937, Annie L. Slagle and John R. Slagle owned a large tract of land which included the tract now owned by plaintiff and the tract now owned by defendant. On 2 July 1937, the Slagles conveyed the tract now owned by plaintiff to Herman Menzel and wife. By conveyance and by will title thereto became vested in plaintiff. Annie L. Slagle acquired the interest of John R. Slagle in the remaining portion of the large tract under John R. Slagle's will. On 7 November 1945, she conveyed the tract now owned by defendant to T. H. McNish and E. M. McNish and on 24 November 1953, they conveyed it to defendant. For many years prior to 2 July 1937, a dwelling house was located on the tract now owned by plaintiff and ingress and egress to the house and the land now owned by plaintiff was by a road leading from said property over the lands now owned by defendant to the Wayah public road. This road was used for a great many years prior to 2 July 1937 by the occupants of the house and was the only means of access to the property. The subsequent owners of the property, including plaintiff continued to use the road as the only access to the property. Plaintiff's immediate predecessor in title constructed a summer home on the land, using the road to haul in all building materials used therein and kept the road maintained. In 1961 defendant obstructed the road and has refused to allow plaintiff to use it. Al-

though the house needs repair plaintiff cannot move materials therefor onto the property and cannot use the property as a home in which to live because of the obstructions on the road. Plaintiff's land does not abut any public road. The road leading from Wayah public road over defendant's land is the only way plaintiff can gain access to his property and the road is necessary to the beneficial enjoyment of plaintiff's land.

Defendant answered denying the necessary use of the road by plaintiff, averring that a road constructed by the Mead Corporation in an entirely different location is available to plaintiff, denying the existence of a right-of-way, averring that it purchased its land with no notice of any easement for a road to plaintiff's land and further averring abandonment of the road or easement if any existed.

At the close of plaintiff's evidence defendant demurred to the evidence and moved for judgment as of involuntary nonsuit. The motion was denied and defendant excepted. Defendant introduced certain deeds into evidence, rested, and renewed its motion for nonsuit, which was denied and defendant excepted. The jury answered the issue submitted in favor of plaintiff and defendant appealed assigning error.

Jones, Jones and Key, by R. S. Jones, Jr., and J. H. Stockton, for plaintiff appellee.

Monteith, Coward & Coward, by Thomas W. Jones, for defendant appellant.

MORRIS, J.

[1] The only assignment of error brought forward by defendant is the failure of the court to allow its motion for nonsuit at the close of all the evidence.

The record contains a stipulation that competent evidence was introduced by plaintiff upon which the jury could find the following facts:

"(1) That the plaintiff is a citizen and resident of Fulton County, Georgia, and that the defendant is a North Carolina Corporation with its principal place of business in Macon County, North Carolina.

(2) That prior to July 2, 1937 Annie L. Slagle (single) and John R. Slagle (single) were the owners of a tract of land in Macon County, North Carolina, and that said tract of land in-

cluded the lands now owned by the plaintiff and the land now owned by the defendant.

(3) That prior to July 2, 1937, and on that date, and thereafter that portion of the Slagle lands now owned by the defendant adjoined and abutted upon a public road known as the Wayah Public Road, and that portion of the Slagle lands now owned by the plaintiff did not and does not join or abut upon any public road.

(4) That on July 2, 1937 Annie L. Slagle and John R. Slagle conveyed by Warranty Deed that portion of their tract of land described in Paragraph 3 of the Amended Complaint to Herman Menzel and wife, Willa H. Menzel, the habendum clause in said deed reading as follows: 'To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said Herman Menzel and wife, Willa H. Menzel, and their heirs and assigns, to their only use and behoof forever', and that said warranty deed was duly recorded in the Office of the Register of Deeds of Macon County and appears of record in said Office.

(5) That on January 22, 1940 Herman Menzel and wife, Willa H. Menzel conveyed by warranty deed with the above quoted habendum clause the lands now owned by the plaintiff and described in Paragraph 3 of the Amended Complaint to R. B. Dorman and that said deed was duly recorded in the Office of the Register of Deeds of Macon County and appears of record in said Office.

(6) That R. B. Dorman thereafter died leaving a will dated July 19, 1954, that said will was allowed for probate in Macon County, North Carolina, on August 10, 1955 following the death of R. B. Dorman, and that the plaintiff in this action became the owner in fee of his lands described in Paragraph 3 of the Amended Complaint under and by virtue of said will.

(7) That upon the death of John R. Slagle sometime prior to February 18, 1938, Annie L. Slagle became the owner in fee of the remainder of the Slagle large tract of land not theretofore conveyed to Herman Menzel and wife, Willa H. Menzel.

(8) That on November 7, 1945 Annie L. Slagle conveyed by Warranty Deed to T. H. McNish and E. M. McNish the remainder of the Slagle large tract of land, the habendum clause in said deed reading as follows: 'To have and to hold the aforesaid tract or parcel of land and all privileges and appurten-

ances thereto belonging to the said T. H. McNish and E. M. McNish, and their heirs and assigns, to their only use and behoof forever'; that said deed contained no reference to any road or road right-of-way or easement, and that said deed was duly recorded in the Office of the Register of Deeds of Macon County, North Carolina and appears of record in said Office.

(9) That on November 24, 1953 T. H. McNish and wife, E. M. McNish and wife conveyed their lands by warranty deed to the defendant with the same habendum clause quoted in paragraph next above, and that said deed contained no reference to any road or road right-of-way or easement, and that said warranty deed was duly recorded in the Office of the Register of Deeds of Macon County and appears of record in said office."

We note that plaintiff alleges in his complaint that the metes and bounds description of the land owned by plaintiff contains the following call: "thence N 8 degrees 30 E crossing small island in Locust Tree Creek at 3.00 chains, 4.00 chains to corner 7, a planted stone with wits. on north side of road;" and this is not denied by defendant.

"It is settled law in this jurisdiction that where an owner of a tract of land conveys a portion thereof, the grantee takes the portion conveyed with the benefits or burdens of all those apparent and visible easements which appear at the time of the conveyance to belong to it, as between it and the property which the grantor retains. *Bradley v. Bradley,* 245 N.C. 483, 96 S.E. 2d 417; *Barwick v. Rouse,* 245 N.C. 391, 95 S.E. 2d 869; *Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323; *Carver v. Leatherwood,* 230 N.C. 96, 52 S.E. 2d 1; *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517; *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224. Stated another way: '. . . (W)here, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of the severance, is in use and is reasonably necessary to the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law. . . . The underlying basis of the rule is that unless the contrary is provided, all privileges and appurtenances as are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant.' *Barwick v. Rouse, supra,* quoting from 17 Am. Jur., 945, Easements Implied, section 33." *Potter v. Potter,* 251 N.C. 760, 112 S.E. 2d 569 (1960).

[2] The three essentials necessary to the creation of an easement by implication upon severance of title were succinctly stated by Winborne, C.J., in *Barwick v. Rouse,* 245 N.C. 391, 95 S.E. 2d 869 (1957), as follows:

> "(1) A separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. 17 Am. Jur. 948; Easements, Section 34. *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224; *Ferrell v. Trust Co., supra* [221 N.C. 432, 20 S.E. 2d 329]; *Spruill v. Nixon, supra* [238 N.C. 523, 78 S.E. 2d 323]."

[1] Appellant has stipulated that from the evidence the jury could find that the first element existed but contends that plaintiff's evidence is insufficient to go to the jury as to the second and third element.

In addition to the stipulated evidence, plaintiff's evidence tended to show: Richard H. Slagle testified that he was 59 years of age, a registered surveyor, a nephew of John R. Slagle and Annie L. Slagle and was familiar with the large tract of land owned by them prior to 2 July 1937. He surveyed the tract sold by them to Menzel in 1937. At that time the road in question was a good "passable" road which could be driven over by car. It was almost 10 feet wide, with a few places where one might pass. The old road was there when he first knew the property and "is older than I am." He again surveyed the property in 1954 for Mr. R. B. Dorman and still later surveyed the road as it existed in 1937. There was evidence of gravel on the road almost all the way through onto the plaintiff's property. There was an old house on plaintiff's property prior to 1937. He didn't remember its being occupied, but he had stopped there to get out of the rain. A portion of the old road is now covered by the lake on defendant's property. The old road was the only access road in 1937 to the property now owned by plaintiff and it was the road he used. Sometime in 1949 or 1950 the Mead Corporation built a separate road used by the U.S. Forest Service which ran from the Wayah public road around a circle to the right of and through the lands of a Dr. Mann, through another portion of defendant's lands and the lands of the U.S. Forest Service to a point at plaintiff's property line. This is an entirely different road from the old road there in 1937 and there was a fence across it. This witness also identified the road in question on a map made by him

which was introduced into evidence. Cecil Green testified that he had lived in Macon County 52 years, was familiar with plaintiff's property and had used the road to plaintiff's property as early as 1919 when he walked there and rode horses. He had bought tan bark and telephone poles from the Slagles and hauled them out over the road about 1927. The road was in about the same location as in 1919 with the exception of a few changes he and one John Wallace had made with the knowledge of the Slagles. He had been back on plaintiff's property in 1934 or 1935 and since 1934 and the road was still in its location and was a very good road.

John Wallace testified that he and the Greens had changed the access road in 1927 when they worked the poles and tan bark; that he was familiar with plaintiff's property; that they had used the road to haul logs and timber since there was no other access road; that there was then a family named Tillson living on the property and they used the road, going in and out in a car or truck. Ernest Wallace testified that he helped relocate the road with Miss Slagle's permission; that he worked for the Forestry Service from 1940 to 1960 and during that time went through plaintiff's property to read rain gauges on the mountain. The road used at that time was in the same location as in 1927; that he never used the Forest Service Road. Wesley Williamson testified that he went on the property now owned by plaintiff in 1932 or 1933 to look at some hogs; that he worked for plaintiff's father in 1951 or 1952 and regularly used the road for access. In 1955 or 1956, he did some work for defendant's predecessor in title. The road was there then and Mr. Dorman was using it for access to his property.

Plaintiff testified that his father bought the property in 1940; that there was a foundation of an old house and some outbuildings which he and his father improved and in which they lived while working on the property; that he used the old road frequently from 1940 to 1962 when it was obstructed by defendant. He and his father improved the old road from time to time, constructed a cabin on the property which he, his family and friends used until the road was obstructed and since then has been unable to get to the property to keep it and the improvements repaired; that he had never attempted to use the Mead Road; that he had no right-of-way over it; that it had not been maintained and was in a bad state of repair; that it crossed the lands of Mann and the defendant before it reaches plaintiff's land.

The evidence is sufficient for submission to the jury as to the second element; i.e., whether before the separation of title took place,

the use giving rise to the easement was so long continued and obvious or manifest to show that it was meant to be permanent.

Even so, defendant contends, plaintiff's evidence at best shows only that the right to use the road would only serve plaintiff's convenience and is not a necessity since there is evidence that another road exists furnishing ingress and egress over other adjoining lands.

Our Court has noted that although the greater weight of authority seems to hold that no easement will be created by implication unless it be one of strict necessity, this jurisdiction interprets that to mean only that the easement should be reasonably necessary to the just enjoyment of the properties affected thereby. *Potter v. Potter, supra.*

> "To establish the right to use a road as appurtenant to the property granted, it is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it, because such use was reasonably necessary to the 'fair', *Potter v. Potter, supra,* 'full', *Bradley v. Bradley, supra,* 'convenient and comfortable', *Meroney v. Cherokee Lodge,* 182 N.C. 739, 110 S.E. 89, *Carmon v. Dick, supra,* enjoyment of his property." *Smith v. Moore,* 254 N.C. 186, 118 S.E. 2d 436 (1961).

We think the evidence of plaintiff sufficient for submission to the jury as respects the third element; i.e., that the easement shall be necessary to the beneficial enjoyment of the land granted or retained.

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

PHILLIP DEAN COLLINS v. CHARLES WALKER CHRISTENBERRY

No.6925SC525

(Filed 19 November 1969)

1. Negligence § 35— nonsuit for contributory negligence

Nonsuit on the ground of plaintiff's contributory negligence is proper only if plaintiff's evidence, considered in the light most favorable to him, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn therefrom.

2. Automobiles § 77; Highways and Cartways § 3— law officer conducting "running roadblock" — contributory negligence

In this action by a highway patrolman for personal injuries received in an automobile collision which occurred when defendant, while driving a stolen vehicle at a high rate of speed and being pursued by another patrolman, attempted to pass the patrol car being driven by plaintiff, plaintiff's evidence that he was attempting to stop defendant with a "running roadblock" by keeping in front of the car driven by defendant and thereby forcing defendant to slow down and eventually to stop, *is held* not to disclose that plaintiff was contributorily negligent as a matter of law.

3. Automobiles § 16; Highways and Cartways § 3— duty of overtaken vehicle to yield right-of-way — law officer conducting "running roadblock"

Provision of G.S. 20-151 requiring the driver of a vehicle about to be overtaken to yield the right-of-way did not apply to a highway patrolman who set up a "running roadblock" in an attempt to stop a stolen car being pursued by another patrolman, since an exemption for police vehicles from G.S. 20-151 in case of a running roadblock may be reasonably implied.

4. Automobiles § 7; Highways and Cartways § 3; Negligence § 1— police officer in pursuit of lawbreaker — Motor Vehicle Act — standard of care

A police officer, when in pursuit of a lawbreaker, is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act, but he is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances.

5. Automobiles § 45; Appeal and Error § 49— exclusion of evidence — harmless and prejudicial error

In this action by a highway patrolman for personal injuries received in an automobile collision while conducting a "running roadblock" in an attempt to stop a stolen car driven by defendant, the trial court did not commit prejudicial error in sustaining objections to questions asked plaintiff on cross-examination as to whether he had knowledge of the statute requiring the operator of a motor vehicle to yield to faster moving traffic, whether he knew there would be danger to other slower traffic at the speed he was traveling, and whether he knew of any Highway Patrol rule ordering him to set up a running roadblock, defendant's counsel not having been prevented from developing fully all facts supporting his theory of the law applicable in this case.

6. Automobiles § 90; Highways and Cartways § 3— highway patrolman conducting running roadblock — standard of care — instructions

In this action by a highway patrolman for injuries received in an automobile collision while conducting a "running roadblock" in an attempt to stop a stolen car driven by defendant and pursued by another patrolman, the trial court correctly instructed the jury as to the standard of care required of a police officer while engaged in his official duties.

APPEAL by defendant from *Beal, J.,* 16 December 1968 Special Civil Session of BURKE Superior Court.

This is a civil action in which plaintiff, a North Carolina Highway Patrolman, seeks to recover damages for personal injuries he suffered as result of an automobile collision which occurred on Interstate Highway No. 40 near Morganton, N. C., when defendant, while driving a stolen vehicle at a high rate of speed, attempted to pass the patrol car being driven by plaintiff. Defendant denied negligence on his part and pleaded contributory negligence on the part of plaintiff.

Plaintiff's evidence in substance tended to show: At 10:30 p.m. on 1 February 1967 plaintiff, a member of the North Carolina Highway Patrol with twelve and one-half years' service, was on duty in his patrol car on Highway No. 70 west of Morganton, N. C. He received a radio message that Highway Patrolman Adams was in pursuit of a stolen car traveling in excess of 100 miles per hour east on Interstate No. 40 and that Patrolman Adams requested assistance in getting the car stopped. Interstate No. 40 is a four-lane divided highway having two lanes for eastbound and two lanes for westbound traffic, the eastbound and westbound lanes being divided by a grass median strip. The posted speed limit was 65 miles per hour. Patrolman Adams, accompanied by a deputy sheriff, had pursued the stolen car, driven by defendant, for approximately fourteen miles, traveling at speeds in excess of 100 miles per hour. As Adams and the car he was pursuing approached Kathy Road on Interstate 40, Adams contacted plaintiff by radio. As advised by Adams, plaintiff proceeded in his patrol car to the intersection of Kathy Road and Interstate 40 and entered the eastbound lanes of Interstate 40 from the Kathy Road ramp some distance ahead of the cars driven by the defendant and Adams. Plaintiff turned on the blue flashing light on top of his patrol car and also turned on the emergency flashers which caused the two red taillights and the front parking lights of his patrol car to flash in unison. When plaintiff first came onto Interstate 40 he did not see the car driven by defendant or the pursuing car driven by Adams. When these came into view behind him, plaintiff was traveling approximately 100 miles per hour, which was the speed which Adams had advised plaintiff the defendant was driving. Plaintiff gradually decreased the speed of his patrol car and attempted to set up a "running roadblock" by keeping in front of the car driven by defendant and thereby forcing defendant to slow down and eventually to stop. As defendant changed lanes, plaintiff also changed lanes so as to keep in front of and to block defendant's car. While still traveling at a high rate of speed,

defendant drove up to and bumped the rear of plaintiff's patrol car several times in rapid succession, and then tried to pass on the left while plaintiff's patrol car was traveling in the left-hand lane. Defendant drove partly on the median which separates the eastbound and westbound lanes of Interstate 40 and moved up alongside plaintiff's patrol car. Defendant's car then swerved back onto the pavement, colliding with the left side of plaintiff's patrol car, sending both cars out of control and off of the road. Plaintiff was injured in the resulting wreck.

Defendant admitted in his pleadings that at the time of the wreck he was an escapee from a state prison camp and was driving a stolen car in an effort to make good his escape.

At the close of plaintiff's evidence, defendant's motion for nonsuit was denied. Defendant did not introduce any evidence, and the case was submitted to the jury on issues of negligence, contributory negligence, and damages. The jury answered all issues in plaintiff's favor, awarding him damages in the amount of $12,500.00, and from judgment on the verdict, defendant appealed.

Byrd, Byrd & Ervin, by Robert B. Byrd and John W. Ervin, Jr., for plaintiff appellee.

Smathers & Ferrell, by James C. Smathers and Larry W. Pitts, for defendant appellant.

PARKER, J.

On this appeal defendant concedes his own negligence but contends nonsuit should have been allowed on the ground that plaintiff was contributorily negligent as a matter of law. We do not agree.

[1, 2] It is elementary that nonsuit on the ground of plaintiff's contributory negligence is proper only if plaintiff's evidence, considered in the light most favorable to him, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn therefrom. *Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607; *Black v. Wilkinson,* 269 N.C. 689, 153 S.E. 2d 333; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360. Considering the plaintiff's evidence in the present case in the light most favorable to him, we agree with the trial court's conclusion that it does not so clearly establish negligence on his part as one of the proximate causes of his injury that no other reasonable inference may be drawn, and accordingly we hold the trial court was without error in overruling defendant's motion for nonsuit.

[2] It was plaintiff's duty to assist his fellow officers in attempting to stop and apprehend the defendant. In performing that duty he was unavoidably subjected to great personal danger. The duty of a police officer frequently involves danger; such is the nature of his job. Therefore, we are not here concerned with any question as to whether plaintiff acted so as to avoid all risk of personal injury; if he performed his duty, he necessarily incurred some risk. While we agree with the statement contained in defendant's brief that there was "extreme danger involved in two vehicles touching or bumping each other at a speed of 100 miles per hour," this extreme danger was primarily of defendant's creation. Given plaintiff's obligation to attempt to stop the defendant, the setting up of a "running roadblock" may have been the safest method which he could pursue. The only question is whether in performing his duty he exercised such care for his own safety as a prudent man would have exercised in the discharge of official duties of a like nature under like circumstances. As stated in 60A C.J.S., Motor Vehicles, § 375, p. 708, the true rule is that "the standard of care which the law requires is the same for drivers of police vehicles as for drivers of ordinary vehicles, the standard being such care as a prudent man would exercise in the discharge of official duties of a like nature under like circumstances." In the present case it was for the jury to determine whether plaintiff exercised such care as a prudent man would exercise in the discharge of official duties of a like nature under like circumstances. Certainly plaintiff's evidence does not so clearly establish his own negligence that no other reasonable inference may be drawn therefrom.

[3] Defendant, however, contends that in setting up the "running roadblock," plaintiff violated the provisions of G.S. 20-151 and was therefore guilty of negligence *per se*. G.S. 20-151 in pertinent part provides:

> "The driver of a vehicle about to be overtaken and passed by another vehicle approaching from the rear shall . . . . give way to the right in favor of the overtaking vehicle on suitable and audible signal being given by the driver of the overtaking vehicle. . . ."

In support of his contention, defendant points to G.S. 20-145, which provides that statutory speed limitations "shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law," and contends that since there is no similar express statutory exemption from the requirements of G.S. 20-151, this latter statute was

applicable to the plaintiff under the circumstances of this case. We do not agree, however, with defendant's basic assumption that the Legislature, by including the express exemption for police vehicles when operated with due regard for safety in G.S. 20-145, thereby evidenced an intent that there be no exemption under any circumstances from other sections of the Motor Vehicle Act for police vehicles while being similarly operated. Adoption of defendant's assumption is required neither by reason nor authority and would unnecessarily hinder the State Highway Patrol in performance of its duties. By G.S. 20-188 the Patrol is directed to "enforce all laws and regulations respecting travel and use of vehicles upon the highways of the State." Imposition of this duty implies the right to employ reasonable means in a reasonable manner in fulfilling it. For example, there is no express exemption for police vehicles from the provisions of G.S. 20-161, which prohibits parking on the main traveled portion of any highway, just as there is no express exemption for police vehicles from the provisions of G.S. 20-151, which requires the driver of a vehicle about to be overtaken to yield the right-of-way. Nevertheless, as the facts in the present case illustrate, erection of some type of roadblock, whether stationary or running, may be the only practical method of stopping a determined and reckless lawbreaker. Under such circumstances exemption for police vehicles from G.S. 20-161 (in case of a stationary roadblock) or from G.S. 20-151 (in case of a running roadblock), may be reasonably implied.

[4] In *Goddard v. Williams,* 251 N.C. 128, 110 S.E. 2d 820, Denny, J. (later C.J.), quoted with approval from *Edberg v. Johnson,* 149 Minn. 395, 184 N.W. 12, as follows:

> "We do not hold that an officer, when in pursuit of a lawbreaker, is under no obligation to exercise a reasonable degree of care to avoid injury to others who may be on the public roads and streets. What we do hold is that, when so engaged, he is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act. His conduct is to be examined and tested by another standard. He is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances."

In our opinion, this is a correct statement of the law applicable to the present case.

[5] Defendant also assigns as error the court's action in sustaining objections to certain questions asked of the plaintiff on cross-

examination. On cross-examining the plaintiff, defendant's counsel asked if he had knowledge of the statute requiring the operator of a motor vehicle to yield to faster moving traffic, if he knew there would be danger to other slower traffic at the speed he was traveling, and if he knew of any Highway Patrol rule ordering him to set up a running roadblock. Out of the hearing of the jury, plaintiff answered that he was familiar with the statute requiring slower moving traffic to yield, that he could see the road in front of him for over a mile and it was clear of any traffic, and that the Patrol is taught the procedure for setting up a running roadblock but he did not know if there was any law providing for it. Defendant suffered no prejudicial error when the court sustained the objections to his questions and excluded the answers from the jury. Defendant's able counsel was not unduly restricted in his cross-examination of the plaintiff and was not prevented from developing fully all facts supporting his theory of the law applicable in this case. In his assignments of error directed to the court's rulings sustaining objections to his questions referred to above, we find no prejudicial error.

[6] We have also carefully examined defendant's assignments of error based on his exceptions to portions of the trial court's charge to the jury, and find that the court correctly instructed the jury as to the standard of care required of a police officer while engaged in discharge of his official duties consistent with the standard approved by our Supreme Court in *Goddard v. Williams, supra,* and with our holding above. In the charge as a whole we find no error prejudicial to defendant.

In the trial we find

No error.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. RICHARD LEE BLACKBURN AND HAROLD DEAN HOLLAND

No. 6927SC382

(Filed 19 November 1969)

1. Criminal Law § 92— trial of two defendants — consolidation of indictments

Where the two defendants are charged in separate indictments with breaking and entering the same building at the same time and with the larceny of the same property, the trials of the defendants are properly consolidated upon motion of the State.

2. Criminal Law § 170— prejudicial error during trial — motion to dismiss attorney

Defendant was not prejudiced by the refusal of the trial court to grant the co-defendant's motion to discharge the co-defendant's appointed counsel.

3. Burglary and Unlawful Breakings § 5; Larceny § 7— prosecution — sufficiency of evidence — recent possession — failure of watchdog to bark

In a consolidated trial of two defendants for breaking and entering and larceny, question of co-defendant's guilt was properly submitted to the jury, where evidence of the State showed that a store was broken and entered, that articles found in the automobile in which co-defendant was riding as a passenger had been taken from the store, that the watchdog in the store had once been owned by the co-defendant, and that the owner of the store did not hear a sound from the dog during the night of the offense.

4. Searches and Seizures § 2; Criminal Law § 84— search of automobile — consent of defendant — admissibility of evidence

Testimony by a police officer on *voir dire* that he stopped the defendant's automobile for a routine license check, that he saw through the window some dishes and pots in the back seat, that he asked the defendant's permission to search the automobile, and that the defendant replied "Yes, go ahead," *held* sufficient to support the court's findings and conclusion that defendant consented to the search of the automobile; the evidence seized in the search was properly admitted on trial.

5. Searches and Seizures § 1— search of the person — lawful arrest

A search of defendant's person made after the arrest of defendant for carrying a concealed weapon in his automobile *held* lawful.

6. Criminal Law § 84— evidence obtained in search — different offense

Evidence of a different offense from the crime for which defendant was arrested and lawfully searched is competent evidence on the trial of such defendant for that different offense.

APPEAL by defendants from *Thornburg, S.J.*, 3 March 1969 Special Session of Superior Court held in CLEVELAND County.

This is a criminal action in which each defendant was charged, in separate but similar bills of indictment, with breaking and entering and larceny. Each defendant is charged with breaking and entering the same building at the same time and stealing the same property. Upon motion of the State, the trials of defendants were consolidated.

On 8 November 1968 at about 2:15 a.m., defendant Richard Lee Blackburn (Blackburn) was driving his 1956 Chevrolet automobile North of Shelby on Highway #150. Defendant Harold Dean Holland (Holland) was riding in Blackburn's car in the right front

passenger seat. Cleveland County Deputy Sheriff Paul Barbee (Barbee) was on a routine patrol with off-duty City of Shelby Policeman G. A. Poston (Poston). Barbee observed defendant's car advancing toward Cherryville at a slow rate of speed. Barbee and Poston followed for a short distance and then stopped defendants for a routine license check. Barbee and Poston got out of the police car and approached defendant's car. Barbee asked Blackburn to produce his driver's license. Defendant Blackburn did not do so, and Barbee advised him he would have to arrest him for driving without a driving permit and asked Blackburn to get out of the car. Blackburn got out and after a while produced his driver's license. Shortly after Blackburn got out of the car, defendant Holland got out of the car and walked around toward Barbee. Holland was drunk and Barbee placed him under arrest for public drunkenness. Barbee then searched Holland and found two boxes of .22 cartridges and some coins in his pockets. These cartridges were stolen from Jerry Cooke's store only a short time before.

Barbee noticed some dishes and pots and pans in the back seat of Blackburn's car. Barbee asked Blackburn if "he minded if I look through the car" and Blackburn replied, "Not a bit in the world." Barbee and Poston then searched the car and found a gun case on the back seat of the car, four pistols under the front seat of the car, and some coins. Two of the pistols were under the driver's seat and two were under the passenger's seat where Holland had been sitting. The pistols consisted of one 25-calibre automatic pistol (Spanish), one 22-calibre Italian pistol, one Rossi pistol, and one 22-calibre Rossi pistol. All of the pistols and the gun case had been stolen from Jerry Cooke's store unbeknown to the police officers.

Blackburn was then arrested for carrying a concealed weapon and was searched by Barbee. Barbee found two boxes of cartridges and some coins on Blackburn's person. The boxes of cartridges had been stolen from Jerry Cooke's store unbeknown to the police officers.

The police officers proceeded to Jerry Cooke's Hobby Store and awakened Mr. Cooke at about 2:45 a.m. Mr. Cooke checked the store and found it had been broken into. Cooke testified that the items found in the two defendants' possession had been stolen from the store. Mr. Cooke testified that the store was locked that night at 8:00 p.m. and that everything was in order. Cooke said that he left a dog formerly owned by defendant Holland in the store to warn him if any trouble arose. Cooke said that while he lives only 500 feet from the store, he did not hear the dog bark or any noise from the store that night.

The defendants pleaded not guilty, and the jury found them guilty as charged of both breaking and entering and larceny. The defendants assigned error and appealed to the Court of Appeals.

Attorney General Robert Morgan and Staff Attorney Sidney S. Eagles, Jr., for the State.

Michael S. Kennedy for defendant appellant, Richard Lee Blackburn.

John D. Church for defendant appellant, Harold Dean Holland.

MALLARD, C.J.

Appeal of Defendant Holland

[1] The defendant Holland assigns as error the refusal of the trial judge to sever the trials of the two defendants and the trial judge's refusal to nonsuit the State as to Holland after the State had presented its evidence.

As to the trial judge's refusal to sever the defendants' trials, the correct rule is stated in 2 Strong, N.C. Index 2d, Criminal Law, § 92:

> "Indictments charging several defendants with committing the same offense based upon a single occurrence are properly consolidated for trial, at least when there is no reason to anticipate that the State would offer an admission of either defendant which might prejudice the other. . . .
>
> * * *
>
> Where three defendants are charged in separate indictments with larceny of specified personalty from a specified store and with breaking and entering and safebreaking at said store, the court may properly consolidate the indictments for trial, the offenses charged being of the same class and so connected in time and place that evidence at the trial of one would be competent and admissible at the trial of the others.
>
> * * *
>
> Ordinarily, a motion for severance is addressed to the discretion of the trial court, to be determined in each particular case on the basis of possible prejudice in a joint trial."

The indictments in these cases charged each defendant with breaking and entering the same store. The crime was alleged to have been committed jointly. As such, trial was properly consolidated and motion for severance properly denied.

[2] Before the jury was selected Blackburn stated he would like to discharge his appointed counsel and "disregard that not guilty

plea and take the Fourth Amendment." The judge made appropriate findings in the absence of potential jurors and declined to discharge counsel. We do not agree with Holland's contention that this episode was prejudicial to him.

[3] Defendant Holland next assigns as error the failure of the trial judge to allow his motion for judgment as of nonsuit.

The applicable rule on nonsuit of the State is stated in *State v. Church,* 265 N.C. 534, 144 S.E. 2d 624 (1965):

> "Upon a motion for judgment of nonsuit the evidence offered by the State must be taken in the light most favorable to the State and conflicts therein must be resolved in the State's favor, the credibility and effect of such evidence being a question for the jury."

In this case the State has shown that a store was broken into and articles found in defendant's possession were taken therefrom; that the defendants were a short distance from the store which had been broken into; that the store had been broken into only a short time before; that a dog left in the store to warn the owner of intruders had been owned by defendant Holland; and that the owner of the store did not hear a sound from the dog. The inference which could reasonably be made from the State's evidence would tend to show that the defendant Holland took part in the breaking and entering and larceny. The credibility and effect of such evidence is for the jury.

We are of the opinion that there was sufficient evidence of defendant's guilt under the indictment to go to the jury.

Appeal of Defendant Blackburn

[4] Defendant Blackburn assigns as error the refusal of the trial judge to exclude evidence seized as a result of the search of defendant's car and defendant's person.

The defendant contends that his car was illegally searched. He testified that he was assaulted and threatened and did not voluntarily give his permission for a search of his automobile. The State presented evidence which tended to show that the defendant Blackburn gave his consent to the search.

Deputy Sheriff Barbee testified:

> "I saw some dishes and pots in the back seat by looking through the glass. The car was registered in Blackburn's name. As Blackburn was standing by the car, I asked him if he would mind my

looking in his car. As I started walking back toward the trunk of the car, Blackburn said, 'Not a bit in the world.'

I couldn't get the trunk lid opened and Blackburn opened it for me. After I searched the trunk, I asked Blackburn if he minded my searching inside the car and he said, 'Not a bit.' I walked to the driver's side and found a large amount of coins lying on the floor right under the driver's seat. I found two pistols up under the seat on the driver's side.

Officer Poston was standing on the other side of the car and I told him to look up under the front seat. He pulled out two more guns. There was one .25 automatic Spanish pistol, one .22 caliber made in Italy, one 32 caliber Rossi and one 22 caliber Rossi — four guns totaled."

Officer G. A. Poston testified:

"Blackburn said 'Yes, go ahead' when Barbee asked him to search the car. Officer Barbee then searched the front of the car. . . .

* * *

. . . Officer Barbee saw money lying in the floorboard of the car on the driver's side. He asked him if he could search the car and Blackburn gave him permission to search. Officer Barbee got the money out of the floorboard of the car and as he did he saw a pistol under the front driver's seat, and he took the pistol out from under the seat and placed Mr. Blackburn under arrest for carrying a concealed weapon."

The trial judge, after holding a *voir dire,* found and concluded that:

"(O)n the morning of November 8, 1968, the defendant, Richard Lee Blackburn, was operating a 1955 or 1956 Chevrolet, going north on highway 150, and had as a passenger in his vehicle and seated in the right front seat the defendant Harold Dean Holland; that the vehicle was stopped by Officer Barbee, a member of the Cleveland County Sheriff's Department; that at the time and place the vehicle was stopped, the defendant, Blackburn, told Officer Barbee after a request being made that he could search the Blackburn vehicle if he chose to do so; that prior to the time this statement was made, the defendant, Blackburn, had not been threatened in any manner, or intimidated or coerced in any manner, and that the consent was understandingly, voluntarily, freely, and willingly given; that pursuant to the permission given by the defendant, Richard Lee Blackburn,

a search of the vehicle was made, at which time certain pots, pans, coins, guns, and gun cases were found; that both the defendant, Blackburn, and the defendant, Holland, were placed under arrest for carrying a concealed weapon; that after the arrest for the carrying of a concealed weapon, Officer Barbee did search the persons of the defendants, Blackburn and Holland, finding upon their persons certain coins and 22 cartridges; that at the time the vehicle was stopped and without the necessity of permission to search, certain pots, pans, and other items were visible in the vehicle; that the defendant, Blackburn, owned the vehicle, or had the vehicle under his control; that the defendant Holland, was in his presence at all times; that the defendant, Blackburn, had a legal right to permit the search of the vehicle; that neither the defendant, Blackburn, nor the defendant, Holland, at any time objected to the search made by Officer Barbee."

The applicable rule as to the findings of the trial judge on *voir dire* and the necessity of a waiver of defendants' right not to be searched without a search warrant is stated in 7 Strong, N.C. Index 2d, Searches and Seizures, § 2:

"Where a person consents to a search by officers of the law, such consent dispenses with the necessity for a search warrant. However, the presumption is against the waiver of the constitutional right to be free from unreasonable searches and seizures, and the burden is upon the state to establish unequivocally that the consent was voluntarily, freely, and intelligently given, free from coercion, duress, or fraud. Upon the voir dire to determine the voluntariness of defendant's consent to a search of his premises, *the weight to be given the evidence is peculiarly a determination for the trial judge, and his findings are conclusive when supported by competent evidence.*" (Emphasis Added.) See also *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968).

The findings of the trial judge were based on competent evidence and the conclusion of the trial judge that the defendant consented to the search are supported by the findings of fact. The evidence seized in the search was properly admitted in the trial as evidence of the crime charged.

[5] As to the search of defendant Blackburn's person, both defendant Blackburn and defendant Holland were searched after each was arrested. Defendant Holland was searched after he was arrested for public drunkenness; defendant Blackburn was searched after he had been arrested for carrying a concealed weapon found under the

front seat of the car. The applicable rule is stated in *United States v. Rabinowitz,* 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950):

> "Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him."

[6] It is also a rule that evidence of a different offense from the crime for which defendant was arrested and lawfully searched is competent evidence on the trial of such defendant for that different offense. *Harris v. United States,* 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1946); *State v. Grant,* 248 N.C. 341, 103 S.E. 2d 339 (1958); 2 Strong, N.C. Index 2d, Criminal Law, § 84.

Applying the above rules, we hold that the officers had the right to conduct the search of defendant Blackburn and that the evidence thus obtained was properly admitted in this case by the trial judge.

We have examined all other assignments of error not abandoned by these defendants on this appeal and find no prejudicial error.

No error.

MORRIS and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. ROYCE STAMEY AND LEONARD AUSTIN

No. 6925SC508

(Filed 19 November 1969)

1. Criminal Law § 66— illegal lineup — in-court identification — independent origin — sufficiency of State's evidence

In this armed robbery prosecution, the trial court's findings and conclusion that the victim's in-court identification of defendants as the perpetrators of the robbery was not based on an illegal pretrial lineup but was based on the witness' observations of defendants during the robbery *are held* supported by clear and convincing evidence presented by the State on *voir dire*, where the victim's *voir dire* testimony showed that he had a good and sufficient opportunity to observe defendants while they were in his store taping his hands, tying his feet, threatening him with pistols and removing his money, and his testimony showed unequivocally that his in-court identification of defendants was based on what he observed at that time.

2. Criminal Law § 175— findings upon voir dire — appellate review

Findings of the trial court upon *voir dire* are binding on appeal when supported by competent evidence.

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

Testimony by robbery victim that defendants entered his store, threatened him with pistols, tied his feet, taped his hands and took his money *is held* sufficient to be submitted to the jury on the issue of defendants' guilt of armed robbery.

4. Criminal Law § 66— in-court identification — illegal lineup — voir dire hearing — remarks of trial court

Where defendants were granted a new trial by the Court of Appeals for error in the admission of evidence of an in-court identification without a determination that such in-court identification was independent in origin and not the result of an illegal out-of-court confrontation, defendants' contention that the prosecuting witness' testimony at the *voir dire* hearing conducted upon retrial was influenced by the trial court's statement that a *voir dire* hearing would be conducted in compliance with the decision of the Court of Appeals and that "It might well be that . . . the identity of both defendants was based on factors complete and independent of the line-up identity," *is held* to be without merit.

5. Criminal Law § 168— illegal lineup — instructions — harmless error

In this armed robbery prosecution, defendants may not now complain about a slight reference to an illegal lineup made by the court in recapitulating the evidence, where the trial court had informed defense counsel that he would allow a motion, if made, to strike evidence of the lineup and to instruct the jury not to consider it, even though the evidence was brought out on cross-examination by the defense, but defendants made no such motion, and defendants made no request for special instructions.

APPEAL by defendants from *Copeland, J.*, May 1969 Session BURKE Superior Court.

Defendants were charged with armed robbery in separate bills of indictment proper in form. They were first tried at the March 1968 Session, Burke County Superior Court. Upon conviction both defendants appealed to this court. They were granted a new trial for error in the admission of evidence of an in-court identification without a *voir dire* determination that such in-court identification was independent in origin and not the result of an illegal out-of-court confrontation. The illegal confrontation occurred when the prosecuting witness identified the two defendants in a pretrial lineup while they were not represented by counsel and at a time when their right to be represented had not been intelligently and voluntarily waived.

At the second trial evidence was offered on *voir dire* relating to the prosecuting witness' identification of the defendants. The court found facts from the evidence and concluded that the identification was not related in any manner to any "lineup identity." The defend-

ants were again found guilty by the jury and they appeal from judgments of imprisonment for terms of not less than twenty nor more than thirty years.

Robert Morgan, Attorney General, Jean A. Benoy, Deputy Attorney General, and Bernard A. Harrell, Assistant Attorney General, for the State.

Riddle & McMurray by John H. McMurray for defendant appellant Royce Stamey.

Ted S. Douglas for defendant appellant Leonard Austin.

GRAHAM, J.

[1] Defendants assign as error the court's conclusion that their identity as perpetrators of the alleged robbery was not based on the illegal pretrial lineup identification. They also contend that their cases should have been nonsuited for lack of sufficient evidence.

The case of *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 and the companion case of *Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 held that the constitutional right to counsel at "critical" stages of a criminal proceeding includes the right to counsel at a police lineup. If this right is not afforded and a subsequent in-court identification is made, the question arises as to whether the in-court identification has been tainted by the prior lineup identification. In granting a new trial on defendants' former appeals Parker, J., speaking for this court, stated the test that is applicable in determining the admissibility of such identification evidence as follows:

> "Under such circumstances the in-court identification is admissible only when the State establishes by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than the lineup identification. If the in-court identification had an independent origin it is competent. If it resulted from the illegal out-of-court confrontation it is incompetent." *State v. Stamey,* 3 N.C. App. 200, 203, 164 S.E. 2d 547.

To determine the admissibility of the in-court identification a lengthy *voir dire* hearing was conducted. The State and the defendant Stamey offered evidence.

The State's evidence on *voir dire* consisted of the testimony of the prosecuting witness M. A. Brinkley. He stated that shortly after 8:00 a.m. on 25 February 1967 a man entered his hardware store in

Valdese and asked for a load of insulation. "He was standing at speaking distance of 2, 3, or 4 or 5 feet away." When the witness turned from picking up a roll of insulation the man put a gun in his ribs and said: "Do as I say, and I won't kill you." At that point a "shorter" man entered the store and faced the witness directly from across a four-foot counter. This man also had a gun which he held right at the witness' head, "just like he was going to squeeze the trigger immediately." Brinkley stated that the taller man was dressed in a dark hat, a tie and trench coat. He wore a pair of "small" "ordinary" sun glasses. Brinkley recognized him as having been in the store before. The shorter man wore a red zip-up jacket but no hat or any form of disguise. The men, both still armed with pistols, forced Brinkley to the back of the store and into the basement where they taped his hands and tied his feet to the banister at the foot of the stairs. They removed a billfold containing $191.00 from his hip pocket and approximately $140.00 or $145.00 from the store safe.

Brinkley's testimony indicated he had ample opportunity to observe both defendants. He stated: "While they were taping my hands, they finished in perhaps 5 minutes, there was quite a little time taping my hands, and all of the time they was (sic) in and around and in front of me, and I had a good view of them. There was no question in my mind as to a mental picture of the two. I observed them perhaps 8 to 10 minutes from the time they came in."

After testifying as to the circumstances of the robbery, Brinkley pointed out the defendant Stamey as the one he had described in his testimony as the "taller one" and the defendant Austin as the one he had described in his testimony as the "shorter one." Counsel for each defendant cross-examined Brinkley extensively but he did not waiver in his insistence that he got a clear mental picture of the men who robbed him at the time of the robbery and that his identification of the two defendants in court was based on that mental picture.

The defendant Stamey offered evidence on *voir dire* tending to show that Brinkley had often seen him in and about the store and in other places and "knew him." Without expressing an opinion on the persuasiveness of this evidence we nevertheless note that it is not inconsistent with Brinkley's testimony that Stamey had previously been his customer.

The case of *State v. Williams*, 274 N.C. 328, 161 S.E. 2d 581 was decided by our Supreme Court subsequent to the decisions of the United States Supreme Court in *United States v. Wade, supra*, and

Gilbert v. California, supra. There, as in the instant case, the evidence was that that prosecuting witness had ample time to observe the defendant at the time of the crime. Lake, J., stated at 341, 342:

> "Here, in contrast to *State v. Wright, supra,* the offense was committed not in a dimly lighted room but in a service station open for business; the victim of the crime was not aroused from sleep but was the service station attendant who had sold a bottled drink to the robber and had observed him standing in the station for a substantial period of time prior to the robbery, and who also observed him for 'three or four minutes' after the robbery was commenced by the sticking of a pistol into the victim's ribs. Only ten weeks elapsed between the robbery and the in-court identification. There is nothing whatever in the record to contradict or cast doubt upon any of this evidence as to the conditions under which Wood observed the robber at the time of the crime. To use again language from the opinion of the Court in *United States v. Wade, supra,* the State has established 'by clear and convincing evidence that the in-court identification was based upon observation of the suspect other than the lineup identification.' "

In *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225, an in-court identification of the accused was challenged on the basis of the *Wade* and *Gilbert* decisions. There the defendant who was charged with rape took the stand, and admitted having sexual intercourse with the prosecutrix but denied that it was without her consent. Under such circumstances the matter of identity was not in issue. The Supreme Court nevertheless noted that the identification in a lineup did not come within the principles condemned in the *Wade* and *Gilbert* cases "for the simple reason that the identification in the lineup had an independent origin in the prosecuting witness' identification of defendant just previously when she saw defendant get out of the pickup truck, *and further she had ample opportunity to see him when he changed the flat tire on her automobile, when he rode with her down the road, and when he assaulted her.*" (emphasis added). 275 N.C. 61, 68, 69.

[1, 2] Applying the principles of the above cases we hold that the quality of evidence offered by the State on *voir dire* in the instant case met the test of "clear and convincing" evidence. The prosecuting witness had a good and sufficient opportunity to observe the defendants while they were in his store taping his hands, tying his feet, threatening him with pistols and removing his money. His testimony indicated unequivocally that his in-court identification of de-

fendants was based on what he observed at that time. The evidence amply supports the findings and conclusions of the trial court. Findings of the trial court upon *voir dire* are binding on appeal when supported by competent evidence. *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

[3] The testimony of the prosecuting witness before the jury was in substance the same as his testimony on *voir dire.* This was ample evidence to support the verdict and defendants' motions of nonsuit were properly overruled.

Preceding the *voir dire* hearing the court stated as follows:

> "Let the record show . . . it is agreed that a Voir Dire hearing would be conducted by the Court in compliance with mandate of the Court of Appeals language. It may well be that the witnesses in court, the identity of both defendants was based on factors complete and independent of the line-up identity. So at this time the Court will be conducting this hearing for the purpose indicated in the opinion of the Court of Appeals in the absence of the jury."

[4] The defendant Austin noted "an objection of the reading of our opinion before the witness," and he insists here that the court's statement influenced the prosecuting witness' testimony and caused him to attach little significance to the lineup identification. No authority is cited to support this contention and we find it without merit. The statement was made outside the presence of the jury and was a proper insertion in the record. To suggest that it influenced the prosecuting witness in his testimony is to invite speculation in which we cannot indulge.

[5] The defendants' remaining assignments of error relate to the charge. Before he gave the charge and outside the presence of the jury the trial judge stated to defense counsel that he would allow a motion, if made, to strike evidence of the pretrial lineup and to instruct the jury not to consider it, even though the evidence was brought out on cross-examination by the defense. The record indicates no such motion was made. Defendants may not now complain about a slight reference to the lineup made by the court in recapitulating the evidence for the jury. No request for special instructions was made by either defendant. A careful examination of the entire charge indicates the court correctly explained the law and applied

it to the evidence on all features of the case. This was all he was required to do.

In the entire trial we find

No error.

CAMPBELL and PARKER, JJ., concur.

ELSA LAGOS CLINE, PETITIONER v. FRANK CLINE, JR., RESPONDENT

No. 6925SC505

(Filed 19 November 1969)

1. Parent and Child § 10— child support — jurisdiction — Uniform Support Act

Jurisdiction of all proceedings under the Uniform Reciprocal Enforcement of Support Act is vested in any court of record in the state having jurisdiction to determine liability of persons in a criminal proceeding for the support of dependents. G.S. 52A-9.

2. Parent and Child § 9; Husband and Wife § 18— failure to support — misdemeanor

The willful failure of a husband or parent to provide support is a misdemeanor. G.S. 14-322; G.S. 14-325; G.S. 49-2.

3. Criminal Law § 16; Parent and Child § 9— exclusive original jurisdiction — district court — misdemeanor

The district court has exclusive original jurisdiction of misdemeanors, G.S. 7A-272, including actions to determine liability of persons for the support of dependents in any criminal proceeding.

4. Parent and Child § 10— jurisdiction of district court — Uniform Support Act

The district court has exclusive original jurisdiction to entertain a proceeding pursuant to the Uniform Reciprocal Enforcement of Support Act.

5. Parent and Child § 10— proceeding under Uniform Support Act

A proceeding under the Uniform Reciprocal Enforcement of Support Act is a civil proceeding as in actions for alimony without divorce. G.S. 52A-12.

6. Appeal and Error § 1— jurisdiction on appeal — civil cases from district court

Civil proceedings are appealable directly from the district court to the Court of Appeals. G.S. 7A-27.

7. Parent and Child § 10; Appeal and Error § 16— appeal from Uniform Support proceeding — jurisdiction of superior court

A proceeding in the district court under the Uniform Reciprocal Enforcement of Support Act is appealable directly from the district court to the Court of Appeals, and a judge of the superior court has no authority to grant petitioner an extension of time to perfect an appeal from the district court to the Court of Appeals but he does have authority to give petitioner an additional 60 days to prepare the case on appeal to the Court of Appeals from an order entered by him which remanded the proceeding to the district court.

8. Appeal and Error § 24— abandonment of exceptions

Exceptions not filed in the record are deemed abandoned. Rule of Practice in the Court of Appeals No. 19(c).

APPEAL by respondent from *Collier, J.*, 10 August 1969 Session, CATAWBA County Superior Court.

Proceeding under Uniform Reciprocal Enforcement of Support Act.

On 17 April 1969 there was filed in the office of the Clerk of Superior Court of Catawba County a certificate from the Clerk of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, to which was attached a certificate and order of Circuit Judge William A. Herin, dated April 4, 1969; a petition of Elsa Lagos Cline verified 28 March 1969; an information sheet attached thereto and a copy of the Florida statute, together with an insolvency affidavit. These papers had been mailed to the Clerk of Superior Court, County of Columbia, [*sic*] Whiteville, North Carolina, on 8 April 1969.

The certificate and order of Judge Herin certified that the petitioner had instituted the proceeding "to compel the support of the above-named Petitioner and of any other Dependents named in the Petition"; that the respondent was believed to be residing in Hickory, North Carolina; that the respondent had a duty to support the dependents listed in the petition and should be dealt with according to law; it was thereupon ordered and decreed that certified copies of the petition and of the Judge's certificate be sent to the Clerk of Superior Court, County of Columbia Courthouse, [*sic*] Whiteville, North Carolina, for appropriate action and proceedings under the reciprocal laws of the State of North Carolina and the State of Florida.

The petition set out that petitioner was the former wife of respondent and mother of Geovanna, born 16 November 1966; that respondent is the father of Geovanna and said child is entitled to

support from respondent; that respondent since August 1966 has refused to provide support for dependent; that respondent is residing in Hickory, North Carolina, and that North Carolina has a Uniform Reciprocal Enforcement of Support Act similar to the one in Florida.

The record does not show how the papers got from Whiteville, North Carolina, to Catawba County, North Carolina. At any rate, the Deputy Clerk of the District Court of Catawba County under date of 17 April 1969 issued a notice to the respondent notifying him (1) that the papers had been docketed in the District Court of Catawba County, (2) that the matter would be presented to the Judge of the District Court of Catawba County in the courtroom in Hickory, to enter an order of support against the respondent and (3) that the respondent would be afforded an opportunity to present testimony and argument against the entry of such an order.

On 29 April 1969 the respondent answered the petition and denied that he was ever married to the petitioner or in any way liable for support to the petitioner or of Geovanna Lagos, the daughter of the petitioner. He alleged that this matter had previously been before the District Court of Catawba County, North Carolina, and the proceeding had been quashed and dismissed by an order of Judge Keith S. Snyder dated 11 September 1967; that no appeal had been taken from the previous adjudication and that to order this respondent to support Geovanna Lagos would be a violation of law.

The matter was heard, evidence offered and an order was entered by Judge Keith S. Snyder dated 2 May 1969 finding certain facts including:

> "Now, therefore, the Court finds that Geovanna Lagos, also known as Geovanna Lagos Cline, who was born on November 16, 1966, is not an obligee of Franklin Smith Cline; and that Franklin Smith Cline is not an obligor of Geovanna Lagos, also known as Geovanna Lagos Cline, and that the claim of Elsa Lagos Cline, also known as Elsa Lagos, also known as Elsa M. Lagos has no meritorious claim for an order of support, either for herself, or for her child, Geovanna Lagos, also known as Geovanna Lagos Cline.
>
> It Is Further Ordered that the petition filed in this matter, Docket Number 69Cr5593, be dismissed."

The evidence introduced supported the findings made by Judge Snyder.

To the entry of this order by Judge Snyder, the petitioner gave notice of appeal in open court. This matter was then placed on the

calendar of the Superior Court of Catawba County at the 4 August 1969 Criminal Session. The respondent at that time filed a motion to dismiss the matter in the Superior Court. Judge Collier entered the following order:

"This cause coming on to be heard and being heard before the Honorable Robert A. Collier, Jr., Judge Presiding at the August 4, 1969 Criminal Term of the Superior Court of Catawba County upon motion by the respondent that this cause be dismissed from the Criminal Docket of the Superior Court of Catawba County. The respondent was represented by J. Carroll Abernethy, Jr., and the petitioner in the original action by W. Gene Sigmon of the law firm of Sigmon & Sigmon of Newton, North Carolina. After examining and studying the Motion filed in this matter, and hearing argument of counsel, the Court makes the following findings of fact:

1. That this action is a Reciprocal Non-Support Action which was heard in the District Court in Catawba County on May 2, 1969 by the Honorable Keith S. Snyder, Judge Presiding.

2. That at said hearing on May 2, 1969, the Honorable Keith S. Snyder, Judge Presiding, after making certain findings of facts, found as follows:

'Now, therefore, the Court finds that Geovanna Lagos, also known as Geovanna Lagos Cline, who was born on November 16, 1966 is not an obligee of Franklin Smith Cline; and that Franklin Smith Cline is not an obligor of Geovanna Lagos, also known as Geovanna Lagos Cline, and that the claim of Elsa Lagos Cline, also known as Elsa Lagos, also known as Elsa M. Lagos, has no meritorious claim for an order of support, either for herself, or for her child, Geovanna Lagos, also known as Geovanna Lagos Cline.

It is further Ordered that the petition filed in this matter, Docket Number 69Cr5593, be dismissed.'

3. That from the said Order of the Honorable Keith S. Snyder, Judge Presiding at the District Court on May 2, 1969 at Hickory, North Carolina, the petitioner by and through her attorney, W. Gene Sigmon, in open court, gave notice of appeal. That this appeal entry was added to the Order and signed by the Honorable Keith S. Snyder, Judge Presiding.

4. That this cause was docketed for trial on the August 4th Term of the Criminal Division of the Superior Court of

Catawba County and set for trial on Wednesday, August 6, 1969, and that at that time the respondent moved that the action be dismissed from the criminal court docket on the grounds that it was not a criminal action.

5. That the Court finds as a fact that an appeal by a petitioner from an Order of the District Court in favor of the respondent is not a criminal action and that an appeal does not lie to the criminal division of the Superior Court or to the Superior Court.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that this matter be remanded from the Superior Court Criminal Docket of the Catawba County Superior Court to the District Court Docket of the Catawba County District Court. IT IS FURTHER ORDERED that the petitioner be and she is hereby granted a 60-day extension of time in which to prepare and serve her case on appeal to the Court of Appeals of the State of North Carolina. The respondent is granted 30 days thereafter in which to prepare and serve his case on appeal.

By Consent of the attorney for the Petitioner and the attorney for the Respondent, it was agreed that this Order might be signed by the Court out of the county, out of the term, and out of the district.

This 10th day of August, 1969.

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

From that portion of Judge Collier's Order granting the petitioner additional time in which to prepare and serve case on appeal, the respondent objected and took an exception and appealed to this court. The respondent also filed a motion in this court to docket and dismiss the petitioner's case on appeal for failure to perfect and serve and file same in apt time.

J. Carroll Abernethy, Jr., for respondent appellant.

Sigmon and Sigmon by W. Gene Sigmon for petitioner appellee.

CAMPBELL, J.

The Uniform Reciprocal Enforcement of Support Act was adopted in North Carolina in 1951. For the background of the Act see *Mahan v. Read,* 240 N.C. 641, 83 S.E. 2d 706 (1954). For comments pertaining thereto, see 29 N.C.L. Rev. 423 and Lee, North Carolina Family Law, § 169. See also 38 N.C.L. Rev. 1 for an article on the subject of family support.

[1] The Act was amended in 1955 and again in 1959. When the statute was first enacted in 1951, jurisdiction was confined to the Superior Courts. Now the Act provides:

> ". . . Jurisdiction of all proceedings hereunder shall be vested in any court of record in this State having jurisdiction to determine liability of persons for the support of dependents in any criminal proceeding." G.S. 52A-9.

[2, 3] The willful failure of a husband or parent to provide support is a misdemeanor. *State v. Lowe,* 254 N.C. 631, 119 S.E. 2d 449 (1961); G.S. 14-322, 14-325, and 49-2. The District Court in North Carolina has exclusive original jurisdiction of misdemeanors, G.S. 7A-272, including actions "to determine liability of persons for the support of dependents in any criminal proceeding."

[4] The District Court was established and became operative on the first Monday in December 1966 for the Twenty-Fifth District which includes Catawba County. G.S. 7A-131. Therefore, the District Court had exclusive original jurisdiction to entertain a proceeding pursuant to the Uniform Reciprocal Enforcement of Support Act.

[5-7] A proceeding under the Uniform Reciprocal Enforcement of Support Act is a civil proceeding "as in actions for alimony without divorce." G.S. 52A-12. Civil proceedings are appealable directly from the District Court to the Court of Appeals. G.S. 7A-27. Since the instant civil action was brought in the court designated as the one with exclusive original jurisdiction, the District Court, appeal would properly lie to the Court of Appeals.

[7] Judge Collier properly found and adjudicated that an appeal did not lie from Judge Snyder's order in the District Court to the Superior Court. The additional order of Judge Collier granting the petitioner a 60-day extension of time in which to prepare and serve her case on appeal to the Court of Appeals was a nullity if it was intended to give additional time to perfect the appeal from Judge Snyder's order in the District Court. The Superior Court was not the trial tribunal, and Judge Collier, as a Superior Court Judge, had no authority to grant an extension of time to perfect an appeal from the District Court to the Court of Appeals.

[8] If the extension of time of 60 days given by Judge Collier was intended to give the petitioner an additional 60 days to prepare and perfect her case on appeal to the Court of Appeals from the order entered by Judge Collier in the Superior Court, it was valid. The petitioner did give notice of appeal from Judge Collier's Order,

but did not file any exceptions, and therefore all exceptions of the petitioner are deemed abandoned. Rule 19(c), Rules of Practice in the Court of Appeals of North Carolina.

The time for perfecting an appeal from Judge Snyder in the District Court has expired. The motion of the respondent to dismiss the appeal from the District Court is allowed.

The result is that the Order in this cause entered by Judge Snyder dated 2 May 1969 and filed 14 May 1969 is in full force and effect.

PARKER and GRAHAM, JJ., concur.

MRS. KATE G. ROCKETT v. THE CITY OF ASHEVILLE

No. 6928SC403

(Filed 19 November 1969)

1. Municipal Corporations § 14— liability for defect in street or sidewalk

A municipality may be held liable for injury to a pedestrian caused by a defect in its street or sidewalk only where it is shown that the officers of the municipality knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travelers using its street or sidewalk in a proper manner might reasonably be foreseen.

2. Municipal Corporations § 14— liability for injuries to users of streets and sidewalks

A municipality is not an insurer of persons injured while using the public streets and sidewalks of the municipality.

3. Negligence § 35— nonsuit for contributory negligence

Ordinarily the burden of proving contributory negligence is on defendant, but where the evidence of the plaintiff is so clear as to compel no other conclusion, motion for judgment of involuntary nonsuit should be sustained.

4. Municipal Corporations § 17— injury from defect in sidewalk — contributory negligence

In this action for personal injuries received in a fall allegedly caused by a defect in a municipal sidewalk, judgment of nonsuit on the ground of contributory negligence was properly entered where plaintiff's evidence shows that she had discovered and was aware of the defective or dangerous condition of the sidewalk prior to the accident but chose to continue her way over the area she now complains was defective.

APPEAL from *Snepp, J.*, April 1969 Civil Term BUNCOMBE Superior Court.

This is a civil action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a fall on the public sidewalk in the City of Asheville. The plaintiff, a sixty-nine-year-old woman alleged and offered evidence tending to show that on 10 February 1968 at about 2:00 P.M. she was walking in an easterly direction on the public sidewalk on the north side of Hilliard Street in the City of Asheville between Asheland Avenue and Coxe Avenue when she slipped and fell on the public sidewalk, which resulted in the injuries complained of. The plaintiff alleged that a portion of the sidewalk between Asheland Avenue and Coxe Avenue over which she was walking was "broken, depressed, torn up and covered with loose rock and gravel . . .", and that the defective condition of the sidewalk was known or ought to have been known by the defendant city, and that the plaintiff's injuries were the proximate result of the defendant's negligence in failing to keep the public sidewalk at the point where the plaintiff fell in a safe condition for pedestrian travel.

The evidence tended to show that at the time and place where the plaintiff fell the sidewalk adjacent to a parking lot was broken and cracked and covered with bits and pieces of broken concrete, round river stone and sand for a distance of eight to eighteen feet, running laterally with the street and to a width of from three to six feet running perpendicular to the street and that this portion of the sidewalk was used by heavy vehicular traffic entering the parking lot from Hilliard Street. The evidence further tended to show that the sidewalk at the point where the plaintiff fell was on an incline of fifteen to twenty degrees from Hilliard Street to the parking lot. The defendant municipality filed an answer denying negligence and alleging contributory negligence on the part of the plaintiff. At the close of the plaintiff's evidence, the defendant's motion for judgment as of involuntary nonsuit was allowed, and the plaintiff excepted and appealed to this Court assigning as error the entry of the judgment of involuntary nonsuit.

Don C. Young for the plaintiff appellant.

Van Winkle, Buck, Wall, Starnes and Hyde, by O. E. Starnes, Jr., for the defendant appellee.

HEDRICK, J.

[1] The principles of law regarding the liability of a municipality for failing to keep its streets and sidewalks in a safe condition were

set out by Parker, J., now C.J., in *Smith v. Hickory,* 252 N.C. 316, 113 S.E. 2d 557 (1960), as follows:

> "The governing authorities of a town or city have the duty imposed upon them by law of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who use them in a proper manner. Liability arises only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect in the street or sidewalk and the injury: he must also show that the officers of the town or city knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travellers using its street or sidewalk in a proper manner might reasonably be foreseen. Actual notice is not required. Notice of a dangerous condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it in the exercise of due care."

These principles have been cited and quoted with approval in numerous decisions of the Supreme Court. See *Faw v. North Wilkesboro,* 253 N.C. 406, 117 S.E. 2d 14 (1960); *Waters v. Roanoke Rapids,* 270 N.C. 43, 153 S.E. 2d 783 (1967). See also G.S. 160-54.

[2] Application of the foregoing controlling principles of law does not make a municipality an insurer of persons injured while using the public streets and sidewalks of a municipality. *Mosseller v. Asheville,* 267 N.C. 104, 147 S.E. 2d 558 (1966); *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309 (1905).

[3, 4] The pleadings and evidence of the instant case raise the issues of the actionable negligence of the defendant and the contributory negligence of the plaintiff. We hold that the judgment of nonsuit was properly entered, if not on the principal question of liability, then upon the ground of contributory negligence. *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571 (1938); *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424 (1939). Ordinarily the burden of proving contributory negligence is on the defendant but where the evidence of the plaintiff is so clear as to compel no other conclusion, the law requires that the Court sustain the motion for judgment of involuntary nonsuit. As stated by Lake, J., in *Waters v. Roanoke Rapids, supra:*

> "The motion for judgment of nonsuit could be sustained on the ground of contributory negligence by the plaintiff only if the plaintiff's evidence, construed most favorable to her, established so clearly that no other conclusion can reasonably be drawn therefrom that the plaintiff, as she walked upon this sidewalk,

failed to exercise the care which a reasonable person would have exercised in so walking at that time and place."

The plaintiff testified that she was returning to her home from the southern part of the city to the northern part of the city and that when she came to the intersection of Hilliard Street and Asheland Avenue she decided to walk on the sidewalk on the northern side of Hilliard Street because: "I thought it would be nearer for me to cut through there than it was the other way. . . ." The plaintiff testified that on going from her home to the southern part of the city she had travelled along Asheland Avenue from Patton Avenue. The evidence is clear that the plaintiff had a choice of routes from the intersection of Asheland Avenue and Hilliard Street. The plaintiff fell less than one block from the point where she made the decision to walk along the northern side of Hilliard Street. The plaintiff further testified:

"This sidewalk that I was walking on, I couldn't hardly tell what kind of material it was made of, it was so broken up. Before I got to this place in the sidewalk, it looked like it was made out of cement. It was about eight feet wide. It was downhill, it was slanting like this in there where I fell, where my foot slipped.

"I came to a place where it was, it had sunk down, the place had, and it looked like there were little gravels all over it, and it was broken up, and right next to it was a parking lot. I couldn't go above it, and cars on this side, I couldn't go on that side, so I thought I would cross it, and I got about three steps when my foot slipped, and I couldn't catch, and it throwed me back over, and this hip hit the sidewalk way over there, and that is when it broke my hip."

On cross-examination, the plaintiff testified:

"I remember about what time of day it was when I fell. It was about 2:00 in the afternoon. I had my glasses on. I was by myself. It was a clear day, the sun was shining, but it was cold."

[4] Clearly the plaintiff had discovered and was aware of any defective or dangerous conditions prior to undertaking to traverse the allegedly defective portion of the sidewalk described as being from eight to eighteen feet in length and three to six feet in width. Apparently the plaintiff determined that the route over the depressed and broken section of the sidewalk presented less perils than undertaking to walk in the edge of Hilliard Street or passing the area by way of that portion of the sidewalk immediately adjacent to the

parking lot. Once the plaintiff had discovered the defective area, which she now contends was dangerous and unsafe, she was under a duty for her own safety, to exercise a degree of care commensurate with the danger or appearance thereof. *Watkins v. Raleigh, supra; Ferguson v. Asheville,* 213 N.C. 569, 197 S.E. 146 (1938).

After considering the evidence in the light most favorable to the plaintiff, we believe that, after discovering the defective condition of the sidewalk, for her own convenience she thought she was choosing the least perilous of the three dangerous routes. Prudence, rather than convenience, should have motivated the plaintiff's choice. The plaintiff was not compelled to undertake to traverse the area at all. Although it may have been inconvenient, the plaintiff could have returned to the corner of Hilliard Street and Asheland Avenue. As was said in *Dunnevant v. R. R.,* 167 N.C. 232, 83 S.E. 347 (1914), quoted by Schenck, J., in *Groome v. Statesville,* 207 N.C. 538, 177 S.E. 638 (1935):

> " 'If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence. . . . And where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery.' "

As to the negligence of the defendant city, we are cited by the appellants to numerous decisions of the Supreme Court of North Carolina: *Bunch v. Edenton,* 90 N.C. 431; *Fitzgerald v. Concord, supra; Radford v. Asheville,* 219 N.C. 185, 13 S.E. 2d 256 (1941); *Ferguson v. Asheville, supra; Lumber Co. v. Perry,* 212 N.C. 713, 194 S.E. 475 (1938); *Waters v. Roanoke Rapids, supra.*

An examination of all of these cases reveals that each is factually distinguishable in that the defective or dangerous condition of the public street or sidewalk complained of was concealed or was not discovered by the plaintiff prior to the incident causing the personal injury. As pointed out in the instant case, the plaintiff obviously knew or had discovered that the sidewalk was defective; nevertheless, she chose to continue her way along Hilliard Street over the area she now complains was defective. We believe her action in doing so was contributory negligence as a matter of law. The judgment of the Superior Court of Buncombe County of 29 April 1969 is affirmed.

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

STATE OF NORTH CAROLINA v. HERMAN MITCHELL

No. 6929SC521

(Filed 19 November 1969)

1. Rape § 18— assault on a female — lesser included offense of assault with intent to rape

Assault on a female by a male person is a lesser included offense in a proper bill of indictment charging an assault with intent to commit rape.

2. Rape § 18— assault with intent to rape — presumption that defendant is over 18

There is a presumption that a male person charged with an assault with intent to commit rape is over 18 years of age, with the burden on defendant to show as a matter of defense, relevant solely to punishment, that he was not over 18 years of age when the offense was committed.

3. Rape § 17— assault with intent to commit rape defined

In order to convict a male defendant of an assault with intent to commit rape, the State must prove that he assaulted the prosecutrix, that at the time of the assault he intended to gratify his passion on the person of the woman, and that he intended to do so at all events notwithstanding resistance on her part.

4. Rape § 18— assault with intent to rape — sufficiency of evidence

The State's evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of assault with intent to commit rape.

5. Rape § 6— instructions on assault on a female

In this prosecution upon an indictment charging assault with intent to commit rape, no prejudicial error was committed by the court in its instructions to the jury on the offense of assault on a female when the charge is considered contextually.

6. Assault and Battery § 17— assault on a female — punishment — prior law — amendment to G.S. 14-33

Prior to the enactment of Chapter 618, Session Laws of 1969, which rewrote G.S. 14-33, the maximum punishment for the crime of assault on a female by a male over the age of 18 was two years; under G.S. 14-33 as rewritten by the 1969 enactment, the maximum punishment for such crime is by fine not to exceed $500, imprisonment not to exceed six months, or both.

7. Constitutional Law § 35; Criminal Law § 138; Assault and Battery § 17— assault on female prior to 1969 amendment to G.S. 14-33 — trial after amendment — maximum punishment

A defendant sentenced for the crime of assault on a female after 28 May 1969, the effective date of the 1969 amendment which rewrote G.S. 14-33 and reduced the maximum sentence of imprisonment for that crime from two years to six months, is entitled to be sentenced under the provisions of G.S. 14-33 as it was constituted at the time he was sentenced, notwithstanding the crime was committed prior to the effective date of

the 1969 amendment, since defendant is entitled to the benefit of the more lenient punishment provided by the legislature while his trial was pending; therefore, sentence of imprisonment of two years imposed on 12 June 1969 for an assault on a female committed on 24 March 1969 is excessive.

8. Criminal Law § 177— excessive sentence — remand for resentencing

Where the court imposes a sentence in excess of the limit prescribed by law, the judgment must be vacated and the cause remanded for proper sentence, giving defendant credit for the time served under the excessive sentence.

APPEAL by defendant from *McLean, J.*, 9 June 1969 Criminal Session of Superior Court held in McDOWELL County.

Defendant was tried upon a bill of indictment charging him with an assault on Betty Fagan, a female, with intent to rape her.

Upon his plea of not guilty, trial was by jury. The jury returned a verdict of "guilty to assault on female."

From a judgment of imprisonment for two years, suspended upon certain conditions, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan, Deputy Attorney General Jean A. Benoy, and Special Assistant Maurice W. Horne for the State.

Van Winkle, Buck, Wall, Starnes & Hyde by Emerson D. Wall and Herbert L. Hyde for the defendant appellant.

MALLARD, C.J.

[1] Assault on a female by a male person is a lesser included offense in a proper bill of indictment charging an assault with intent to commit rape. 6 Strong, N.C. Index 2d, Rape and Allied Offenses, § 18.

The jury found that the defendant was "guilty to assault on female." In the judgment and commitment the record reads that the defendant was "found guilty of assault on a female, he being a male person over the age of 18 years of age." Defendant testified that he was 44 years of age.

In *State v. Beam*, 255 N.C. 347, 121 S.E. 2d 558 (1961), in which the Supreme Court found no error, the defendant was tried upon an indictment charging him with an assault on a female person with intent to commit rape. The jury returned a verdict of guilty of simple assault on a female. The trial judge imposed sentence of two years which was the maximum sentence that could be imposed

for the crime of assault on a female by a male person over the age of 18 years.

In *State v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861 (1958), the Supreme Court found no error. The defendant Courtney was tried upon an indictment for rape. The jury returned a verdict of "guilty of assault on a female." The trial judge imposed a prison sentence of not less than 12 nor more than 18 months, which was more than could be imposed for a simple assault on a female unless the defendant was a male person over the age of 18 years.

[2] There is a presumption that a male person charged with an assault with intent to commit rape is over 18 years of age. If a defendant, so charged, is under 18 years of age, such is relevant only on the question of punishment. Age is a matter of defense, and the burden of establishing this defense is on him. *State v. Beam, supra; State v. Courtney, supra.*

In *State v. Beam, supra,* it was held that in a prosecution for an assault with intent to commit rape a verdict of "guilty of simple assault on a female" would support a sentence for an assault on a female by a male person over the age of 18 years when the defendant's own evidence discloses that he was over 18 years of age at the time of the commission of the assault, and no question of defendant's age was raised during the trial.

[3] In order to convict a male defendant of an assault with intent to commit rape, the State must prove that he assaulted the prosecuting witness, that at the time of the assault he intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding resistence on her part. *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649 (1963).

[4] The evidence, taken in the light most favorable to the State, tended to show that the crime of assault with intent to commit rape had been committed. We do not deem it necessary to summarize the evidence in this case. We hold that it was not error for the judge to charge the jury that they could return a verdict of guilty of assault with intent to commit rape. *State v. Howard,* 5 N.C. App. 509, 168 S.E. 2d 495 (1969).

[5] The defendant also assigns as error the instructions to the jury on the lesser included offense of assault on a female. When the charge is considered contextually, we are of the opinion and so hold that no prejudicial error is made to appear with respect to the instructions to the jury on the offense of assault on a female.

Defendant's other assignment of error is that the sentence of im-

prisonment for two years imposed was excessive and exceeded the maximum provided by statute. The defendant does not raise any question relating to the conditions upon which the two year prison sentence was suspended; therefore, we do not discuss it.

[6] On 24 March 1969, the date of the assault alleged in the bill of indictment, the maximum punishment for the crime of assault on a female person by a male person over the age of 18 years was two years.

The defendant was tried during the week of 9 June 1969 and sentenced on 12 June 1969.

By Chapter 618 of the Session Laws of 1969, which became effective upon ratification on 28 May 1969, the General Assembly of North Carolina amended G.S. 14-33 by rewriting it in its entirety. The pertinent parts of G.S. 14-33, after such revision, read as follows:

". . . (b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any aggravated assault, assault and battery, or affray is guilty of a misdemeanor punishable as provided in Subsection (c) below. A person commits an aggravated assault or assault and battery if in the course of such assault or assault and battery he:

* * *

"(4) Assaults a female person, he being a male person;

* * *

"(c) Any aggravated assault, assault and battery, or affray is punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six (6) months, or both such fine and imprisonment if the offense is aggravated because of one of the following factors:

* * *

"(2) Assaulting a female, by a male person;"

Under the amended statute, an assault on a female by a male person is an aggravated assault.

[7] In the instant case, we hold that upon the verdict "guilty to assault on female," the defendant should be sentenced for an aggravated assault under the provisions of G.S. 14-33(c), as amended by Chapter 618 of Session Laws of 1969. The statute, as amended, provides that the maximum punishment for this type of aggravated assault is by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six (6) months, or both such fine and imprisonment.

In the case of *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698 (1967), the Supreme Court said:

> " 'The rule is, not that the punishment cannot be *changed,* but that it cannot be *aggravated.' State v. Kent,* 65 N.C. 311, 312; 16 Am. Jur. 2d Constitutional Law §§ 400, 403 (1964). See *Sekt v. Justice's Court,* 26 Cal. 2d 297, 159 P. 2d 17; 167 A.L.R. 833. The legislature may always *remove* a burden imposed upon citizens for State purposes.
>
> And, when this occurs pending an appeal, absent a saving clause, a manifest legislative intent to the contrary, or a constitutional prohibition, the appellate court must give effect to the new law. *State, use of Mayor & C. C. of Balto., vs. Norwood, et. al.,* 12 Md. 195. See *State v. Williams,* 45 Am. Dec. 741 (S.C.), 2 Richardson's Law 418; *Moorehead v. Hunter,* 198 F. 2d 52 (10th Cir.) (*habeas corpus* proceeding). Since the judgment is not final pending appeal 'the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered.' *Gulf, Col. & S. F. Ry. v. Dennis,* 224 U.S. 503, 506, 56 L. Ed. 860, 861, 32 S. Ct. 542, 543.
>
> An amendatory act which imposes a lighter punishment can be constitutionally applied to acts committed before its passage. *In re Estrada, supra.* After a defendant, who did not appeal, has begun serving his sentence, a change or repeal of the law under which he was convicted does not affect his sentence absent a retrospective provision in the statute. . . ."

Applying the above general rule to the facts in this case, we are of the opinion and so hold that the defendant was entitled to be sentenced under the provisions of G.S. 14-33 as it was constituted at the time he was sentenced. The sentence of two years in this case for an assault on a female by a male over the age of 18 years was in excess of that permitted by the statute at the time the sentence was imposed, although such a sentence would have been proper on the date of the commission of the crime. The defendant was entitled to the benefit of the more lenient punishment provided by the legislature while his trial was pending.

[8] "Where the court imposes a sentence in excess of the limit prescribed by law, the judgment must be vacated and the cause remanded for proper sentence, giving defendant credit for the time served under the excessive sentence." 3 Strong, N.C. Index 2d, Criminal Law, § 177. For the reasons stated, the judgment heretofore

pronounced in this case is vacated, and the cause is remanded to the Superior Court of McDowell County to the end that judgment may be imposed as provided by law.

Remanded for proper judgment.

MORRIS and HEDRICK, JJ., concur.

JAMES M. FORD v. ALBERT SMITH

No. 6927SC510

(Filed 19 November 1969)

1. Negligence § 35— nonsuit for contributory negligence

Judgment of nonsuit for contributory negligence cannot be sustained unless the plaintiff's evidence, considered in the light most favorable to him, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn therefrom.

2. Negligence § 35— nonsuit — acts of contributory negligence not alleged

Acts of contributory negligence not alleged in the answer should be ignored.

3. Automobiles §§ 77, 79— contributory negligence — passing to right of left-turning vehicle

In this action for personal injuries received by plaintiff motorcyclist in a collision at an intersection controlled by traffic lights, plaintiff was not contributorily negligent as a matter of law in passing on the right a left-turning vehicle which had stopped ahead of him at the intersection, the provision of G.S. 20-149(a) requiring the driver of a vehicle passing another vehicle proceeding in the same direction to pass at least two feet to the left thereof being inapplicable.

4. Automobiles § 79— intersection accident — contributory negligence — failure to maintain proper lookout

In this action for personal injuries received by plaintiff motorcyclist in a collision at an intersection controlled by traffic lights, plaintiff's evidence does not establish as a matter of law that plaintiff failed to keep a proper lookout, where it tends to show that plaintiff passed to the right of a left-turning vehicle, that plaintiff was faced with a green traffic signal when he entered the intersection, that defendant's car entered the intersection on a red light, that plaintiff first looked to the left and saw defendant's car coming into the intersection about five or six feet from him when he got past the left-turning vehicle, and that he could not see

defendant's car until he went past the left-turning car, since in the absence of anything which gave or should have given him notice to the contrary, plaintiff had the right to assume that motorists faced with the red traffic signal would yield the right-of-way as required by law.

5. Automobiles § 79— intersection accident — contributory negligence — failure to keep vehicle under proper control

In this action for personal injuries received by plaintiff motorcyclist in a collision at an intersection controlled by traffic lights, plaintiff's evidence does not establish as a matter of law that plaintiff failed to keep his vehicle under proper control, where it tends to show that plaintiff stopped behind another vehicle which was already stopped for a red light and signaling for a left turn, that when the light changed to green he proceeded to the right of the left-turning vehicle at five to ten miles per hour, and that he tried to stop his motorcycle when he saw defendant's automobile five or six feet away.

APPEAL by plaintiff from *Grist, J.,* 16 June 1969 Session of GASTON County Superior Court.

Plaintiff instituted this action to recover for personal injuries allegedly sustained when the motorcycle he was operating collided with a car being operated by defendant at a Mount Holly intersection. Defendant answered denying negligence, pleading contributory negligence, and asserting a counterclaim for his damages. At the conclusion of plaintiff's evidence the court allowed defendant's motion for judgment of nonsuit and the plaintiff appealed assigning the granting of that motion as error.

Childers and Fowler by Henry L. Fowler, Jr., for plaintiff appellant.

Hollowell, Stott & Hollowell by Grady B. Stott for defendant appellee.

GRAHAM, J.

The parties do not dispute the fact that sufficient evidence was presented to take the case to the jury on the issue of defendant's actionable negligence. Therefore, the only question before us is whether plaintiff's evidence establishes as a matter of law his own negligence as one of the proximate causes of his injury. *Jernigan v. R. R. Co.,* 275 N.C. 277, 167 S.E. 2d 269.

[1] The judgment of nonsuit cannot be sustained unless the plaintiff's evidence, considered in the light most favorable to him, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn there-

from. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47; *Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607; *Black v. Wilkinson,* 269 N.C. 689, 153 S.E. 2d 333.

Evidence of the plaintiff, taken in the light most favorable to him, tended to show as follows: On 11 August 1967, the plaintiff was operating a motorcycle south on Main Street in Mount Holly. When he got to the intersection of Charlotte Avenue and Main Street, the traffic control light at the intersection was red for traffic moving along Main Street. Plaintiff brought his motorcycle to a stop behind a car that was already stopped for the light and signaling for a left turn. There was only one lane for traffic traveling south on Main Street, but at the intersection there was sufficient room for the plaintiff to safely pass to the right of the turning vehicle and clear the intersection. When the light changed to green, the car ahead of the plaintiff moved forward for about 8 feet into its turn. The plaintiff proceeded around the turning vehicle on the right at a speed of from 5 to 10 miles an hour. As the plaintiff entered the intersection the front of his motorcycle collided with the right side of the defendant's car which was moving west through the intersection along Charlotte Avenue. A police officer was standing about 60 feet from the intersection and witnessed the collision. He stated that the light controlling traffic along Charlotte Avenue changed from yellow to red when the defendant's car was 10 to 15 feet east of the intersection and that defendant's car entered the intersection on a red light. The left-turning car ahead of the plaintiff stopped just as the plaintiff entered the intersection and the collision occurred. The plaintiff testified:

> "After I got on past the car that I said was giving a left turn signal, that's when I looked to my left and saw Mr. Smith's car the first time. At that time Mr. Smith's car was coming into the intersection. . . . I don't know how far from my motorcycle Mr. Smith's car was when I first saw it. I guess it was about five or six feet. I tried to stop when I saw he was that close; I hit the brakes on the motorcycle."

The plaintiff further testified that he could not see the defendant's car until he went past the car making the left turn.

[2, 3] Defendant contends that plaintiff's act of passing to the right of the left-turning vehicle establishes actionable negligence on his part sufficient to justify the nonsuit. However, the theory of the defendant's answer is that it was the plaintiff who "ran the red light" and no allegation appears asserting the act of passing on the right as an act of negligence. Acts of contributory negligence not

alleged in the answer should be ignored. *Bowen v. Gardner, supra; Maynor v. Pressley,* 256 N.C. 483, 124 S.E. 2d 162; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785; *Skinner v. Jernigan,* 250 N.C. 657, 110 S.E. 2d 301. Even if alleged, it is our opinion that the act of passing on the right under the circumstances of this case would not compel a nonsuit. "Generally, the overtaking driver is justified in proceeding along the right side of the highway in attempting to pass the forward vehicle where the driver of the latter gives a left-turn signal or pulls over to the left as though intending to make a left turn." 38 A.L.R. 2d 109, 117, Annotation.

G.S. 20-149(a) requires the driver of a vehicle in overtaking and passing another vehicle proceeding in the same direction, to pass at least two feet to the left thereof. In commenting on that statute in the case of *Maddox v. Brown,* 232 N.C. 542, 547, 61 S.E. 2d 613, our Supreme Court stated:

> "[N]otwithstanding the provisions of this statute, a motorist may, in the exercise of ordinary care, pass another vehicle, going in the same direction, on the right of the overtaken vehicle when the driver of that vehicle has given a clear signal of his intention to make a left turn and has left sufficient space to the right to permit the overtaking vehicle to pass in safety."

This rule, however, does not mean that the act of passing on the right of a left-turning vehicle at an intersection may not be accomplished in such a manner as to constitute negligence. *Ward v. Cruse,* 236 N.C. 400, 72 S.E. 2d 835, 38 A.L.R. 2d 109. The question of negligence under such circumstances is for the jury to determine under appropriate instructions by the court, applying the rules stated in the *Maddox* case and other applicable rules of due care.

[4] We are of the further opinion that the plaintiff's evidence does not establish as a matter of law that the plaintiff failed to keep a proper lookout or failed to maintain his motorcycle under proper control. The plaintiff was faced by the green traffic signal, and, in the absence of anything which gave or should have given him notice to the contrary, he had the right to assume that motorists faced with the red signal would yield the right-of-way as required by law. 1 Strong, N.C. Index 2d, Automobiles, § 10, p. 425 and cases therein cited. In the case of *Currin v. Williams,* 248 N.C. 32, 102 S.E. 2d 455, the plaintiff testified: "At the speed I was going I could have stopped my car in ten feet. If I had seen the man coming I could have. I did not see him coming. I was looking down the road, but my crossview would have given me some distance." Also: "Q You did not look to your left nor your right? A No. I didn't look

sideways. I was looking forward." The plaintiff in that case further testified that he did not see the approaching vehicle before the collision. The case was nevertheless submitted to the jury. In finding no error the Supreme Court stated through Bobbitt, J., at p. 37:

> "Under the evidence here presented, we cannot say that the only reasonable inference or conclusion that may be drawn therefrom is that defendant was operating his car in such manner as to put plaintiff on notice, at a time when plaintiff could by the exercise of due care have avoided the collision, that defendant would not stop in obedience to the red light. We conclude that it was proper to submit the issue of contributory negligence to the jury."

The evidence of the plaintiff here no more compels such a single inference than did the evidence of the plaintiff in the *Currin* case.

[5] On the question of control, the plaintiff testified that his speed was only five to ten miles per hour and that he tried to stop his motorcycle when he first saw the defendant five or six feet away. He had traveled only a short distance from where he had stopped and waited for the light to change. Such evidence does not establish as a matter of law that plaintiff failed to keep his motorcycle under proper control.

The defendant cites the case of *Almond v. Bolton,* 272 N.C. 78, 157 S.E. 2d 709, as controlling here. Conceding that the *Almond* case is similar in many respects to the instant case, we are nevertheless more impressed with its distinctions. There, the plaintiff motorcycle operator observed a left-turning truck that had stopped at an intersection 150 feet ahead of him. He admitted that this put him on notice that the truck could not complete its turn because of the presence of other traffic. Plaintiff nevertheless went around the truck on the right and continued into the intersection at a speed of 20 miles per hour. In the case before us the evidence was that the turning vehicle moved into its turn and stopped just as the plaintiff entered the intersection and the collision occurred. Furthermore, the *Almond* case involved a defendant who was meeting the plaintiff and turning left in front of him. Plaintiff did not, as did the plaintiff here, have the right to rely on a traffic signal governing the movement of traffic through the intersection, absent some indication to him that he could not rely on it.

An issue of plaintiff's contributory negligence as a proximate cause of his injury obviously arises on his own evidence. It is in our

opinion, however, a question to be resolved by the jury and the judgment of nonsuit must therefore be reversed.

Reversed.

CAMPBELL and PARKER, JJ., concur.

KAREN MARIE MOTYKA, MINOR; FRANCES WANDA MOTYKA, MINOR; ANN ALLEN, MINOR; AND RICHARD ALLEN, MINOR; BY THEIR NEXT FRIEND, LEATA ALLEN BARNES v. J. H. NAPPIER, INDIVIDUALLY AND AS EXECUTOR OF THE WILL OF RALPH ALLEN, DECEASED; CLARENCE M. KIRK AND WIFE, IMOGENE S. KIRK; THOMAS A. BANKS, TRUSTEE; AND TAR HEEL PRODUCTION CREDIT ASSOCIATION, BENEFICIARY

No. 6910SC60

(Filed 19 November 1969)

1. Cancellation and Rescission of Instruments § 8— cancellation of executor's deed — action against grantees — sufficiency of complaint

In this action to set aside and cancel a deed given by an executor to defendants and a deed of trust executed by defendants on the conveyed property, the complaint fails to state a cause of action against defendants where it alleges that plaintiffs are beneficiaries under a will which directed the executor to sell all of the property of the estate, including realty, and to pay the money in accordance with provisions of the will, that a certain tract of land was included in the estate, that for $100 the executor privately executed to one defendant an option to purchase the tract for $31,000, that at the time the option was executed defendants knew that plaintiff beneficiaries had objected to the sale and had demanded notice and an opportunity to be heard before any action to sell was taken, and that the executor thereafter conveyed the property to defendants for $31,000, which price was grossly inadequate, since the executor had the power and duty to sell the property and plaintiffs could impose no legal obligation on him to hear their objections, there were no allegations of fraud or collusion by defendants or that they had knowledge of bad faith or fraud by the executor, and the allegation that the $31,000 paid for the property was inadequate is insufficient to state a cause of action for cancellation of the deed.

2. Cancellation and Rescission of Instruments §§ 1, 10; Executors and Administrators § 11— inadequacy of price — executor's deed

Mere inadequacy of price standing alone and absent any element of fraud on the part of the purchaser is not sufficient ground for setting aside a sale by an executor unless the inadequacy is so gross as in itself to indicate fraud or an abuse of the power conferred.

APPEAL by plaintiffs from *Hobgood, J.*, 19 August 1968 Session, WAKE Superior Court.

Plaintiffs, who are all minors, bring this action by their next friend to have set aside and canceled a deed from defendant Nappier, as executor, to defendant, Clarence M. Kirk, and to have set aside and canceled a deed of trust from defendants Kirk to defendant Production Credit Association.

Plaintiffs are the beneficiaries under the Fifth, Sixth, and Seventh items of the Will of Ralph Allen who died on or about 18 December 1965, and whose Will was duly probated in Johnston County on 23 December 1965. The defendant Nappier was named as executor in said Will and duly qualified as such on 23 December 1965. The Will provided in item Second as follows: "It is my will and desire and I do direct my executor shall sell all of the property consisting of this estate, including real estate, and when the same has been liquidated, he, after payment of the debts and expenses, shall pay the money in accordance with the following bequests." Thereafter follows specified dispositions of the money, including bequests of percentages of the remainder to the minor plaintiffs.

Included in testator's estate was a tract of land in Wake County consisting of approximately 218 acres which defendant Nappier sold at private sale to defendant Clarence M. Kirk, and upon which defendants Kirk executed a deed of trust to defendant Production Credit Association.

On or about 14 February 1966, and again on or about 3 March 1966, the minor plaintiffs, through their "natural guardians and attorneys," advised defendant Nappier that "they demanded notice and an opportunity to be heard before any action was taken to sell or otherwise dispose of" the Wake County tract of land. On or about 21 March 1966 defendant Nappier, without notice to plaintiffs, executed as executor for $100.00 an option to defendant Clarence M. Kirk to purchase said tract of land for $31,000.00. The option was to expire 31 March 1966. On 28 March 1966, without notice to plaintiffs, defendant Nappier as executor executed and delivered to defendant Clarence M. Kirk a deed reciting consideration of $31,100.00 which conveyed said Wake County tract of land. Also on 28 March 1966 defendants Kirk executed a deed of trust upon said tract to secure their note to defendant Production Credit Association in the amount of $31,000.00. It is this deed and this deed of trust which plaintiff's seek by this action to have set aside and canceled.

Defendants Kirk demurred *ore tenus* to the complaint for failure to allege a cause of action against them. Their demurrer was sus-

tained and a mistrial as to the other defendants was ordered. Plaintiffs appeal from the order sustaining the demurrer of defendants Kirk.

Liles & Merriman, by John W. Liles, Jr., and Harris, Poe, Cheshire & Leager, by Samuel R. Leager, for plaintiff appellants.

Maupin, Taylor & Ellis, by William W. Taylor, Jr., and Susan H. Ehringhaus for defendant appellees Clarence M. Kirk and Imogene S. Kirk.

PARKER, J.

[1] The allegations of the complaint as they relate to defendants Kirk, except where quoted, may be summarized as follows:

(a) That defendant Nappier was the duly qualified and acting executor of the Will of Ralph Allen, deceased.

(b) That the Will of Ralph Allen directed the executor to sell all of the property of the estate, including real estate.

(c) That at the time of his death Ralph Allen owned a tract of land in Wake County containing about 218 acres.

(d) That on 21 March 1966 defendant Nappier as executor, in consideration of the sum of $100.00, privately executed to defendant Clarence M. Kirk an option to purchase the 218 acre tract in Wake County for the purchase price of $31,000.00.

(e) That at the time of granting the option defendant Nappier advised defendant Clarence M. Kirk of the objections of the plaintiffs to the sale of said property.

(f) That on 23 March 1966 plaintiffs advised defendant Kirk by mail "that said sale was not to the best interest of the beneficiaries, that they objected to the sale of the property described in the above mentioned option and that they would resist said sale and take necessary legal action to avoid said sale."

(g) That on 28 March 1966 defendant Nappier as executor, executed and delivered to defendant Kirk a deed reciting consideration of $31,100.00 conveying the said 218 acre tract.

(h) That at the time of the conveyance defendant Kirk "had written notice that the infant beneficiaries objected to said sale."

(i) That defendants Kirk, on 28 March 1966, executed a deed of trust conveying said 218 acre tract to secure their note in the sum of $31,000.00 to defendant Production Credit Association.

(j) "That at the time of the granting of the option for the sale of said land, at all times subsequent thereto and at the present time the fair market value of said land was, has been and is reasonably at least $50,000.00."

(k) "That the price of $31,000.00 received at said sale for said property is grossly inadequate, the fair market value thereof being at least $50,000.00."

(l) "That the granting of an option for the sale and the sale of said lands by said executor to Clarence M. Kirk was contrary to law and equity for the reason that the price at which said land was sold was grossly inadequate, which was known or should have been known to said Executor and to Clarence M. Kirk, and said sale was consummated at a time and in a manner and under circumstances where said Executor and Clarence M. Kirk were fully advised that the minor beneficiaries, plaintiffs herein, objected to said sale, all to the great damage of these minor plaintiffs, beneficiaries under the will of Ralph Allen, deceased."

[1] The sole question presented by this appeal is whether plaintiffs have stated a cause of action against defendants, Clarence M. Kirk and wife, Imogene S. Kirk, for rescission and cancellation of the deed executed by defendant executor J. H. Nappier. We are of the opinion that the facts alleged in the complaint are not sufficient to constitute a cause of action against the defendants Kirk. The only allegations material to defendants Kirk are that they knew that the plaintiffs had objected to the sale and had demanded notice and an opportunity to be heard before any action to sell was taken; and that the price of $31,000.00 was grossly inadequate.

Even though defendants Kirk were aware at the time the option to purchase the property was executed that plaintiffs had objected generally to the sale and had demanded notice and an opportunity to be heard before any action to sell was taken, these facts would not be sufficient grounds to declare the sale of the property to defendant Clarence M. Kirk null and void and to set aside the deed conveying title to him. The executor had the express power and duty to sell the property and therefore plaintiffs could not impose a legal obligation upon him to hear their objections.

The defendant Kirk purchased the land from the executor who had been directed by the Will to sell all of the property of the estate, including the real estate. Since the executor had express power and duty to sell and there are no allegations of fraud or collusion on the part of defendants Kirk, or that defendants Kirk had knowl-

edge of any bad faith or fraud on the part of the executor, the complaint fails to allege a cause of action against defendants Kirk to have the deed set aside. 33 C.J.S., Executors and Administrators, § 293, p. 1323. See *Felton v. Felton,* 213 N.C. 194, 195 S.E. 533; *Sprinkle v. Hutchinson,* 66 N.C. 450; *Polk v. Robinson,* 42 N.C. 235; *Gray v. Armistead,* 41 N.C. 74.

[2] Also, the allegation that the $31,000.00 paid for the property was inadequate will not provide facts sufficient to overcome the demurrer. Mere inadequacy of price standing alone and absent any element of fraud on the part of the purchaser, is not a sufficient ground for setting aside a sale by an executor unless the inadequacy is so gross as in itself to indicate fraud, or an abuse of the power conferred. 33 C.J.S., Executors and Administrators, § 294, p. 1325. Such was not the case here. It is noteworthy that plaintiffs voiced no objection to the sale on the ground of inadequacy of price until after the sale was consummated, even though they were aware of the terms of the option.

The judgment sustaining the demurrer of defendants Kirk is

Affirmed.

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

HARWELL ENTERPRISES, INC. v. GARY L. HEIM, INDIVIDUALLY, AND GARY L. HEIM AND DWIGHT BALLARD, TRADING AS METRO SCREEN ENGRAVING COMPANY

No. 6927SC532

(Filed 19 November 1969)

1. Appeal and Error § 45— the brief — abandonment of exceptions

Exceptions and assignments of error not set out in appellant's brief are deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

2. Pleadings § 19— demurrer — admission of facts

The demurrer admits the facts pleaded in the complaint, but it does not admit any legal inferences or conclusions of law asserted by the pleader.

3. Master and Servant § 11— employment contracts — restrictive covenants — enforcement

Restrictive covenants in employment contracts, otherwise reasonable, will be enforced by a court of equity if they are no wider than reasonably necessary for the protection of the employer's business and do not impose

undue hardship on the employee, due regard being had to the public interest.

4. Master and Servant § 11— employment contract — burden of proof

The burden is on the plaintiff to establish the reasonableness of an employment contract containing a restrictive covenant not to engage in competition.

5. Master and Servant § 11— action on employment contract — covenant not to compete — sufficiency of allegations

In an action by plaintiff to restrain its former employee from engaging in the silk screen processing business in the United States for a period of two years in violation of the terms of a restrictive covenant in the employment contract, allegations that plaintiff's businesses are conducted throughout the United States and include all phases of silk screen processing and that defendant is interfering with its silk screen processing business in the territory surrounding a certain municipality in this State, *held* demurrable, there being no allegations that defendant is interfering with plaintiff's other businesses throughout the country.

APPEAL by plaintiff and defendant Ballard from *Ervin, J.*, 22 September 1969 Session of the GASTON Superior Court.

Plaintiff, Harwell Enterprises, Inc., (Harwell), employed defendant, Gary L. Heim (Heim), on 27 September 1967 pursuant to a written contract. Heim voluntarily left the employ of Harwell on 11 February 1968. Immediately thereafter, Heim and another former employee of Harwell, defendant Dwight Ballard (Ballard), set up the Metro Screen Engraving Company in Gastonia to engage in the silk screen processing business in competition with Harwell.

The employment contract provided:

"THIS AGREEMENT, executed in duplicate, sets forth the agreement between Gary L. Heim (Employee), and HARWELL ENTERPRISES, INC., (Employer), covering certain aspects of employment with Harwell Enterprises, Inc.

Harwell Enterprises, Inc., is engaged in various business endeavors including all phases of silk screen processing, plastics, importing and various other ventures which will materialize during the time of my employment with HARWELL ENTERPRISES, INC. The nature of these operations or businesses will depend upon constant engineering, research, development, manufacturing, and processes which are of a secret and confidential nature necessary to maintain its business, and in order to continue as a company in these fields.

THEREFORE, in consideration of the above and in consideration of employment or continued employment with Har-

well Enterprises, Inc., and the payment of wages during employment, it is understood and agreed as follows:

* * *

6. I further agree that I will not, after the termination of my employment with Harwell Enterprises, Inc., for any cause whatsoever, engage either directly or indirectly on my own behalf, or on behalf of any other person, persons, firm, partnership, company, or corporation in the business of silk screen processing or any other business providing products and services similar in nature to those of Harwell Enterprises, Inc., or in any competitive business in the United States for a period of two (2) years from the date of the termination of my employment.

IN WITNESS WHEREOF, Gary L. Heim has hereto set his hand and seal, and Harwell Enterprises, Inc., has caused this agreement to be executed in its name by its President and its corporation seal to be hereto affixed and attested by its Secretary, this the 27th day of September, 1967."

This suit is for an injunction to restrain Heim from engaging in any other business similar to Harwell's in violation of the terms of the contract; to restrain Ballard for participating in any such business effort with Heim; to require Heim to account for all money earned by engaging in the silk screen processing business in violation of his contract with Harwell; for all past and anticipated money damages to Harwell as a result of the breach of the contract; and for costs of this action.

Plaintiff alleged that its business consists "of various business endeavors including all phases of silk screen processing, plastics, importing and various other ventures throughout the United States"; that Heim has contacted customers being served by Harwell in Gastonia, North Carolina and Clover, South Carolina, and is actually supplying silk screen processing equipment and materials to them; that these concerns were customers of Harwell during the employment of Heim. Heim also acquired during his employment with Harwell trade and technical information, lists of plaintiff's customers, price information, manufacturing processes and research and development information and is now using same in violation of his contract.

It was further alleged that Ballard knew of the contract and conspired with Heim to violate it; that defendants are not sufficiently solvent to respond in damages and that plaintiff has no adequate remedy at law.

Heim demurred for failure of complaint to allege facts sufficient to state a cause of action and for misjoinder of causes of action.

Ballard demurred for misjoinder of causes of action and failure of complaint to state facts sufficient to constitute a cause of action against him since he was not a party to the employment contract.

The demurrer of defendant Heim was sustained and the action dismissed as to him, since "the complaint states a defective cause of action in that the contract sued upon is void and unenforceable because it purports to prevent the defendant from working in 'any competitive business in the United States.'" The demurrer of the defendant Ballard was overruled. Harwell and Ballard appeal to this Court.

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

Horace M. DuBose, III, for defendant appellee Heim.

Hollowell, Stott & Hollowell by Grady B. Stott for defendant appellee Ballard.

CAMPBELL, J.

[1] While Ballard took exceptions to overruling his demurrer and in the record made assignments of error, nevertheless, he did not set same out in his brief, and they are taken as abandoned by him. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Ballard filed a brief in support of the ruling of the trial judge sustaining the demurrer of Heim.

We confront the question as to whether the employment contract in this case is void and unenforceable.

The law of "restrictive covenants not to compete" has been fashioned in numerous decisions of the North Carolina Supreme Court. Although general restraints of trade are not allowed, so-called partial restraints have been permitted under certain conditions. *Moskin Bros. v. Swartzberg,* 199 N.C. 539, 155 S.E. 154 (1930); *Scott v. Gillis,* 197 N.C. 223, 148 S.E. 315 (1929); 17 C.J.S., Contracts, § 241(1), pp. 1109-1110.

This case involves a personal service contract and does not involve covenants not to compete entered into in connection with the sale of a business and its good will.

[2] The demurrer admits the facts pleaded in the complaint, but it does not admit any legal inferences or conclusions of law asserted

by the pleader. *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77, S.E. 2d 910 (1953).

Applying this principle as to the admitted facts, we next turn to the applicable law. In *Asheville Associates v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 121 S.E. 2d 593 (1961), Higgins, J., set forth the applicable rule as follows:

> "Courts generally refuse to enforce restrictive covenants in employment contracts unless they are (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy."

[3] Restrictive covenants in employment contracts, otherwise reasonable, will be enforced by a court of equity if

> ". . . they are no wider than reasonably necessary for the protection of the employer's business, and do not impose undue hardship on the employee, due regard being had to the interests of the public." 17 C.J.S., Contracts, § 254, p. 1138. See *Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E. 2d 304 (1965); *Asheville Associates v. Miller, supra;* and *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961).

[4, 5] Restrictive covenants not to compete in employment contracts are scrutinized more rigorously than similar covenants incident to a sale of a business. The burden is on the plaintiff to establish the reasonableness of the contract. The mere allegation of business throughout the United States which needs to be protected is not sufficient. The plaintiff has failed to demonstrate on this record that the restrictive covenant applying to the entire United States was necessary to protect the legitimate interests of the business of the plaintiff. *Noe v. McDevitt*, 228 N.C. 242, 45 S.E. 2d 121 (1947).

Some of the criteria to be observed in these cases are set out by Stacy, C.J., in *Beam v. Rutledge*, 217 N.C. 670, 9 S.E. 2d 476 (1940):

> "Public policy is concerned with both sides of the question. It favors the enforcement of contracts intended to protect legitimate interests and frowns upon unreasonable restrictions. . . . It is as much a matter of public concern to see that valid contracts are observed as it is to frustrate oppressive ones. Both functions belong to the courts.
>
> The test to be applied in determining the reasonableness of a restrictive covenant is to consider whether the restraint affords

> only a fair protection to the interest of the party in whose favor it is given, and is not so broad as to interfere with the rights of the public. . . . The question is one of reasonableness — reasonableness in reference to the interests of the parties concerned and reasonableness in reference to the interests of the public. . . . Such a covenant is not unlawful if the restriction is no more than necessary to afford fair protection to the covenantee and is not injurious to the interests of the public. . . .
>
> * * *
>
> The line of demarcation, therefore, between freedom to contract on the one hand and public policy on the other must be left to the circumstances of the individual case. Just where this line shall be in any given situation is to be determined by the rule of reason. Of necessity, no arbitrary standard can be established in advance for the settlement of all cases."

In order for plaintiff to establish the reasonableness of a contract to protect a business throughout the United States, we think it is incumbent upon the plaintiff to show that such a business does exist and that the contract was necessary to protect such legitimate interests. The record in this case does not support the position of the plaintiff.

[5] The allegation "[t]hat the business of the plaintiff consists of various business endeavors including all phases of silk screen processing, plastics, importing and various other ventures throughout the United States" undoubtedly establishes a conglomerate in the largest sense but there is no corresponding allegation that the defendant is such an inventive genius or other human dynamo that his presence in a business endeavor anywhere in the United States would short-circuit the operations of the plaintiff and cause even the mildest tremor in the far flung operations of the plaintiff. To uphold the covenant the plaintiff must allege and be prepared to prove that the covenant is "no more than necessary to afford fair protection to the covenantee [the plaintiff] and is not injurious to the interests of the public." *Beam v. Rutledge, supra.*

Here the allegations show that Heim is interfering with the "silk screen processing" segment of business of the plaintiff Harwell, in a territory surrounding Gastonia, North Carolina. There is nothing to show that Heim is interfering with any other segment of the "various business endeavors" of the plaintiff or that any "other ventures throughout the United States" are affected in the least. Thus there is no correlation of the protection sought with any need of the business of Harwell. "The court cannot, by splitting up the territory,

make a new contract for the parties — it must stand or fall integrally." *Noe v. McDevitt, supra.*

As to Defendant Ballard — Appeal dismissed.

As to Plaintiff Harwell — Affirmed.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. MAYNARD McGUINN

No. 6929SC453

(Filed 19 November 1969)

1. Criminal Law §§ 43, 66— photographs — appearance of defendant — beard and mustache — prejudice

In a homicide prosecution, photographs purporting to show defendant on the night of the offense with a mustache and a short growth of beard were properly admitted in evidence as material and relevant to the issue of defendant's guilt, notwithstanding defendant's claims of prejudice on the grounds that he is "a nice looking, clean shaven man" and that the jury generally associates the wearing of beards with a disrespect for the law, where (1) one of the eyewitnesses had identified defendant as "the boy with the beard" and (2) defendant himself testified on cross-examination that the photographs fairly and accurately represented his appearance on the night of the shooting.

2. Criminal Law § 43— photographs — admissibility — prejudicial effect

Photographs otherwise competent for the purpose of illustrating the testimony of a witness are not rendered inadmissible solely because they may tend to arouse prejudice.

3. Criminal Law § 86— impeachment of defendant's credibility — date of marriage — children prior to marriage

There is no merit to defendant's contention that the question asked him on cross-examination as to the date of his marriage was prejudicial in that subsequent examination as to the age of his children disclosed he had two children by his wife prior to the marriage, since (1) at the time the question was asked the evidence of the marriage date was innocuous, (2) defendant failed to object when he was later asked the age of his children, and (3) the solicitor may impeach defendant's credibility by cross-examination as to collateral matters, provided the questions are based on information and asked in good faith.

4. Homicide § 28— self-defense — instruction — rule of apparent necessity

In homicide prosecution, an instruction on self-defense that defendant

could use no more force than was reasonably necessary is erroneous, the correct rule being that defendant could use such force as was necessary or *apparently necessary* to protect him from death or great bodily harm.

APPEAL by defendant from *McLean, J.*, May 1969 Session of POLK Superior Court.

This is a criminal prosecution on an indictment charging defendant with the first-degree murder of Paul Kuykendall on 1 February 1969. The solicitor announced in open court he would not try the defendant for first-degree murder, but would place him on trial for second-degree murder or manslaughter as the evidence might disclose. The defendant pleaded not guilty.

The State presented evidence of three eyewitnesses who testified in substance as follows: At approximately 9:15 p.m. on 1 February 1969 they had driven to a filling station operated by Paul Kuykendall in the town of Tryon, N. C., for the purpose of purchasing oil. When they arrived they found the defendant and one Daniel Franklin already at the station. The defendant and Franklin had both been drinking and were arguing with Kuykendall, though the State's witnesses did not know exactly what the argument was about. Kuykendall told the defendant and Franklin to leave, and they did leave the station, walking across the street. The defendant and Franklin stood across the street from the filling station for a few minutes, after which one of them — the State's witnesses did not know which — called to Kuykendall to come across the street. Kuykendall left the filling station, crossed the street to where defendant and Franklin were standing, and the argument continued for a few minutes. The witnesses then observed the defendant pull out a gun and shoot Kuykendall in the abdomen. Kuykendall backed away a few steps, then pulled a pistol from his pocket and shot back two or three times, but without hitting either the defendant or Franklin, both of whom ran. The State also presented medical evidence that Kuykendall died in the hospital early the next morning as a result of the bullet wound in his abdomen.

Defendant, appearing as a witness in his own behalf, admitted he shot Kuykendall, but testified he did so only after Kuykendall had first fired at him and testified to other circumstances tending to support his contention that he acted only in self-defense. After two defense witnesses had testified to defendant's good character and reputation, Daniel Franklin testified as a witness for defendant in support of defendant's version of what had occurred at the time of the shooting.

The jury found defendant guilty of murder in the second-degree. From judgment imposing prison sentence for a term of 25 years, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General Jean A. Benoy and Special Assistant Thomas J. Bolch, for the State.

Hamrick & Hamrick, by J. Nat Hamrick, for defendant appellant.

PARKER, J.

[1, 2] Defendant assigns as error the trial court's overruling of his objection to the introduction in evidence of two photographs which purport to show his appearance on the night the crime was committed. He contends these did not illustrate the testimony of any witness and were therefore not competent, and that their introduction in evidence was prejudicial because they showed defendant with a mustache and a short growth of beard, whereas, so his counsel asserts, the defendant is "a nice looking, clean shaven man." Defendant's counsel contends that beards and mustaches as shown in the pictures "are generally associated in the minds of the jury and the population as being worn by persons who are either criminals or have a disrespect for the law," and that therefore the pictures were prejudicial to the defendant. Without expressing any opinion as to the accuracy of counsel's appraisal of prevailing public attitudes toward hair styles currently popular with one segment of our male population, we find no merit in this assignment of error. Defendant's appearance on the night the shooting occurred was material and relevant. On that night one of the State's eyewitnesses had reported to the police that "the boy with the beard pulled the gun and shot Paul," thereby identifying the defendant. The defendant himself testified on cross-examination that the photographs fairly and accurately represented his appearance on the night of the shooting except that his beard "wasn't showing up quite that heavy." Photographs otherwise competent for the purpose of illustrating the testimony of a witness are not rendered inadmissible solely because they may tend to arouse prejudice. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10.

[3] The defendant assigns as error the overruling of his objection to the question asked him on cross-examination as to the date of his marriage. He contends this prejudiced him in the eyes of the jury, since his further answers on cross-examination subsequently disclosed that he already had two children by his wife when he mar-

ried her sometime after the date of the shooting. There is no merit to this assignment of error. At the time the question was asked concerning the date of his marriage the evidence elicited was innocuous, and defendant failed to object later when questions were asked as to the age of his children. Moreover, in this jurisdiction it has long been settled that "(f)or the purpose of impeaching defendant's credibility as a witness the solicitor may cross-examine him as to collateral matters, including charges of other criminal offenses and degrading actions, provided the questions are based on information and asked in good faith." 2 Strong, N.C. Index 2d, Criminal Law, § 86, p. 607.

[4] Defendant assigns as error the judge's charge to the jury relative to his plea of self-defense. In this connection the judge instructed the jury that it would be their duty to acquit the defendant if they were satisfied from the evidence that each of several questions should be answered in the affirmative. One of these questions as contained in the judge's charge was: "Did he (the defendant) use no more force than was reasonably necessary to repel the assault, which he contends the deceased was making upon him at the time the fatal shot was fired?" In *State v. Hardee,* 3 N.C. App. 426, 165 S.E. 2d 43, this Court has already pointed out that this charge is erroneous in that the court failed to charge the jury with respect to the use of such force as necessary or as was *apparently necessary* to protect the defendant from death or great bodily harm, quoting from *State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756, in which our Supreme Court said:

> "The plea of self-defense rests upon necessity, real or apparent. *S. v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892; *S. v. Goode,* 249 N.C. 632, 107 S.E. 2d 70; *S. v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620. Or, to put it another way, one may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. The reasonableness of such belief or apprehension must be judged by the facts and circumstances as they appear to the party charged at the time of the assault. As pointed out by *Moore, J.,* in *S. v. Fowler, supra,* 'The law does not require the defendant to show that he was actually in danger of great bodily harm.' Neither does it limit the force to be used in self-defense to such force as may be *actually* necessary to save himself from death or great bodily harm. But the jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which the party charged acted."

While in other portions of his charge to the jury the trial judge correctly stated the law applicable to the plea of self-defense, this did not render harmless the error pointed out above. "Conflicting instructions upon a material aspect of the case must be held prejudicial error, since it cannot be known which instruction was followed by the jury." 7 Strong, N.C. Index 2d, Trial, § 33, p. 327.

We do not pass upon the defendant's remaining assignments of error, since they may not recur and since for the error in the charge noted above, defendant is entitled to a

New trial.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. ROY McCAIN, JR.

No. 6926SC468

(Filed 19 November 1969)

1. Homicide § 5— second-degree murder defined

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

2. Homicide § 14— intentional killing with deadly weapon — malice

Malice is implied in law from the intentional killing with a deadly weapon.

3. Homicide § 3— deadly weapon — knife

A knife may be used as a deadly weapon.

4. Homicide § 21— second-degree murder — sufficiency of evidence

The State's evidence tending to show that defendant repeatedly stabbed deceased with a knife and that deceased died as a result of the stab wounds *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of second-degree murder.

5. Homicide § 15; Criminal Law § 50— opinion testimony that deceased was dead — non-expert

In this homicide prosecution, the trial court properly admitted testimony by a detective that the deceased had a cut on the right side of his neck and what appeared to be three stab wounds in the stomach, and that in his opinion the deceased was dead when he observed him at the scene of the crime, the question of whether a person is living or dead not being wholly scientific or of such a nature as to render valueless any

opinion but that of an expert, and common inferences derived from the appearance, condition, or mental or physical state of a person being proper subjects of opinion testimony by non-experts.

6. Homicide § 20; Criminal Law § 43— photographs of body of deceased

In this homicide prosecution, the trial court did not err in the admission for illustrative purposes of four photographs depicting the body of the deceased and the inside of the house where the alleged crime occurred, the State not having made excessive use of the photographs.

7. Homicide § 20; Criminal Law § 43— gruesome photographs

The fact that a photograph is gory or gruesome will not alone render it incompetent.

APPEAL by defendant from *Falls, J.*, 12 May 1969 Schedule "B" Criminal Session of MECKLENBURG Superior Court.

The defendant was tried under a bill of indictment charging him with the second degree murder of Charles Weaver on 28 March 1969. The plea was not guilty and both the State and the defendant offered evidence.

The State offered the testimony of three eyewitnesses which tended to show that they were at 1107 North Allen Street in Charlotte on the night of 27 March 1969 and until approximately 2:00 or 2:30 the morning of 28 March 1969. The three-room house at that address contained a "juke box" and was commonly known as a "piccolo house." Sometime after midnight the defendant came into the house with his knife open and stated "I will kill you all." Charles Weaver, who was sitting on the couch beside the piccolo said to the defendant, "[y]ou wrong, man, you wrong." The defendant replied, "you ...., I'll kill you" and proceeded to cut and repeatedly stab Weaver as he sat unarmed on the couch. Weaver "struggled" from the couch into the kitchen where he fell to the floor. The defendant left the house immediately with his girl friend, Johnnie Mae Davis. There was no evidence to indicate that the assault was in any manner provoked.

Dr. Hobart R. Wood, medical examiner for Mecklenburg County, performed an autopsy on the deceased on 28 March 1969. He found that the deceased had a total of nine stab wounds or cutting wounds about his body. In the opinion of Dr. Wood, the deceased died of multiple stab wounds. Two uniformed police officers and a city detective testified for the State that they went to the house at 1107 North Allen Street at approximately 2:30 a.m., 28 March 1969. Statements given the officers on that morning by the State's eye-

witnesses tended to corroborate their testimony in court. The officers described the scene and the condition of the deceased's body when they arrived.

The defendant testified on his own behalf that he went to the "piccolo house" three or four times during the night of 27 March 1969 and the morning of 28 March 1969. He stated that the people in the house, including the State's eyewitnesses, were dancing and drinking beer, wine and whiskey. Some were arguing and fighting. The defendant emphatically denied that he had killed the deceased or cut and injured him in any manner. He admitted that there was blood on his pants when he was arrested shortly after the incident allegedly occurred, but he explained that it could have come from a friend who had been cut earlier in the evening or from his girl friend who was bleeding about the neck.

Johnnie Mae Davis testified that she had dated the defendant for about a year and a half. She had been to the house on North Allen Street several times during the night in question. She stated that she and the defendant last went to the house about 40 minutes before the defendant was arrested. The defendant waited on the outside while she went inside and got her coat. At that time people inside the house were arguing but she saw no blood and noticed nothing unusual about the house. She and the defendant then left and did not return. The witness explained that she was bleeding on the night in question because she had been scraped or stabbed with a fingernail file in a fight with a girl earlier that night.

The jury returned a verdict of guilty as charged in the bill of indictment and from the judgment imposing a prison sentence of not less than 28 nor more than 30 years the defendant appealed assigning error.

Attorney General Robert Morgan by Staff Attorney James L. Blackburn for the State.

Calvin W. Chesson and A. Victor Wray for the defendant appellant.

GRAHAM, J.

The defendant assigns as error the court's refusal to grant his motion for judgment of nonsuit made at the close of the State's evidence and renewed at the close of all of the evidence.

[1-4] Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and delibera-

tion. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39. Malice is implied in law from the intentional killing with a deadly weapon. *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39; *State v. Benson,* 183 N.C. 795, 111 S.E. 869. A knife may be used as a deadly weapon. *State v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132. Suffice it to say that in the trial of this defendant for second degree murder the testimony of various eyewitnesses that they saw him repeatedly stab the deceased with a knife and further evidence that the deceased died as a result of the stab wounds made out a clear case for the jury.

[5] Defendant assigns as error the admission of testimony by a detective that the deceased had a cut on the right side of his neck and what appeared to be three stab wounds in the stomach, and that in his opinion the deceased was dead when he observed him at the scene of the alleged crime. "When relevant to the issue, a witness may testify to any thing he has apprehended by any of his five senses, or all of them together." *State v. Fentress,* 230 N.C. 248, 251, 52 S.E. 2d 795. It would have been completely impractical and unnecessarily time consuming for the witness to have been required, as suggested by the defendant, to describe in detail his observations respecting the deceased's "breathing, color, appearance, pulse, etc." in lieu of stating his opinion that the deceased was dead. The question of whether a person is living or dead is not wholly scientific or of such a nature as to render valueless any opinion but that of an expert. See 31 Am. Jur. 2d, Expert and Opinion Evidence, § 99. Common inferences derived from the appearance, condition, or mental or physical state of persons, animals and things are proper subjects of opinion testimony by non-experts. *Bane v. R. R.,* 171 N.C. 328, 88 S.E. 477; Stansbury, N.C. Evidence 2d, § 129. The evidence was properly admitted.

[6, 7] Defendant's final assignments of error are to the admission of four photographs depicting the body of the deceased and the inside of the house where the alleged crime occurred. The record clearly indicates that these photographs were admitted only for the purpose of illustrating the testimony of witnesses. They were competent for that purpose. *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; *State v. Matthews,* 191 N.C. 378, 131 S.E. 743; *State v. Russ,* 2 N.C. App. 377, 163 S.E. 2d 84. The defendant contends that the photographs were excessive and prejudicial and should have been excluded under the authority of *State v. Foust, supra.* This contention is without merit. In the *Foust* case the State introduced ten gory color photographs of the victim's body and elicited detailed testimony as to the death wound, even though the defendant had stipulated that the de-

ceased died as a result of the gun shot wound which came from the gun in the State's possession. The court noted that under the circumstances of that case the State had made excessive use of the ten photographs. Here there was no stipulation as to the cause of death. Furthermore, the four photographs were useful to the witnesses in illustrating their testimony and likely helpful to the jury in understanding it. The fact that a photograph is gory or gruesome will not alone render it incompetent. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Gardner, supra.*

In the entire trial we find no error.

No error.

CAMPBELL and PARKER, JJ., concur.

STEVE MORRIS v. A. E. PERKINS AND WIFE, GYPSY K. PERKINS

No. 6929SC503

(Filed 19 November 1969)

1. Judgments § 45— plea in bar — former judgment — question presented

When a former judgment is set up as a bar or estoppel, the questions presented are whether the former adjudication was on the merits of the action, whether there is an identity of the parties and the subject matter in the two actions, and whether the merits of the second action are identically the same as will support a plea of *res judicata.*

2. Judgments § 35— conclusiveness of judgment — res judicata — prerequisites

In order for a judgment to constitute *res judicata* in a subsequent action, there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual.

3. Judgments § 35— estoppel by judgment — mutuality

An estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it had it gone against him.

4. Judgments § 36— estoppel by judgment — identity of parties and issues — privity — stockholders

In an action by plaintiff, a stockholder in a named corporation, against the defendants husband and wife, who were also stockholders in the corporation, in which action plaintiff asks (1) that a note executed by plaintiff to the husband and assigned by the husband to the corporation be can-

celled and (2) that defendants be required to transfer to plaintiff 455 shares of stock in the corporation, which shares plaintiff lent to defendant as collateral for a loan, judgment rendered in a prior action between plaintiff and the corporation, which adjudicated the rights of the parties to the note assigned to the corporation, does not constitute a plea in bar to the present action, there being no identity of parties in the two actions, no privity among the parties, and no identity of subject matter in the two actions that would support the plea of *res judicata.*

APPEAL by plaintiff from *Froneberger, J.,* at the 14 July 1969 Session of TRANSYLVANIA Superior Court.

This is a civil action brought by plaintiff against defendants asking that a note dated 1 January 1965 for $16,902.50, executed by plaintiff to the male defendant, be cancelled, that defendants be required to transfer to plaintiff 455 shares of stock in The Mountainaire Corporation, and for judgment against defendants for $50,000.00 in the event defendants cannot return the stock. Hereinafter, the male defendant will be referred to as Perkins and the feme defendant as Mrs. Perkins.

The complaint is summarized as follows: (Numerals ours)

(1) In about February 1964, plaintiff was the owner of 455 shares of stock in The Mountainaire Corporation (Mountainaire); Perkins was the owner of 455 shares, one R. S. Morris was the owner of 10 shares, and one R. M. Redden was the owner of 70 shares of stock in said corporation.

(2) On or about 1 January 1965, Perkins, with the intent to defraud plaintiff, falsely represented to plaintiff that he needed plaintiff to execute an instrument and also lend Perkins plaintiff's stock to use as collateral so as to obtain a bank loan; Perkins assured plaintiff that both the instrument and stock would be returned to plaintiff. In reliance on said assurance, plaintiff and his wife executed a promissory note to Perkins for $16,902.50; a copy of the note is attached to the complaint as an exhibit, is dated 1 January 1965, and is summarized as follows: payable to Perkins in ten equal annual installments of $1,690.25 each, the first installment being payable on 15 January 1966 and one installment on the 15th day of each January thereafter until the entire indebtedness is paid, with interest from date at 6% per annum, payable annually; 455 shares of Mountainaire stock are pledged as collateral security for the note; failure to pay any installment when due will at payee's option render the entire note payable immediately; upon default payee is authorized to sell, assign and deliver any or all of said stock at either public or private sale; in the event of public sale and if such sale is advertised, it is agreed that advertisement of the time, place and

terms of the sale be posted on the bulletin board at the Transylvania County Courthouse for ten days prior to the sale.

(3) On 23 June 1967, plaintiff filed suit in the General County Court of Henderson County against Mountainaire on eleven separate promissory notes totaling $20,675.00 plus interest. On or about 14 July 1967, Perkins sold at public sale at the courthouse door at Brevard the 455 shares of Mountainaire stock pledged by plaintiff to Perkins. The $16,902.50 note executed by plaintiff to Perkins was without consideration and Perkins did not pay, release or relinquish anything of value in obtaining said note and the 455 shares of stock. The exhibit of the note shows that $1,000.00 was credited on the note on 14 July 1967 "by reason of the sale of the 455 shares of stock in the Mountainaire Corporation which sale was conducted, after due advertisement, as authorized in this note, at the front courthouse door, in the City of Brevard, N. C., on 14 July 1967." The exhibit also shows an assignment of the note from Perkins to Mountainaire in words and form as follows: "For value, I hereby assign, transfer, and deliver unto The Mountainaire Corporation all my right, title and interest in and to the within note, on which there remains unpaid $16,902.50, with interest from 1 January, 1965, at the rate of 6% per annum, less a credit of $1,000.00 applied on 14 July, 1967. This 15 July, 1967. /s/ A. E. Perkins (SEAL)"

(4) At the sale of said stock, Perkins sold the 455 shares owned by plaintiff to Mrs. Perkins and she is now the holder of said stock; that Mrs. Perkins did not obtain title to said stock by reason of said sale for the reason that the purported transfer of the stock from Perkins to Mrs. Perkins was illegal and void. Mrs. Perkins paid nothing for said stock which has a fair market value of $50,000.00.

(5) In the suit which plaintiff filed against Mountainaire, said corporation filed an answer and counterclaim on several notes which plaintiff executed to Perkins and which Perkins had assigned to the corporation (including the $16,902.50 note aforesaid). The promissory notes executed by plaintiff to Perkins and the notes executed by Mountainaire to plaintiff were satisfied in full by a judgment entered in the General County Court of Henderson County on 14 November 1968, a copy of said judgment being attached to the complaint and by reference made a part thereof, said judgment being summarized as follows: Mountainaire, for value, executed to plaintiff all the notes set forth in the complaint and plaintiff is entitled to recover the amounts thereof. Mountainaire is entitled to recover of plaintiff on the notes set forth in the answer and counterclaim (these being the notes transferred from Perkins to Mountainaire). The judgment

sets forth in detail the various amounts of each note, and interest thereon, that plaintiff is entitled to recover of Mountainaire and the various notes that Mountainaire is entitled to recover of plaintiff, the latter notes including the $16,902.50 note dated 1 January 1965 from plaintiff to Perkins, less a credit of $1,000.00 as of 14 July 1967; the judgment finally provides that Mountainaire owed plaintiff $78.54.

(6) Perkins and Mrs. Perkins conspired to unlawfully transfer the 455 shares of stock owned by plaintiff and conducted an unlawful and illegal sale in violation of the laws of the United States with intent to defraud plaintiff of his stock. (The complaint alleged certain acts of Congress setting forth requirements for transfer of control of any corporation holding a license for a radio station, but the three paragraphs of the complaint pertaining to said regulation were stricken on motion of Perkins.)

Defendants filed answer to the complaint, denying various allegations thereof alleging wrongful or unlawful acts on the part of defendants, and setting forth a further answer and defense and plea in bar in which defendants set forth the entire summons, complaint, answer and judgment in the case of plaintiff against Mountainaire instituted and disposed of in the General County Court of Henderson County. In a reply to defendants' further answer and plea in bar, plaintiff admitted the allegations setting forth the entire pleadings and judgment in the Henderson County Court action.

Defendants' plea in bar was heard by Froneberger, J., on 14 July 1969 and from judgment sustaining the defendants' plea in bar and dismissing the action, plaintiff appealed.

Cecil C. Jackson, Jr., for plaintiff appellant.

Redden, Redden & Redden for defendant appellees.

BRITT, J.

[1] In *Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132, in an opinion by Parker, J. (now C.J.), it is said:

> "When a former judgment is set up as a bar or estoppel, the question is whether the former adjudication was on the merits of the action, and whether there is such an identity of the parties and of the subject matter in the two actions, and whether the merits of the second action are identically the same, as will support a plea of *res judicata. Hayes v. Ricard,* 251 N.C. 485,

112 S.E. 2d 123; McIntosh, N.C. Practice & Procedure, 2d Ed., Sec. 1236(7)."

[2, 3] In *Shaw v. Eaves,* 262 N.C. 656, 138 S.E. 2d 520, in an opinion by Moore, J., it is said:

"'The doctrine of *res judicata* as stated in many cases is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.' 30A Am. Jur., Judgments, § 324, p. 371. In order for a judgment to constitute *res judicata* in a subsequent action there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual. *Light Co. v. Insurance Co.,* 238 N.C. 679, 79 S.E. 2d 167; *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345; *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796; *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570. In order for a party to be barred by the doctrine of *res judicata,* it is necessary not only that he should have had an opportunity for a hearing but also that the identical question must have been considered and determined adversely to him. *Crosland-Cullen Co. v. Crosland,* 249 N.C. 167, 105 S.E. 2d 655. * * *

* * *

An estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it had it gone against him. *Bernhard v. Band of America Nat. Trust & Sav. Ass'n.,* 122 P. 2d 892. * * *"

[4] The judgment pleaded in bar in this action was rendered in an action in which Steve Morris, the plaintiff in this action, was the only plaintiff and The Mountainaire Corporation was the only defendant. In the present action, Steve Morris is the plaintiff and Perkins and Mrs. Perkins are the defendants. Thus, we do not find an identity of parties in the two actions. Was there privity among the parties? We think not.

In the 4th Edition of Black's Law Dictionary, p. 1361, privity is defined as follows:

"Mutual or successive relationship to the same rights of property. 1 Greenl. Ev. § 189; *Duffy v. Blake,* 91 Wash. 140, 157 P. 480, 482; *Haverhill v. International Ry. Co.,* 217 App. Div. 521, 217 N.Y.S. 522, 523.

Thus, the executor is in privity with the testator, the heir with

> the ancestor, the assignee with the assignor, the donee with the donor, and the lessee with the lessor. *Litchfield v. Crane,* 8 S. Ct. 210, 123 U.S. 549, 31 L. Ed. 199."

In *Dudley v. Jeffress,* 178 N.C. 111, 100 S.E. 253, Clark, C.J., quoting from *Boughton v. Harder,* 61 N.Y. Supp. 574, said: "Privity implies succession. He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title and thus takes it with the burden attending it." There is no showing that Mountainaire acquired any property rights in the former action that succeeded to defendants. Furthermore, it cannot be said that any estoppel created by the former action was mutual as between plaintiff on the one hand and defendants herein on the other. We perceive nothing about the former action that would have been binding on Perkins or Mrs. Perkins regardless of its outcome.

It is true that the record discloses that Perkins and Mrs. Perkins were major shareholders in Mountainaire but that fact does not create privity of parties. Analogous is the holding in *Lumber Co. v. Hunt, supra,* stated in the fourth headnote as follows:

> "A corporation is not barred from maintaining an action for damages to its vehicle by reason of a prior judgment in favor of defendant in an action by its president against the same defendant to recover for personal injuries arising out of the same accident, even though the president of the corporation is its controlling shareholder, and chairman of its board of directors, and has control of its action, since there is no identity or privity of parties within the purview of the doctrine of *res judicata.*"

Nor do we think there is such an identity of subject matter in the two actions that would support the plea of *res judicata.* In the former action, plaintiff sued to recover on certain notes and Mountainaire pled as a setoff, cross-action or counterclaim the notes assigned to it by Perkins. Although in the present action plaintiff asks that the $16,902.50 note from plaintiff to Perkins dated 1 January 1965 be rescinded and cancelled, the principal relief prayed for in the complaint is that defendants be required to transfer to plaintiff 455 shares of stock in Mountainaire or if the stock cannot be recovered that plaintiff have judgment against defendants for $50,000.00. The judgment in the former action made no adjudication regarding any stock in Mountainaire; it only adjudicated the rights of the parties to that suit relative to certain promissory notes. It cannot be said that the *identical* question posed in the instant case was considered and determined adversely to plaintiff in the former action. *Crosland-Cullen Co. v. Crosland, supra.*

The only question before us is did the trial court commit error in sustaining defendants' plea in bar and dismissing the action on that ground. We hold that it did and the judgment dismissing the action is

Reversed.

BROCK and VAUGHN, JJ., concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. WALLACE M. GAMBLE, SINGLE; JOSEPH G. GAMBLE, JR. AND WIFE, MRS. JOSEPH G. GAMBLE, JR.; WAYNE W. GAMBLE AND WIFE, SUE M. GAMBLE; HILDA GAMBLE GROSSE AND HUSBAND, WILLIAM M. GROSSE; LAURA M. GAMBLE, SINGLE; MARY E. GAMBLE, SINGLE; AND CONNIE W. GAMBLE, WIDOW

No. 6926SC527

(Filed 19 November 1969)

Eminent Domain § 7; Parties § 1; Appeal and Error § 63— condemnation proceeding — conflict in landowner's deed — necessary parties — remand

Where, in a condemnation proceeding between the highway commission and the landowner, the court must construe conflicting provisions of the landowner's deed to determine if the landowner's grantor retained a strip of land lying between the highway right-of-way and the tract conveyed to landowner, the grantor is a necessary party to the proceeding, and the cause will be remanded so that the necessary party may be brought in.

APPEAL by plaintiff from *Ervin, J.,* 2 June 1969 Schedule "A" Civil Session of the MECKLENBURG Superior Court.

The State Highway Commission commenced this civil action on 31 January 1966 under G.S. Chapter 136, Article 9, to condemn certain lands of the defendants for a right-of-way of State Highway Project No. 8.1640801. On 2 June 1969, pursuant to the provisions of G.S. 136-108, a hearing was had by Ervin, J., to determine all issues raised by the pleadings other than the issue of damages.

The defendants claim title to the lands affected by the condemnation under a deed from Duke Power Company (Duke) dated 19 March 1962. The lands lie on the easterly side of U.S. Highway No. 21. The deed to defendants from Duke provides that the western line of said tract runs with "the eastern margin of N.C. Highway right of way for U.S. 21." The boundary along the highway right-

of-way line is described by courses and distances. The map which was incorporated into the deed by reference shows the western property line of defendants' tract as following the highway right-of-way line. The courses and distances shown on the map are the same as those contained in the deed.

Although defendants' deed calls for its western line to begin at a point "in the eastern margin of N.C. highway right of way for U.S. Highway No. 21," and then proceeds "thence . . . with said highway right of way limit" for certain courses and distances, the other courses and distances given in said deed and map show the western boundary line of defendants' property to be located parallel to and running some distance to the east of the western right-of-way line, the parties having stipulated that the right-of-way extended seventy-five feet on each side of the center line of U.S. Highway No. 21. The parties also stipulated that at the time of the conveyance by Duke to the defendants, Duke owned the property to the easterly margin of said highway right-of-way.

The purpose of the hearing before Judge Ervin was, in effect, to resolve the conflicting provisions in the deed from Duke to the defendants and thus ascertain whether the western boundary of the tract conveyed extended to the eastern right-of-way line as called for in one part of the description or whether, giving effect to the other courses and distances, Duke retained a strip of land lying between the highway right-of-way and the tract conveyed.

The order of the trial judge in pertinent part is as follows:

"AND IT APPEARING to the Court and the Court finding as facts and concluding as a matter of law from the Stipulations of the parties in open Court and from the pleadings filed herein and the exhibits offered in evidence and from the arguments of counsel, that the deed from Duke Power Company to the Defendants dated March 19, 1962 and recorded in Book 2437, Page 239 in the Mecklenburg Public Registry is inconsistent in its description of Tract No. 2 therein in that said deed provides that the boundary line of said tract runs with the eastern margin of N.C. Highway right of way for U.S. Highway No. 21 and said boundary along the highway is described by courses and distances which do not follow the highway right of way as it then existed or as it exists now as a result of this condemnation action; that the eastern margin of N.C. Highway right of way for U.S. Highway No. 21 was definitely established and ascertainable on March 19, 1962 and as such constituted an artificial monument; that Duke Power Company owned the

property on said date to the eastern margin of said highway right of way; that as a conflict exists between courses and distances and a fixed monument, the call for the monument will control.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that as of January 31, 1966, the date of the taking in this action, the property of the Defendants extended to the eastern margin of U.S. Highway No. 21 as it then existed and that the Defendants are entitled to recover from the Plaintiff their damages caused by the taking of this additional tract of land, shown as the shaded area on Defendants' Exhibit No. 1 filed herein."

From this order the plaintiff appeals.

Attorney General Robert Morgan by Trial Attorney I. B. Hudson, Jr., and Staff Attorney Carlos W. Murray, Jr., for the State Highway Commission.

Harkey, Faggart, Coria and Fletcher by Harry E. Faggart, Jr., for the defendant appellees.

VAUGHN, J.

Duke Power Company is not a party to the action. The Court is called upon to construe the deed from Duke and determine whether Duke conveyed the tract in dispute to the defendants or whether title to the tract was retained by Duke, it having been stipulated that Duke owned the tract at the time of the conveyance.

Reference to *Britt v. Children's Homes,* 249 N.C. 409, 106 S.E. 2d 474, is thought to be appropriate. The plaintiffs in that case sought specific performance of a contract wherein defendant had agreed to purchase land from the plaintiffs who had acquired the same from one Odum. The defendants contended the deed from Odum to plaintiffs conveyed only a defeasible fee. The trial court concluded plaintiffs could convey in fee simple and decreed specific performance. The Supreme Court vacated the judgment and remanded the cause for additional parties, saying: "The Odums are not parties to the action. They cannot be bound without an opportunity to be heard . . . no judicial declaration should be made which could have no binding effect, but which might seriously cloud and interfere with such right as the Odums may have."

A similar question arose in *Oxendine v. Lewis,* 251 N.C. 702, 111 S.E. 2d 870. There the defendant refused to accept the deed tendered

by the plaintiff Oxendine on the ground that the plaintiff had previously executed a deed to Melinda Hunt. Oxendine contended his deed to Melinda Hunt conveyed only a life estate and that upon her death prior to the execution of the contract sought to be enforced, he became the owner in fee. On appeal the judgment ordering specific performance was set aside and the cause remanded for additional parties. The Supreme Court stated:

> "Involved in this action are apparently conflicting provisions of a deed. The court is called upon to resolve the conflict. In order that its judgment may be binding on all parties in interest and be a final termination of the controversy, the court should have before it all the heirs at law of Melinda Oxendine Hunt. The absent heirs are not bound by the judgment in a cause to which they are not parties. Our procedure requires that they be brought in and given an opportunity to be heard."

When it appears, as here, in a case involving the construction of a deed that the absence of a party prevents the entry of a judgment fully settling and determining the question of interpretation, we think the court should refuse to deal with the merits of the case until the absent party is brought in. *Morganton v. Hutton and Bourbonnais Co.*, 247 N.C. 666, 101 S.E. 2d 679; *Edmondson v. Henderson*, 246 N.C. 634, 99 S.E. 2d 869.

Following the practice in *Underwood v. Stafford*, 270 N.C. 700, 155 S.E. 2d 211; *Bank v. Jordan*, 252 N.C. 419, 114 S.E. 2d 82; *Oxendine v. Lewis, supra; Britt v. Children's Homes, supra; Cutler v. Winfield*, 241 N.C. 555, 85 S.E. 2d 913; and other cases cited, the order appealed from is vacated and the cause is remanded to the Superior Court where the additional party or parties necessary to a decision may be made.

Vacated and remanded.

BROCK and BRITT, JJ., concur.

RAY G. REGISTER AND WIFE, ELIZABETH B. REGISTER v. JOSEPH M. GRIFFIN, TRUSTEE, AND PIEDMONT PRODUCTION CREDIT ASSOCIATION

No. 6926SC387

(Filed 19 November 1969)

1. Appeal and Error § 58— review of injunctive proceedings

Upon appeal from an order granting or refusing an interlocutory injunction, the findings of fact, as well as the conclusions of law, are reviewable by the Court of Appeals.

2. Costs § 1— time of imposing costs

Costs usually follow a final judgment.

3. Injunctions § 12— continuance of injunction — foreclosure of deed of trust — improper conditions

In granting an injunction restraining a defendant trustee from foreclosing the deed of trust in which the plaintiffs were grantors, the trial judge was without authority to require the plaintiffs, as a condition precedent to the continuing of the injunction, to (1) pay the defendant's costs of advertising the property described in the deed of trust, (2) pay the attorney fees incurred in the action by the defendant, (3) enter into an agreed order with the defendant for a reference of the case, and (4) consent to be taxed with the costs of the reference, since these conditions compelled the plaintiffs to give up undetermined legal rights prior to a hearing of the case on the merits.

4. Injunctions § 12— temporary injunction — show cause hearing — jurisdiction of court — merits of case

Upon a hearing to show cause why a temporary restraining order should not be continued to the hearing, the court has no jurisdiction to hear and determine the controversy on its merits, but has jurisdiction to determine only whether the temporary restraining order should be continued to the hearing and the amount of bond to be required of plaintiffs. G.S. 1-496, G.S. 1-497.

APPEAL by plaintiffs from *Snepp, J.*, 21 March 1969 Session of Superior Court held in MECKLENBURG County.

Plaintiffs in an action, S.D. #67-355, instituted on 16 November 1967, obtained an injunction on 20 October 1967 to prevent the defendant trustee in a deed of trust from foreclosing the deed of trust in which the plaintiffs were the grantors. This injunction was dismissed and the action nonsuited on 29 January 1969 when the plaintiffs failed to appear and prosecute the action. Thereafter on 13 March 1969, the plaintiffs brought this action and obtained another injunction to prevent a foreclosure under the same deed of trust. Upon a show cause hearing, the trial judge found that the injunction should be continued but imposed certain conditions precedent

upon the plaintiffs. The judge required, under the heading of "Conclusions":

"1. That the Plaintiffs, within ten days from the date of this order, pay to the Defendant, Piedmont Production Credit Association, the costs of advertisement of the property described in the Deed of Trust in the amount of $134.00, and the sum of $500.00 in reimbursement of the counsel fees incurred by the Defendant in the action heretofore filed which is referred to above.

2. That within ten days from the date of this order, Plaintiffs deposit with the Clerk of Court for Mecklenburg County a good and sufficient bond in the sum of $500.00, conditioned upon the payment by the Plaintiffs of the entire costs of a reference in this case and that the Plaintiffs do hereby consent that they shall be taxed with the entire costs of such reference.

3. That the Plaintiffs, within ten days from the date of this order, enter into an agreed order with the Defendants for a reference of this case.

4. That the Plaintiffs give a good and sufficient bond in the amount of $2,000.00, conditioned upon their payment of any damages which the Defendants may sustain, if upon the hearing of this suit it is determined that this injunction was improvidently granted.

5. In the event plaintiffs shall not comply with these conditions the Defendants shall be entitled to proceed against the bond in the amount of $250.00 heretofore given by the Plaintiffs in this action for such damages as they may have sustained by reason of the temporary order dated March 12, 1969.

6. In the event the Plaintiffs do not comply with the conditions set forth above that they be and are restrained and enjoined from thereafter seeking any order restraining or enjoining any subsequent attempt to sell the property described in the Deed of Trust at a foreclosure sale without notice to the Defendants. Upon the failure of the plaintiffs to comply with any of the foregoing conditions, the restraining order issued herein shall be immediately dissolved."

Upon the entry of the order, the plaintiffs excepted and appealed to the Court of Appeals.

Clayton, Lane & Helms by Thomas G. Lane, Jr., for plaintiff appellants.

Griffin & Gerdes by Joseph M. Griffin for defendant appellees.

MALLARD, C.J.

The appellants assign as error certain conditions included in the order continuing the restraining order. Appellants contend that the trial judge erred in requiring the plaintiffs to meet the conditions contained in paragraphs numbered 1, 2, and 3 of the "Conclusions," as set forth above, before plaintiffs would be entitled to have the injunction continued to the final hearing. Appellants raise no question about the other findings of fact or other provisions of the order.

[1] "Upon an appeal from an order granting or refusing an interlocutory injunction, the findings of fact, as well as the conclusions of law, are reviewable by this Court." *Deal v. Sanitary District,* 245 N.C. 74, 95 S.E. 2d 362 (1956); *Dilday v. Board of Education,* 267 N.C. 438, 148 S.E. 2d 513 (1966). However, there is a presumption that the judgment entered by the trial court is correct, and the burden is upon appellants to assign and show error. *Conference v. Creech and Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619 (1962).

[2] Costs usually follow a final judgment. *Whaley v. Taxi Co.,* 252 N.C. 586, 114 S.E. 2d 254 (1960).

No evidence appears in the record to support the finding of fact appearing in the order that "(t)he Defendant, Piedmont Production Credit Association has expended the sum of $134.00 for the cost of advertising the property described in the Deed of Trust for sale, and incurred counsel fees in the prior action brought by Plaintiffs in the amount of $500.00."

[3] "The costs incident to a reference, including the referee's fee, are taxable in the discretion of the court." *Perry v. Doub,* 243 N.C. 173, 90 S.E. 2d 239 (1955). We think it was improper for the judge, in this case, as a condition precedent to the restraining order, to require plaintiffs to pay one of the defendants the sum of $634.00.

Attorney fees, costs of advertising, and costs of reference are usually considered as elements of damages. 43 C.J.S., Injunctions, § 315. In general, there are two situations in which damages may be assessed in consequence of the issuance of an injunction.

1. "A final decision that an injunction was wrongfully obtained usually is a condition precedent to the assessment of damages in the injunction suit." 43 C.J.S., Injunctions, § 285.

2. "The granting of an injunction is conclusive of probable cause so as to prevent recovery for malicious prosecution of the injunction suit; and final determination of the injunction

suit is a condition precedent to an action for damages brought independently of the injunction bond." 43 C.J.S., Injunctions, § 307.

McCormick states the "'(p)rinciple' that counsel fees and other expenses, beyond taxable costs, in lawsuits generally are not recoverable." He further states: "In the great majority of the states, however, attorneys' fees and other reasonable and necessary expenses incurred in proceedings before final trial to vacate or dissolve the injunction are recoverable, if the injunction is dissolved on the grounds which imply that it should not have been issued originally. In such cases, the proof must identify the fees and expenses incurred on the motion to dissolve the injunction, as distinguished from those incurred in defending the suit generally." McCormick on Damages, § 109.

Generally, in granting injunctions the court requires a bond to insure the defendant against any loss. See G.S. 1-496; G.S. 1-497. The rule seems to be that "(a)side from liability arising from bond required as a condition to the granting of the injunction, as a general rule damages are not recoverable for the wrongful issuance of an injunction unless malicious prosecution is shown." 43 C.J.S., Injunctions, § 281.

[4] The court on this hearing had no jurisdiction to hear and determine the controversy on its merits. *Patterson v. Hosiery Mills,* 214 N.C. 806, 200 S.E. 906 (1939); *Carbide Corp. v. Davis,* 253 N.C. 324, 116 S.E. 2d 792 (1960). The only questions presented to the trial judge on this hearing were whether the temporary restraining order should be continued to the hearing and the amount of bond to be required of plaintiffs. G.S. 1-496.

[3] "When the judge below grants or refuses an injunction, he does so upon the evidence presented, and the only question is whether the order should be made, dissolved, or continued. He cannot go further and determine the final rights of the parties, which must be reserved for the final trial of the action." McIntosh, N.C. Practice 2d, § 2219. In requiring the plaintiffs to pay $634.00 to one of the defendants, consent to a reference, and consent to be taxed with the entire costs of such reference, as a condition precedent to the continuance of the restraining order, the court was, in effect, forcing plaintiffs to give up some of their undetermined legal rights prior to the case being heard on its merits. The primary purpose of a temporary restraining order is usually to meet an emergency when it appears that any delay would materially affect the rights of a plaintiff. The purpose of a plaintiff's undertaking pursuant to G.S.

1-496 is to assure that a defendant will be able to recover such damages "as he may sustain by reason of the injunction, not exceeding the amount named, if the court should finally decide that the injunction was improperly issued." McIntosh, N.C. Practice 2d, § 2214. The court protects a plaintiff's rights by the issuance of the restraining order and protects a defendant's rights in determining the amount of the bond required.

The order of Judge Snepp continuing the temporary restraining order dated 21 March 1969 is modified by striking therefrom the above paragraphs numbered 1, 2, and 3, which appear in the order under "Conclusions," and as thus modified the order is affirmed.

Modified and affirmed.

MORRIS and HEDRICK, JJ., concur.

SANKEY L. BLANTON, PLAINTIFF v. ALLEN HOYT McLAWHORN, DEFENDANT AND LILLIAN H. BLANTON, ADDITIONAL DEFENDANT

No. 6910SC59

(Filed 19 November 1969)

1. Pleadings § 32— motion to amend answer — discretion of trial court

In an action for personal injuries arising out of an automobile accident, the trial court did not abuse its discretion in denying defendant's motion to be allowed to amend his answer in order to plead a prior judgment of nonsuit as *res judicata* on his cross action against the additional defendant for contribution, where (1) the motion was made more than two years after the original answer was filed and (2) allowance of the amendment under the circumstances of the case would have been at most of only limited value to the defendant.

2. Judgments § 45— plea of res judicata — judgment of nonsuit — determination — hearing

In determining whether a prior judgment of nonsuit operates as *res judicata* in a subsequent action, the trial court must defer a ruling on the plea until after all the evidence is presented upon the trial, since only then can it be determined if the evidence at the second trial was substantially the same as at the first.

3. Judgments § 36— conclusiveness of judgment — parties concluded — principal

A prior judgment establishing negligence on the part of an agent is not conclusive in a subsequent action against the principal.

APPEAL by defendant from *Hobgood, J.,* September 1968 Non-Jury Civil Session of WAKE Superior Court.

This is a civil action instituted on 21 April 1966 in which plaintiff seeks recovery of damages for personal injuries he suffered as result of an automobile collision which occurred on 25 November 1965 at the intersection of N.C. Highways Nos. 42 and 96. Plaintiff was a passenger in his wife's automobile which was being driven by her in a northerly direction on Highway No. 96. Defendant was driving his truck in an easterly direction on Highway No. 42. Plaintiff alleged that the collision between his wife's automobile and defendant's truck and the resulting injuries sustained by plaintiff were solely and proximately caused by the negligence of defendant in driving at an excessive speed and in other specified respects.

On 19 July 1966 defendant filed answer denying negligence on his part, and in a further answer and counter-claim alleged that at the time of the collision plaintiff's wife was acting as agent for the plaintiff and that certain specified negligent acts and omissions of the plaintiff's wife were the sole and proximate cause of the collision and of resulting injuries sustained by the defendant, for which defendant counterclaimed against the plaintiff. In a second further answer, defendant pleaded the contributory negligence of plaintiff's wife, acting as plaintiff's agent, as a defense. In a third further answer defendant alleged that plaintiff had himself been contributorily negligent in failing to keep a proper lookout on his own account. As a fourth further answer and defense and cross action, and in the alternative if it should be found that the wife was not agent of the plaintiff, defendant pleaded a cross action against the wife for contribution as a joint tort-feasor under G.S. 1-240. As a result of this cross action and on motion of defendant, order was entered 19 July 1966 making plaintiff's wife an additional party defendant. On 1 September 1966 the additional defendant filed answer to the cross action, denying negligence on her part and praying that the action be dismissed as to her.

On 6 August 1968, defendant filed a motion for permission to amend his answer so as to add thereto an additional further answer and defense as follows:

> "1. That at the time of the institution of this action the additional defendant, Lillian Blanton, also instituted an action against this defendant for damages resulting from the collision complained of herein, and that this defendant filed answer and counterclaim and the case came on for trial at the December 4, 1967 Civil Session of the Superior Court of Wake County,

and at the conclusion of the evidence of the plaintiff in that action, who is the additional defendant herein, the court found as a matter of law that the plaintiff therein, the additional defendant herein, was negligent and that her negligence was a proximate cause of the collision and allowed the motion of this defendant for judgment as of nonsuit, whereupon, this defendant took a voluntary nonsuit on his counterclaim.

"2. That the plaintiff therein, the additional defendant herein, gave notice of appeal to the Supreme Court of North Carolina, but thereafter abandoned her appeal and consented to the entry of a judgment dismissing her action, which judgment was entered on the 10th day of June, 1968.

"3. That the final judgment entered as to the cause of action of the plaintiff therein, the additional defendant herein, Lillian Blanton, constituted between this defendant and the additional defendant, Lillian Blanton, an adjudication that Lillian Blanton was negligent and that her negligence was a proximate cause of the collision complained of by the plaintiff in this action and that as a result of such adjudication the original defendant herein is entitled, as a matter of law, to contribution from the additional defendant, Lillian Blanton, in the event that it should be found that this defendant was in anyway negligent, which is again expressly denied."

From order denying defendant's motion for permission to amend his answer, defendant appealed.

Smith, Leach, Anderson & Dorsett, by Willis Smith, Jr., for defendant appellant.

Harris, Poe, Cheshire & Leager, by W. C. Harris, Jr., for additional defendant appellee.

PARKER, J.

[1] Defendant appellant's only assignment of error is the denial of his motion to be allowed to amend his answer to plead the prior judgment as *res judicata* on his cross action against the additional defendant for contribution. The motion to amend was made on 6 August 1968, more than two years after the original answer was filed and long after the time for filing answer had expired. "After the time for answering a petition or complaint has expired, the respondent or defendant may not as a matter of right, file an amended answer. The right to amend after the time for answering has expired,

is addressed to the discretion of the court, and the decision thereon is not subject to review, except in case of manifest abuse." *Hardy v. Mayo,* 224 N.C. 558, 31 S.E. 2d 748. This well-established rule has been repeatedly announced and followed by our Supreme Court. *Vending Co. v. Turner,* 267 N.C. 576, 148 S.E. 2d 531, and cases cited therein.

Appellant contends nevertheless that he has been denied a right to which he was entitled as a matter of law, citing *Sisk v. Perkins,* 264 N.C. 43, 140 S.E. 2d 753. In that case, however, the defendant had been *allowed* to amend his cross action so as to plead the judgment in the parallel action as *res judicata* on the issue of the additional defendant's negligence, and the decision furnishes no support for appellant's contention in the case now before us that he is entitled to amend as a matter of right or that denial of his motion to amend was in this case an abuse of discretion.

[1-3] While the record does not disclose what factors were considered by the trial judge in exercising his discretion in the present case, we note that in *Sisk* the prior judgment pleaded as *res judicata* was based upon a jury verdict, while in the present case the prior judgment was a judgment of nonsuit. Therefore, even had the motion to amend been granted it would still be necessary to defer a ruling on the plea in bar until after all evidence is presented upon the trial, as only then could it be determined whether the evidence at the second trial was substantially the same as at the first. *Batson v. Laundry,* 206 N.C. 371, 174 S.E. 90. Furthermore, in the case before us, unlike the *Sisk* case, the defendant has pleaded, in his first and second further answers, that the additional defendant was acting as agent of the plaintiff, thereby seeking to hold plaintiff responsible for any negligence on the part of the additional defendant. Even if defendant's motion to amend had been granted and he should ultimately establish his defense of *res judicata* on the issue of the additional defendant's negligence, the plea of *res judicata* would be valid only in connection with his cross action for contribution against the additional defendant and could not be effective as against the plaintiff, since a prior judgment establishing negligence on the part of an agent is not conclusive in a subsequent action against the principal. *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688; 46 Am. Jur. 2d, Judgments, § 569, p. 729. Therefore, allowance of the amendment in the present case would have been at most of only limited value to the defendant. In any event the record fails to

disclose any abuse of discretion on the part of the court in refusing to allow the motion to amend. The order appealed from is therefore

Affirmed.

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

STATE OF NORTH CAROLINA v. PAUL SMITH

No. 6924SC393

(Filed 19 November 1969)

1. Larceny § 7; Criminal Law § 66— sufficiency of evidence — identification of defendant — expression of doubt on cross-examination

In this prosecution for automobile larceny, defendant's motion for nonsuit was properly denied where the State's witness testified that he saw defendant driving the automobile on the morning after it was stolen, and that defendant had discussed with him the possibility of trading the stolen automobile for one parked on the witness' used car lot, notwithstanding the witness on cross-examination expressed some doubt as to the correctness of his identification of defendant, the weight of the witness' testimony being for the jury.

2. Criminal Law § 114— expression of opinion by court — instructions — reference to person by nickname

In this prosecution for automobile larceny, the trial court did not express an opinion on the credibility of defendant as a witness during recapitulation of defendant's testimony by referring to a person who defendant testified had aided him in escaping from prison as "Cadillac," the court having used defendant's own words, and the court's failure also to use the person's correct name not constituting an expression of opinion.

3. Larceny § 8— felonious larceny — failure to submit misdemeanor larceny

In this prosecution for larceny of an automobile of a value of over $200, the trial court did not err in failing to charge the jury with respect to larceny of property of a value less than $200, where there was no evidence from which it could even be inferred that the value of the automobile was less than $200.

4. Constitutional Law § 31— opportunity to prepare for trial — trial of case at same term counsel is appointed

In this felonious larceny prosecution, defendant was not denied an adequate opportunity to prepare for trial by the fact that the case was called for trial at the same term of court at which counsel was appointed, where the record shows that defendant refused to allow counsel to move for a continuance but insisted that the case be tried when called.

STATE *v.* SMITH

APPEAL by defendant from *Copeland, S.J.*, 14 April 1969 Special Session Superior Court of WATAUGA County.

Defendant was charged with larceny of personal property of the value of more than $200. Upon a finding of indigency, counsel was appointed to represent him at his trial. A plea of not guilty was entered. The jury returned a verdict of guilty as charged, and defendant appealed from the judgment entered.

Attorney General Robert Morgan by Staff Attorney James L. Blackburn for the State.

Stacy C. Eggers, Jr., for defendant appellant.

MORRIS, J.

[1] By his first assignment of error, defendant contends that the trial tribunal committed error in denying his motion for nonsuit at the close of the State's evidence and renewed at the close of all the evidence. The witness, whose evidence is the basis for defendant's position testified that he was engaged in the garage and used car business. On the morning after the automobile larceny with which defendant was charged occurred, defendant came to his place of business about 8:30 and wanted to borrow jumper cables with which to start a car. Defendant was not driving a car at that time. Witness loaned defendant the jumper cables as requested. Defendant returned about 20 minutes later driving a "red 1960 2-door maroon Chevrolet." He then discussed with witness the possibility of trading the Chevrolet for a 1960 Mustang which was parked on witness's lot. Witness talked with defendant about 20 or 30 minutes. When defendant left, witness helped him start the Chevrolet, and defendant drove off in a southerly direction toward Jefferson. He did not see defendant again until that night about 10 o'clock. Witness then saw defendant walking toward his place of business. Witness was driving his car at the time. He had his headlights on and it was misting rain. He stopped or slowed his car and saw that the man walking was the same one who had been in his place that morning. On the next morning, witness found the Chevrolet, without a license plate, parked on the West Jefferson highway and notified the authorities. On cross-examination, witness testified that he talked with defendant a long time and observed him but defendant did not tell witness his name. "That in my opinion, Paul Smith, the defendant was the man in the car at the time in question. I don't think I could be mistaken, but I could be". On redirect examination the witness was asked: "Is the defendant, Paul Smith, who is seated at the defense table with his

attorney, the same man you saw driving this automobile on that Saturday morning at your place of business?" The witness answered: "I think it is." On Recross-examination the following occurred:

"Q. You think he looks similar to him, but you could be mistaken?

A. Well, I could be, but I'm just about sure he is the same man.

Q. But there is some doubt in your mind, isn't there, Mr. Calloway?

A. Like you say, a lot of them look alike and there might be some doubt."

Defendant contends that because the witness expressed some doubt as to the correctness of his identification, the trial tribunal should not have submitted the matter to the jury. This contention is without merit. The witness was speaking of his firsthand observation in daylight hours and as a result of a conversation of some length. While counsel's cross-examination of the witness may have elicited from the witness expressions indicating some indistinctness of perception or memory, the court correctly admitted the evidence and denied defendant's motion. The weight of the evidence was for the jury. *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544 (1965). To hold otherwise would make the judge the trier of facts. *State v. Burton,* 272 N.C. 687, 158 S.E. 2d 883 (1967).

[2] Defendant next contends that the court, in its charge, expressed an opinion that defendant's evidence was not worthy of belief. Although it is not clear from the record, it appears that the portion of the charge to which defendant takes exception occurred during the court's recapitulation of the testimony of the defendant: "Anyway, he said they went over the fence. He said he went one way and the others went another way. That he went in the woods and went to sleep. He said he woke up about 7:00 or 8:00 o'clock that night and when he did he walked out to the road and about that time a man came along whose name was Carl Jones. That Carl Jones was a man he had been in prison with before. He was from Charlotte. He said that the way he got word to Carl Jones from Charlotte was that Cadillac — some man he called Cadillac, who was at the prison camp, he said, and was in the prison camp at the time he went over the fence on that day — and that Cadillac got word to the man in Charlotte and that the man from Charlotte came along the road and picked him up."

The record shows that the following testimony was given by defendant on cross-examination:

"Q. How did you get word to him in Charlotte?
A. Through a friend of mine.
Q. Who was that?
A. Cadillac — Shorty —
Q. Well, what was his name?
A. Anthony Perry.

I got to know Anthony Perry when we were serving time at Boone. He did not escape with us but was in the camp at the time the escape was made. He came to the Boone Camp after I was there, and was there up to the time I escaped. That I got word to Cadillac — Anthony Perry, to pick me up."

It is obvious that the court, in recapitulating defendant's testimony, accurately used defendant's own words. The failure of the court also to use the name Anthony Perry is not prejudicial error and does not constitute the expression of an opinion. This assignment of error is overruled.

[3] Defendant's third assignment of error is to the failure of the court to charge the jury with respect to larceny of property of a value less than $200. An examination of all the evidence reveals that all of the evidence was that the vehicle stolen had a value in excess of $200. There is no evidence from which it could even be inferred that the value was less than $200. This assignment of error is overruled.

[4] Finally, defendant contends that his constitutional rights were violated by reason of the fact that the case was called for trial at the same term of court at which counsel was appointed, and counsel could not have had adequate time to prepare for trial. The record is devoid of any motion for continuance. On the contrary, counsel candidly states that no motion was made; that defendant refused to allow counsel to make such a motion and insisted that his case be tried when called. Defendant had a choice between two rights: to move for a continuance or demand a speedy trial. It appears that he exercised his right to demand a speedy trial with full knowledge of his right to move for a continuance. In exercising one right, he waived the other and cannot now be heard to complain.

The record discloses that defendant had a fair trial before a jury, and in the trial we find

No error.

MALLARD, C.J., and HEDRICK, J., concur.

MARJORIE ANNE W. DILLON v. NORTH CAROLINA NATIONAL BANK AS EXECUTOR U/W OF JAMES PATRICK DILLON, AND AS TRUSTEE UNDER TRUST OF JAMES PATRICK DILLON, DECEASED

No. 6926SC477

(Filed 19 November 1969)

1. Trusts § 6— discretionary powers of trustee — interests of minor beneficiaries — action by widow

In an action by plaintiff, a widow, against the trustee of a trust established by plaintiff's deceased husband for the benefit of his two minor daughters, the trial court properly found that the trustee did not abuse its discretionary powers under the trust instrument in refusing to pay one-half of the mortgage debt on property owned by plaintiff as the surviving tenant by the entireties, notwithstanding the trustee was granted discretionary power to satisfy any debts and expenses of the estate, including mortgages, and the trustee did pay numerous small debts of the estate, since it appeared from the record that the trustee's refusal to pay was an honest effort, based upon reasonable judgment, to protect the minor beneficiaries.

2. Trusts § 6— discretion of trustee — abuse of powers

The courts may not control a trustee in the exercise of discretionary powers except to prevent an abuse of those powers.

3. Costs § 3; Declaratory Judgment Act § 2— taxing of costs — discretion of court — trust action — declaratory judgment

In a declaratory judgment action by plaintiff, a widow, against the trustee of a trust established by plaintiff's deceased husband for the benefit of his two minor daughters, in which action the plaintiff unsuccessfully sought to compel the trustee to pay one-half of a mortgage debt on survivorship property, the trial court did not err in taxing all costs, with the exception of attorneys' fees, against the plaintiff. G.S. 1-263, G.S. 6-21(2).

APPEAL by plaintiff from *Clarkson, J.*, 5 May 1969 Session of MECKLENBURG Superior Court.

This is a proceeding initiated pursuant to Chapter 1, Article 26 of the North Carolina General Statutes, entitled "Declaratory Judgment". Plaintiff seeks to have paid by the defendant as executor of the decedent's estate or as trustee of a trust established by decedent for the benefit of his two minor daughters, Mary Anne and Kathleen Patrice Dillon, one-half the outstanding balance due on a note executed by plaintiff and her deceased husband, James Patrick Dillon, secured by a deed of trust conveying lands held by them as tenants by the entirety.

Based on the stipulations of the parties, argument of counsel and consideration of the evidence the judge found, *inter alia,* the follow-

ing facts: that plaintiff was the widow of the decedent and the mother of the two minor daughters; that decedent's last will and testament was offered for probate and is recorded in the office of the Clerk of Superior Court; that the trust agreement referred to in the last will and testament was stipulated into the record by the parties; that at the time of decedent's death, he and plaintiff owned as tenants by the entirety certain real estate in Mecklenburg County, North Carolina; that at the time of decedent's death the sum of $10,298.31 was the outstanding balance due and owing on a note secured by a deed of trust executed by plaintiff and decedent; that plaintiff took title to the real estate under the rights of survivorship of a tenancy by the entirety on the death of her husband; that defendant as trustee under the trust agreement collected proceeds on certain life insurance policies on the life of decedent in the total amount of $41,190.27; that the total value of decedent's estate was $1,977.96; that defendant, after qualifying as executor, paid estate debts totaling $1,752.83 out of estate funds; that thereafter, pursuant to law, defendant as executor paid plaintiff the statutory widow's allowance totaling $1,600.00, $916.00 of this total being in cash and $684.00 being in personal property of that value; that thereafter defendant as trustee paid a total of $1,546.92 to the decedent's estate for the satisfaction of estate liabilities; that plaintiff made demand on defendant as executor to pay one-half of the mortgage debt and that defendant refused because the estate did not have sufficient funds to pay the debt; that plaintiff made the same demand on defendant as trustee but that defendant, in the exercise of its discretion, refused to pay on the ground that the principal function of the trust is the support, maintenance and education of the trust beneficiaries and that payment of the debt as demanded by plaintiff would not be consistent with defendant's duties as trustee; that after the death of decedent, defendant as trustee offered to purchase the house and real estate with trust proceeds, the purchase price offered being the balance due on the mortgage, but that plaintiff rejected the offer; that the property in question was appraised as having a value of $15,500.00 as of the date of decedent's death and that one-half of the mortgage debt was a just and proper debt of the decedent's estate.

Based on these findings of facts the court made the following conclusions of law:

> "1. That the decision of whether to pay or not to pay one-half the mortgage debt referred to in Plaintiff's Complaint is within the discretionary authority of the Defendant in its capacity as Trustee.

2. The refusal by the Defendant, in its capacity as Trustee, to pay one-half the mortgage debt referred to in the Complaint was a discretionary act on the part of said Trustee, and said refusal was not an abuse of the Trustee's discretion, nor has the Trustee acted arbitrarily or unreasonably.

3. The payment of some estate liabilities and debts by the Defendant in the exercise of its discretion as Trustee does not obligate the Defendant, as Trustee, to pay one-half of the mortgage debt referred to in the Complaint."

The court then ordered that plaintiff was not entitled to have defendant, as trustee, pay one-half the mortgage debt, that her action be dismissed and that, in the discretion of the court, all costs except attorneys' fees be taxed against the plaintiff, with the court retaining jurisdiction over attorneys' fees until final disposition of the case.

Clayton, Lane and Helms, by Thomas G. Lane, Jr., for plaintiff appellant.

Palmer, Jonas and Mullins, by Michael P. Mullins, for defendant appellee.

MORRIS, J.

[1] Plaintiff raises two questions on appeal: whether defendant as trustee abused its discretionary powers and whether the court erred in taxing all costs against the plaintiff. Plaintiff concedes in her brief that defendant as trustee was given discretionary powers under the terms of the trust agreement, but contends that defendant abused this discretion in refusing to pay one-half of the mortgage debt. The trust instrument clearly vests the trustee with discretionary powers in the administration of the trust and specifically grants the trustee discretionary power to transfer to the estate "sufficient funds or property to pay or satisfy any debts, . . . including (but not limited to) mortgages, debts, testamentary expenses and all costs and expenses incident to the administration and settlement of his estate . . ."

[1, 2] In the light of this language and the fact that defendant as trustee transferred $1,546.92 to the decedent's estate to pay numerous outstanding, and relatively small, debts of the estate, plaintiff contends that it was an abuse of discretion for defendant to refuse to pay one-half of the mortgage debt. We agree with the trial court that the discretionary payment of these estate liabilities did not obligate the defendant, as trustee, to pay $5,149.15 to satisfy

one-half of the mortgage debt. It is settled law that the courts may not control a trustee in the exercise of discretionary powers except to prevent an abuse of those powers. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639 (1951).

> "The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment." Id. at 471, 67 S.E. 2d at 644.

Applying this test, we find nothing in the record before us which would indicate that the trustee has acted dishonestly, or with an improper motive, or beyond the bounds of a reasonable judgment. On the contrary, it appears that the decision of the trustee to refuse to pay one-half the balance due when requested to do so by plaintiff was the result of an honest effort, based upon reasonable judgment, to protect the interests of the beneficiaries of the trust — the two minor daughters of decedent.

[3] The court did not commit error in taxing all costs, with the exception of attorneys' fees, against the plaintiff. *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326 (1963). G.S. 1-263 permits the court, in a proceeding under the Declaratory Judgments Act, to make such an award of costs as may seem equitable and just. G.S. 6-21(2) grants the court discretion to tax costs against either party in proceedings which require construction of a will or trust agreement.

For the reasons herein stated the judgment is

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

STATE OF NORTH CAROLINA v. WILLIAM LEONARD CLONTZ

No. 6930SC478

(Filed 19 November 1969)

1. Homicide § 17— evidence of threats — improper question

In this homicide prosecution, the trial court properly sustained the State's objection to a question asked a defense witness as to what deceased had stated to him with regard to the defendant and what threat he had made to the witness, since the question was leading by suggesting a fact not in evidence, and it was susceptible to the interpretation that it

was asking about a threat by deceased against the witness, which would be immaterial.

2. Criminal Law § 162— improper question before jury — proper question in absence of jury

Where the court sustained the State's objection to an improper question asked by defense counsel in the presence of the jury, and counsel requested that the witness be allowed to answer in the absence of the jury, defendant may not complain that because the question asked the witness in the absence of the jury was proper the court's ruling upon the question asked in the jury's presence was error.

3. Homicide § 15; Criminal Law § 89— evidence corroborating previous witness — testimony of previous witness not properly offered

In this homicide prosecution, the trial court properly refused to allow defendant's sister to testify as to what a previous defense witness had told her, where the previous witness' testimony was never properly offered and was therefore not before the jury.

4. Criminal Law § 166— abandonment of assignments of error

Assignments of error not brought forward in appellant's brief are deemed abandoned. Court of Appeals Rule No. 28.

APPEAL by defendant from *Martin, (Harry C.), J.*, 31 March 1969 Session, CHEROKEE Superior Court.

Defendant was tried upon a charge of murder in the second degree. The jury returned a verdict of guilty of manslaughter and defendant was sentenced to a term of not less than fourteen nor more than sixteen years.

The State offered evidence tending to show that on the evening of 2 December 1967 the defendant and one Barbara Murrin were riding around Cherokee County in defendant's car and that they drove to a Mr. Graham's house where the car of the deceased, Henry Dotson, was parked. The defendant twice drove by the house blowing his horn and stopped a third time and asked Mrs. Graham to see Mr. Graham. The defendant then drove to his own home where he got a heavy unidentified object and stuck it under his belt or in his pocket. The defendant and Murrin then returned to the Graham house where the defendant drove by at a fast speed and fired a pistol out the car window and into the air. The Dotson car was not seen at the Graham house at that time.

A short time later the defendant and Murrin passed the Dotson car, and after passing it, the defendant turned around and passed the Dotson car again as the two cars went in opposite directions. The defendant again turned around and pulled up beside the Dotson car which was parked on a side road. The defendant and Dotson had a conversation which the State's witness described as "friendly."

Dotson drove off with defendant following him. As he followed Dotson, the defendant threatened to get even with Dotson and to kill him. The defendant then fired a pistol out the car window into the air. Dotson sped up and turned off onto a dirt road with defendant following him.

The Dotson car was lost from view for a few moments, and when the defendant rounded a curve, the Dotson car was parked in the middle of the road. Dotson was on the outside leaning over the car with a rifle pointed in the direction of defendant's car. The defendant backed up his car but slid into a ditch and against a bank. Dotson then shouted that he didn't want any more trouble and fired. The shot hit the gravel in front of defendant's car. The defendant got out of his car and he and Dotson exchanged some harsh words and threats. Several more shots were fired, one of which struck Dotson and he died shortly thereafter. Defendant was holding a pistol after the shooting. The defendant then reported the incident to officers of the law.

Defendant offered evidence tending to show that sometime prior to the incident Dotson had assaulted and severely cut defendant about the abdomen, requiring 144 stitches to repair the cuts, and that the deceased had threatened the defendant and had attempted to run him off the road on several occasions. Because of this, the defendant was afraid of the deceased.

On the evening in question, the defendant and Barbara Murrin were driving around in the community where the defendant lived. Dotson lived in another section of the county some distance from where the incidents occurred. Defendant went to the Graham home to see Mr. Graham as promised earlier that day. While at the Graham home he did not blow his horn at Dotson or later fire a pistol near that house.

When he later pulled up beside the Dotson car, the defendant told Dotson he was not looking for him. He did not chase after Dotson, threaten him, or fire a pistol while following him. The defendant and Murrin were just driving around and when they came upon Dotson's car in the middle of the road, he could not drive by. The defendant tried to get away by backing up his car, but it slid into a ditch and against a bank and would not move. Dotson said he had cut the defendant once and didn't want any more trouble with him. Then Dotson fired. The defendant fired back with a pistol in an effort to protect his own life. Dotson fired again and the defendant fired and his shot struck Dotson. A high-powered rifle was found by Dotson's body.

Robert Morgan, Attorney General, by J. Bruce Morton, Trial Attorney, for the State.

McKeever and Edwards, by Arthur W. Hays, Jr., for the defendant.

BROCK, J.

[1] Defendant's assignment of error No. 9 is addressed to the ruling of the trial judge in sustaining State's objection to a question propounded to a defense witness. The testimony of the defense witness appears in the record on appeal as follows:

"My name is Fred Garrett. I live in Murphy and will have lived there three years this April. I knew Henry Dotson prior to his death. Sometime prior to his death, I had a conversation with Henry Dotson.

"Q. What did Henry Dotson state to you on this occasion with regard to the defendant, Leonard Clontz, and what threat did he make to you?

"State objects. Sustained. Exception No. 9."

[1, 2] The question to which the objection was sustained was improper for at least two reasons. First, it was leading by suggesting a fact not in evidence; second, it is susceptible of the interpretation that it was asking about a threat by deceased against the witness Garrett which would be immaterial. Absent the last clause it appears that the question would have been proper; however, counsel did not undertake to rephrase his question. Instead counsel requested that the witness be allowed to answer in the absence of the jury. The trial judge sent the jury from the courtroom to allow the answer in the record. After the jury retired from the courtroom counsel asked his question again, apparently in a proper manner and the witness' answer was responsive. However, this proper question was never propounded before the jury and consequently never ruled upon by the trial judge. Defendant may not now complain that because his question in the absence of the jury was proper that the ruling of the trial judge upon the question propounded in the presence of the jury was error.

[3] While the jury was out defendant called to the stand defendant's sister, who had not theretofore testified, and questioned her. The questions propounded to her related to what the previous witness Garrett had told her. The solicitor for the State objected to this testimony being offered before the jury and the objection was sustained. This ruling of the trial judge is the subject of defendant's assignment of error No. 10. Since the previous witness' (Garrett's)

testimony was never properly offered and therefore not before the jury, it would obviously be incompetent for defendant's sister to testify as to what the previous witness, Garrett, had told her.

Defendant's brief discusses well-established rules of evidence with relation to a showing by a defendant upon a plea of self-defense in a homicide case of communicated threats by deceased against defendant (See *State v. Rice,* 222 N.C. 634, 24 S.E. 2d 483; *State v. Thomas,* 5 N.C. App. 448, 168 S.E. 2d 459), and of uncommunicated threats by deceased against defendant (See *State v. Minton,* 228 N.C. 15, 44 S.E. 2d 346; *State v. Hurdle,* 5 N.C. App. 610, 169 S.E. 2d 17). However, these principles do not operate until evidence of threats is properly offered. Defendant's assignments of error Nos. 9 and 10 are overruled.

[4] Assignments of error Nos. 1 through 11 (except Nos. 9 and 10 discussed above) are not brought forward in defendant's brief and they are therefore deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

Assignments of error Nos. 12 through 29 are to the charge of the Court to the jury. Five of these are not brought forward in defendant's brief and are deemed abandoned. Rule 28, *supra.* We have considered the remaining assignments of error to the charge, and when the charge is viewed contextually, as it must be, we perceive no error prejudicial to defendant. Defendant has had a fair trial free from prejudicial error.

Affirmed.

BRITT and VAUGHN, JJ., concur.

PATRICIA MORSE v. KATHRYN F. CURTIS, DOING BUSINESS AS CAMP ILLAHEE

AND

BLEECKER MORSE v. KATHRYN F. CURTIS, DOING BUSINESS AS CAMP ILLAHEE

No. 6929SC524

(Filed 19 November 1969)

Master and Servant § 87; Appeal and Error § 57— common-law tort action — Workmen's Compensation action — plea in bar — employee or independent contractor — findings by trial court

In this hearing upon defendant's plea in bar to plaintiff's action for personal injuries on the ground that plaintiff should be limited to recovery under the Workmen's Compensation Act, findings of fact by the trial

court that plaintiff, who had contracted to serve as senior counselor for the saddle seat program at defendant's summer camp, was an independent contractor and not an employee of defendant, and that plaintiff was not acting in the course and scope of her employment when she was injured at the camp, *are held* binding on appeal since they are supported by some competent evidence, and the findings support the court's conclusion that defendant's plea in bar should be denied.

APPEAL by defendant from *McLean, J.,* at the May-June 1969 Civil Session of Superior Court held in HENDERSON County.

Patricia Morse (Patricia) instituted this common-law action to recover for injuries sustained by her on 15 August 1964 on the premises of defendant at Camp Illahee, a summer camp for girls located near Brevard, North Carolina. Bleecker Morse, the father of Patricia, instituted his action to recover for medical expenses and loss of services of Patricia during her minority. The two cases were consolidated for hearing upon the plea in bar interposed by defendant.

Patricia, who was then 20 years of age, had been engaged by contract with defendant as a senior counselor to head up the saddle seat riding program at the camp during the 1964 season.

On 15 August 1964 at about 9:00 a.m. Patricia, who had no car, went to the parking lot with other camp personnel to remove their cars from the regular parking area in order to make room for visitors to the camp. Afterwards, Patricia and two others went into the pump house on the camp grounds to get out of the rain and to smoke a cigarette. Upon leaving the pump house, Patricia's raincoat caught in the pump equipment and her left arm was pulled into the machinery, injuring her arm and necessitating its amputation.

A proceeding under the Workmen's Compensation Act is pending, and defendant contends, as a plea in bar, that plaintiffs should be confined to recovery under the Workmen's Compensation Act.

The plea in bar was heard and evidence was offered. The judge made findings of fact and conclusions of law. The defendant excepted, assigned error, and appealed to the Court of Appeals.

Landon Roberts for defendant appellant.

Uzzell & Dumont by Harry Dumont, and Francis M. Coiner for plaintiff appellees.

MALLARD, C.J.

Only two questions are presented on this appeal. The first is whether there was competent evidence upon which the trial judge

could make the findings of fact. The second question is collateral to the first and is whether the facts so found support the trial judge's conclusions of law.

Upon the hearing on the plea in bar, the trial judge found and concluded as follows:

"1. That on or about March 4, 1964, the defendant entered into a written contract with the plaintiff, Patricia Morse, wherein said plaintiff for a specified sum agreed to accept the position of a senior counselor as head of the saddle seat program for the camp 1964 season, beginning on June 25, 1964, and ending on August 20, 1964, in Brevard, North Carolina.

2. That prior to March 4, 1964, the plaintiff, Patricia Morse, was an accomplished and skilled horse woman, having participated in numerous horse shows in Western North Carolina, and during the year 1963, had given private instruction in horseback riding in Hendersonville and other counties in Western North Carolina.

3. That the plaintiff, Patricia Morse, upon accepting employment pursuant to the written contract dated March 4, 1964, located and chose horses to be used by her as head of the saddle seat riding program at Camp Illahee, Inc., which was owned and operated by the defendant.

4. That the plaintiff, Patricia Morse, was engaged during the 1964 camp season as head of the saddle seat program, and as such, had the independent use of her skill, knowledge and training in the execution of said program; was engaged as head of the saddle seat program because of her independent skill and occupation as a horseback riding instructor; that she was employed to perform said duties at the fixed price of $400.00 plus living expenses at the camp for the entire camp season; that said plaintiff in the performance of her duties had complete charge and control of said program, determining solely the type of instruction to be given and the times when such instruction was to be given, and was not subject to discharge for adopting one method of performing her duties rather than another; that said plaintiff was free to use such assistants in said program as she deemed proper, and had full control and the right to control such assistants; that said plaintiff in fact had full responsibility and control, including the right to control the saddle seat riding program at the defendant's camp during the 1964 camp season, more particularly, from June 25, 1964, up to and including

August 15, 1964, the date of the occurrence giving rise to this action.

5. That on and prior to August 15, 1964, the defendant owned and maintained a wooden shed in which was located an open water pump, consisting of inter-locking wheels and gears; that said shed was located adjacent to a public parking area also located on the defendant's premises; that the door to said shed was allowed to remain open, and a bench had been placed therein for the use of counselors, visitors and other persons rightfully on said premises, including the plaintiff, Patricia Morse; that the defendant knew or should have known that said shed was used by invitees on the premises for shelter from the weather and as a place to smoke so as not to be observed by the children attending the camp.

6. That on August 15, 1964, a water pageant was being conducted by the defendant, to which parents of the campers and other visitors had been invited, and other camp activities had been suspended, including the saddle seat program.

7. That on the morning of August 15, 1964, the defendant instructed all camp personnel to remove their automobiles from the public parking area in order to make room for the visitors to the camp's water pageant; that the plaintiff, Patricia Morse, accompanied other camp personnel to said parking area.

8. That on said occasion it was drizzling rain. That the plaintiff, Patricia Morse, after visiting said parking area, went, together with other camp personnel, to the pump shed, which was located adjacent thereto, for the purpose of shelter and to smoke a cigarette.

9. That on the aforesaid occasion and prior thereto on August 15, 1964, the plaintiff, Patricia Morse, was not performing any of the duties for which she had been employed, nor had said plaintiff at any time been instructed not to use the aforesaid shed.

10. That the plaintiff, Patricia Morse, on said occasion had entered the aforesaid shed and was using the same as an invitee, when the incident giving rise to this action occurred, resulting in serious personal injuries to said plaintiff."

After the foregoing findings of fact, the trial judge made the following conclusions of law:

"1. That this Court has jurisdiction of the parties and the subject matter of these actions.

2. That the plaintiff, Patricia Morse, during the 1964 camp

season and up to and including August 15, 1964, was not an employee of the defendant, but was an independent contractor.

3. That the plaintiff, Patricia Morse, was properly on the defendant's premises and was properly using the shed on said premises as an invitee.

4. That the injuries received by the plaintiff, Patricia Morse, did not arise out of nor were they received in the course of employment by the defendant.

5. That the defendant's pleas in bar are hereby overruled and the plaintiffs' motions to strike the First Further Answer and Defense as set forth in the Answers are hereby sustained.

6. That this Court has jurisdiction to determine these controversies and causes of action on their merits and that the same are not subject to the provisions of the North Carolina Workmen's Compensation Act."

Patricia testified that she entered into a written contract with defendant. The contract was marked "P-1" for identification. Patricia also testified that the duties she was to perform for defendant were those designated on the contract. The record reveals that the paperwriting marked "P-1" "is offered in evidence by Mr. Roberts." However, the record is silent as to whether it was admitted. If it was admitted, appellant did not see fit to include it in the record on appeal.

Upon a review of the evidence contained in the record, it appears that the findings of fact by the trial judge were supported by some competent evidence. On the other hand, there was plenary evidence which would have justified a finding that Patricia was an "employee" and acting in the course of and scope of her employment at the time of her injury.

The applicable rule is stated in 1 Strong, N.C. Index 2d, Appeal and Error, § 57:

> "The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, . . ." See also *Kilby v. Dowdle*, 4 N.C. App. 450, 166 S.E. 2d 875 (1969); *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E. 2d 806 (1964).

Upon examination of the facts and conclusions, we are of the opinion and so hold that the trial judge correctly applied the facts that he found in making the conclusions of law.

Affirmed.

MORRIS and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. MARSHALL MOORE

No. 6926SC395

(Filed 19 November 1969)

1. **Criminal Law § 157— appeal — necessary parts of record proper**

The record proper in a criminal case consists of the bill of indictment or warrant, the plea on which the case is tried, the verdict and the judgment from which appeal is taken, but does not include, technically speaking, the charge and the evidence.

2. **Criminal Law § 161— appeal as exception to the judgment**

An appeal itself is an exception to the judgment which presents for review error appearing on the face of the record.

3. **Criminal Law §§ 162, 163— appeal — necessity for exceptions — charge — evidence**

The Court of Appeals will not consider error in the charge and the evidence which has not been made the subject of an exception or assignment of error. Rule of Practice in the Court of Appeals No. 21.

4. **Constitutional Law § 32— right to counsel — dissatisfaction by defendant**

Notwithstanding indigent defendant's general expression of dissatisfaction with his court appointed counsel during the course of the trial, the court properly ordered the trial to proceed with counsel, where (1) no motion was made by defendant or his counsel that counsel be permitted to withdraw or that he be discharged, (2) defendant did not suggest that counsel was incompetent, and (3) defendant expressed no desire to represent himself.

APPEAL by defendant from *Falls, J.*, 7 April 1969 Schedule "B" Session of Superior Court for MECKLENBURG County.

Defendant was tried under a bill of indictment charging him with larceny of property of the value of more than two hundred dollars. The only evidence was that offered by the State and it tended to show that shortly after midnight, on 3 March 1969, two police officers observed the defendant operating a 1967 Oldsmobile station wagon at a high rate of speed in the City of Charlotte. The officers turned on the blue light and siren of their patrol car and followed the defendant for several blocks. The defendant did not stop until he wrecked into a chain link fence across the end of a dead end street. The station wagon was owned by one Carwell Crawford and had been removed without his permission from in front of a grill on Seventh Street approximately three hours earlier. Crawford testified that the value of the station wagon was approximately $2500.00 on 2 March 1969.

Judgment was entered imposing a prison sentence of not less

than seven nor more than ten years. The defendant personally gave notice of appeal in open court and the same attorney appearing for him at the trial was appointed to prosecute his appeal.

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

Clark C. Totherow for defendant appellant.

GRAHAM, J.

This case was submitted on briefs without oral argument and pursuant to Rule 10, Rules of Practice in the Court of Appeals of North Carolina.

The only purported assignment of error appearing in the record is as follows:

> "The defendant appellant excepts to the trial of his case with the undersigned as his court appointed attorney. He, is of the opinion, that the record of trial will speak for itself."

Defendant's counsel prepared and docketed the record on appeal which includes a narration of the evidence and the court's charge as well as the record proper. In his brief counsel states:

> ". . . I have searched the *record proper* and am unable to find any error in the *record proper* that merits the court's consideration, whereby the defendant would be entitled to any relief by the court." (emphasis added).

[1, 2] Technically speaking, the charge and the evidence are not a part of the record proper. *Carruthers v. R. R.*, 218 N.C. 377, 11 S.E. 2d 157. 1 Strong, N.C. Index, Appeal and Error, §§ 40, 41. The record proper in a criminal case consists of the bill of indictment or warrant, the plea on which the case is tried, the verdict and the judgment from which appeal is taken. *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262. An appeal itself is an exception to the judgment which presents for review error appearing on the face of the record. *State v. Ayscue*, 240 N.C. 196, 81 S.E. 2d 403; *State v. Williams*, 235 N.C. 429, 70 S.E. 2d 1; *State v. Hitchcock*, 4 N.C. App. 676, 167 S.E. 2d 545.

[3] Even though the charge and evidence is included in the case on appeal, if error appears therein, it has not been made the subject of an exception or assignment of error and is therefore not before us for consideration. Rule 21, Rules of Practice in the Court of Appeals of North Carolina; *State v. Jones*, 275 N.C. 432, 168 S.E. 2d

380. We have, however, examined the record proper. The Superior Court had jurisdiction. The bill of indictment charges in proper form a criminal offense. The verdict and judgment are in proper form and the sentence imposed is within the limits fixed by statute. We agree with counsel that no error appears on the face of the record proper. *State v. Williams, supra; State v. Hitchcock, supra.*

Defendant's exception to having been tried with counsel appearing herein representing him, though not timely or in proper form, has been considered by us and found without merit.

[4] The record indicates that at sometime before the trial the defendant was determined indigent and counsel was assigned by the court. The order finding defendant indigent and assigning counsel does not appear in the record and we have no way of knowing the date on which counsel was appointed. Before the jury was impaneled the defendant complained of his court appointed counsel and stated to the court outside the presence of the jury selected to try the case:

> "Well, Judge, your Honor, I think I was assigned Mr. Totherow as my attorney. We have had several discussions and in my opinion, he approaches my case with a negative attitude, as if my chances of being proven innocent is [sic] minute, very small, and I consider myself to be innocent of this crime. . . . I at least, want to be tried with a lawyer that considers me to have some chances of my innocence being proven. . . . I discussed this with him and we had recently agreed that it would be no reflection upon his character whatsoever that if he were to withdraw himself from the case."

No motion was made by defendant or his counsel that counsel be permitted to withdraw or that he be discharged. The defendant did not suggest to the court that counsel was not professionally competent nor did he express a desire to represent himself. An expression by a defendant of an unfounded dissatisfaction with his court appointed counsel does not entitle him to the services of another court appointed attorney. *People v. Terry,* 36 Cal. Reptr. 722. It is well settled that an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. *State v. Alston,* 272 N.C. 278, 158 S.E. 2d 52; *State v. Morgan,* 272 N.C. 97, 157 S.E. 2d 606; *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330; *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667; *Campbell v. State of Maryland,* 231 Md. 21, 188 A. 2d 282; *Brown v. United States,* 105 U.S. App. D.C. 77, 264 F. 2d 363. In *State v. McNeil, supra,* Parker, C.J., quotes as follows from an annotation appearing in 157 A.L.R. 1225, *et seq.,* and entitled "Right of defendant in criminal case to discharge

of, or substitution of other counsel for, attorney appointed by court to represent him."

> " 'The right to such discharge or substitution is to this extent relative, and the authorities seem united in the view that if there is fair representation by competent assigned counsel, proceeding according to his best judgment and the usually accepted canons of criminal trial practice, no right of the defendant is violated by refusal to accede to his personal desire in the matter.' " 263 N.C. 260, 270; 157 A.L.R. 1226.

Under the circumstances of this case we hold that the court properly ordered the trial to proceed with counsel originally appointed by the court in charge of the case. Nothing appears in the record before us to suggest that the defendant was not represented in a competent manner at the trial below.

No error.

CAMPBELL and PARKER, JJ., concur.

THERESA E. GOODROW v. CURTIS E. MARTIN, INC.

No. 6910SC16

(Filed 19 November 1969)

1. Deeds § 19— restrictive covenants

A restrictive covenant creates a negative easement constituting an interest in land.

2. Deeds § 24— covenant against encumbrances — restrictive covenants

A restrictive covenant whereby the beneficial use of land by the owner is restricted is an encumbrance within the covenant against encumbrances.

3. Deeds § 24— violation of covenant against encumbrances — sufficiency of complaint

In this action in which plaintiff seeks to set forth a cause of action based upon defendant's allegedly having sold plaintiff a house which is located closer to the lot line than allowed by restrictive covenants upon the property, the complaint fails to state a cause of action for a breach of the covenant against encumbrances in the deed from plaintiff to defendant, where there is no allegation in the complaint as to the covenant against encumbrances in the deed or any breach thereof, there is no allegation that the restrictive covenants referred to in the complaint imposed

a burden rather than a benefit, and there is no allegation of the way plaintiff is damaged by any breach of the covenant against encumbrances.

4. Deeds § 19— violation of restrictive covenants — sale of house — sufficiency of complaint

In this action in which plaintiff seeks to set forth a cause of action based upon defendant's allegedly having sold plaintiff a house which is located closer to the lot line than allowed by restrictive covenants upon the property, the complaint fails to state a cause of action based upon violation of the restrictive covenants, where there is no allegation as to any contract or agreement or representation on the part of defendant that restrictive covenants have not been violated.

APPEAL by plaintiff from *Hobgood, J.*, 12 August 1968 Session, WAKE Superior Court.

This is a civil action in which the plaintiff seeks to set forth a cause of action against the defendant for the defendant's allegedly having sold to the plaintiff a house and lot at the time the house was allegedly located on said lot in violation of the "lot line restrictions" of certain restrictive covenants upon the property.

The amended complaint filed by the plaintiff on 11 June 1968 reads as follows:

"The plaintiff, complaining of the defendant, says:

"1. The plaintiff is a resident of Wake County, North Carolina.

"2. The defendant is a North Carolina corporation, with its principal office and place of business in Fayetteville, Cumberland County, North Carolina.

"3. By deed dated the 15th day of June, 1967, the defendant, in consideration of Sixteen Thousand Seven Hundred Fifty ($16,750.00) Dollars to it paid, conveyed by deed in fee simple to the plaintiff that certain tract of land, on which a house was located, situated in Wake County, North Carolina, and more particularly described as follows:

BEING all of Lot 760, Block 13, Section 2, Rollingwood Subdivision, Part 1, according to map recorded in Book of Maps 1960, at page 236, Wake County Registry.

"4. Said deed, copy of which is attached hereto, marked Exhibit A, is incorporated herein as if fully set out.

"5. At the time of said conveyance, the property was subject to certain restrictive covenants recorded in Book 1411 at page 72, a copy of which is attached hereto, marked Exhibit B,

and incorporated herein as if fully set out, and to restrictive covenants recorded in (Book) 1420 at page 11, attached hereto, marked Exhibit C, and incorporated herein as if fully set out.

"6. The house on said property is located approximately 8.25 feet closer to an interior lot line than is permitted by the aforesaid restrictive covenants.

"7. The plaintiff is informed and believes that the defendant knew that the house on said lot was located approximately 8.25 feet closer to an interior lot line than is permitted by the aforesaid restrictive covenants at the time the defendant conveyed the property to the plaintiff.

"8. The plaintiff is informed and believes that the value of the property without said violation of the restrictive covenants as set out above would be Sixteen Thousand Seven Hundred and Fifty ($16,750.00) Dollars.

"9. The plaintiff is informed and believes that the value of the property with said violations of the restrictive covenants as set out above is Ten Thousand ($10,000.00) Dollars.

"WHEREFORE, the plaintiff prays:

"1. The defendant be required to return to the plaintiff the sum of Sixteen Thousand Seven Hundred and Fifty ($16,750.00) Dollars.

"2. The deed to the plaintiff by the defendant be cancelled and rescinded.

"Or, in the alternative, the plaintiff prays:

"1. That the plaintiff have and recover of the defendant the sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars."

Defendant demurred *ore tenus* to the amended complaint for failure to state a cause of action and the demurrer was sustained. Plaintiff appealed.

Hollowell & Ragsdale, by William L. Ragsdale, for plaintiff appellant.

Rose & Thorp, by Charles G. Rose, Jr., for defendant appellee.

PARKER, J.

[1, 2] A restrictive covenant creates a negative easement constituting an interest in land. 3 Strong, N.C. Index 2d, Deeds, § 19, p.

277. A restrictive covenant whereby the beneficial use of land by the owner is restricted is an encumbrance within the covenant against encumbrances. 7 Thompson on Real Property, 1962 Replacement, Covenants, Deeds, § 8133, p. 272. 20 Am. Jur. 2d, Covenants, Conditions and Restrictions, § 90, p. 653.

[3] From a reading of the first five paragraphs of the complaint, it would appear that plaintiff may have intended to allege a cause of action against the defendant for a breach of the covenant against encumbrances in the deed from defendant to plaintiff. However, there is no allegation in the complaint as to the covenant against encumbrances in the deed or any alleged breach thereof, nor is there any allegation that the restrictive covenants referred to in paragraph 5 imposed a burden rather than a benefit, or of the way plaintiff is damaged by any breach of the covenant against encumbrances. Thus the complaint fails to allege a cause of action for a breach of the covenant against encumbrances.

[4] Paragraphs 6, 7, 8 and 9 seem to undertake to allege a cause of action upon the grounds that the house which was on the property at the time of the conveyance from the defendant to plaintiff was located in violation of certain restrictive covenants which were applicable to the property. However, there is no allegation as to any contract or agreement or representation on the part of the defendant that restrictive covenants had not been violated, and therefore the complaint fails to state a cause of action based on the alleged violation of the restrictive covenant.

It is not clear what plaintiff intended by the allegations in paragraph 7 because what is said there seems to be irrelevant to the other allegations. There is no effort to allege fraud on the part of the defendant by reason of its alleged knowledge of the violation of the restrictive covenants.

If so advised, plaintiff may apply for leave to amend.

The judgment sustaining the demurrer is

Affirmed.

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

EUGENE B. LaVANGE v. CATHARYN McGILL LENOIR

No. 6930SC389

(Filed 19 November 1969)

Automobiles § 43— accident case — nonsuit for variance

In an action to recover for personal injuries allegedly sustained when plaintiff, a pedestrian, was struck by an automobile operated by defendant, there is a fatal variance between pleading and proof, where plaintiff alleged that he was walking in the street toward his car and that he was struck while in front of defendant's car with his back to the car, and plaintiff's own evidence shows that he was standing on the curb or sidewalk at the time of the accident.

APPEAL by plaintiff from *Martin, J., (Harry C.)*, 6 January 1969 Civil Session, HAYWOOD County Superior Court.

Plaintiff seeks to recover for personal injuries allegedly sustained when he was struck by an automobile being operated by defendant. Upon trial, after plaintiff had presented his evidence, defendant demurred to the evidence and moved the court for a judgment of involuntary nonsuit. The motion was granted, and plaintiff excepted and appealed. Facts necessary for a decision are set out in the opinion.

Monteith, Coward & Coward, by Kent Coward and Thomas W. Jones, for plaintiff appellant.

Williams, Morris and Golding, by Robert G. McClure, Jr. and William C. Morris, Jr., for defendant appellee.

MORRIS, J.

Plaintiff's only contention on appeal is that the court committed prejudicial error in granting defendant's motion for involuntary nonsuit at the close of plaintiff's evidence. This contention must be examined in light of the variance between the allegations contained in plaintiff's complaint and the evidence presented by plaintiff at the trial.

> "The rule is well established that judgment of nonsuit is proper when there is a fatal variance between a plaintiff's *allegata* and *probata*. Proof without allegation is no better than allegation without proof. A plaintiff must make out his case *secundum allegata*. He cannot recover except on the case made by his pleading. (Citations omitted.)" *Hall v. Poteat*, 257 N.C. 458, 125 S.E. 2d 924 (1962).

Plaintiff's complaint contained, among others, the following allegations:

"6. That at a point just past the defendant's automobile the plaintiff in proceeding to his own car stopped for the purpose of ascertaining whether it was safe for him to proceed further; that having looked in all directions and ascertained that there was no moving traffic that would be a danger to him, plaintiff proceeded toward his own vehicle.

7. That at the same moment the defendant Catharyn McGill Lenoir, failed to look in the direction of the plaintiff and failed to observe the plaintiff walking in front of her with his back to her and failed to ascertain whether or not she could make a move forward without causing injury to pedestrians, and the defendant, Catharyn McGill Lenoir, then and there proceeded to advance her vehicle forward.

8. That as a result of the defendant's failure to observe the path in front of her and failure to ascertain whether or not she could safely proceed forward, defendant propelled her automobile so that it struck the plaintiff as he was walking as aforesaid, thereby knocking him to the pavement, and as a direct and proximate result of the defendant's carelessness and negligence in so moving her automobile forward caused the plaintiff serious physical injuries and personal damages as hereinafter described.

. . .

10. That among the careless, negligent and unlawful acts of the defendant, Cathryn McGill Lenoir, which directly and proximately resulted in the aforesaid injuries and damages to the plaintiff were the following:

a. That Catharyn McGill Lenoir, the defendant, operated her said automobile without keeping a reasonable, careful and prudent outlook in the direction of pedestrian travel thereby failing to see what she should have seen.

b. That Catharyn McGill Lenoir, the defendant, failed to ascertain whether there were pedestrians in front of her said automobile.

c. That Catharyn McGill Lenoir, the defendant, failed to observe the plaintiff in front of her car and perform the duty of sounding her horn in order that pedestrians in front of her may be made aware of her approach.

d. That Catharyn McGill Lenoir, the defendant, negli-

gently and unlawfully operated her said Corvair on the Main Street in Waynesville in a way and manner so as to endanger or be likely to endanger the life and person of the said plaintiff who was observing and complying with the statutes applicable to the situation then and there existing.

e. That the defendant, Catharyn McGill Lenoir, failed to exercise due care to avoid colliding with the plaintiff, a pedestrian.

11. That the sole and proximate cause of the plaintiff's injuries were the aforesaid negligent and unlawful acts of the defendant."

These allegations clearly place plaintiff walking in the street toward his car at the time of the accident and allege that he was struck while walking in front of defendant's car with his back to her car. However, plaintiff's own evidence at the trial placed him standing on the curb at the time he was struck. There can be no doubt that this constitutes a variance. The question is whether it is fatal to plaintiff's case. "Whether the variance is to be deemed material (fatal) must be resolved in the light of the facts of each case." *Spaugh v. Winston-Salem,* 249 N.C. 194, 105 S.E. 2d 610 (1958).

To these allegations defendant would certainly reasonably expect to interpose plaintiff's contributory negligence as a bar to any recovery. This she did in her answer. Plaintiff's evidence — that he was standing on the curb or sidewalk when struck — would certainly serve to lessen the effectiveness of defendant's defense of contributory negligence on the part of plaintiff and would require defendant at trial to defend a cause of action completely different from the cause of action alleged in the complaint.

We hold that the variance is material and the judgment of nonsuit is proper. See *Canaday v. Collins,* 261 N.C. 412, 134 S.E. 2d 669 (1964).

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

ANGIE D. REECE v. ERNEST V. REECE, JR.

No. 6926DC517

(Filed 19 November 1969)

1. Appeal and Error § 39— failure to docket record on appeal in apt time — order extending time for serving case on appeal

Appeal is subject to dismissal *ex mero motu* for failure to docket the record on appeal within 90 days from the date of the judgment appealed from as required by Rule 5, where appellant obtained no order from the trial court extending the time within which to docket the record on appeal but only secured an order extending the time to serve his case on appeal upon the appellee. Court of Appeals Rule No. 5.

2. Appeal and Error § 54; Trial § 48— setting aside verdict — appellate review

Action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion.

3. Appeal and Error § 6; Trial § 55— order setting verdict aside — review of nonsuit question

Defendant's exception to the failure of the trial court to grant his motion for nonsuit presents no question for consideration on appeal where the trial court set aside a verdict in defendant's favor as being against the greater weight of the evidence, since the case remains on the civil issue docket for trial *de novo* unaffected by the ruling of which defendant complains.

APPEAL by defendant from *Abernathy, District Judge,* 19 May 1969 Session, MECKLENBURG District Court.

This appeal is from an Order entered 5 June 1969 following a trial conducted at the 19 May 1969 Session.

Plaintiff instituted this action on 4 February 1966 seeking an award *pendente lite,* and permanently, of alimony without divorce, custody, child support, and counsel fees under the provisions of G.S. 50-16. As grounds for relief she alleged, in her original and amended complaint, adultery by defendant and conduct of defendant which rendered her condition intolerable and her life burdensome. Defendant denied the material allegations of the complaint, and alleged condonation by plaintiff.

In trial on the merits before a jury both parties offered evidence tending to support their contentions. Issues were submitted to and answered by the jury as follows:

"1. Were the plaintiff and the defendant married to each other as alleged in the complaint?

"ANSWER: Yes.

"2. Did the defendant commit adultery as alleged in the complaint?

"ANSWER: Yes.

"3. Did the defendant without adequate provocation offer such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome as alleged in the complaint?

"ANSWER: No.

"4. Did the plaintiff condone the acts and conduct of the defendant as alleged in the answer?

"ANSWER: Yes."

Upon the jury rendering its verdict plaintiff moved to set the verdict aside as being against the greater weight of the evidence. Order was entered 5 June 1969 setting the verdict aside and ordering a new trial. Defendant appealed.

William G. Robinson for plaintiff appellee.

Robert F. Rush for defendant appellant.

BROCK, J.

[1] Defendant appealed from an order dated and entered 5 June 1969. Therefore, to docket the record on appeal in this Court within ninety days as provided by our Rules, it was necessary for defendant to docket the record on appeal on or before 3 September 1969; unless he obtained an order from the trial tribunal extending the time within which to docket his record on appeal, not to exceed an additional sixty days. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. The record on appeal in this case was docketed 17 September 1969, fourteen days later than allowed by our Rules. The record shows no order from the trial tribunal extending the time to docket the record on appeal. We find only that defendant secured an order extending the time to serve his case on appeal upon the plaintiff.

We reiterate once again what we said in *Smith v. Starnes,* 1 N.C. App. 192, at pp. 194, 195; 160 S.E. 2d 547:

"The time for docketing the record on appeal in the Court of Appeals is determined by Rule 5, *supra,* and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settle-

ment of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under Rule 5. The trial tribunal, upon motion by appellant, and upon a finding of *good cause* therefor, may enter an order extending the time *for docketing the record on appeal* in the Court of Appeals not exceeding a period of 60 days beyond the 90 days provided by Rule 5. However, this cannot be accomplished by an order allowing additional time to serve case on appeal."

[2, 3] For failure to timely docket the record on appeal this appeal is subject to dismissal *ex mero motu;* however, we have considered appellant's two assignments of error and find them to be without merit. The action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion. *Goldston v. Chambers,* 272 N.C. 53, 157 S.E. 2d 676. The record in this case does not disclose an abuse of discretion by the trial judge. Defendant's exception to the failure of the trial judge to grant his motion for nonsuit presents no question for consideration. The verdict having been set aside and a new trial ordered, the case remains on the civil issue docket for trial *de novo,* unaffected by the ruling of which defendant seeks to complain. *Michaels v. Carson,* 4 N.C. App. 417, 166 S.E. 2d 845.

Appeal dismissed.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT EUGENE GALLAMORE

No. 6929SC397

(Filed 19 November 1969)

1. Criminal Law § 142— suspended sentence — right of appeal

An appeal is allowed from a suspended sentence to test allegations of errors of law. G.S. 15-180.1.

2. Criminal Law § 142— suspension of sentence — condition — reparation to injured party

As a condition to suspension of sentence, the court may order that a defendant make reparation of injuries to a party aggrieved as a result of or incident to the offense committed by defendant. G.S. 15-199.

3. Criminal Law § 142; Automobiles § 130— driving under the influence — suspended sentence — reasonable condition — reparation

Upon defendant's conviction of a first offense of operating a motor vehicle upon the highways of the State while under the influence of intoxicating liquor, suspension of sentence of 18 months' imprisonment upon condition that, among other things, defendant shall pay into the office of the clerk the sum of $3,000 for reparation to the prosecuting witness, *held* reasonable, but the cause is remanded for imposition of a sentence of imprisonment within the statutory maximum. G.S. 20-179.

APPEAL by defendant from *McLean, J.*, March-April 1969 Term, TRANSYLVANIA Superior Court.

Defendant appeals from a judgment and order of the trial judge, entered after verdict of guilty on the charge of violating G.S. 20-138, operating a motor vehicle upon the highways of the State while under the influence of intoxicants or narcotics or drugs. The warrant, on which the defendant was tried, charged a first offense. The judgment imposed sentence of 18 months, which was suspended upon the following conditions:

"Upon motion of the defendant, through his Counsel William White, and by and with his consent and at his request, the foregoing prison sentence is suspended for a period of 5 years, upon the following expressed terms and conditions:

1. That the defendant shall not own, possess or drink any intoxicating liquors for a period of 5 years.

2. That the defendant shall not go in, upon or about any premises wherein intoxicating liquors are manufactured or sold, either legally or illegally for a period of 3 years.

3. That the defendant shall pay into the Office of the Clerk of Superior Court of Transylvania County at this term of Court the sum of $300.00; that thereafter, on or before the fourth Monday in May, 1969, he shall pay into the Office of the Clerk of Superior Court of Transylvania County the sum of $250.00 and a like amount on the fourth Monday in each month thereafter, for a period of 13 months.

4. That he shall not violate any of the criminal laws of this State or any other State of the Union or of the Federal Government for a period of 3 years.

Upon breach of any of the foregoing conditions, Capias and Commitment to issue to place the prison sentence into effect.

ORDER

That out of the monies ordered to be paid in under the foregoing judgment, the Clerk of Superior Court shall pay to the

prosecuting witness Harry Koleman the sum of $3,000.00, that out of the balance the Clerk shall retain the cost of this action and remit the balance to the school fund as provided by law."

Defendant contends (1) that the punishment imposed by the judgment and conditions of suspension were harsh and excessive and in effect constituted a civil judgment against him without his having had an opportunity to meet the allegations against him; and (2) that the punishment imposed by the judgment (which was suspended) was in excess of that allowed by the statute, G.S. 20-179.

Ramsey & White by William R. White for defendant appellant.

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

CAMPBELL, J.

[1] This appeal presents first the question of law as to the reasonableness of the terms of the suspension of the judgment. Compare *State v. Baynard,* 4 N.C. App. 645, 167 S.E. 2d 514 (1969). The statute, G.S. 15-180.1, allows an appeal to test allegations of errors of law even though a suspended sentence was provided in the judgment.

[2] Reparation of injuries to a party aggrieved as a result of or incident to an offense committed by a criminal defendant as a condition to suspension of sentence has long been recognized in North Carolina judicially and by statute. *Myers v. Barnhardt,* 202 N.C. 49, 161 S.E. 715 (1932); G.S. 15-199(10). *State v. Simmington,* 235 N.C. 612, 70 S.E. 2d 842 (1952).

[3] We cannot say that any of the terms of the suspension of sentence are unreasonable. See *State v. Baynard, supra.* There is no merit in this assignment of error.

The defendant further contends, however, that the sentence suspended was in excess of the statutory limits for such an offense. There is merit in this position.

A few days before the judgment was entered in this case the legislature changed the statute. The learned trial judge had no way of knowing of this change as it had not been published. The statute now provides:

"§ 20-179. *Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.* — Every person who is convicted of violating § 20-138, relating to habitual users of nar-

cotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall, for the first offense, be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or imprisonment for not less than thirty (30) days, nor more than six months, or by both such fine and imprisonment, in the discretion of the court. For a second conviction of the same offense, the defendant shall be punished by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00), or imprisonment for not less than two months, nor more than six months, or by both such fine and imprisonment, in the discretion of the court. For a third or subsequent conviction of the same offense, the defendant shall be punished by a fine of not less than five hundred dollars ($500.00) or by both such fine and imprisonment in the discretion of the court not to exceed two years. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50.)" [Ratified and effective 3/10/69.]

Since the sentence of 18 months exceeds the statutory limit, this case must be remanded for the imposition of a sentence within the statutory limitation.

Remanded for judgment.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. BENNIE WILLIAMS

No. 6926SC526

(Filed 19 November 1969)

Criminal Law § 117— instructions — prosecuting witness as interested witness

In this prosecution of two cases of assault with a deadly weapon in which the trial court instructed the jury that defendant was an interested witness, the trial court did not err in failing also to instruct the jury that the prosecuting witnesses were interested witnesses, since such instruction would improperly and prejudicially discredit the testimony of the prosecuting witnesses and would be an unwarranted extension of the interested witness rule.

APPEAL from *Falls, J.*, 12 May 1969 Schedule "B" Session of the Criminal Term, MECKLENBURG Superior Court.

Attorney General Robert Morgan and Staff Attorney Dale Shepherd for the State.

Charles V. Bell for the defendant appellant.

HEDRICK, J.

The defendant was tried and convicted in two cases of assault with a deadly weapon. From an active prison sentence imposed in each case, the defendant appealed contending that the court committed prejudicial error in charging the jury that the defendant was an interested witness and in failing to charge that the prosecuting witnesses were also interested witnesses. The defendant contends that since the prosecuting witnesses had allegedly been cut with a knife by the defendant, they were interested in his conviction and the defendant was entitled to have the jury instructed as to their interest. We do not agree with this contention.

Prior to the adoption of Chapter 110, Public Laws of 1881, now G.S. 8-54, defendants in criminal actions were not competent to testify in their own behalf. The prevailing theory prior to the adoption of the statute was ". . . that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with crime, if permitted to testify, to swear falsely." *State v. Wilcox,* 206 N.C. 691, 175 S.E. 122 (1934). By the language of G.S. 8-54, a defendant is ". . . at his own request, but not otherwise, a competent witness . . .", and may testify in his own behalf at the trial. The North Carolina Supreme Court, interpreting the provisions of this statute, stated in *State v. Holland,* 216 N.C. 610, 6 S.E. 2d 217 (1939), that:

> "There is no hard and fast form of expression or consecrated formula required but the jury may be instructed that as to the defendant the jury should scrutinize his testimony in the light of his interest in the outcome of the prosecution but that if after such scrutiny the jury believes that the witness has told the truth, it should give his testimony the same weight it would give the testimony of any other credible witness. *S. v. Green, supra.*"

The Court, in *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606 (1943), stated that it is not mandatory that the judge charge the jury in this respect but that the charge is permissible and that it appeared to be the uniform practice.

In *State v. Turner,* 253 N.C. 37, 116 S.E. 2d 194 (1960), the Supreme Court of North Carolina was faced with a question similar

to the one in the instant case. In *Turner,* the defendant was arrested and prosecuted for the unlawful possession of illicit liquors for the purpose of sale. At the trial, the defendant testified in his own behalf. Thomas Hoyle, the defendant's brother-in-law, testified that he lived with the defendant and that the whiskey which had been confiscated belonged to him and not to the defendant. The trial judge, in his charge to the jury, instructed them that the testimony given by Hoyle was to be carefully scrutinized in the light of his interest in the jury's verdict. Upon appeal, the North Carolina Supreme Court reversed on the ground that "these instructions tended improperly and prejudicially to discredit the testimony of Hoyle." The Court further stated that "In our view, nothing else appearing, the bias that would incline a person to testify in his own interest, that is, in such a manner as to protect himself from criminal prosecution, should be regarded at least as strong as the bias that would incline him to testify in behalf of his brother-in-law and against his own interest." For us to require the court to give the jury the instructions contended for by the appellant in this case would be to "improperly and prejudicially" discredit the testimony of the prosecuting witnesses and would be an unwarranted extension of the interested witness rule beyond the reasons underlying its existence.

For the above reasons, we find

No error.

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

STATE OF NORTH CAROLINA v. GEORGE CORN

No. 6929SC381

(Filed 19 November 1969)

1. Criminal Law § 75— incriminating statements — admissibility

In this homicide prosecution, the trial court did not err in the admission of testimony by a police officer concerning incriminating statements made to the officer by the defendant while defendant was in custody immediately following his arrest, where the trial court made findings supported by competent evidence on *voir dire* that defendant's statements were made freely and voluntarily after he had been fully advised of his constitutional rights.

2. Criminal Law § 166— abandonment of assignments of error

Assignments of error not brought forward in appellant's brief are deemed abandoned. Court of Appeals Rule No. 28.

STATE *v.* CORN

APPEAL by defendant from *McLean, J.*, March 1969 Session of RUTHERFORD Superior Court.

Defendant was indicted for the first-degree murder of Wayne Rollins. The solicitor stated he would not place defendant on trial for first-degree murder, but would try him only for second-degree murder or manslaughter. Defendant pleaded not guilty. At the trial the State offered the evidence of a number of eyewitnesses, who testified that the defendant and Rollins, while attending a teenage dance, had gotten into a fight; that defendant ran as Rollins collapsed to the floor; and that Rollins was found to have four stab wounds in his chest, one of which was in his heart and proved fatal. Defendant was arrested in the dance hall immediately after the fight and was placed in a police car stationed just outside the building. After the officer searched the defendant and found no knife, he asked the defendant where the knife was. The defendant told the officer the knife was in an ash barrel inside the dance hall and the knife was found at the place indicated by defendant. Defendant acknowledged to the police officer that the knife was his.

The jury found defendant guilty of manslaughter, and from judgment imposing sentence on the verdict, defendant appeals.

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

Hamrick & Hamrick, by J. Nat Hamrick for defendant appellant.

PARKER, J.

[1] Defendant assigns as error the admission in evidence of testimony by the police officer concerning the incriminating statements made to the officer by the defendant while defendant was in custody immediately following his arrest. By means of these statements the officer located and obtained identification of the defendant's knife. This testimony was admitted only after the trial court properly held a *voir dire* hearing in the absence of the jury to determine whether the statements were in fact voluntarily and understandingly made. During the course of this hearing both the arresting officer and the defendant testified, and there was no substantial conflict in their testimony either as to the circumstances under which the statements were made or as to what statements defendant had actually made.

The officer testified on the *voir dire* examination that prior to

asking any question of the defendant, he had warned him that he had a right to remain silent, to be represented by a lawyer while being questioned, that if he wasn't able to hire an attorney the court would appoint him one, and that any statement he made could be used against him in court. The defendant admitted on the *voir dire* examination that prior to his making any statement to the officer, the officer had said to him: "Before I ask you any questions, I want to tell you you have a right to remain silent and don't have to tell me anything if you don't want to." Defendant testified he didn't remember that the officer had told him he had a right to have a lawyer, but defendant did not positively state that the officer had failed to so advise him. Defendant does not contend that he was or is an indigent, and he was represented at his trial and is represented on this appeal by privately employed counsel. The defendant further testified that the officer had never threatened him in any way, had never promised to do anything to try to help him, and that his statements to the officer had been made freely and voluntarily.

At the conclusion of the *voir dire* hearing the trial judge made full findings of fact and concluded that the statements were made "freely and voluntarily by the defendant, without compulsion or fear and he had been fully advised as to his constitutional rights." There was competent evidence to support the trial court's findings of fact and these findings are binding on this Court upon appeal. *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. The findings of fact support the trial court's conclusions of law. There is no merit in this assignment of error.

[2] Appellant's remaining assignments of error are either related to the foregoing assignment of error, and must stand or fall with it, or have not been brought forward in appellant's brief and are therefore deemed abandoned. Rule 28 of the Rules of Practice of the Court of Appeals. Nevertheless, we have examined the entire record and find

No error.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. JOSEPH STEVE MARTIN

No. 6926SC523

(Filed 19 November 1969)

1. Robbery § 4; Criminal Law § 106— armed robbery — sufficiency of the evidence

In a prosecution for armed robbery, evidence of defendant's guilt was sufficient to be submitted to the jury, notwithstanding defendant's contentions that the prosecuting witness was "obviously unreliable" and that defendant's unequivocal denial of the charge presented a factual situation too conflicting for the jury's consideration.

2. Criminal Law § 106— sufficiency of the evidence — function of jury

It is the function of the jury to determine the facts in the case from the evidence, to weigh the evidence and determine the credibility of the witnesses and the probative force to be given their testimony, and to determine what the evidence proves or fails to prove.

3. Robbery § 5— armed robbery — instructions on lesser included offense

In a prosecution for armed robbery, where the evidence tends to show that the defendant had committed the armed robbery as alleged in the indictment or that the defendant was innocent, the trial court is not required to instruct the jury on the lesser included offenses of assault with a deadly weapon and simple assault.

APPEAL by defendant from *Beal, S.J.*, 16 June 1969 Schedule "D" Session of MECKLENBURG County Superior Court.

Defendant was charged under a bill of indictment with armed robbery on 19 May 1969. The uncontroverted evidence of the State, based on the testimony of the prosecuting witness Jarvis Cox and the corroborative testimony of Charlotte Police Officers W. G. Burnett and H. R. Smith, tends to show that Cox was approached by defendant at a "cafe" near the bus station in Charlotte and was persuaded to follow the defendant while in search of a girl, that after walking "a good little piece down there" they came to a vacant lot where defendant for no apparent reason said, "Well, g - - d - - - your soul, I am going to kill you". Defendant then allegedly pulled Cox into a vacant lot and knocked him down, tied him to a tree and threatened to kill him with a knife "about six or eight inches long which looked like a steak knife." Defendant allegedly took $360 in currency and other personal property belonging to Cox. After defendant left the scene, Cox untied himself, "ran at least two blocks" to a service station and called the police. The robbery allegedly occurred around 9 p.m. as it was getting dark. Cox testified that he had not had anything alcoholic to drink on the day of the robbery.

Defendant testified that he had never seen Cox before he was arrested for committing the alleged robbery, that Cox "was half-high, smelled like he had been drinking wine" when defendant saw him at the police station, that the police never found a knife or the money on him and that at the time of the robbery he was "down at West 8th Street and Pine Street, down there at a friend's Mae Blackworth."

Defendant was apprehended about midnight on the day of the robbery when he was seen at the bus station in Charlotte by Cox, who immediately notified a police officer.

At the conclusion of the testimony the court charged the jury on the offenses of armed robbery and common law robbery. The jury rendered a verdict of guilty of armed robbery and defendant was sentenced to serve not less than 15 nor more than 18 years in the State Prison.

Defendant appealed.

Attorney General Robert Morgan by Trial Attorney I. B. Hudson, Jr., and Staff Attorney Howard P. Satisky for the State.

James M. Shannonhouse, Jr., for defendant appellant.

MORRIS, J.

[1] By assignments of error Nos. 1 and 2 defendant contends that it was error for the court to refuse his motion for nonsuit at the close of the State's evidence and at the close of all the evidence. Defendant does not cite pertinent authority for this position, contending only that the prosecuting witness was "obviously unreliable", because he was unwilling or unable to explain to the court and jury what he had been doing in Charlotte and why he had so much money on his person when he was not planning to make any substantial purchases. Defendant further contends that this "unreliability" along with "defendant's unequivocal denial" presents a "factual situation too conflicting to be presented the jury for consideration."

[2] It is the function of the jury to determine the facts in the case from the evidence and it is the function of the jury to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony and determine what the evidence proves or fails to prove. 7 Strong, N.C. Index 2d, Trial, § 18, p. 288. There was ample evidence to be submitted to the jury. Defendant's assignments of error Nos. 1 and 2 are overruled.

[3] Defendant's assignment of error No. 3 is addressed to the

court's failure to instruct the jury on the lesser included offenses of assault with a deadly weapon and simple assault under G.S. 15-169 and G.S. 15-170. This failure, he contends, constitutes prejudicial error. It is true that a defendant may be acquitted of armed robbery and convicted of an included or lesser offense if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence at the trial. However, the evidence in this case tended to show that the defendant had committed armed robbery upon Cox as alleged in the indictment or that the defendant was innocent of the alleged crime. The jury was persuaded to accept the evidence of the State and find the defendant guilty as charged. This assignment of error is overruled. *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194 (1966); *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834 (1948); *State v. McLean,* 2 N.C. App. 460, 163 S.E. 2d 125 (1968).

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

STATE OF NORTH CAROLINA v. THOMAS WILSON, JR.

No. 6926SC499

(Filed 19 November 1969)

1. Criminal Law § 106— nonsuit — sufficiency of evidence

Motion to nonsuit is properly denied if there is any competent evidence to support the allegations of the indictment, considering the evidence in the light most favorable to the State, and giving it the benefit of every reasonable inference fairly deducible therefrom.

2. Burglary and Unlawful Breakings § 5; Larceny § 7— nonsuit — sufficiency of evidence

In this prosecution for felonious breaking and entering and felonious larceny, defendant's motion for nonsuit was properly overruled where a State's witness testified that she saw defendant enter the victim's apartment after pulling nails from the door hinge, and saw defendant carry a television set from the apartment and place it in a taxi.

3. Burglary and Unlawful Breakings § 6— instructions — intent to commit specific crime alleged

In this prosecution for breaking and entering with intent to commit felonious larceny, the trial court properly instructed the jury that the requisite felonious intent must be applied to the specific crime alleged, where portion of the charge to which defendant objects was merely a

general outline of G.S. 14-54, and the court thereafter correctly instructed the jury at least three times that they must find the breaking and entering to have been with the intent to commit the felony of larceny.

APPEAL by defendant from *Beal, S.J.*, 16 June 1969 Schedule "D" Criminal Session MECKLENBURG County Superior Court.

The defendant, Thomas Wilson, Jr., along with Joshua Robinson and Sandra Patricia Martin were jointly indicted in a bill of indictment charging them with the felonies of breaking and entering and larceny and a third count of receiving. The cases were consolidated for trial. The record before us does not disclose the disposition of the cases against Robinson and Martin. The jury found the defendant Wilson guilty of breaking and entering with intent to commit the felony of larceny and larceny as charged in the bill of indictment. From judgment on the verdict defendant appeals.

Attorney General Robert Morgan by Staff Attorney Edward L. Eatman, Jr., for the State.

Richard H. Robertson for defendant appellant.

VAUGHN, J.

[1] Motion to nonsuit is properly denied if there is any competent evidence to support the allegations of the indictment, considering the evidence in the light most favorable to the State, and giving it the benefit of every reasonable inference fairly deducible therefrom. 2 Strong, N.C. Index 2d, Criminal Law, § 106.

[2] Evidence for the State tends to show the following. On 29 April 1969, Mrs. Esteven Taylor lived in an apartment. There were four other apartments in the building including one across the hall which was shared by Patricia Martin and Sarah Wallace. Mrs. Taylor left her apartment about 6:50 a.m. and upon returning from her day's work at 3:45 p.m. found that the lock to her front door had been removed. Her television set and a record player were missing. Sarah Wallace testified that she saw Thomas Wilson and Patricia Martin enter the Taylor apartment after Wilson took a hammer from his pocket and pulled the nails from the hinge. She watched Wilson put the television set in a taxi and drive off with Patricia and Joshua. Patricia, as a witness for the defense, denied entering the Taylor apartment. She testified that she first saw the television set when Wilson put it into the taxi and that she, Wilson and Joshua then went to Frank's Pawn Shop where after leaving the set, they separated. She testified that she received no money from the pawn

of the set and entered the pawn shop for the sole purpose of getting the cab fare which Wilson paid. Mrs. Taylor located her set at Frank's Pawn Shop the next day and identified it at the trial. Her record player was not found. Sarah Wallace, on cross examination, stated that Mrs. Taylor came home about 4 p.m. and that she did not talk to her until 8 p.m. because Wilson had threatened her.

It is apparent from a review of the record that there was substantial direct evidence of every element of the crime charged and that there was no variance between the indictment and the proof. The defendant's assignment of error based on the failure of the court to grant his motion for nonsuit is overruled.

[3] The defendant contends that the trial judge failed to instruct the jury that the requisite felonious intent must be applied to the specific crime alleged, that of intent to commit the felony of larceny. That part of the court's charge which the defendant sets out in his brief was merely a general outline of the applicable statute, G.S. 14-54, which the trial judge had just read. A reading of the entire charge discloses that thereafter the court correctly instructed the jury at least three times that they must find the breaking and entering to have been with the intent to commit the felony of larceny. When the charge of the court is considered contextually as a whole, as we are required to do, it is clear that the trial judge properly declared and explained the law arising on all phases of the evidence. *Nance v. Long,* 250 N.C. 96, 107 S.E. 2d 926.

We have carefully considered the defendant's remaining assignment of error relating to the charge to the jury and find no prejudicial error.

Affirmed.

BROCK and BRITT, JJ., concur.

PATRICIA MORSE (EMPLOYEE) v. MRS. KATHRYN F. CURTIS (EMPLOYER) AND INSURANCE COMPANY OF NORTH AMERICA (CARRIER)

No. 6929IC471

(Filed 19 November 1969)

Appeal and Error § 6; Master and Servant § 96— order continuing compensation proceeding — premature appeal

Appeal from an order of the Industrial Commission continuing a Workmen's Compensation proceeding and removing it from the hearing docket

pending determination of a common-law action for personal injuries brought by plaintiff against her employer in the superior court is dismissed by the Court of Appeals *ex mero motu* as being premature.

APPEAL by defendants from full Industrial Commission order of 27 March 1969.

An examination of the record discloses that the claimant, Patricia Morse, a 20-year-old girl, was injured on 15 August 1964 on the premises of the defendant, Kathryn F. Curtis, at Camp Illahee in Transylvania County, North Carolina. A common law action to recover damages for personal injuries arising out of the incident was instituted by the claimant against the defendant Curtis in the Superior Court of Henderson County on 26 July 1966. A claim for compensation under the North Carolina Workmen's Compensation Act was filed with the Industrial Commission by the claimant's attorney by letter dated 3 August 1966.

After the claim for compensation was filed, the matter was first set for hearing at Brevard, North Carolina, on 16 November 1967 before Commissioner William F. Marshall, at which time the matter was not heard but was continued. Thereafter, the matter was set for hearing and continued two times until it was finally set for hearing on 21 November 1968 at Brevard before Deputy Commissioner C. A. Dandelake when and where the claimant's attorney moved that the hearing be continued until the common law action pending in the Superior Court could be heard. The defendants moved that the matter pending before the Industrial Commission either be heard or dismissed. The Deputy Commissioner entered the following order dated 6 December 1968:

"Upon the call of this case for hearing, no testimony was taken but counsel for plaintiff and defendants' counsel ably argued their contentions in this matter. Mr. DuMont presented a letter to the undersigned from the plaintiff's doctor in New York which stated that the plaintiff was under medical treatment and, therefore, unable to attend the hearing. A motion was then made by Mr. DuMont that this case be continued until this action is heard in Superior Court. He stated it would be heard at the next Term of Superior Court of Henderson County.

"Mr. Roberts, defendants' counsel, made a motion that this case pending before the Industrial Commission either be heard now or dismissed.

"The undersigned being of the opinion that the matter could not fairly and impartially be heard in the absence of the plain-

tiff, and after having carefully reviewed this case, the motion made by the plaintiff's counsel is allowed. Motion made by defendants' counsel is denied.

"NOW, THEREFORE, IT IS ORDERED that this case be and the same is hereby CONTINUED and REMOVED from the hearing docket until disposition is made of the Superior Court Action."

From the foregoing order, the defendants appealed to the full Industrial Commission. The defendants' appeal was heard on 25 March 1969, and on 26 March 1969 the full Commission entered an order affirming the order of the Deputy Commissioner dated 6 December 1968. From the order of the Full Commission, the defendants appealed to the North Carolina Court of Appeals.

Landon Roberts for the defendant appellant.

Uzzell and DuMont by Harry DuMont and Francis M. Coiner for the plaintiff appellee.

HEDRICK, J.

In this case the defendants have undertaken to appeal from an order of the Industrial Commission continuing the case and removing the same from the hearing docket pending the determination of the common law action in the Superior Court of Henderson County. This is a premature appeal and presents no question for review to this Court. G.S. 97-86. "Appeal does not lie unless it deprives the appellant of some substantial right which might be lost if the order is not reviewed before final judgment." *Tucker v. Highway Commission,* 247 N.C. 171, 100 S.E. 2d 514 (1957). ". . . there is such a thing in compensation procedure as completely unreviewable matters, just as there is in ordinary judicial procedure, as in the case of interlocutory decisions that are unreviewable for lack of finality or incidental decisions that involve details committed to the absolute discretion of the lower tribunal." Larson, Workmen's Compensation Law, Vol. 2, Sec. 80.10.

For the reasons stated herein, the appeal is dismissed *ex mero motu.*

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

MARGARET HICE DIXON v. AUBREY BRICE DIXON

No. 6926DC511

(Filed 19 November 1969)

1. Appeal and Error § 39— dismissal of appeal — failure to docket on time

Appeal is subject to dismissal *ex mero motu* by the Court of Appeals for failure to docket the record on appeal within 90 days after date of judgment appealed from. Rule of Practice in the Court of Appeals No. 5.

2. Appeal and Error § 39— extension of time for docketing record

Authority of trial tribunal for good cause to extend the time for docketing the record on appeal in the Court of Appeals may not be exercised after the 90-day period for docketing has expired.

3. Divorce and Alimony § 18— award of alimony pendente lite and fees — discretion of court

The amount to be awarded for alimony *pendente lite* and counsel fees rests in the sound discretion of the trial judge and his determination will not be disturbed in the absence of a clear abuse of that discretion.

APPEAL by plaintiff from *Arbuckle, District Judge,* 5 May 1969 Session of the District Court of MECKLENBURG County.

On 15 April 1969 the plaintiff filed this action seeking alimony, alimony *pendente lite* and counsel fees. The plaintiff's application for alimony *pendente lite* and counsel fees was heard on 5 May 1969. On 14 May 1969 the trial judge signed an order requiring the defendant to pay alimony *pendente lite* and counsel fees. From said order the plaintiff appeals to this Court contending, among other things, that the court abused its discretion in that it did not allow an adequate amount for alimony *pendente lite* and counsel fees.

Hamel & Cannon by Thomas R. Cannon for plaintiff appellant.

Bailey and Davis by Thomas D. Windsor for defendant appellee.

VAUGHN, J.

[1] Rule 5 of the Rules of Practice in the Court of appeals of North Carolina provides in part that the record on appeal shall be docketed within 90 days after the date of the judgment, order, decree or other determination appealed from. Here the appeal entries, presumably prepared by counsel, allowed appellant 60 days to serve the case on appeal and allowed appellee 30 days after such service to serve countercase or exceptions. Obviously, if the parties used all of the time allowed under the order, as in fact they did, the

record on appeal could not reasonably be docketed in the Court of Appeals within the 90 days allowed by Rule 5. Despite this, there was no application to the trial tribunal to extend the time for docketing the record on appeal until after the time for docketing in this Court had expired.

[2] Although Rule 5 provides that the trial tribunal may for good cause extend the time not exceeding 60 days for docketing the record on appeal, this authority may not be exercised after the time for docketing in the Court of Appeals has expired. *Roberts v. Stewart and Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58. For failure to comply with our rule, we *ex mero motu* dismiss the appeal.

Nevertheless, we have carefully considered plaintiff's assignments of error but find them without merit.

[3] On this appeal the question before us is not whether the award for alimony *pendente lite* and counsel fees may have been higher or lower than that anticipated or even usual in similar cases, but whether in consideration of the circumstances under which it was made it was so unreasonable as to constitute an abuse of discretion. *Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899. The purpose of the award of alimony *pendente lite* is to provide for the reasonable and proper support of the wife in an emergency situation, pending the first determination of her rights. *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5. It is well settled that the amount to be awarded for alimony *pendente lite* and counsel fees rests in the sound discretion of the trial judge and his determination will not be disturbed in the absence of a clear abuse of that discretion. *Miller v. Miller,* 270 N.C. 140, 153 S.E. 2d 854.

The record before us discloses no abuse of discretion by the trial judge in fixing the amount of the alimony *pendente lite* and counsel fees.

Appeal dismissed.

BROCK and BRITT, JJ., concur.

ROBERT L. KURTZ, ANCILLARY ADMINISTRATOR OF THE ESTATE OF ROBERT G. KOONTZ, DECEASED v. ALLSTATE INSURANCE COMPANY, A CORPORATION

No. 6926DC485

(Filed 19 November 1969)

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

Authority of the trial tribunal to extend for good cause the time for docketing the record on appeal in the Court of Appeals cannot be exercised by an order allowing appellant additional time to serve his case on appeal upon the appellee, and the docketing of the record on appeal in such case more than 90 days after date of entry of judgment subjects the appeal to dismissal by the Court of Appeals *ex mero motu*. Rule of Practice in the Court of Appeals No. 5.

APPEAL by plaintiff from *Stukes, District Judge,* 14 April 1969 Session, MECKLENBURG District Court.

Plaintiff brings this action under the "uninsured motorist" endorsement of plaintiff's intestate's liability insurance policy to recover damages for the wrongful death of plaintiff's intestate.

On 21 September 1966, at approximately 9:35 p.m., plaintiff's intestate, along with William Edgar Helton and Tom Roberts, was riding in the 1962 Chevrolet automobile which was involved in a one-car accident near the Town of Sylva in Jackson County. All three of them were killed as a result of the accident and there was no eyewitness as to who was driving the vehicle.

At the close of plaintiff's evidence the defendant's motion for judgment of involuntary nonsuit was allowed. Plaintiff appealed.

Levine, Goodman and Murchison, by Alton G. Murchison, III, for the plaintiff.

Sanders, Walker and London, by James E. Walker, for the defendant.

BROCK, J.

The plaintiff's appeal in this case is from a judgment of involuntary nonsuit entered on 23 April 1969. According to Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina, it was necessary that the record on appeal be docketed within 90 days unless the trial tribunal, for good cause, extended the time not exceeding an additional 60 days for docketing the record on appeal. Consequently, without an extension by the trial tribunal, the record

on appeal should have been docketed in this Court on 22 July 1969; it was actually docketed on 25 August 1969, over a month late. There was no order from the trial tribunal entered under the provisions of Rule 5, *supra,* extending the time within which the record on appeal might be docketed.

We do find in the record an order dated 5 June 1969 extending the time within which plaintiff might serve the case on appeal on defendant to and including 7 July 1969 and allowing the defendant 30 days thereafter to serve countercase or exceptions. Once again we refer the Bar to our holding in *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547, where we point out that an extension of time to docket the record on appeal cannot be accomplished by an extension of time to serve case on appeal. For failure to comply with the Rules respecting the time for docketing the record on appeal, the appeal is subject to dismissal *ex mero motu.*

Nevertheless, we have examined plaintiff's assignment of error to the ruling of the Court and find that plaintiff was faced with two particular problems in this lawsuit. First, a difficulty in establishing the identity of the driver of the motor vehicle at the time of the accident; and second, a difficulty in establishing that the motor vehicle involved in the accident was an uninsured motor vehicle. With respect to the first particular problem, it is our opinion that the circumstantial evidence which was offered by the plaintiff before the jury was not sufficient to justify submitting the case to the jury upon the question of the identity of the driver. The circumstantial evidence voluntarily offered by the plaintiff in the absence of the jury without an opportunity for the trial court to rule upon its competence has not been considered by us. We express no opinion upon the sufficiency of the evidence to establish that the motor vehicle involved in the accident was an uninsured motor vehicle.

For failure to comply with the Rules of this Court, this appeal is

Dismissed.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. EUGENE DAYTON McDONALD

No. 6926SC474

(Filed 19 November 1969)

Burglary and Unlawful Breakings § 8; Arrest and Bail § 9; Criminal Law § 151— punishment — bail pending appeal

The trial court did not abuse its discretion in imposing a sentence of imprisonment of six to ten years upon defendant's plea of guilty of felonious breaking and entering and in fixing bail pending appeal in the amount of $10,000.

APPEAL by defendant from *Falls, J.*, 19 May 1969 Schedule "B" Criminal Session of MECKLENBURG Superior Court.

Defendant was charged in a valid bill of indictment with felonious breaking and entering, larceny and receiving. He was represented by court-appointed counsel and entered a plea of guilty to the charge of felonious breaking and entering. The court found that the plea was freely, understandingly and voluntarily made without undue influence, compulsion or duress, and without promise of leniency. From a judgment imposing a sentence of imprisonment of not less than six (6) nor more than ten (10) years, the defendant appeals.

Attorney General Robert Morgan by Trial Attorney Fred P. Parker, III, for the State.

Whitfield, McNeely and Echols by Paul L. Whitfield for defendant appellant.

VAUGHN, J.

The defendant assigns as error the judgment of the trial court, contending that the court abused its discretion and showed malice toward the defendant by imposing an active sentence of six (6) to ten (10) years and by fixing bail pending appeal in the amount of $10,000.00.

Counsel for defendant concedes it to be elementary that, within the limit of the statute, punishment is left to the sound discretion of the trial judge. The sentence imposed was within the maximum authorized by G.S. 14-54. It is equally fundamental that the amount to be fixed for bond pending appeal is largely in the discretion of the court below.

We have carefully examined the record and briefs filed in the case and hold that no abuse of discretion appears therein.

Affirmed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD WOOTEN

No. 6928SC375

(Filed 19 November 1969)

Criminal Law § 155— dismissal of appeal for failure to comply with rules

Court of Appeals dismisses criminal defendant's appeal where defendant (1) failed to docket record on appeal within the time specified by the order allowing *certiorari*, (2) failed to set out any exceptions to the proceedings, rulings or judgment of the court, (3) failed to group any exceptions, and (4) failed to comply with the Court rules for filing record on appeal in that he merely filed a photostatic copy of much of the trial proceedings. Rules of Practice in the Court of Appeals Nos. 19(c) and 21.

ON Certiorari to review the judgment of *McLean, J.*, at the 11 November 1968 Session of BUNCOMBE County Superior Court.

The defendant was charged in a bill of indictment with the larceny of $3,216.13 from the Skyland Beer Distributing Company of Asheville, North Carolina. To the charge the defendant entered a plea of not guilty. A verdict of guilty as charged was returned by the jury and judgment was entered thereon. The defendant, after he began to serve the sentence imposed, requested that the court appoint an attorney to aid him in perfecting an appeal. An attorney was appointed and represented the defendant at a Habeas Corpus proceeding. Since the time for an appeal as of right had passed, the defendant, through his court appointed attorney, filed a petition for certiorari. The petition for certiorari was allowed by order of the North Carolina Court of Appeals on 12 March 1969.

Ruben J. Dailey for the defendant appellant.

Attorney General Robert Morgan and Staff Attorney Christine Y. Denson for the State.

HEDRICK, J.

The order of the North Carolina Court of Appeals dated 12 March 1969 allowing the defendant's petition for certiorari stated that the record on appeal was to be docketed in this Court by 10:00 A.M. on 3 June 1969. The defendant's attorney was notified of the order by letter dated 14 March 1969 and a copy of the order was certified to the Clerk of the Superior Court of Buncombe County on the same day. The defendant docketed his record on appeal on 4 June 1969 and has for that reason failed to comply with the order of the Court allowing certiorari.

Rule 21, Rules of Practice in the Court of Appeals of North Carolina, provides that: "When appellant is required to serve a record on appeal, he shall set out in his statement of record on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered." Under Rule 19(c), Rules of Practice in the Court of Appeals of North Carolina: "All exceptions relied on shall be grouped and separately numbered immediately before the signature to the record on appeal. Exceptions not thus set out will be deemed to be abandoned." The defendant has not set out any exceptions to the proceedings, rulings or judgment of the court. He has not grouped any exceptions as required by Rule 19(c). Indeed, the appellant has failed to comply with the rules of the Court for filing the record on appeal in that he has merely filed a photostatic copy of much of the proceedings in the Superior Court and a transcript of the evidence and the judge's charge. The appellant has also failed to bring forward, as he should have, the order of the North Carolina Court of Appeals allowing his petition for certiorari.

For failure to comply with the rules and orders of this Court, upon motion of the Attorney General, the appeal is dismissed. *Kelly v. Washington,* 3 N.C. App. 362, 164 S.E. 2d 634 (1968); *State v. Flanders,* 4 N.C. App. 505, 167 S.E. 2d 43 (1969); *State v. Ellisor,* 4 N.C. App. 514, 167 S.E. 2d 35 (1969).

Nevertheless, we have examined and considered all of the questions discussed by the appellant in his brief and have found no prejudicial error.

Appeal dismissed.

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

STATE OF NORTH CAROLINA v. JERRY CASSADA

No. 6928SC401

(Filed 19 November 1969)

Constitutional Law § 28; Criminal Law § 23; Receiving Stolen Goods § 7— receiving stolen goods — guilty plea — no indictment or waiver of indictment for such offense

Where defendant was being tried upon indictments charging him with felonious breaking and entering and felonious larceny, the trial court

erred in accepting during trial defendant's plea of guilty of the felony of receiving stolen goods when defendant had not been indicted for such offense and had not waived a bill of indictment pursuant to G.S. 15-140.1, and the sentence of imprisonment imposed by the court is vacated as a nullity.

APPEAL by defendant from *Froneberger, J.*, March 1969 Criminal Session, BUNCOMBE County Superior Court.

The defendant was indicted for the felonious larceny of various shotguns, rifles and pistols with a total value of $750.00. In the bill of indictment the various items were described. In another bill of indictment the defendant was charged with the felony of breaking and entering. The two charges, one under each bill of indictment, were consolidated for the purpose of trial, and the defendant entered a plea of not guilty to each offense.

During the course of the trial the defendant, through his privately-employed attorney, withdrew the plea of not guilty and tendered a plea of guilty to feloniously receiving stolen merchandise, knowing same to have been stolen. After questioning the defendant as to his understanding of the plea which he tendered, the trial judge determined and adjudicated that the defendant entered his plea of guilty voluntarily, freely, understandingly and without any undue influence, compulsion, duress or promises of leniency.

From a sentence of not less than five nor more than ten years in the State's prison, the defendant appealed to this Court. The defendant was found to be an indigent, and an attorney was duly appointed to represent him in his appeal.

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

Carl W. Loftin, for defendant appellant.

CAMPBELL, J.

The defendant assigns as error the acceptance by the court of a plea of guilty to the felony of receiving stolen goods, knowing them to have been stolen, when he had not been indicted for such an offense and had not waived a bill of indictment.

> "The crimes of larceny and of receiving stolen goods, knowing them to have been stolen, are separate and distinct offenses. . . ." *State v. Brady,* 237 N.C. 675, 75 S.E. 2d 791 (1953).

In *McClure v. State,* 267 N.C. 212, 148 S.E. 2d 15 (1966), Chief Justice Parker stated:

"G.S. 15-137 reads in relevant part: 'No person shall be . . . put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law.'

'There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.' 42 C.J.S., Indictments and Informations, § 1; *S. v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381; *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166."

In the instant case there was no bill of indictment for the crime of receiving stolen goods and neither was there a waiver of such bill of indictment pursuant to G.S. 15-140.1.

The sentence of imprisonment of defendant imposed in the trial court is vacated as a nullity.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLES ISSAC
AND
STATE OF NORTH CAROLINA v. HAROLD BENJAMIN LUTCHIN

No. 6926SC502

(Filed 19 November 1969)

APPEAL by defendants from *Beal, S.J.,* 7 July 1969 Schedule "C" Criminal Session, MECKLENBURG Superior Court.

Each defendant entered a plea of guilty to the charge of breaking or entering with intent to commit a felony and each was sentenced to a term of not less than six nor more than nine years in prison. The defendants were represented by privately employed counsel.

Attorney General Robert Morgan, by Deputy Attorney General Jean A. Benoy, for the State.

Allen A. Bailey and John Plumides, by Allen A. Bailey, for defendant appellants.

MORRIS, J.

The guilty pleas were tendered to the court by each defendant personally and through their counsel. The court made due and lengthy inquiry of each defendant with respect to the voluntariness of the plea. Each defendant signed a written plea stating his plea was freely, understandingly, and voluntarily given. The court, as to each defendant, entered its adjudication finding that the plea was freely, understandingly, and voluntarily made, was made without undue influence, compulsion, or duress, and without promise of leniency.

The record contains no exceptions or assignments of error. Counsel for defendants candidly state that they find no error anywhere in the proceedings. We have, nevertheless, examined the record and find no prejudicial error.

No error.

MALLARD, C.J., and HEDRICK, J., concur.

ROBERSON'S BEVERAGES, INC., A CORPORATION v. THE CITY OF NEW BERN, A MUNICIPAL CORPORATION, AND WILLIAM S. POOLE, THE BUILDING INSPECTOR OF THE CITY OF NEW BERN

No. 693SC519

(Filed 17 December 1969)

1. Appeal and Error § 4— theory of trial in lower court

The theory on which a case was tried and judgment rendered in the superior court must be the theory of the case on appeal.

2. Counties § 5; Municipal Corporations § 30— zoning ordinance — presumption of validity — burden of showing invalidity

The presumption is that a zoning ordinance is valid and a constitutional exercise of the police power, with the burden to show otherwise on the property owner who asserts that it is invalid.

3. Counties § 5; Municipal Corporations § 30— zoning ordinance — validity — evidence that property made less valuable

Evidence that a zoning ordinance has made property less valuable is an insufficient ground, standing alone, for invalidating it.

4. Municipal Corporations § 31— judicial review of zoning ordinance

When question of whether a zoning ordinance was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts

may not substitute their judgment for that of the legislative body as to the wisdom of the ordinance.

5. Municipal Corporations § 30— zoning ordinance — validity — depriving owner of beneficial use of property

A zoning ordinance is invalid if it has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted.

6. Municipal Corporations § 30— validity of zoning ordinance — whether confiscatory — burden of proof

In an action to restrain a municipality from enforcing a portion of a zoning ordinance which changed the zoning classification of plaintiff's property from business or commercial to office or institutional on the ground that it is unreasonable and confiscatory, plaintiff cannot prevail merely upon a showing that the property in question could be more profitably and efficiently used for business or commercial purposes, but plaintiff must establish that the property could not reasonably be adapted to any use permissible under the challenged zoning regulation, and that that fact rendered the property valueless or virtually so.

7. Municipal Corporations § 30— validity of zoning ordinance — whether confiscatory — sufficiency of evidence

In this action to restrain a municipality from enforcing a portion of a zoning ordinance which changed the zoning classification of plaintiff's property from business or commercial to office or institutional, plaintiff's evidence *is held* insufficient to support the trial court's findings and conclusion that the ordinance as it relates to plaintiff's property is invalid as confiscatory, where plaintiff's evidence tends only to show that the property would be more valuable in the market place under a business or commercial zoning classification, there is no evidence that plaintiff's building has no reasonable value for any of the broad variety of uses permitted under the office and institutional classification, there is no evidence of the cost of removing the improvements in relation to the value of the land without the improvements, and plaintiff can continue to use the property, as it has for the past nine years, for a storage warehouse as a permitted nonconforming use, or can sell the property for that purpose.

APPEAL by defendant from *Cowper, J.*, May 1969 Civil Session of CRAVEN County Superior Court.

This action was brought by the plaintiff to restrain the City of New Bern from enforcing a zoning ordinance as to certain of the plaintiff's property on the alleged ground that the ordinance as it relates to the subject property is unreasonable, confiscatory and illegal.

The following facts are not in dispute: In 1944 the plaintiff purchased 3.32 acres of land in the City of New Bern. In 1946 and 1947 a bottling company building was constructed on the property and the plaintiff conducted a bottling operation thereon until approxi-

mately 1960. From that time until the present the buildings and premises have been used as a warehouse for the storage and distribution of soft drinks manufactured elsewhere by the plaintiff. In 1953 the City of New Bern adopted the first zoning ordinance which affected plaintiff's property and under that ordinance the property was zoned for business or commercial use. Additional improvements at considerable cost were made to the property by the plaintiff before and after the ordinance was passed. On 5 March 1968, the City repealed that ordinance and adopted a new zoning ordinance under which a portion of plaintiff's property was zoned for residential use and a portion was zoned for office or institutional use. The portion zoned for office or institutional use is the property on which the improvements are located. It has a frontage on Trent Boulevard of approximately 175 feet, a rear frontage on Elmwood Drive of approximately 225 feet and a depth of 430 feet. The improvements consist of a steel and masonry two-story main building containing a lobby, office, bottling room and large inside storage and work space, with steel-roofed outside storage sheds of about 8,000 square feet, fencing and paving.

Plaintiff objected to the rezoning of its property through the ordinance enacted 5 March 1968 and after exhausting its administrative remedies filed this action contending that the ordinance is invalid insofar as it purports to change the zoning classification of that portion of its property on which the improvements are located from a business or commercial classification to an office or institutional classification. The parties waived a jury trial and the court heard the evidence and found facts including the following:

"13. That during the fall of 1967 and prior to the adoption or notice of hearing to adopt the present zoning ordinance hereinabove referred to, the plaintiff advertised its said property for sale as commercial property with local realtors and caused the same to be publicly advertised and offered for sale as business or commercial property. That the plaintiff received offers of substantial considerations from prospective purchasers but only as commercial or business property, as zoned by the 1953 Ordinance. That as 'office and institutional' property as classified by said ordinance and as restricted by the same, the plaintiff has totally been unable to entertain any sale for the same at any price, although it has made diligent effort to sell the same as 'office and institutional property.'

14. That said property as commercial or business property has a reasonable market value of $128,000; that the plaintiff

has invested in the purchase and improvements made to said property the sum of at least $140,000.00.

* * *

16. That said building was designed and constructed for industrial or commercial usage and the same cannot be practically adapted to office or institutional use; to convert said property to residential usage or development would necessitate the demolition of the building, which would be extremely expensive, and not more than three or four residential lots could be developed from said property unless a roadway is constructed in accordance with the City ordinances and regulations through said property from Trent Boulevard to Elmwood Drive; that such development would produce only a small number of small lots, the value of which would probably not exceed the cost of the road construction and the demolition of said building.

17. That there are located within three blocks of the plaintiff's property on Trent Boulevard various other business establishments, including a supermarket, a small shopping center and a motel; said property is adjoined by three residences, two of which have a fair market value of less than eleven thousand dollars; most of the other residences in the immediate vicinity of said property are of modest value; that Trent Boulevard is a wide main-travelled thoroughfare, being approximately the fifth heaviest travelled thoroughfare outside of the central business district in the City of New Bern. Nearly all, if not all, of the houses situate in the immediate vicinity of the subject property were built either prior to the zoning of said property by the City of New Bern in 1953, or subsequent to 1953 during which time the same was zoned 'Commercial'.

18. That the improvements made to said property by the plaintiff were made in good faith both during the time prior to 1953 when said property was not zoned and subsequent to 1953 and up to March 1968 in specific reliance upon said property being zoned business or commercial by the defendant City of New Bern.

19. That the subject property was appraised in the last county revaluation for ad valorem taxes as 'Commercial Property' at a value of $101,766.00, and is being taxed by Craven County and by the defendant City of New Bern as 'commercial property' at the value of $50,883.00, one-half of the appraised value."

Based on its findings the court concluded: (1) That the property in question has no practical use nor any reasonable value, and

is not suitable for office and institutional use or residential use under applicable building codes and zoning regulations. (2) That the ordinance as it relates to the subject property tends to destroy all its practical use and value and tends to render it practically valueless and to deprive the owner of its beneficial use. (3) As it relates to the subject property the ordinance is unreasonable and confiscatory and therefore illegal.

The court thereupon declared the ordinance invalid, unenforceable and void as it relates to the property in question and enjoined defendants from enforcing it with respect thereto. Defendants appealed assigning error.

Barden, Stith, McCotter & Sugg by L. A. Stith and David S. Henderson for plaintiff appellee.

Ward & Ward by A. D. Ward for defendant appellants.

GRAHAM, J.

[1] The plaintiff contends, for the first time in this court, that the zoning ordinance was invalid because the City failed to positively establish that a mistake had been made in the original ordinance adopted in 1953, or that the character of the neighborhood had changed, or that public safety, health, morals and general welfare required the change. These contentions differ substantially from the theory of plaintiff's case as it was tried below. There, plaintiff conceded the validity of the ordinance except insofar as it affected the portion of its property changed from "business or commercial" classification to "office or institutional" classification, and as to that portion plaintiff contended the ordinance was invalid as unreasonable and confiscatory. The plaintiff may not now change the theory on which this cause was tried and judgment rendered in the trial below. *State v. Brooks,* 275 N.C. 175, 166 S.E. 2d 70; *Board of Education v. Waynesville,* 242 N.C. 558, 89 S.E. 2d 239; 1 Strong, N.C. Index 2d, Appeal and Error, § 4. Conceding *arguendo* that the burden of showing the reasons for a change in zoning might under certain circumstances rest upon a municipality, the theory of plaintiff's pleadings and evidence in this case has never placed that matter in issue. Certainly the City cannot now be called upon to come forward with evidence which was unnecessary for it to present at the trial.

We therefore consider only the question raised by defendants' exceptions and assignments of error, which is: Was the evidence presented sufficient to support a judgment declaring the zoning or-

dinance invalid, unenforceable and void as it relates to that portion of plaintiff's property about which complaint is made?

[2-4] The presumption is that a zoning ordinance is valid and a constitutional exercise of the police power. *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600; *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306. The burden to show otherwise rests upon a property owner who asserts that it is invalid. *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870; *Durham County v. Addison, supra.* Evidence that an ordinance has made property less valuable is an insufficient ground, standing alone, for invalidating it. *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325; *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706. "When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere." *In re Appeal of Parker, supra,* at p. 55. Under such circumstances the courts may not substitute their judgment for that of the legislative body as to the wisdom of the legislation. *Zopfi v. City of Wilmington, supra; Schloss v. Jamison,* 262 N.C. 108, 136 S.E. 2d 691.

[5] It is well settled, however, that zoning cannot render private property completely valueless. "[I]f the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted, the ordinance is invalid." *Helms v. Charlotte,* 255 N.C. 647, 653, 122 S.E. 2d 817. 8 McQuillin, Municipal Corporations, § 25.45.

[6] Applying the above principles, we hold that the plaintiff could not prevail merely upon a showing that the property in question could be more profitably and efficiently used for business or commercial use. What plaintiff had to establish was that the property could not reasonably be adapted to any use permissible under the challenged zoning regulation; and that that fact rendered the property valueless or virtually so.

Under the challenged zoning ordinance, the office and institutional classification, though prohibiting commercial and industrial uses, nevertheless permits a broad variety of other uses. Section 5.6 of the Ordinance provides as follows:

> "The O & I Office and Institutional District is established as the district in which the principal use of land is for residences, general business offices and professional offices, and institutional type uses such as hospitals, medical offices and clinics. . . .

A. PERMITTED USES

a. Accessory uses clearly incidental to a permitted use and which will not create a nuisance or hazard.

b. Any use permitted in RA-6 Residential District.

c. Tourist homes and boarding houses.

d. Agencies rendering specialized services, such as real estate, insurance, advertising, brokerage, stenographic, telephone answering, and similar services, not involving retail trade with the general public nor maintenance of a stock of goods for sale.

e. Drug Stores.

f. Offices rendering professional services, such as legal, medical, dental, engineering, architectural and similar institutions.

g. Public and private colleges, universities, business colleges, music conservatories, dancing schools, day nurseries and kindergartens and similar services.

h. Offices and headquarters of civic, charitable, political, fraternal, social and religious organizations.

i. Funeral homes, undertaking establishments, and mortuaries.

j. A commercial parking lot.

k. Signs, advertising goods or services sold on the premises not to exceed one (1) square foot of area per lineal foot of lot abutting on a walk, drive or public way, or facing a private access way if there is no frontage on a public street.

l. Signs required by governmental agency or law to promote the health, safety and general welfare of the residence."

[7] The burden of proving that the property in question could not be adapted for any of the permissible uses set forth above was on the plaintiff. In our opinion the findings of the court below do not support its conclusions respecting the effect of the zoning regulations on plaintiff's property, nor do we feel that the evidence offered would permit findings sufficient to support such conclusion.

Except for certain stipulations and admissions the only evidence offered was the testimony of two witnesses for the plaintiff. The realtor who had been attempting to sell the property testified and described the property and the surrounding area from memory.

When asked his opinion as to whether the property could be applied to institutional use, he replied:

> "From a realtor's standpoint, the highest and best use for this piece of property would be commercial, but the City in community planning does not always necessitate the highest and best use. I think I can safely say with the experience I have had in trying to merchandise this piece of property, that an offer of somewhere around seventy thousand, sixty-five thousand to seventy-five thousand, is as high as has been entertained by any of the prospects I have shown it to. That is, for the classification commercial. I have not had anyone make me an offer when I was handling it for institutional or office use. An institutional use was contemplated by the Elks, the Elks Club, but I was not at their meeting and do not know what was the cause of them rejecting the idea.
>
> I think it would be expensive to adapt it to the use of institutional or for office use, probably more than would be justified in completely rebuilding."

As to the possible use of the subject property for residential use the witness stated:

> "In order to make the property usable for residential purposes, the building would have to be torn down, completely demolished. I am not qualified to give an opinion as to the expense of that. With respect to what would have to be done to remove the present building, there are several tons of steel supporting a large metal roof and a large area of concrete. I believe you have someone here who can tell the exact dimensions. I think it is six inches in the bottling area and four inches in the storage area, and it would require quite a demolition crew to tear it up. I don't think there's enough salvage material in it to get it done for free, but I am not qualified to tell you what it would cost."

On cross-examination the realtor engaged in various calculations concerning the number of lots that could be obtained for residential purposes and testified that the zoning classification would permit multi-housing units. The only other witness was the president of the defendant corporation. Nothing in his testimony indicated that it would be impractical to adapt the property to a use permissible under a classification of office or institutional.

Taking the plaintiff's evidence in its most favorable light we find that all it shows is that the property in question would be more

valuable in the market place under a business or commercial zoning classification. That is not an unusual consequence of zoning, for the nature of such regulations is to deflate some property values while inflating others. But as is recognized by authorities heretofore cited, depreciation in value is not the test used in seeking to determine the validity of a zoning ordinance. Nor could it be, for such a test would necessarily result in the wholesale exemption of lots and tracts of land from any type of zoning regulation and would render ineffective the efforts of a municipality to orderly regulate the use of property for the common health, safety and welfare of its citizens. It is unfortunate that a property owner sometimes, as in this case, suffers hardship. But as stated by Barnhill, J., (later C.J.) in *In re Appeal of Parker, supra,* at p. 57:

> "Each person holds his property with the right to use the same in such manner as will not interfere with the rights of others, or the public interest or requirement. It is held in subordination to the rights of society. He may not do with it as he pleases any more than he may act in accordance with his personal desires. The interests of society justify restraints upon individual conduct and also upon the use to which the property may be devoted. The provisions of the Constitution are not intended to so protect the individual in the use of his property as to enable him to use it to the detriment of the public. When the uses to which the individual puts his property conflict with the interest of society the right of the individual is subordinated to the general welfare and incidental damage to the property resulting from governmental activities or laws passed in the promotion of the public welfare is not considered a taking of the property for which compensation must be made."

The plaintiff contends that it is faced with a situation similar to that of the landowner in the case of *Helms v. Charlotte, supra.* We do not agree. That case involved two lots with a combined useable area of less than 5,000 square feet. The ordinance required a minimum of 7,500 square feet for a residence. The dimensions and terrain of the lots were such that even if a residence could be legally constructed thereon, it would be "odd shaped" and would require a foundation and roof variation for each room. The court remanded the case for findings on the question: "Is it practical to use the lots for residential purposes and do they have any reasonable value for residential use under zoning regulations, the building code and other pertinent circumstances?" In the instant case there is nothing in the record before us to indicate that the plaintiff's building which contains an office, lobby and substantial inside space has no reasonable

value for one or perhaps several of the uses permitted under the present zoning classification. Nor is there evidence as to the cost of removing the improvements in relation to the value of the land without the improvements. A vacant lot of the size here involved, located in an area such as has been described would certainly not be without value as a potential site for office or institutional construction.

Furthermore, in the *Helms* case the lot had not been previously used for business and therefore it had no value for a nonconforming use. Here, under the ordinance in question, the plaintiff may continue to use its property in the same manner it has used it for the past nine years as a permitted nonconforming use. It could be sold for that purpose. The ordinance specifically provides that the lawful use of a building and land existing at the time of the passage of the ordinance shall not be affected unless discontinued for a continuous period of more than 180 days. The property has been valuable for use as a storage warehouse for nine years. There is no evidence to indicate that its value for that purpose has been substantially affected.

Reversed.

CAMPBELL and PARKER, JJ., concur.

BLANCHE M. CRAWFORD, WIDOW, OF JERRY CRAWFORD, DEC'D, EMPLOYEE-PLAINTIFF v. B. L. PRESSLEY, EMPLOYER AND/OR IOWA MUTUAL INSURANCE CO., CARRIER-DEFENDANTS

No. 6929IC210

(Filed 17 December 1969)

1. Master and Servant § 48— workmen's compensation — employers subject to the Act — five or more employees

Where there was evidence that at the time pulpwood employee met his death his employer regularly employed four persons, including decedent, in the pulpwood business, two persons in a milk hauling business, two or three persons in the construction of houses, and two persons in a store and filling station, the Industrial Commission properly found that the employer's businesses were separate and distinct and that the employer did not regularly employ five or more employees in the same business or establishment, there being no evidence that the employees in any one of the employer's several enterprises had ever performed sufficient services in two or more of the enterprises as would make the enterprises, by virtue of a common set of employees, the "same business or establishment." G.S. 97-2(1), G.S. 97-13(b).

2. Master and Servant § 48— workmen's compensation — employer subject to the Act — cancellation of policy — notice to Commission

Where a corporate employer with less than five employees in the same business purchased a policy of workmen's compensation insurance, the employer and his employees became bound by the provisions of the Workmen's Compensation Act so that the widow of an employee fatally injured in an accident on the job would be entitled to compensation benefits, G.S. 97-13(b), notwithstanding the cancellation of the policy by the insurer prior to the date of the accident, unless the employer, prior to the fatal accident, had given notice to the Industrial Commission of his nonacceptance of the Act in the manner prescribed by G.S. 97-4; the widow's proceeding is remanded to the Commission for a finding of fact as to the employer's nonacceptance of the Act.

3. Master and Servant § 96— workmen's compensation — remand — findings of fact

Where the findings of the Industrial Commission are insufficient to determine the rights of the parties in a workmen's compensation proceeding, the court may remand the proceeding to the Commission for additional findings.

APPEAL by plaintiff from North Carolina Industrial Commission, opinion and award of 19 December 1968.

On 20 November 1963 Jerry Crawford was accidentally killed while operating a bulldozer for his employer, B. L. Pressley (Pressley). Plaintiff, widow of the deceased employee, instituted this proceeding before the North Carolina Industrial Commission to obtain benefits under the Workmen's Compensation Act. The parties stipulated that at the time of his death Crawford was employed by Pressley at an average weekly wage of $47.50 per week, and that his death resulted from an injury by accident arising out of and in the course of his employment.

A hearing on plaintiff's claim was held on 23 January 1968 before Deputy Commissioner Delbridge and a further hearing was held on 28 June 1968 before Deputy Commissioner Thomas. At these hearings Pressley testified in substance as follows: At the time of the accident he was engaged in several different business activities consisting of: (1) a timber operation, getting out pulpwood and logs; (2) hauling milk from farm to plant; (3) building and selling houses (in partnership with a Mr. Andy Orr); and (4) operation of a grocery store and filling station. He regularly employed four persons, including the decedent, Crawford, in the timber business; two in the milk hauling business; two or three (one of whom was his partner) in the building business; and one or two in the store and filling station. Employees who worked in the milk hauling business, in the building business, and in the grocery store,

did not work in the timber business. During the quarter in which Crawford was killed, Pressley had employed as many as six different persons in the pulpwood business, but never more than four at any one time and only employed four on a regular basis. Crawford's main job was driving a truck in connection with Pressley's timber and pulpwood business, though occasionally he did a few odd jobs with the bulldozer on Saturdays, and on one occasion assisted Pressley in carpentry work on a porch when it was too wet to get in the woods.

Plaintiff testified that the deceased employee, besides driving the wood truck, occasionally worked for Pressley as a carpenter, as a bulldozer operator grading yards and driveways, as a mechanic, and as driver of a pickup truck. Other witnesses for plaintiff testified as to Pressley's various businesses and as to Crawford's activities as an employee.

Pressley also testified that some two months prior to the accident he had been informed by someone at the employment office that he was required to maintain workmen's compensation insurance under the laws of North Carolina. He had not theretofore carried such insurance. At that time he went to the office of the General Insurance Agency at Hendersonville, N. C., operated by Homer Hobbs, from which agency he had bought all of his other insurance for approximately twelve years. Through that agency Pressley obtained an insurance policy written by Iowa Mutual Insurance Company, providing workmen's compensation insurance coverage for all of his employees in all of his various business operations for a period of one year. He received physical possession of the policy and paid Mr. Hobbs the full premium therefor. Subsequently, and before 20 November 1963, Hobbs informed Pressley to bring the policy back, that Iowa Mutual had not accepted it. Pressley did return the policy to Hobbs, who assured him he would place insurance with another company. When Pressley had not received a new policy in about a month's time, he went back to see Hobbs, who again assured him that he did have coverage and that he would receive a policy immediately. Another 30 days passed and Pressley reported Crawford's death to Hobbs, who stated that: "My mistakes and errors policy will cover the man."

After obtaining the Iowa Mutual policy, Pressley had represented to his employees, and he continued to represent to them up to and including the time that Crawford was killed, that he carried workmen's compensation insurance for their benefit. Only after Crawford was killed did Pressley learn that he did not actually

have any workmen's compensation coverage in effect. At no time previously had he been informed that he was not covered for workmen's compensation insurance, and at no time has he ever been refunded the premium which he initially paid to Hobbs for the Iowa Mutual Insurance Company policy. Subsequent to Crawford's death, and effective 10 December 1963, Pressley obtained a policy of workmen's compensation insurance through another agent and in another insurance company, providing workmen's compensation insurance coverage for all of his employees. This new insurance coverage was still in effect at the time of the hearings in this matter.

At the conclusion of the hearings, Deputy Commissioner Delbridge made findings of fact and conclusions of law as follows:

"FINDINGS OF FACT

"1. The deceased employee, Jerry Crawford, sustained an injury by accident arising out of and in the course of his employment with the defendant employer on November 20, 1963. Said injury and resulting death occurred when a bulldozer turned over on the plaintiff while he was employed with the defendant employer in the pulpwood business.

"3. The defendant employer is in the pulpwood business, builds houses, runs a store, operates a milk business, and is not in the bulldozer business as such. The defendant employs three employees in the house building, three employees in the milk business, two employees at his store, four employees in the pulpwood business. The defendant has never had over four employees at any given time in the pulpwood business.

"4. In the pulpwood business the defendant employed the deceased, Jerry Crawford, Praytor, Stewart, and Franks. There were never more than four employees regularly employed with the pulpwood business nor in any other of the defendant enterprises.

"5. The defendant employer procured a policy of workmen's compensation insurance from the Iowa Mutual Insurance Company approximately two months prior to November 20, 1963. The agent for the Iowa Mutual Insurance Company requested the defendant to return the policy as the Iowa Mutual Insurance Company did not wish to insure the defendant's pulpwood operation. The defendant returned the policy to the agent of Iowa Mutual Insurance Company and said policy was cancelled. The agent informed the defendant that he would obtain

another policy of workmen's compensation insurance covering his liability under the workmen's compensation Act with another company. The advance premium that the defendant paid the agent for Iowa Mutual policy was never returned to the defendant. The agent did not procure another workmen's compensation policy for the defendant. There was no workmen's compensation insurance policy in effect covering the defendant on November 20, 1963, the date the deceased employee was killed.

"6. Mrs. Blanche M. Crawford is the widow of the deceased employee.

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

"CONCLUSIONS OF LAW

"1. The defendant did not on November 20, 1963, have in effect a workmen's compensation insurance policy to cover his workmen's compensation liability. G.S. 97-13.

"2. The defendant, B. L. Pressley, employer of the deceased employee did not regularly employ five or more employees in the same business or establishment nor did he have in his employment five or more employees subject to the Workmen's Compensation Act at the time of the injury by accident giving rise hereto. The parties are not therefore subject to the Workmen's Compensation Act, and the Industrial Commission has no jurisdiction over the plaintiff's claim. . . ."

On these findings and conclusions, the Deputy Commissioner entered an award dismissing plaintiff's claim for lack of jurisdiction. The case then came on for review before the full Commission, which entered its opinion and award on 19 December 1968, adopting as its own the opinion and award of Deputy Commissioner Delbridge and affirming his order dismissing plaintiff's claim for lack of jurisdiction. Plaintiff appealed, assigning errors.

Gudger & Erwin, by James P. Erwin, Jr., for plaintiff appellant.

No counsel for defendant.

PARKER, J.

This appeal challenges the Commission's jurisdictional conclusion on two grounds: First, that the Commission erred in conclud-

ing as a matter of law that the employer in this case "did not regularly employ five or more employees in the same business or establishment"; and second, even if there be no error in that regard, that the Commission erred in failing to conclude as a matter of law, from the facts found by it and established by the evidence, that the parties were nevertheless subject to the Workmen's Compensation Act because the employer had voluntarily accepted its provisions by purchasing workmen's compensation insurance.

[1] We find that the Industrial Commission was clearly correct in its conclusion that the employer in this case "did not regularly employ five or more employees in the same business or establishment." In this regard the evidence clearly supports the Commission's findings and establishes that the employer's various business enterprises were separate and distinct and were not operated as an integrated whole, each being radically different from the other, having its own separate group of employees, and each furnishing a different service or product to a different market. While there was evidence that the deceased employee had on isolated occasions performed services for his employer unrelated to the timber business, in which he was primarily employed, these were minimal, and there was no evidence tending to show that the employees in any of the employer's several enterprises ever performed sufficient services in two or more of such enterprises as to require a conclusion that these enterprises had, by virtue of having a common set of employees, become in law the "same business or establishment." G.S. 97-2(1); G.S. 97-13(b).

[2] In our opinion, however, under the facts established by the evidence and as found by the Commission itself, the parties were nevertheless subject to the provisions of the Workmen's Compensation Act. The evidence is uncontradicted and the Commission found that a few months prior to the accident the employer had purchased from Iowa Mutual Insurance Company a policy of workmen's compensation insurance, had paid the premium therefor, and had obtained possession of the policy. This policy provided workmen's compensation liability coverage for a period of one year for all of his employees, including the employees in the timber operation. G.S. 97-13(b) provides in part:

> "This article shall not apply . . . to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, except that any employer *without regard to number of employees, . . . who has purchased workmen's compensation insurance to cover*

his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this article from the effective date of said policy and his employees shall be so bound unless waived as provided in this article." (Emphasis added.)

The Iowa Mutual policy had been cancelled prior to the date of the accident. Therefore, the conclusive presumption of coverage created by G.S. 97-13(b) does not here come into play, since by the language of the statute this conclusive presumption existed only "during life of the policy." However, also by the express language of the statute, the employer by purchasing workmen's compensation insurance coverage, accepted the provisions of the Workmen's Compensation Act "from the effective date of said policy and his employees shall be so bound unless waived as provided in this article." Interpreting this statute, the North Carolina Supreme Court, speaking through Bobbitt, J. (now C.J.) in the case of *Laughridge v. Pulpwood Co.*, 266 N.C. 769, 771, 147 S.E. 2d 213, 216, said:

> "Ordinarily, an employer with less than five employees is exempt from the Act. However, when such employer at his election voluntarily purchases workmen's compensation insurance, he accepts all provisions of the Act. G.S. 97-13(b). In such case, the policy he purchases both creates and protects his compensation liability; and thereafter such employer and his employees are bound by the provisions of the Act unless, prior to any accident resulting in injury or death, notice to the contrary is given 'in the manner (therein) provided.' G.S. 97-3. The manner in which such notice is to be given is prescribed in G.S. 97-4."

In the present case not only was there no evidence that a notice had been given as prescribed in G.S. 97-4, but the evidence was overwhelmingly to the contrary. The employer himself testified that upon being notified by the insurance agent through whom the Iowa Mutual policy had been placed that that policy was being cancelled, he had requested and obtained assurances that other workmen's compensation insurance was being obtained. He had informed his employees that they were covered by such insurance, and it was his and their understanding that this was so up to and including the time of the accident. Only after the accident had occurred and he had given the insurance agent notice thereof, did he and his employees first obtain any information to the effect that workmen's compensation insurance was not then in effect. Therefore, all of the evidence establishes that the employer and his employees intended

to be bound by the Act and thought they were so bound up to and including the time of the accident. By purchasing the policy, the employer and his employees became subject to the Act and continued to be "so bound unless waived as provided in this article." The failure of a third party, the insurance agent in this case, to fulfill his agreement to see that other insurance was obtained upon the cancellation of the Iowa Mutual policy, did not constitute a waiver "as provided in this article."

[2, 3] The Commission found as a fact that the employer procured a policy of workmen's compensation insurance but that this policy had been cancelled shortly prior to the accident in this case. By purchasing this policy the employer accepted the provisions of the Workmen's Compensation Act and became bound thereby from the effective date of the policy. G.S. 97-13(b). Thereafter he and his employees were bound by its provisions unless, prior to any accident resulting in injury or death, notice to the contrary was given in the manner prescribed by G.S. 97-4. *Laughridge v. Pulpwood Co., supra.* While, as noted above, all of the evidence would tend to establish that no such notice was given prior to the accident in this case, the Commission failed to make any finding of fact on this point. "In case the findings are insufficient upon which to determine the rights of the parties, the court may remand the proceeding to the Industrial Commission for additional findings." *Byers v. Highway Comm.*, 275 N.C. 229, 233, 166 S.E. 2d 649, 651; Citing *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439. Accordingly, this proceeding is remanded to the Industrial Commission to make an additional finding of fact as to whether any notice of nonacceptance of the Act had been given prior to the accident in this case. If it shall find that the notice had not been so given, then it would follow as a conclusion of law from all of the facts found that the parties were subject to the Act at the time of the accident and the Commission will render award and decision in conformity with such conclusion.

Error and remanded.

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

WILMINGTON SHIPYARD, INC. v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 695SC557

(Filed 17 December 1969)

1. State § 4— action against the State — waiver of immunity

The State may not be sued unless by statute it has consented to be sued or has otherwise waived its immunity from suit.

2. State § 4; Highways and Cartways §§ 4, 9— suit against Highway Commission — repair of ferryboats — claim on contract

A shipyard is entitled to maintain an action against the Highway Commission on a contract for the repair and reconditioning of seven ferryboats used in the state highway system, such action being within the purview of the statute permitting suit against the Commission on claims arising out of "any contract for the construction of any State highway." G.S. 136-29.

3. Statutes § 5— derogation of common law

Statutes in derogation of the common law are generally construed strictly.

4. Statutes § 9— remedial statutes — construction

A remedial statute must be construed so as to remedy the existing evil and permit the courts to bring the parties to an issue.

5. State § 4; Highways and Cartways § 9— waiver of immunity from suit — Highway Commission — statutory construction

The rule that statutes waiving governmental immunity must be strictly construed does not compel the Court to take the strictest possible view of the statute, G.S. 136-29, permitting suit against the Highway Commission on claims arising out of construction contracts, but the Court will simply examine the language of the statute within its context, mindful of the principle that the intent of the legislature controls the interpretation of a statute.

ON *certiorari* to review an order of *Fountain, J.*, at the 21 April 1969 Regular Civil Session of NEW HANOVER Superior Court.

This is a civil action brought by the Wilmington Shipyard, Inc., against the North Carolina State Highway Commission on a contract for the repair and reconditioning of seven ferryboats used in the State Highway System. The plaintiff alleged in its complaint that G.S. 136-29 authorizes this suit against the Highway Commission.

Defendant demurred for lack of jurisdiction and prayed the action be dismissed. The trial court entered an order overruling the demurrer, and to the signing and entry of such order, the defendant excepted and gave notice of appeal.

After appeal entries were made, plaintiff was permitted by order of the trial court to file an amendment to its complaint. Defendant filed in this Court a demurrer ore tenus to the amended complaint; however, such demurrer will not be considered by us as the amended complaint is not before us inasmuch as it was filed after the ruling of the trial court of which defendant complains.

Stevens, Burgwin, McGhee & Ryals by Karl W. McGhee for plaintiff appellee.

Attorney General Robert Morgan by Staff Attorney James E. Magner for defendant appellant.

BRITT, J.

Defendant assigns as error the order overruling defendant's demurrer to the complaint. The demurrer challenged the jurisdiction of the superior court to adjudicate the matters alleged in the complaint.

[1] In *Construction Co. v. Dept. of Administration,* 3 N.C. App. 551, 165 S.E. 2d 338, this Court set out some of the basic principles which govern this case: "It is settled as a general rule that the State may not be sued unless by statute it has consented to be sued or has otherwise waived its immunity from suit. *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247; *Ferrell v. Highway Commission,* 252 N.C. 830, 115 S.E. 2d 34. The defendant in this case is an agency of the State. It is not subject to suit on contract or for breach thereof unless and except in the manner expressly authorized by statute. * * *"

[2] Plaintiff contends that it is authorized to maintain this suit by G.S. 136-29, which permits the filing of an action in the superior court in certain cases and subject to conditions precedent as specified in the statute. This appeal, therefore, presents the question: "Does G.S. 136-29 authorize plaintiff's action against the State Highway Commission on a contract for the maintenance and reconditioning of ferryboats used in the North Carolina Highway System?" Our answer is yes.

The pertinent provisions of G.S. 136-29 are as follows:

> "§ 136-29. *Adjustment of claims* — (a) Upon the completion of any contract for the construction of any State highway awarded by the State Highway Commission to any contractor, if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may, within sixty (60)

days from the time of receiving his final estimate, submit to the State Highway Administrator a written and verified claim for such amount as he deems himself entitled to under the said contract setting forth the facts upon which said claim is based.

* * *

(b) As to such portion of the claim as is denied by the State Highway Administrator, the contractor may within six (6) months from receipt of said decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed. * * *

* * *

(e) The provisions of this section shall be deemed to enter into and form a part of every contract entered into between the State Highway Commission and any contractor, and no provision in said contracts shall be valid that is in conflict herewith."

The impact of this statute is well summarized in 17 N.C.L. Rev. 340 as follows: "Prior to this statute [c. 318 at that time] one who had any claim growing out of a contract with the commission could not bring suit against the commission for it is a state agency and no consent to suit has been given. The claimant might present his claim to the general assembly or he might invoke the original jurisdiction of the supreme court under Article IV, Section 9 of the state constitution. [After 1965 Amendment, Section 10.] The latter course was not very satisfactory for the court has said that in such a proceeding it will consider only questions of law. The decision of the court, if in favor of the claimant, was simply recommendatory and was reported to the next General Assembly for its action. * * *"

[3, 4] In determining whether G.S. 136-29 authorizes plaintiff's suit, this Court notes the principle that statutes in derogation of the common law are generally construed strictly. On the other hand, as a remedial statute, it "ought to receive from the courts such a construction as will remedy the existing evil," *Morris v. Staton,* 44 N.C. 464, so as "to advance the remedy and permit the courts to bring the parties to an issue." *Land Co. v. Lange,* 150 N.C. 26, 63 S.E. 164. The Workmen's Compensation Act, for example, was an "* * * innovating substitution of statute law in a field theretofore left entirely to the common law, — in the retreat from the outmoded methods of the common law to a more modern concept

* * *." The court held that because of the radical and systematic changes in the common law, a statute "so markedly remedial in nature" must be liberally construed with a view to effectuating its purposes. *Essick v. Lexington,* 232 N.C. 200, 60 S.E. 2d 106.

The General Assembly has undertaken a comparably radical and systematic substitution of statutory provisions for the monarchistic doctrine of sovereign immunity: by G.S. 97-2(3) and 97-7, the State is an "employer" subject to workmen's compensation; by G.S. 143-291, *et seq.,* tort claims against State agencies and institutions may be asserted; by G.S. 143-135.3, the State may be sued on certain contracts for the construction of public buildings, and by G.S. 136-29, the State may be sued on a contract for highway construction.

The separate opinions of three distinguished justices in the case of *Alliance Co. v. State Hospital,* 241 N.C. 329, 85 S.E. 2d 386, reflect a disagreement at that time as to which rule of construction should be applied to statutes waiving immunity. The majority opinion concluded that "* * * [h]owever, it is not here necessary to pass upon the question as to rule of construction in a statute waiving immunity," holding that even a liberal construction of the Tort Claims Act, which the appellee urged, did not require the particular result urged by the plaintiff. Parker, J. (later C.J.), dissenting, was of the view that "[t]he current trend of legislative policy and of judicial thought is toward the abandonment of the monarchistic doctrine of governmental immunity, as exemplified by Tort Claims Acts enacted by the Congress and the Legislatures of various states. The purpose of such acts is to relieve the legislative branch of the government from the judicial function of passing upon tort claims against the State."

In *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703, filed three weeks after *Alliance,* the decisions reflected the same disagreement. After setting out the controversy, the majority opinion said by way of dicta, "* * * [W]e think the sounder view is that they should be strictly construed," to which Parker, J., dissenting, replied, "I do not agree with the expression in the majority opinion that *we think* the sounder view is that the Tort Claims Act of this State should be strictly construed." (Emphasis added.) The majority opinion continued, "At any rate, the statute giving the right to maintain the suit must be followed as written," and simply held that the plaintiff failed to show any facts sufficient for a finding of negligence. It is thus highly questionable that *Floyd* is a clear mandate from our Supreme Court that statutes in derogation of governmental immunity must be construed strictly. *Floyd* was cited in

passing as authority for such a proposition in *R. R. v. Highway Commission,* 268 N.C. 92, 150 S.E. 2d 70, and several subsequent cases, but this transformation of dicta into "authority" took place only after a dissenting opinion in *Ivey v. Prison Department,* 252 N.C. 615, 114 S.E. 2d 812, committed the error of saying that "[t]his rule of construction was given express approval by the *entire* Court in *Floyd v. Highway Com.* * * *." (Emphasis added.) Rather, it is clear from *Floyd* and *Alliance* that the court's position on the proposition was characterized by disagreement at the time. Also, the legislature disagreed with the *result* of the construction undertaken in *Floyd* and enacted Chapter 400, Session Laws 1955, ratified 31 March 1955. See *Ivey,* p. 623, Rodman, J., dissenting.

[5] It is, therefore, the opinion of this Court that the "rule" of strict construction of statutes waiving governmental immunity, which has its questionable origins in *Floyd* and *Ivey* and has subsequently been quoted without examination in cases where the strictest possible construction was not required to reach the result, is not so clearly and definitely the rule in North Carolina as to compel this Court to take the strictest possible view of G.S. 136-29. If the "rule" of strict construction is a clear mandate, still the "rule that certain statutes must be strictly construed does not require that they be stintingly or even narrowly construed, but only that everything shall be excluded from their operation which does not come within the scope of the language used, taking their words in their natural and ordinary meaning." See 7 Strong, N.C. Index 2d, Statutes, § 5, p. 74. This Court will not attempt at this point to enunciate a rule of construction, or to express a preference as to "the sounder view." Rather, we will simply examine the language of G.S. 136-29 within its context, mindful of the principle that "[t]he intent of the legislature controls the interpretation of a statute," and the principle that "[t]he intent and spirit of an act are controlling in its construction, and the language of a statute will be construed contextually * * *." See 7 Strong, N.C. Index 2d, Statutes, § 5, pp. 68 & 69.

We are of the opinion that such an approach will accurately reflect the attitude of the General Assembly, which enacted G.S. 136-29 to relieve that body from the judicial function of passing upon certain claims against the State. The role of the appellate court in dealing with a statute waiving immunity was aptly stated by Judge Cardozo in *Anderson v. Construction Co.,* 243 N.Y. 140, 153 N.E. 28: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its

rigor by refinement of construction where consent has been announced."

Such an approach is demanded by the language of G.S. 136-29. As the Court said in *Yacht Co. v. High, Commissioner of Revenue,* 265 N.C. 653, 144 S.E. 2d 821, "The term 'highway' is a generic one 'frequently used in a very broad sense with the result that no fixed rule with regard to its meaning can be given, and its construction depends on the intent with which it is used, as determined by the context.' * * *"

The defendant bases its argument on the contention that a ferryboat is not included in the term "highway" as in G.S. 136-29. In *Yacht Co.,* however, the court indicated that a ferry may well be a "highway":

> "* * * In discussing the meaning to be given to the term 'highway' it has been pointed out that whether 'streets, *ferries,* railroads, toll roads, rivers or rural roads are all meant to be included in a particular statute can not, in many instances, be asserted without a careful study of the entire statute and a full consideration of all the matters which the courts usually call to their assistance in ascertaining the meaning and effect of legislative enactments.'" (Emphasis added.)

After such a study, the court in *Yacht Co.* held that the legislature did not intend that "highways" include *navigable waters* when the Revenue Commissioner attempted to apply a motor vehicle privilege tax to a yacht on the theory that such a boat comes within the statutory definition of "motor vehicle" as "any vehicle which is self-propelled and designed primarily for use upon the highways."

[2] A careful study of the scope and history of North Carolina's statutory law on "Roads and Highways," Chapter 136 of the General Statutes, indicates a legislative intent to include ferries within the term "highway" in a proper case. Article 12, Chap. 70, § 3828, Consolidated Statutes of North Carolina, 1924, refers to the counties' acquisition of toll bridges or ferries; it provides in part that "said toll-bridge or ferry, with the causeways, roads, and bridges leading to the same, *shall become a part of the public highway.*" (Emphasis added.) The State Highway Commission, by G.S. 136-83, "* * * shall succeed to all rights and duties vested in the county commissioners or county highway commissioners * * * with respect to the maintenance and operation of any public *ferries or toll bridges forming links in the county highway systems* * * *." (Emphasis

added.) The State Highway Commission is authorized by G.S. 136-82 "* * * to acquire, own, lease, charter or otherwise control all necessary vessels, boats, terminals or other facilities required for the proper operation of such ferries or to enter into contracts with such persons, firms or corporations for the operation thereof and to pay therefor such reasonable sums as may in the opinion of said Commission represent the fair value of the public service rendered." While judicial constructions of the word highway "only throw some light upon the normal usage of the term," *Yacht Co., supra,* the overwhelming weight of authority is to the effect that a " 'ferry' is simply a movable portion of a highway where it crosses a stream." *Reid v. Lincoln County,* 46 Mont. 31, 125 P. 429. See also *Hackett v. Wilson,* 12 Or. 25, 6 P. 652.

In *State Highway Commission v. Yorktown Ice & Storage Corp.,* 152 Va. 559, 147 S.E. 239, the court held that the word "highway" included the word "ferry," "a public ferry being merely a part of a highway." *Reid v. Lincoln County, supra.*

In *Sullivan v. Board of Supervisors,* 58 Miss. 790, the court stated that "[w]here a stream crosses a public highway, the continuity of the highway is not broken; it does not end on one side of the stream and begin again on the other, but continues across the stream * * *."

In *U. S. v. William Pope,* 28 Fed. Cas. 629, No. 16,703, the court said, "A ferry is nothing but a continuation of a road," and in *Almond v. Gilmer,* 188 Va. 822, 51 S.E. 2d 272, the court said: "It is practically conceded that a public ferry is a public highway. The authorities so hold."

There is little question that a contract for the *establishment* of a ferry — which the Commission may undertake by G.S. 136-82 — would be equivalent to the "construction of a highway." Repair or reconditioning, i.e. "maintenance" — which the Commission may undertake by G.S. 136-82 — as a means of reestablishing ferry service, is a lesser act and is deemed to be included within "construction" for the G.S. 136-29 adjustment of claims. It is the opinion of this Court that the procedure for adjustment of claims set out in G.S. 136-29 is available to the plaintiff.

The order overruling defendant's demurrer to the complaint is

Affirmed.

BROCK and VAUGHN, JJ., concur.

WILSON COUNTY BOARD OF EDUCATION v. BESSIE H. LAMM, WIDOW; VIRGINIA LAMM HAYES AND HUSBAND, J. F. HAYES; JACK F. HAYES, A MINOR; TEMPIE ANN HAYES, A MINOR; JACK THOMAS HAYES, A MINOR; THE FREE WILL BAPTIST CHILDREN'S HOME, INC.; AND ALL PERSONS NOT IN BEING WHO MAY BY ANY CONTINGENCY OWN OR ACQUIRE ANY INTEREST IN THE LANDS CONSTITUTING THE SUBJECT MATTER OF THIS ACTION BY REASON OF THE LAST WILL AND TESTAMENT OF GROVER T. LAMM, DECEASED

No. 697SC422

(Filed 17 December 1969)

1. Appeal and Error § 47— harmless error rule

It is the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error.

2. Adverse Possession § 2— open and notorious possession

In this action to quiet title to realty, plaintiff could acquire title to the disputed property by adverse possession only if the jury, under proper instructions, were satisfied that the acts of ownership described by the witnesses constituted open, notorious and adverse possession.

3. Adverse Possession § 23— burden of proof

The party asserting title by adverse possession must carry the burden of proof on that issue.

4. Adverse Possession §§ 2, 25.1— instructions — permissive use — hostile possession

Where plaintiff conceded that its entry into possession was with permission of the owner and offered no proof of its allegation that it was put into possession "as owner," the trial court properly charged that if the jury believed the entry into possession was permissive, such possession did not become adverse until the acts of dominion done in the character of owner were such as to give notice to the owner that permissive use was disclaimed.

5. Adverse Possession § 24; Evidence § 35— declaration accompanying and characterizing transfer of possession — exception to hearsay rule

In this action by plaintiff county board of education to quiet title to realty used as a school site since 1923, wherein plaintiff claimed title to the property by adverse possession, testimony by defendants' witness of statements made by the county superintendent in 1922, shortly before possession of the property was transferred to plaintiff, that the owner was giving the site for as long as it was a school and "that's as long as we want it," *is held* admissible as an exception to the hearsay rule as a declaration accompanying and characterizing the act of transfer of possession.

6. Adverse Possession § 24— harmless error in admission of evidence — similar evidence properly admitted

In this action to quiet title wherein plaintiff school board claims title to the disputed property by adverse possession, error, if any, in the ad-

mission of testimony by defendants' witnesses of declarations by the title-holder, at approximately the time he put the school board into possession and on two occasions while it has been in possession, that the county was using the property as long as it was used for school property and that the property would go back to him when the school was discontinued, *is held* not prejudicial to plaintiff where a declaration to the same effect made by an agent of plaintiff was properly admitted.

7. Adverse Possession § 25.1— instructions — contract for erection or repair of school — ownership of site and registration of deed — statute

In this action to quiet title wherein plaintiff county board of education claims title to the disputed property by adverse possession, the trial court did not err in failing to charge the jury upon the statute prohibiting a county board of education from contracting for the erection or repair of any school building unless the site on which it is located is owned by the county board of education and the deed for the site is properly registered, Ch. 36, § 64, Session Laws of 1923, later codified as C.S. § 5472, a violation of this statute not being evidence of adverse possession, and plaintiff's evidence showing that no contract for construction or repair of the school building on the disputed property has been entered since the effective date of the statute.

APPEAL by plaintiff from *Bone, E.J.*, at the March 1969 Civil Session of WILSON Superior Court.

This is a civil action brought by plaintiff Board of Education to quiet title to realty which the Board has used as a school site since 1923. The Board claims ownership by adverse possession. The complaint alleges that "[p]rior to the year 1922 Grover T. Lamm [Lamm] was the owner in fee" and joins as defendants appropriate devisees of Lamm who died in 1952.

The evidence tended to show that plaintiff entered into possession of the premises in 1922 and let a contract for the construction of the buildings now standing. The buildings included a six-classroom brick schoolhouse called Lamm's School, a frame teacherage, and a pumphouse. Since 1923, plaintiff has operated a grammar school there and has made necessary repairs through its maintenance department, treating it "just like all the other schools in the county." The frame dwelling initially used as a teacherage has in recent years been rented by plaintiff to persons not associated with the school system. The school site was located near "Lamm's Crossroads" and approximately in what was at that time the middle of Lamm's farm. A corner lot, the boundaries were defined by roads on the north and east sides and by Lamm's cultivated fields on the south and west. In 1950 or 1951, Lamm laid off and plaintiff caused to be constructed a driveway around the south and west boundaries on land Lamm previously cultivated after the principal had casually men-

tioned to him the inconvenience of parking buses on the playground. The complaint was amended to delete the claim of title to this portion by adverse possession.

The complaint and the admissions to these allegations in the answer establish that "[p]rior to the year 1922 Grover T. Lamm was the owner in fee of that certain tract or parcel of land * * *" and that "[i]n the year 1922 the said Grover T. Lamm put plaintiff in possession of said land * * *." The plaintiff's evidence regarding the entry into possession consists only of one witness' testimony that "I do not know how the Wilson County Board of Education obtained the land for the site of Lamm's School" and another's that "I never saw a deed. I never heard a deed mentioned."

Consistent with his charge that "a crucial question here is circumstances under which the Board of Education went into possession," the court admitted over objection testimony by defendants' witness Harrison relating to a declaration of E. J. Barnes, County Superintendent, made at the time. Harrison described a public meeting held at Lamm's store in about 1922 to discuss the relocating of several schools in the district. In answer to the question, "What statement did he [the county superintendent conducting the meeting] make [with regard to how the land for Lamm's School site was obtained]," the witness testified:

> "That question was raised several times. When they were asking about where the site was going to be, he showed it to them. It was right there in sight of the store, right in sight of where the school is now. And he told them that Mr. Lamm was giving the site for as long as it was a school. He said, 'After all, that's as long as we want it. What do we want with it if we don't have any school here?' "

Several declarations made by Lamm were also admitted over objection. (1) Defendants' witness Peele testified as to a conversation with Lamm in 1922 prior to the time construction began on the site: "I was taking him home, and it was just when we got in sight of — a quarter of a mile of where he lived at. I told him I understood he had let the county have a school site there. He said, yes, he had. I said, 'How much did you get for it?' he said — He raised his voice — Says, 'I didn't sell it. I let them have it long as it was used as school property, and then it went back to me when they discontinued school there.' " (2) Defendants' witness Simpson testified to a conversation with Lamm in 1922 prior to the time construction began on the site: "We were talking about putting a school there, and I asked him, I says, 'What are you getting out of it now, what's

the county paying you for this land?' He says, 'The county ain't paying me anything. I'm giving the land for a school as long as it is a school, and when it ceases to be a school it goes back to me or my estate.' " (3) Defendants' witness Jones testified as to a conversation with Lamm in 1940: "I bought a lot from him [Lamm], and I didn't have anymore money to use to get more of the land, and I wanted to use some more land. He told me I could use some more land to put cars on as long as I didn't abuse the land, just like Lamm's School. That they was using the land as long as they had school there, and when the school was discontinued the land would go back to him." (4) Defendants' witness Moore testified as to a conversation between her father and Lamm (date uncertain): "* * * And he made the statement that he only gave the property for Lamm's School to be used only as long as it was a school, and then it was to go back to him."

The trial court's charge to the jury included instructions as to the law of this State regarding the elements of adverse possession. Issues were submitted to and answered by the jury as follows:

"1. Is the plaintiff the fee simple owner of the lands described in the Complaint as amended?

ANSWER: No.

2. If so, does the claim of the defendants constitute a cloud on plaintiff's title?

ANSWER: ....."

From judgment entered on the verdict in favor of defendants, plaintiff appealed.

Connor, Lee, Connor & Reece by Cyrus F. Lee and David M. Connor for plaintiff appellant.

Lucas, Rand, Rose, Meyer & Jones by Louis B. Meyer for defendant appellees.

BRITT, J.

[1] The assignments of error brought forward and argued relate to rulings of the court admitting certain evidence and to certain aspects of the charge. This Court is governed by the "settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error or for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of was erroneous but that it was material and prejudicial, amount-

ing to a denial of some substantial right." *Herring v. McClain,* 6 N.C. App. 359. Plaintiff contends there is reversible error. We think not; rather, the record indicates that plaintiff simply failed to show adverse possession to the satisfaction of the jury.

[2, 3] Plaintiff could acquire title by adverse possession only if the jury, under proper instructions, were satisfied that the acts of ownership described by the witnesses constituted open, notorious and adverse possession. The settled law, restated in the case of *State v. Brooks,* 275 N.C. 175, 166 S.E. 2d 70, is that "the party asserting title by adverse possession must carry the burden of proof on that issue." The record indicates that the instructions given presented the issue fully and fairly and are in accord with the classic definition of adverse possession stated in *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347, and cited with approval in *State v. Brooks, supra,* as follows:

> "It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

[4] In its complaint, plaintiff conceded and the defendants admitted that plaintiff's entry into possession was with the permission of the owner ("Grover T. Lamm put plaintiff in possession of said land"), and offered no proof of the additional allegation — which defendants denied — that plaintiff was put into this possession "as owner." Thus, the court properly charged that where the jury believed the entry into possession was permissive, such possession does not become adverse until the "acts of dominion * * * done in the character of owner" are such as to give notice to the owner that permissive use is disclaimed. The jury verdict indicates that the plaintiff failed to satisfy them that there was an adverse possession rather than a merely permissive one.

[5] The testimony of defendants' witness Harrison relating to the declaration of County Superintendent E. J. Barnes that "Lamm was giving the site for as long as it was a school" and "that's as long as we want it" was properly admissible over objection. Certain *decla-*

rations accompanying and characterizing an act are allowed as a well-known exception to the hearsay rule. See Stansbury, N.C. Evidence 2d, § 159. The acquisition of some type of right in Lamm's realty was clearly non-verbal conduct of the sort which frequently "must be accompanied by some manifestation of purpose in order to give it any effect at all, or to determine which of two possible effects it is to have." Stansbury, N.C. Evidence 2d, § 159, p. 399.

The rule that *declarations by persons in possession of land or chattels* are admissible is a particular application of the above-stated principle to cases such as actions in adverse possession where "[t]he bare fact of possession is usually equivocal." Stansbury, N.C. Evidence 2d, § 160, p. 401. The case of *Newberry v. R. R.*, 133 N.C. 45, 45 S.E. 356, is cited for Stansbury's proposition that "[p]ossession by the declarant is of course essential to admissibility." The court held in that case that where one person claims goods by purchase of another, the declarations of the seller as to ownership of goods are not admissible under this where he was an assignor who had never at any time been in possession. The "possession by the declarant" element should not be applied with such strictness as to render the admission of Barnes' declaration unassisted by this rule, because although the school board was not in possession at that precise instant, the declaration did "accompany," "characterize" and "explain" the forthcoming entry into possession, which did, in fact, take place soon thereafter. Also, the court has indicated that the basic principle of admitting declarations accompanying and characterizing an act "cannot reasonably be restricted to the very moment of the act." *Moore v. Gwyn*, 26 N.C. 275.

[6] The defendants' witnesses Peele, Simpson, Jones and Moore testified as to declarations of the titleholder Grover T. Lamm at approximately the time he put the school board into possession (Peele and Simpson) and at two separate instances while it has been in possession (Jones and Moore). A strong argument can be made that Lamm's declarations to Peele and Simpson accompany and characterize the act of putting plaintiff into possession. An equally strong argument can be made that the declarations to which Jones and Moore testified are admissible for the limited purpose of refuting the notoriety of the adverse claim which plaintiff asserts because each shows that the titleholder considered the use still permissive at the time each was made. Such an argument is founded on a logical view of the rule making declarations of the *possessor* admissible to show a notorious and hostile claim. The case of *Batts v. Staton*, 123 N.C. 45, 31 S.E. 372, however, is authority for the ex-

clusion of a declaration, made by one who put the claimant's predecessor into possession, to the effect that the entry was permissive, with the land to be used as a matter of favor and the title to remain in the declarant. The admission of such a declaration was held to be error. The case itself offers neither argument nor authority for such a position. It has not been cited as authority in subsequent North Carolina opinions.

The enunciation of a clear rule in favor of the admissibility of declarations by the titleholder, both at the time the claimant entered possession and at a subsequent time for the purpose of refuting notoriety, might be valid and desirable. However, it is only necessary at this point for this Court to observe that whatever error there may be in the admission of these declarations at bar is not material and prejudicial where the declaration of the possessor through his agent Barnes — which was properly admitted — was to like effect.

[7] There is no prejudicial error in the failure of the court to charge the jury as to Chapter 136, section 64, Session Laws of 1923 (later codified as C.S. § 5472, 1939). Plaintiff contends that the erecting and repairing of the school building were done in the character of full owner and, therefore, "hostile" because of the statutory provision that "[t]he county board of education shall make no contract for the erection or repair of any school building unless the site on which it is located is owned by the county board of education, and the deed for the same is properly registered and deposited with the clerk of court." The act itself, however, provided that it was effective 15 April 1923. The plaintiff's evidence shows that the Lamm School contract was let and construction begun in 1922 and that subsequent repairs have been made not by way of letting contracts but by plaintiff's own agents. The statute indicates the intent to establish two requirements which must now be met by a county board of education before acting in the manner in which the plaintiff has acted. Although plaintiff contends it acted as owner of the site, it has never contended there was a deed properly registered and deposited or even that it was under the impression that there was one. The two elements of the statute are not separable. Violation of this statute is not evidence of adverse possession.

The trial of this action in the superior court was free from prejudicial error.

No error.

BROCK and VAUGHN, JJ., concur.

CHARLES YARBOROUGH, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

No. 697SC554

(Filed 17 December 1969)

1. Criminal Law § 181— post-conviction review — insufficiency of findings of fact — remand

Order in a post-conviction hearing *is held* erroneous where (1) there was no evidence to support trial court's finding that defendant effectively waived his right to counsel, (2) trial court failed to make any finding with regard to defendant's contention that he had been given an excessive sentence on one of the charges, and (3) the court made no determination that the defendant entered pleas of guilty freely, knowingly, and understandingly; the cause is remanded to the superior court for sufficient findings of fact and conclusions of law.

2. Criminal Law § 175— review on appeal — findings of fact

The appellate court cannot find the facts, but it is incumbent upon the trial court to find the facts and such facts must be supported by some evidence in the record.

ON writ of certiorari to NASH County Superior Court.

Petitioner filed a petition for a post-conviction review at the April 1969 Session of Nash County Superior Court. On 3 April 1969 Hubbard, J., entered an order denying petitioner's motion for a new trial. Petitioner applied for a writ of certiorari which was allowed.

The record discloses the following factual situation:

1. On 4 August 1964 a warrant was issued upon complaint by Daphine Foster charging the defendant with committing the felony of rape on 2 August 1964.

2. On 4 August 1964 a warrant was issued on complaint of Willie Frank Foster charging the defendant with the felony of a secret assault, on 2 August 1964.

3. During the week of 24 August 1964 at a Criminal Term of the Superior Court of Nash County, two bills of indictment were returned against the defendant, one of which charged him with the felony of rape on 2 August 1964 of Daphine Foster, and the other charging the defendant with the felony of a secret assault on 2 August 1964 of Willie Frank Foster.

4. On 25 August 1964 upon a finding that defendant was an indigent, an attorney was duly appointed to represent him by an order of Mintz, J., who was the presiding judge.

5. On 28 August 1964 in open court, the defendant, in person and through his attorney, tendered a plea of guilty to an assault with intent to commit rape and a plea of guilty to a secret assault with intent to kill. The defendant was interrogated by the presiding judge. On this interrogation the defendant indicated that he understood the nature of the charges made against him and that he was ready for trial and had had ample opportunity to confer with his attorney and that he had authorized his attorney to enter the pleas which had been entered and that he understood the penalties which could be imposed upon the pleas entered. After this interrogation the pleas which had been tendered were accepted by the State and the Court entered a judgment of imprisonment in the State's Prison for a term of not less than 10 nor more than 12 years on the charge of an assault with intent to commit rape. On the charge of a secret assault the court entered a judgment that the defendant be committed to the State's Prison for a term of not less than 10 nor more than 12 years, this sentence to run consecutively with the previous sentence.

6. On 31 August 1964 commitment on each judgment was entered and the defendant was placed in the custody of the warden of the State's Prison.

7. On 21 June 1968 the defendant filed a petition for a post-conviction review asserting that he was being confined illegally and contrary to his constitutional rights. In this petition the defendant asserted that the sentence of 10 to 12 years on the secret assault charge was excessive for that the maximum could not exceed 10 years. He further asserted that with regard to the charge of an assault with intent to commit rape there was no evidence to justify such a conviction; that his attorney had used trickery and flattery to cause the defendant to enter a plea of guilty and that his attorney had promised him that if he entered a plea of guilty he would receive a sentence of only 10 years; whereas, if he did not plead guilty, he would receive a much longer sentence. Upon this petition he requested a hearing and that he either be released from prison or granted a new trial.

8. On 12 September 1968 upon a finding that the defendant was an indigent, Mintz, Judge Presiding, appointed an attorney to represent the defendant.

9. On 12 March 1969 Hubbard, Judge Presiding, entered an order setting the hearing on the petition for 31 March 1969 and directing the Solicitor on behalf of the State to file an answer to the petition.

10. On 31 March 1969 the Solicitor on behalf of the State filed an answer to the petition denying the factual averments in the petition and asserting that the petitioner had entered the plea freely and voluntarily and that none of his rights had been violated.

11. On 2 April 1969 the defendant filed an amendment to the petition for review, and in this amended petition asserted that his constitutional rights had been violated at the time of his original trial in August 1964 in the following respects:

(a) After his arrest and while in custody the defendant was interrogated by the Sheriff and other officers without benefit of counsel.

(b) That even though defendant had requested counsel, same had not been afforded to him, and during his interrogation without counsel, he had made incriminating statements, and these statements caused counsel subsequently to recommend that he enter a plea of guilty.

(c) That defendant was arrested 2 August 1964 and was not provided counsel until 25 August 1964 and that counsel had not had an opportunity to make a complete investigation and prepare for trial.

(d) That defendant had not been provided with effective assistance of counsel at his trial for that the attorney had not made a complete investigation of the factual situation.

(e) That counsel afforded to the defendant had made no attempt to suppress incriminating statements made by the defendant during his interrogation by the Sheriff's Department and to the contrary had recommended to the defendant that he enter a plea of guilty because of incriminating statements previously made.

(f) That the only investigation made by counsel was to interview the Sheriff and the Sheriff's deputies and that this constituted ineffective preparation.

(g) That the plea of guilty was coerced for that the defendant had been advised by both appointed counsel and the presiding judge that he might receive the death sentence if convicted of the charge of rape and that this induced him to enter a plea of guilty to the lesser offense.

12. On 3 April 1969 the Solicitor on behalf of the State filed an answer to the amended petition denying the factual averments thereof.

13. On 3 April 1969 Hubbard, Judge Presiding, entered the following order:

"ORDER OF THE COURT DENYING NEW TRIAL IN EACH CASE

This cause coming on to be heard and being heard before the undersigned Judge holding the Courts of the Seventh Judicial District upon a petition filed in the office of the Clerk of Superior Court of this County on 21 June 1968 and upon an amendment to the petition filed at the beginning or during the hearing, together with answer likewise filed at the beginning of this hearing.

The petitioner-defendant was present in court in person, represented by Robert M. Wiley, Esq., member of the Nash County Bar, and the State was represented by Roy R. Holdford, Jr., Esq., Solicitor for the District.

The defendant testified in his own behalf and offered evidence. The State likewise offered evidence. From the evidence the Court makes the following findings of fact:

The defendant was charged in a bill of indictment returned at the August 1964 Session of Nash County Superior Court with rape. He was also charged in another bill of indictment returned at the same session, with secret assault. According to the court records Mr. J. E. Davenport, member of the Nash County Bar, was appointed by the Court to defend the petitioner-defendant on the rape and assault charges. This appointment apparently was made on the 25th of August, as that is the date on which the order of appointment was signed. After being appointed, Mr. Davenport immediately began making an investigation into the charges, issued subpœnæs for certain witnesses whose names were furnished him by the defendant, and talked to the arresting officers and the petitioner-defendant. Mr. Davenport as well as the defendant apparently felt that he had ample time to investigate and prepare for trial as neither Mr. Davenport nor the defendant requested any continuance, according to the record. Mr. Davenport testified that no request for a continuance was made. Both the petitioner and Mr. Davenport, his attorney, testified emphatically, and the Court finds the testimony to be true, that the defendant never consented or agreed to plead guilty to rape.

With respect to the allegation that the defendant entered a plea of guilty to assault with intent to commit rape in order to

avoid the possibility that he might be placed on trial for rape and thereby endanger his life, the Court finds that such was not the case, and bases its finding on the fact that the original petition signed by the petitioner-defendant filed herein makes no mention of such fear, and that Mr. Davenport was of the opinion that after his investigation into the facts of the case that the defendant would not be convicted of rape. This conclusion is corroborated by the testimony of the Sheriff that he, after conferring with the Solicitor, informed Mr. Davenport that the State would not seek the death penalty, and by the fact that rather than entering a plea of guilty to rape, which if accepted by the State would have carried a mandatory life sentence, a plea of guilty to assault with intent to commit rape was tendered and accepted by the State, and sentence of not less than 10 nor more than 12 years imposed.

With respect to the contention of the petitioner that his constitutional rights were denied in that he was entitled to the appointment of counsel, or the right to consult with counsel, immediately upon his arrest, the Court finds that he was not warned of his constitutional right to counsel on the day he was taken into custody but was warned of his right to counsel and his rights under the *Escobedo* case the following morning, prior to the time he made any incriminating statements, and defendant, after such warning, effectively waived his right to counsel with respect to the statements made on that date.

IT IS, THEREFORE, UPON THE FOREGOING FINDING AND CONCLUSIONS, ORDERED:

That the petition for a new trial in each of the cases be and the same is hereby denied.

It is directed that a copy of this Order be forwarded to the petitioner, in care of the Department of Correction, Raleigh, N. C., to Robert M. Wiley, Esq., Rocky Mount, N. C., to Roy R. Holdford, Jr., Esq., Solicitor, Wilson, N. C., and to the Department of Correction, 835 W. Morgan Street, Raleigh, N. C.

This 3rd day of April, 1969.

s/ HOWARD H. HUBBARD
Judge Presiding"

To review this order we allowed a petition for writ of certiorari.

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

Robert M. Wiley and Samuel S. Woodley for petitioner appellant.

CAMPBELL, J.

The petitioner in his original petition and in the amended petition asserted that his constitutional rights had been violated and therefore he was being illegally restrained. He alleged the following violations:

1. He was given an excessive sentence on the secret assault charge.
2. He had been improperly induced and coerced to submit a plea of guilty.
3. He had been improperly interrogated and incriminating statements procured thereby.
4. He had not been provided with counsel in apt time and counsel had not properly prepared the case for trial.

The evidence introduced at the hearing was adequate to show that an attorney was appointed for the defendant and that this attorney interviewed the defendant and investigated the case prior to and after the signing of the order making the formal appointment; that this attorney adequately investigated the case and prepared for trial. Thus the evidence amply supports the finding of fact made by Judge Hubbard that the appointed attorney, Mr. Davenport, made an investigation and had ample time to do so and prepare for trial. Likewise the evidence was ample to support the finding of Judge Hubbard that the defendant did not enter a plea of guilty to assault with intent to commit rape because of any coercion, fear or other improper inducement.

There is no evidence in the record to support the finding of fact by Judge Hubbard that the defendant "effectively waived his right to counsel." He was advised, according to the evidence, that he did not have to make any statement to the Sheriff, and that any statement that he might make could be used against him in court. This warning was given to him by the Sheriff before the defendant made any statement to the Sheriff, but this was the only warning given to him and nothing was said about an attorney. The defendant was arrested and tried in August 1964. This was prior to the *Miranda* decision, and the *Miranda* decision is not retroactive. *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966); *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966). The defendant made no request for an attorney, and no warning concerning an attorney was required. The requirements of the *Escobedo* case were complied with. *Escobedo v. Illinois,* 378

U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964). Compare with *S. v. Williams,* 269 N.C. 376, 152 S.E. 2d 478 (1966).

The record in this case does not show that the defendant made any incriminating statements which in any way affected his trial and the pleas of guilty which he entered. Nor does it show that Judge Hubbard made a finding with regard to the contention of the defendant that he had received an excessive sentence on the secret assault charge.

[1] In view of the fact that (1) Judge Hubbard found that the defendant "effectively waived his right to counsel" when there is no evidence to support such a finding, (2) that Judge Hubbard failed to make any finding whatsoever with regard to the contention of the defendant that he had been given an excessive sentence on the secret assault charge and (3) that Judge Hubbard's order fails to indicate any determination that the defendant entered pleas of guilty freely, knowingly, understandingly and voluntarily, we think that the order entered by Judge Hubbard is deficient. See *State v. McKinnon,* 4 N.C. App. 299, 166 S.E. 2d 534 (1969).

[2] The Appellate Court cannot find the facts. It is incumbent upon the trial court to find the facts and such facts must be supported by some evidence in the record. In the instant case the trial court found facts not supported by any evidence in the record and failed to find essential facts even though there was evidence in the record pertaining thereto.

This case is remanded to the Superior Court of Nash County for findings of fact and conclusions of law based thereon in keeping with the contentions set forth in the petition and amended petition and the evidence which was introduced.

PARKER and GRAHAM, JJ., concur.

BERTHA MABEL HALL v. CHARLIE HENDERSON KIMBER
No. 6918SC27

(Filed 17 December 1969)

1. Automobiles § 46; Evidence § 42— speed of automobile — opinion testimony — opportunity for observation — physical facts at collision scene

In this action for personal injuries received in an intersection accident, the trial court did not err in excluding plaintiff's opinion testimony that

defendant approached the intersection at a speed of 80 to 90 mph, where plaintiff's testimony shows that she did not observe defendant's car for a sufficient time to afford her a reasonable opportunity to form an intelligent opinion of its speed, and the undisputed evidence of the physical facts at the scene belies plaintiff's estimate and makes it without probative value.

2. Witnesses § 5— prior consistent statements — exclusion of direct testimony

Where plaintiff's direct opinion testimony of defendant's speed was properly excluded, there was no error in the exclusion of evidence concerning plaintiff's prior oral and written statements about defendant's speed, since such evidence of prior consistent statements would have been admissible not as substantive evidence but only for purposes of corroborating her testimony from the witness stand.

3. Automobiles §§ 47, 57— intersection accident — nonsuit — physical facts at scene

In this action for personal injuries received in an intersection accident, the uncontradicted physical evidence disclosing that defendant's car left skid marks only 96 feet long, that these were in a straight line and in defendant's proper lane of travel, and that defendant's car came to a stop at the point of impact cannot support an inference that defendant's speed was excessive or that he failed to keep his car under reasonable control.

4. Automobiles § 50; Trial § 26— nonsuit for variance

Judgment of nonsuit is proper when there is a fatal variance between a plaintiff's allegations and proof.

5. Automobiles § 50; Trial § 26— nonsuit for variance

If the variance between a plaintiff's allegations and proof could not have misled the defendant to his prejudice, it will not be deemed material and therefore fatal.

6. Automobiles § 57— intersection accident — failure to yield right-of-way — fatal variance between allegations and proof

In this action for personal injuries received in a collision which occurred when the automobile in which plaintiff was a passenger attempted to cross the eastbound lanes of a divided four-lane highway, there is a fatal variance between plaintiff's allegations and proof as they relate to plaintiff's contention that defendant was negligent in failing to yield the right-of-way to a vehicle already in the intersection, where plaintiff alleged that the median of the divided highway was only 20 feet wide, and that the driver of plaintiff's automobile drove west on the divided highway to its intersection with a two-lane highway and made a left turn into that highway, which would have made applicable the provisions of G.S. 20-154 and the decisions relating to the respective obligations imposed upon the driver of a vehicle turning left at an intersection and the driver of a vehicle approaching from the opposite direction, but plaintiff's evidence was all to the effect that the median was 31 feet wide, thus making the crossing of the two-lane highway over the eastbound lanes of the divided highway a separate intersection, G.S. 20-38(12), and that the driver of plaintiff's vehicle remained stopped in the median crossover for several

minutes before entering the intersection, the respective rights and obligations of the drivers of the two vehicles involved in the collision being materially different if they were as plaintiff alleged rather than as she proved.

APPEAL by plaintiff from *Lupton, J.*, 22 April 1968 Civil Session of GUILFORD Superior Court, Greensboro Division.

This is an appeal from judgment of nonsuit in a civil action in which plaintiff seeks to recover damages for personal injuries received by her as a result of a collision between two automobiles, in one of which plaintiff was riding as a guest passenger. Defendant is the driver of the other vehicle involved.

The plaintiff's evidence tended to show: The collision occurred at the intersection of U.S. Highway 29-70 with Osborne Road, at a point approximately three miles southwest of the city limits of Greensboro. At this point Highway 29-70 (which is also temporary Interstate Highway No. 85) is a four-lane divided highway which runs generally east and west, having two paved eastbound and two paved westbound traffic lanes separated by a grass median. The eastbound and the westbound lanes are each approximately 24-feet wide and the grass median is approximately 31-feet wide. There are ten-foot wide paved shoulders on the outer side of both the eastbound and westbound lanes. Osborne Road is a two-lane rural road which runs generally north and south and crosses U.S. 29-70 at grade level, passing over the median between the eastbound and westbound lanes of Highway 29-70 on a paved crossover. The collision occurred at approximately 6:10 p.m. on 26 December 1961.

Plaintiff was a passenger riding in the right rear seat of a 1954 two-door Oldsmobile automobile being operated by her daughter, Mrs. Kleiman. Mrs. Kleiman's ten-year-old daughter was riding as a passenger in the right front seat. Mrs. Kleiman and her two passengers had started on a trip from Greensboro to Beckley, West Virginia, and had intended to drive on Interstate Highway No. 40. Mrs. Kleiman missed the turn and drove westerly on Highway 29-70 instead. Realizing her mistake, she looked for a place to obtain directions. As she drove west on Highway 29-70 she observed a Gulf filling station on the opposite or south side of the highway at the southeast corner of its intersection with Osborne Road. She slowed, gave her left-hand blinker signal, and turned left into the paved crossover by which Osborne Road passes over the median between the westbound and eastbound lanes of Highway 29-70. She stopped in the crossover for some minutes, waiting for traffic to clear. Mrs. Kleiman then attempted to drive her Oldsmobile from the crossover across the

eastbound lanes of Highway 29-70, when it was struck on the right side and toward the rear by a 1960 Chevrolet being driven by defendant, injuring the plaintiff.

To the west of the intersection Highway 29-70 is straight for over a mile and the view along the highway looking west from the crossover of Osborne Road is unobstructed for approximately one-half mile. About 700 feet west of the intersection on Highway 29-70 there is a diamond-shaped State highway sign with a crossroads insignia thereon. Mrs. Kleiman testified that when she started to move from her stopped position in the crossover, there were no cars approaching from the west in the area between the sign and the intersection. Her daughter testified to the same effect. Neither Mrs. Kleiman nor her daughter saw defendant's car approaching prior to the collision. Plaintiff testified that while the Kleiman car was stopped in the crossover she did not see a car coming, but that after her daughter started driving across she did see defendant's car approaching from the west and that she had an opinion as to its speed. The court sustained defendant's objection to the admission of plaintiff's opinion as to the speed of defendant's automobile. Mrs. Kleiman testified that five or six seconds elapsed from the time she started from the crossover until the time of the collision, that she started off a "little bit faster" but slowed to about five miles per hour when she got almost across and saw holes in the road ahead of her, and that her car had moved approximately 25 feet and was "almost off the outer lane of traffic for eastbound" traffic when it was hit. Plaintiff testified that only two or three feet of the Kleiman car remained on the road at the time of the collision. The collision occurred in the southernmost or outside eastbound lane of Highway 29-70. The Kleiman car was struck on the right side about the door and toward the rear and was spun around by the impact so that it came to rest headed back toward the direction from which it had come and near the point of the collision. Defendant's automobile left straight skid marks 96-feet long in the outside eastbound lane of Highway 29-70. Defendant's car stopped almost at the point of impact. The occupants of defendant's car were not injured. The posted speed limit for automobiles on Highway 29-70 was 60 miles per hour.

Plaintiff offered evidence relative to the nature and extent of the injuries she received in the collision.

At the close of plaintiff's evidence the court granted defendant's motion for a judgment of nonsuit, and the plaintiff appealed.

Max D. Ballinger for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee.

PARKER, J.

[1] Plaintiff assigns as error the trial court's ruling excluding her testimony that in her opinion defendant approached the intersection at a speed of 80 to 90 miles per hour. In this ruling there was no error. At the time the ruling was made, plaintiff had testified that when she first saw defendant's car approaching, it was "four or five times the length of this courtroom away from us." The courtroom was stipulated to be 40-feet long, so plaintiff in effect testified that she had observed defendant's car while it traveled toward her over a distance of 160 to 200 feet. Had it actually been moving as fast as plaintiff attempted to testify, she would have had only approximately one and one-half seconds during which to observe it, hardly a sufficient interval in which to form an opinion as to its speed of any real probative value. Later in the trial she attempted to testify that when she first saw defendant's car it was three or four hundred feet away, which testimony was excluded on defendant's objection. Even if this later testimony had been admitted and accepted as true, plaintiff would have had only approximately three seconds within which to observe defendant's car. Under either version of plaintiff's testimony it is questionable whether she could be considered as having observed defendant's car for a sufficient time to afford her a reasonable opportunity to form an intelligent opinion as to its speed. Quite apart from that question, however, her testimony as to speed was properly excluded for the reason that the undisputed evidence belies plaintiff's estimate and makes it without probative value. *Mayberry v. Allred,* 263 N.C. 780, 140 S.E. 2d 406. Defendant's automobile left only 96 feet of skid marks leading to the point of impact. These were approximately straight and in defendant's proper lane of travel. Defendant's car stopped practically at the point of impact and headed in its proper direction. Its occupants suffered no injuries. The Kleiman vehicle was spun around, but it, too, came to rest close to the point of impact. Defendant's car could not have been stopped within the distance and in the manner as established by this physical evidence if it had been moving as fast as plaintiff's estimate.

[2] Since her direct testimony as to her opinion concerning defendant's speed was properly excluded, it follows that there was also no error in the exclusion of evidence concerning plaintiff's prior oral and written statements about defendant's speed. Such evidence as to prior consistent statements of the plaintiff would have been admissible not as substantive evidence but only for purposes of corroborating her testimony from the witness stand. Stansbury, N.C. Evidence 2d, § 52, p. 105. Her testimony from the witness stand as

to speed having been excluded, nothing remained to which the proffered corroborative evidence could properly relate.

[3] Plaintiff alleged in her complaint that the collision and her resulting injuries were proximately caused by defendant's negligence in a number of respects. She produced no competent evidence to support her allegations that defendant was driving at an excessive speed, that he failed to decrease speed when approaching an intersection, or that he failed to keep a proper lookout or to keep his vehicle under reasonable control. The uncontradicted physical evidence disclosing that defendant's car left skid marks only 96-feet long, that these were in a straight line and in defendant's proper lane of travel, and that his car came to a stop at the point of impact, certainly cannot support an inference either that his speed was excessive or that he failed to keep his car under reasonable control. *Clayton v. Rimmer,* 262 N.C. 302, 136 S.E. 2d 562. Indeed, this physical evidence would more nearly support the contrary inference. Plaintiff produced no competent evidence whatever relating to the manner in which defendant was driving, certainly none which could legitimately support an inference of negligence on his part. Therefore, nonsuit was proper insofar as all of plaintiff's allegations of negligence on the part of defendant which relate to the manner in which he was driving are concerned.

[4-6] There remains only plaintiff's allegation that defendant was negligent in failing to yield the right-of-way to a vehicle already within the intersection, a violation of G.S. 20-155(b). In this connection plaintiff's evidence was completely inconsistent with the allegations in her complaint. She alleged that the median on Highway 29-70 was approximately 20-feet wide and that Mrs. Kleiman, in whose car plaintiff was riding, drove on Highway 29-70 to its intersection with Osborne Road where she proceeded to make a left turn into Osborne Road. Had these been the facts, the provisions of G.S. 20-154 and North Carolina court decisions which relate to the respective obligations imposed upon the driver of a vehicle turning left at an intersection and the driver of a vehicle approaching from the opposite direction would have applied. Plaintiff's evidence, however, was all to the effect that the median on Highway 29-70 was 31-feet wide, thus making the crossing of Osborne Road over the eastbound lanes of Highway 29-70 a separate intersection. G.S. 20-38(12). In addition, all of plaintiff's evidence was to the effect that the Kleiman vehicle remained stopped in the crossover for several minutes before entering the intersection, a completely different factual situation from that alleged in her complaint. "The rule is well

established that judgment of nonsuit is proper when there is a fatal variance between a plaintiff's *allegata* and *probata*. Proof without allegation is no better than allegation without proof. A plaintiff must make out his case *secumdum allegata*. He cannot recover except on the case made by his pleading." *Hall v. Poteat*, 257 N.C. 458, 125 S.E. 2d 924. If the variance could not have misled the defendant to his prejudice, it will not be deemed material. G.S. 1-168; *McCrillis v. Enterprises*, 270 N.C. 637, 155 S.E. 2d 281. Whether it will be deemed material and therefore fatal must be determined in the light of the facts of each case. *Spaugh v. Winston-Salem*, 249 N.C. 194, 105 S.E. 2d 610. In the present case the plaintiff's allegations would have made applicable one group of statutes and decisions; her proof would make others here pertinent. The respective rights and obligations of the drivers of the two vehicles involved in the collision which gave rise to this lawsuit would be materially different, depending upon whether the facts were as plaintiff alleged or as she proved. In our judgment the variance between plaintiff's allegations and proof insofar as they related to her contention that defendant was negligent in failing to yield the right-of-way was substantial and material in this case.

Confronted by a failure of proof of any negligence of defendant in other respects and by the material variance between plaintiff's allegations and proof insofar as her allegation of negligence in failing to yield the right-of-way is concerned, the trial court properly entered judgment of nonsuit.

Affirmed.

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

RALPH G. STYRON AND ROMA STYRON, T/A STYRON PLUMBING, HEATING & AIR CONDITIONING COMPANY v. LOMAN-GARRETT SUPPLY COMPANY

No. 693SC528

(Filed 17 December 1969)

1. Trial § 57— trial by the court — admission of incompetent evidence — presumption

In a trial by the court under agreement of the parties, it will be presumed that the judge disregarded any incompetent evidence that may have been admitted, unless it affirmatively appears that the judge was influenced thereby.

2. Uniform Commercial Code § 3— date of application

The Uniform Commercial Code does not apply to transactions entered into prior to the effective date of the Code, which was on midnight, 30 June 1967.

3. Limitation of Actions § 18; Sales § 14— breach of express warranty — air conditioning equipment — statute of limitations — sufficiency of findings

In an action on express warranty to recover expenditures incurred by the plaintiffs, a plumbing and heating company, in correcting defects in an air conditioning and heating system purchased from the defendant and installed by the plaintiffs in a motel, the trial court properly ruled that plaintiffs' action was not barred by the three-year statute of limitations, where (1) defendant orally warranted that it would be totally responsible for the design, plans, engineering, installation, and performance of the system, (2) the defects first appeared in a trial run of the equipment in May 1964, (3) defendant replaced the defective parts with new parts and appliances and continued to do so until the equipment performed to the satisfaction of the motel owner in May 1966, and (4) the plaintiffs instituted the cause of action in August 1967.

4. Limitation of Actions § 14— action for breach of warranty — new promise in writing — applicability of statute

In an action on express warranty to recover expenditures incurred by plaintiffs in correcting defects in an air conditioning system purchased from defendant, the statute providing that a new promise must be in writing and signed by the party to be charged in order to start the running of the statute of limitations, G.S. 1-26, *held* inapplicable where the plaintiffs' action was based upon the failure of the equipment to conform with the original warranty and not upon any new promise by the seller.

5. Appeal and Error § 57— findings of fact — review

Findings of fact which are supported by competent evidence are binding on appeal.

APPEAL by defendant from *Cowper, J.*, 10 March 1969 Session, CARTERET County Superior Court.

Action to recover expenditures incurred by plaintiffs in correcting defects in an air conditioning and heating system bought from defendant and installed by plaintiffs. Plaintiffs alleged and introduced evidence tending to establish that in the year 1963 and for sometime prior thereto, they had been engaged in the plumbing, heating and air conditioning business in Carteret County; that they had a customer, A. B. Cooper, who owned Oceanana Motel on Atlantic Beach; that this motel was heated and air conditioned by means of individual window units in each room; that Cooper desired to put in a central system which would be acceptable in appearance, eliminate noise and be more economical in operation; that Cooper had requested the plaintiffs to be on the lookout for a suit-

able installation; that plaintiffs made known to the sales manager of the defendant what Cooper desired; that the sales manager, Robert Helms (Helms), assured plaintiffs that defendant had a system which would fulfill the requirements and desires of Cooper in his motel; that plaintiffs advised Helms that they were not familiar with and did not have either the experience or the ability to design such a system; that Helms went with plaintiffs to call upon Cooper and explain the system to Cooper; that with the help and assurances of Helms, the job was sold to Cooper, and Helms agreed that the defendant would be responsible for designing plans and specifications for the installation of the system and that such system, when installed, would fulfill the requirements of Cooper for heating and cooling the motel; that relying upon such assurances and representations, the plaintiffs contracted with Cooper for the installation of such a system and in turn purchased the system from the defendant.

The defendant did design the system and furnished plaintiffs with plans and specifications for the installation of the system. The various items comprising the system were sent to the job site, and sight drafts were paid by the plaintiffs as the various items were received. The plaintiffs installed the system in accordance with the plans and specifications furnished by the defendant and under the supervision of Helms. In May 1964 the installation had proceeded to such an extent that it was turned on to see how the cooling system was working. The system immediately began to show defects, and various units comprising the system went out of order. Defendant furnished new parts to take the place of the parts which were defective. New parts and appliances were continuously furnished by the defendant and installed by the plaintiffs in an effort to make the system operate in conformity with the requirements of Cooper and to cool the motel satisfactorily. At no time did the entire system work as a unit for that various parts were always inoperative. The cooling portion of the system was completely unsatisfactory, and the motel was not properly cooled until May 1966 when larger chillers were installed in the system. These chillers were considerably larger than the chillers originally called for in the plans, designs and specifications prepared by the defendant. It was not until after that that Cooper paid plaintiffs the final amount due for the system.

This action was brought to recover for expenditures by the plaintiffs for labor and material in making replacements in the system of both defective parts and appliances called for in the original designs and plans, and of new parts and appliances, including chillers, which were finally installed.

The defendant denied that it contracted with the plaintiffs to furnish a system that would heat and cool the motel in a satisfactory manner in keeping with the requirements of Mr. Cooper. The defendant asserted that it was acting in the capacity of a distributor for Edwards Engineering Company, the manufacturer of the equipment; that the manufacturer warranted the equipment to be of good workmanship and that any defective parts would be replaced; that the manufacturer had replaced all defective parts and had exceeded its warranty by furnishing larger chillers than originally called for in the plans and specifications; that the defendant had fully complied with all terms of its contract and had no responsibility for any expenses incurred by the plaintiffs in changing, altering and replacing any parts and appliances comprising the system. The defendants further asserted that if there was any breach in its contract, the same occurred and became known on or about 14 May 1964 when the system was first turned on and that this was more than three years prior to the institution of this action on 22 August 1967, and the defendants pled the three-year statute of limitations (G.S. 1-52) in bar of any recovery.

The parties agreed to waive a jury trial and that the trial judge could find the facts, make conclusions of law and render a judgment.

The trial judge found as a fact that Helms was the sales manager and engineer of the defendant and had full authority to act for and on behalf of the defendant and that "[d]efendant orally warranted and assured plaintiffs that defendant would be totally responsible for the design, plans, engineering, installation and performance of the system"; that defendant, acting through Helms, assured both plaintiffs and Cooper that defendant would be totally responsible for the operation and performance of the system; that defendant drew the plans and specifications; that plaintiffs "were relatively small businesswise and were not prepared or equipped to handle" a job of this size; that defendant knew of the limitations of the plaintiffs and knew that plaintiffs were relying on the skill, judgment and experience of the defendant for the suitability of the equipment; that plaintiffs undertook the job because of the assurances and representations of the defendant; that the plaintiffs installed the equipment in accordance with the plans and specifications prepared by defendant and that the defendant checked the installation from time to time and approved same; that the entire system was never completely installed and working at the same time; that as various breakdowns occurred the defendant sent replacements and "indicated its willingness to pay for extra labor and ma-

terials necessary to install the new equipment"; that plaintiffs had no dealings with Edwards Manufacturing Company and at all times dealt with the defendant and looked to the defendant; that the plaintiffs from May 1964 through May 11, 1966 were constantly making changes and corrections in the system and spent the sum of $8,763.94 for labor and materials in an effort to get the cooling system properly functioning; that the plaintiffs themselves, individually, spent many hours during that period of time, and that $1,500.00 is a modest and reasonable charge for the individual labor of plaintiffs. The trial judge concluded as a matter of law that the action was not barred by the three-year statute of limitations and rendered judgment for the plaintiffs in the sum of $10,263.94.

The defendant filed numerous exceptions to the admission of evidence, findings of fact and conclusions of law and made 29 assignments of error to this Court.

Hoyle, Boone, Dees and Johnson by J. Sam Johnson, Jr., for defendant appellant.

Harvey Hamilton, Jr., for plaintiff appellees.

CAMPBELL, J.

[1] Defendant has a number of assignments of error to the admission of evidence over its objections and exceptions, and to the judge's findings of fact. All of these assignments of error are overruled.

> "When the parties waived a jury trial, [Judge Cowper] occupied a dual position: he was the judge required to lay down correctly the guiding principles of law, and he was also the tribunal compelled to find the facts. In such a trial the rules of evidence as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. If there was incompetent evidence admitted, it will be presumed it was disregarded by the judge in making his decision, unless it affirmatively appears that the action of the judge was influenced thereby." *Mayberry v. Insurance Co.*, 264 N.C. 658, 142 S.E. 2d 626 (1965). *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668 (1957).

The trial court found that "[d]efendant orally warranted and assurred plaintiffs that defendant would be totally responsible for the design, plans, engineering, installation and performance of the system." The trial court further found that plaintiffs purchased the system for a particular purpose known to the defendant and "re-

lied on the skill, judgment and experience of the seller for the suitability of the equipment for that purpose."

In *Potter v. Supply Co.*, 230 N.C. 1, 51 S.E. 2d 908 (1949), Ervin, J., set out the law of North Carolina as follows:

> "The Uniform Sales Act provides 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.' Williston on Sales (Revised Edition), section 194. Our Legislature has not incorporated the Uniform Sales Act in our statutory law, but the accuracy of the lucid and succinct definition of an express warranty embodied in the Act is fully supported by repeated decisions of this Court. *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E. 2d 375; *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813; *Dallas v. Wagner*, 204 N.C. 517, 168 S.E. 833; *Swift v. Meekins*, 179 N.C. 173, 102 S.E. 138; *Tomlinson v. Morgan*, 166 N.C. 557, 82 S.E. 953; *Hodges v. Smith*, 159 N.C. 525, 75 S.E. 726; *Wrenn v. Morgan*, 148 N.C. 101, 61 S.E. 641; *Reiger v. Worth*, 130 N.C. 268, 41 S.E. 377, 89 Am. S.R. 865; *Foggart v. Blackweller*, 26 N.C. 238; *Thompson v. Tate*, 5 N.C. 97, 3 Am. D. 678."

[2] North Carolina has now adopted the Uniform Commercial Code and that law as set out in G.S. 25-2-315 would apparently cover this situation but that Act did not become effective in North Carolina until midnight, 30 June 1967, which was after the contract which is the subject of this litigation.

[3] The defendant contends that the plea of the three-year statute of limitations should have been held as a complete bar to this action as a matter of law. The defendant in support of this position claims that the breach of warranty accrued in May 1964 when the equipment was first tested. This position would be sound except for the fact that thereafter the defendant continued to cooperate with and work with the plaintiffs in an effort to make the equipment comply with the assurances the defendant had given as to the performance of the system. By furnishing new parts for defective parts, furnishing additional pumps and larger chillers, the defendant finally succeeded in procuring satisfactory performance from the equipment. This was not accomplished until May 1966, however. This action was commenced 22 August 1967 which was well within the three-year statute of limitations. We think *Heath v. Furnace Co.*, 200 N.C. 377, 156 S.E. 920 (1931) and *Nowell v. Tea Co.*, 250 N.C. 575, 108 S.E. 2d 889 (1959) are authoritative cases to sustain the

conclusion of the trial court to the effect that the plaintiff's cause of action was not barred by the statute of limitations.

[4] The defendant in this case also relies upon G.S. 1-26 which provides:

> *"New promise must be in writing.* — No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest."

This statute is not applicable in the instant case as the plaintiffs here are seeking to recover damages incurred because of the failure of the equipment to conform with the original warranty. The expenditures for which the plaintiffs seek to recover in this action were incurred because the equipment did not operate in the manner defendant had warranted it would. The expenses incurred were incident to an effort by the plaintiffs to make the equipment conform with the original representations of the defendant. No new promises were necessary.

In *Heath v. Furnace Co., supra,* the plaintiff purchased a combined heating and ventilating plant for an apartment house. The system was guaranteed to heat the building. After certain adjustments had been made, the installation was accepted and final payment made on 12 January 1925. Subsequently, plaintiff claimed the system was defective and action was instituted on 23 March 1929 for breach of the warranty. Defendant relied on the three-year statute of limitations. The question presented was, when did the cause of action accrue? The North Carolina Supreme Court held that ordinarily where there is a warranty that the subject matter of a sale is sound at the date of sale then the statute of limitations begins to run at the date of the warranty and not thereafter.

> "Where, however, the warranty has been construed as a contract by the vendor that if the vendee shall suffer damages resulting from a prospective as well as a present condition, it has been held that a different rule applies. In some cases, as in *Sheehy Co. v. Eastern Imp. & Mfg. Co.,* 44 App. D.C., 107, L.R.A., 1916F, 810, it has been held that the statute of limitations runs from the date on which the vendee discovered or should have discovered the breach of the warranty; in other cases, as in *Felt v. Reynolds Fruit Evap. Co.* (Mich.), 18 N.W. 378, it has been held that the statute begins to run only after

the lapse of a reasonable time within which both the vendor and the vendee had an opportunity to discover, by tests, whether or not there has been a breach of the warranty. In the latter case, it was said by *Cooley, C.J.,* that where the vendor and the vendee, as contemplated by them when the contract was entered into, were engaged for some time after the date of the warranty in making tests to determine whether or not there had been a breach of the warranty, this time was a criterion as to the time required for that purpose.

In the instant case, all the evidence tends to show that the defendant within three years from the date on which the action was commenced, in response to repeated complaints from the plaintiff, was engaged from time to time in testing the heating plant installed by the defendant, and in efforts to make the plant perform in accordance with the warranty. During this time plaintiff was patiently relying upon the repeated assurance of defendant that it would make the plant comply with its warranty. Upon all the facts of this case, the cause of action did not accrue at the date of the warranty, but at the date on which it was finally determined that the plant was not free from all defects and flaws and would not heat the building to a temperature of 70 degrees Fr. with an external temperature of 10 degrees below zero. There was evidence tending to show that this date was within three years of the date on which the action was commenced. Hence, there was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit, or in its refusal to instruct the jury as prayed by defendant. . . ."

We think this is the applicable rule in this case as defendant was endeavoring to get the system to operate.

[5] We find that there was sufficient competent evidence to support the findings of fact and that the conclusions of law were amply supported by the findings of fact. Findings of fact which are supported by competent evidence are conclusive on appeal. *Bizzell v. Bizzell, supra; Used Cars, Inc. v. Easton,* 5 N.C. App. 695, 169 S.E. 2d 204 (1969).

We have reviewed the numerous assignments of error and have found no error prejudicial to any substantial right of the defendant.

Affirmed.

PARKER and GRAHAM, JJ., concur.

IN THE MATTER OF THE IMPRISONMENT OF E. H. HENNIS

No. 6918SC555

(Filed 17 December 1969)

1. Contempt of Court § 2— direct contempt

Behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due its authority, may be punished for contempt. G.S. 5-1.

2. Contempt of Court § 2— direct contempt defined

A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess which tend to subvert or prevent justice.

3. Contempt of Court § 8— appellate review — findings of fact

The Court of Appeals is bound by the factual findings spread upon the record by the presiding judge in summarily punishing a person for direct contempt of court.

4. Contempt of Court § 8; Habeas Corpus § 2— review of summary punishment — duty of habeas corpus judge

The facts found by the court in summarily punishing a person for direct contempt are binding upon the judge at a habeas corpus hearing, the duty of the judge at the habeas corpus hearing being only to review the record and determine whether the court which imposed the sentence for direct contempt had jurisdiction and whether the facts found and specified on the record were sufficient to support the imposition of sentence.

5. Contempt of Court § 4— summary punishment for direct contempt — due process

Defendant's contention that he was denied due process when the court summarily sentenced him for direct contempt committed in the presence of the court in that he did not have sufficient opportunity to prepare his defense or obtain a lawyer, he was not offered a lawyer, he was not informed of the right to have witnesses and compel their attendance, he was not proven guilty beyond a reasonable doubt, he had no opportunity to confront and cross-examine witnesses, and he was not informed of his right against self-incrimination, *is held* without merit, since summary punishment for direct contempt committed in the presence of the court does not contemplate such a trial.

6. Constitutional Law § 18— First Amendment freedoms — compelling interest of State — operation of courts

The right of a person or a group of persons to freedom of expression and peaceably to assemble and petition the Government for a redress of grievances, as guaranteed by the First Amendment to the U. S. Constitution, is not absolute but must give way to the compelling interest of the State effectively to operate its courts of justice.

7. Constitutional Law § 18; Contempt of Court § 2— freedom of speech — picketing of courthouse — contempt of court

Defendant was not denied his right to freedom of speech under the First Amendment to the U. S. Constitution when he was summarily punished for direct contempt of court for picketing the courthouse during a trial with a sign calling for the impeachment of the presiding judge, where defendant placed himself in a position as to be seen from the courtroom and his picketing actually interrupted the proceedings of the court.

8. Contempt of Court § 7— punishment for direct contempt

Punishment of 20 days in jail for direct contempt was not excessive.

9. Contempt of Court §§ 2, 4— direct contempt — picketing courthouse in view of courtroom

Trial court had power to punish defendant summarily for direct contempt where, during the conduct of a trial, defendant picketed the courthouse wearing a sign calling for impeachment of the presiding judge, defendant placed himself in a position as to be seen from the courtroom, and defendant's conduct caused the proceedings of the court to be interrupted.

10. Contempt of Court § 2— committed in presence of court — impeding court business

The power to punish for a contempt committed in the presence of the court, or near enough to impede its business, is essential to the existence of every court.

ON writ of *certiorari* to the Superior Court of GUILFORD County.

On 16 July 1969 E. H. Hennis (petitioner) was adjudged to be in direct contempt of court by Judge Allen H. Gwyn and was summarily punished and given a sentence of twenty days in jail. On 22 July 1969, after serving seven days of the sentence, petitioner made application to Judge May for a writ of habeas corpus, asserting that he was being illegally restrained of his liberty. On 22 July 1969 petitioner was heard by Judge May. After the hearing Judge May refused to release petitioner and "Ordered, Adjudged and Decreed that the Habeas Corpus applied for be and it is hereby denied."

Petitioner indicated his intention of applying to the Court of Appeals for writ of *certiorari,* whereupon Judge May ordered petitioner released upon $500 bond pending final determination of the matter.

Certiorari was allowed by the Court of Appeals on 3 September 1969.

Attorney General Robert Morgan and Staff Attorney James L. Blackburn for the State.

Norman B. Smith for petitioner appellant.

MALLARD, C.J.

[1] Behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority may be punished for contempt. G.S. 5-1.

In G.S. 5-5 it is provided that "contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment, or process in the nature of an execution founded on such judgment or order."

The punishment for direct criminal contempt may not exceed thirty days imprisonment, or a fine of two hundred and fifty dollars, or by both such fine and imprisonment. G.S. 5-4.

[2] "A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess which tend to subvert or prevent justice." 2 Strong, N.C. Index 2d, Contempt of Court, § 2.

The particulars of the offense were "specified on the record" by Judge Gwyn as follows:

> "This being a proceeding for direct contempt of court, the Court finds the following facts:
>
> The Guilford County Superior Courthouse is the only building situated upon and occupying a certain block in the City of Greensboro bounded by West Market Street on the north, by Stafford Place on the east, by Sycamore Street on the south, and Boren Street on the west. Sidewalks extend around the entire block. Entries into the Superior Court building, including paved walkways extend from the four streets from the four sides. Passageways from the streets on the north and south are approximately thirty feet in width; from the north and south, approximately fifteen feet in width.
>
> The several offices and two courtrooms are constructed with windows which afford light and views of the surrounding streets. On this, the 16th day of July, 1969, the undersigned Judge of the Superior Court, was holding a session of Superior Court for the trial of Civil and Criminal actions. At or around the hour of 11 o'clock a.m., the court observed the movement of people to the windows. They appeared to be observing something that was happening on the outside. The court reporter informed the court that the court was being picketed by a man walking

around the courthouse wearing a placard which carried a sign or lettering. The court left the bench and went to a window. There the Court observed E. H. Hennis as he walked slowly around the courthouse wearing a picket sign approximately two feet wide and three feet long draped over his shoulders, front and back, bearing the following words:

'Impeach Allen Gwyn for using a policy of discrimination against members of my white race.'

People going to and from the court observed the said Hennis as he walked slowly across the several entrances and exits to and from the streets.

Court was in session at the time. People within the courtroom appeared to become concerned and apprehensive. Some undertook to observe the picketing from the courtroom windows.

The Court directed the Sheriff to invite the said Hennis into the courtroom. When he appeared before the Court, the Court informed him that proceedings for contempt were being instituted and informed him that he would be given an opportunity to employ counsel to appear for him if he so desired. He informed the Court that he had counsel who lived in Georgia, who traveled all over the United States and that he did not know where he was or when he could contact him. He spoke disparagingly of the lawyers in Greensboro and stated that he preferred not to employ one here.

The Court proceeded to consider any defense the defendant saw fit to interpose.

The Court finds that said E. H. Hennis was picketing the Court during the sitting of the court; that the picketing was in immediate view and presence of the Court, such presence being as hereinbefore described; that said picketing tended to interrupt the court's proceedings and to impair the respect due its authority.

The Court finds and holds that the acts and conduct of the said E. H. Hennis were wilful and malicious and intended to impair the respect due its authority.

The Court concludes and holds that the said E. H. Hennis is guilty of direct contempt of court.

IT IS, THEREFORE, ORDERED AND ADJUDGED that said E. H. Hennis be confined in the common jail of Guilford County for a term of twenty days."

The above factual determinations were made by Judge Gwyn on the basis of his observation and direct knowledge and not from evidence taken.

[3] This Court is bound by the factual findings spread upon the record by Judge Gwyn. *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581 (1962). In the case of *State v. Woodfin,* 27 N.C. 199 (1844), Chief Justice Ruffin said:

> "Necessarily there can be no inquiry *de novo* in another court as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial. Indeed, the person is conclusively fixed with the act, for the record declares it to have been done in court, and the record is entitled to as much faith in that statement as it is as to any other matter appearing by the record to have been transacted by or before the court. It makes it as certain, judicially speaking, that this person and another fought in the presence of the court as that the court fined them therefor; and the fact cannot be controverted."

In the case of *In re Palmer,* 265 N.C. 485, 144 S.E. 2d 413 (1965), it is said:

> "Direct contempt of court is punishable summarily, and the offended court is only required to 'cause the particulars of the offense to be specified on the record.' . . . The facts found by the committing court are binding on the judge at the *habeas corpus* hearing, the only question being whether the judgment was warranted by law and within the jurisdiction of the court. *In re Adams,* 218 N.C. 379, 11 S.E. 2d 163. In *habeas corpus* proceedings, the court is not permitted to act as one of errors and appeals; to justify relief the judgment of imprisonment must be void as distinguished from erroneous. *State v. Edwards,* 192 N.C. 321, 135 S.E. 37; *In re Burton, supra.* The court hearing the matter on *habeas corpus* may not try the cause *de novo,* hear testimony of witnesses, or find facts in conflict with those found by the judge who imposed the sentence. In the *habeas corpus* proceeding the judge merely reviews the record and determines whether the court which imposed sentence had jurisdiction and whether the facts found and specified on the record are sufficient to support the imposition of sentence."

[4] In view of the foregoing rule, the findings of fact by Judge Gwyn were binding upon Judge May in the habeas corpus proceeding. It was the duty of Judge May on the habeas corpus proceeding

to review the record to determine if Judge Gwyn had jurisdiction and whether the facts found and specified on the record by Judge Gwyn were sufficient to support the imposition of the twenty day jail sentence. Judge May, in denying relief to the petitioner, in effect found that the judgment imposed by Judge Gwyn was warranted by law and within the jurisdiction of the court.

[5] Defendant contends that he was denied "procedural due process rights" before Judge Gwyn because: He was summarily punished; he did not have sufficient opportunity to prepare his defense or obtain a lawyer; he was not offered a lawyer; he was not informed of his right to have witnesses and to compel their attendance; he was not proven guilty beyond a reasonable doubt; he was not given the opportunity to confront and cross-examine witnesses; and he was not informed of his right against self-incrimination. We do not agree with these contentions. The defendant here was in direct contempt of court, and it was proper for Judge Gwyn to punish him summarily. In the case of *In re Williams,* 269 N.C. 68, 152 S.E. 2d 317 (1967), Lake, J., said:

> "We find no merit in the contention that the sentence was originally imposed when the contemner was not represented by counsel, or in the contention that the court was under a duty to appoint counsel for him. Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel. . . . There is no basis for the contention that to carry out the sentence would deprive him of his liberty without due process of law on the ground that he was denied a hearing or denied representation by counsel of his choice."

[6, 7] Defendant also contends that on this occasion he was exercising his right to freedom of speech under the provisions of the First Amendment to the Constitution of the United States. It is elementary that a person has the constitutional right to freedom of speech. It is also elementary that a person has the constitutional right peaceably to assemble, and to petition the Government for a redress of grievances.

When our courts of justice are in session, the people of the State of North Carolina are conducting their judicial business. The right of a person or a group of persons to freedom of expression and peaceably to assemble and petition the Government for a redress of grievances may not be exercised in such a way as to interrupt the sitting of a court of justice. The freedom to exercise one's right

to freedom of expression and to assemble and petition the Government for a redress of grievances, as guaranteed under the First Amendment to the United States Constitution, is not absolute but must give way to the compelling interest of the State in the operation of the courts. "The effective operation of its courts of justice is obviously a 'compelling State interest.'" *In re Williams, supra.* Interference with the operations of the court cannot be tolerated. Picketing the courthouse and the judge in the manner shown here would tend to intimidate jurors, witnesses and parties having business with the court.

In *Gregory v. Chicago,* 394 U.S. 111, 22 L. Ed. 2d 134 (1969), cited by petitioner herein, the petitioners were demonstrating for the purpose of pressing their claims for desegregation of Chicago's public schools. While they were marching in a peaceful and orderly manner from the city hall to the mayor's residence, they were ordered by the police to disperse when onlookers became unruly. They refused to disperse and were arrested for disorderly conduct. The Supreme Court of Illinois sustained their conviction and suggested that they had been convicted not for demonstrating in such manner but because they refused to disperse when ordered to do so by the police. The United States Supreme Court in reversing held that they had been convicted for holding the demonstration and that such a peaceful and orderly march is protected by the First Amendment to the United States Constitution.

[7] The case before us is distinguishable from the *Gregory* case. Here, although the defendant was demonstrating or picketing peaceably and orderly, he placed himself in such position as to be seen from the *courtroom.* His demonstration or picketing was so close to the scene of *a trial* that it constituted a clear and present danger to the orderly administration of justice in that it actually interrupted the proceedings of the court. It is not what he expressed but the place he expressed it and the results he obtained that authorized the judge to punish him summarily for direct contempt of court.

[8] In this case the petitioner also contends that punishment for direct contempt "is too radical a cure for this ill." We do not agree with this contention. We hold that the punishment of twenty days in jail for direct contempt of court was not excessive.

[9, 10] The petitioner, who appeared to be a man of some means and considerable court experience, went to a place within 61 feet of the window of the courtroom with the intention of being seen and conveying the message appearing on his sign to others. His position on the sidewalk, in relation to the courtroom in which Judge Gwyn

was holding court, indicated that he wanted those in the courtroom, those entering and leaving the courthouse, and passersby to read his opinion of the presiding judge. He was seen and his message was read. Such conduct caused the proceedings of the court to be interrupted, tended to impair the respect due the court's authority, and therefore constituted direct contempt of court. It was correct and proper for Judge Gwyn to suppress such by immediate punishment. "The power to punish for a contempt committed in the presence of the court, *or near enough to impede its business,* is essential to the existence of every court." (Emphasis Added.) *In re Deaton,* 105 N.C. 59, 11 S.E. 244 (1890).

The order entered by Judge May denying petitioner's release on writ of habeas corpus is

Affirmed.

MORRIS and HEDRICK, JJ., concur.

BERTIE LEWIS GASKILL v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.

No. 693SC529

(Filed 17 December 1969)

1. Negligence §§ 5.1, 52— store customer — invitee

A customer entering a store during business hours is an invitee of the proprietor.

2. Negligence §§ 5.1, 53— store proprietor — liabilities to invitees

A proprietor is not an insurer of his customers' safety while on his premises, but is liable only for injuries suffered by his customers as result of his actionable negligence.

3. Negligence §§ 5.1, 53— store proprietor — duties to invitees

The proprietor owes to his customers the duty to exercise ordinary care to maintain in a reasonably safe condition those portions of his premises which he may expect they will use during business hours, and to give warning of hidden peril or unsafe conditions insofar as these can be ascertained by reasonable inspection and supervision.

4. Negligence §§ 5.1, 53— store proprietor — duties to invitees — condition created by third party

If the unsafe condition is created by third parties or by an independent agency, a showing must be made that it had existed for such length of

time that the store proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the danger or given warning of its presence.

5. Negligence §§ 5.1, 57— fall by invitee on floor of store — inference of negligence — res ipsa loquitur

No inference of negligence on the part of a store proprietor arises from the mere fact of a customer's fall on the floor of his store during business hours, the doctrine of *res ipsa loquitur* not being applicable.

6. Negligence §§ 5.1, 57— fall by invitee on floor of grocery store — sufficiency of evidence

In this action for personal injuries sustained by plaintiff when she slipped and fell in defendant's grocery store, judgment of nonsuit was proper where plaintiff's evidence tended to show only that on a rainy afternoon defendant allowed water to accumulate on the asphalt tile floor immediately inside the entrance to its store, that plaintiff entered the store as a customer, and that plaintiff there fell and was injured, plaintiff's evidence having failed to show that defendant was negligent or had failed to exercise ordinary care to maintain its premises in a reasonably safe condition for its customers, or that her fall and injuries were caused by any slippery condition of the floor or by any other dangerous condition on defendant's premises.

7. Negligence §§ 5.1, 53— store proprietor — duties to invitees

The proprietor of a business establishment is not required to take extraordinary precautions for the safety of his invitees, the measure of his duty being to exercise reasonable or ordinary care.

8. Negligence §§ 5.1, 57—duties to invitees — rainy days — floor mat — mopping up after customers

The mere fact that a proprietor has no mat or other covering on the floor at the entrance of its store during a period of rain is not negligence, and the proprietor cannot be held under a duty to keep a person stationed at the doors on rainy days for the purpose of mopping up after every customer entering or leaving the premises.

APPEAL by plaintiff from *Fountain, J.*, 5 August 1969 Session of CARTERET Superior Court.

This is an appeal from judgment of involuntary nonsuit entered at the close of plaintiff's evidence in a civil action in which plaintiff seeks recovery of damages for personal injuries suffered by her when she slipped and fell in defendant's store. Plaintiff alleged that her injuries were occasioned by defendant's negligence in knowingly permitting water to accumulate immediately inside the entrance door to its store and in failing to exercise due care for its patrons. Defendant answered, denying negligence on its part and pleading contributory negligence on the part of the plaintiff.

Plaintiff's testimony is summarized, except when quoted, as fol-

lows: At approximately 6:00 p.m. on 21 November 1967 plaintiff and her daughter went to defendant's store in Beaufort, N. C. to buy groceries. It was raining and had been raining since noon. They parked in the store parking lot and walked to the store entrance where there was a glass entrance door approximately five-feet wide. Plaintiff reached the entrance first and pushed the door open. Her daughter then held the door open for her while plaintiff entered the store. She put one foot inside the store and started to take another step, then "down I went in a big puddle of water." When plaintiff went down, she caught her right foot under her and slanted back and tried to catch herself with her other arm and hurt her neck. Defendant's store manager came running from his office to help, saying: "Somebody come here and wipe this water up. What's it doing here anyway?" The manager's office was eight or ten feet from the place where plaintiff fell and was enclosed in glass so that he could see out. After plaintiff fell, she observed water on the floor. There was water on the side and back of her coat and her foot and shoe were wet. The water covered the width of the door and was about four or five feet inside the door. The floor inside the store was covered with green and beige or tan asphalt tile. Water was standing on the tile. There were no warning signs warning that water was on the floor. There was no mat and no sawdust or anything else on the floor to soak up the water. Plaintiff was wearing shoes with flat heels and flat wide rubber foam-type soles. The soles on the shoes were a kind of sponge that didn't slip with plaintiff.

On cross-examination plaintiff testified that the lighting in the store was excellent and that it was just as light inside as daylight. She also testified that she had normally shopped at defendant's store and had shopped there ever since it was built and knew the store and its layout and everything about it; that she knew the ground and sidewalk were wet, and knew that if people were walking in and out of the store and in the rain that of necessity they were carrying water and dirt on their shoes; that she went to the door and made one step and her foot went out from under her and she fell. Plaintiff testified: "I wasn't looking for water, because I didn't think it would be there waiting for me." She further testified that when she walked through the door she was looking at the people straight ahead, and that she did not look down until she fell; that she didn't look where she was stepping; that if she had looked down, she could have seen the water. There was no water at any other place in the store except the puddle at the entrance.

Plaintiff's daughter testified: "I didn't have the opportunity to see anyone, because when I pushed the door open and looked down

Mama was lying in the floor." She further testified that she did not see plaintiff fall, that: "I had the door open and when I looked Mama was in the floor. It happened just that fast." The daughter also testified that after her mother fell, she observed water on the floor and that it extended from the door over to the checkout counter about eight or ten feet from the door and approximately four or five-feet wide.

Plaintiff introduced evidence as to the nature and extent of her injuries and also introduced portions of defendant's answer which alleged that: "On said occasions customers were steadily entering the store from the outside," and "the defendant had two employees mopping the floor during the entire time that it was raining."

At the close of plaintiff's evidence, the court entered judgment of nonsuit, and plaintiff appealed, making only one assignment of error, that the court erred in allowing defendant's motion for nonsuit.

Thomas S. Bennett for plaintiff appellant.

Harvey Hamilton, Jr., for defendant appellee.

PARKER, J.

[1-5] A customer entering a store during business hours attains the status of an invitee of the proprietor. *Morgan v. Tea Co.*, 266 N.C. 221, 145 S.E. 2d 877. This relationship, however, does not make the proprietor an insurer of his customers' safety while on his premises. *Routh v. Hudson-Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1. Any liability on the part of the proprietor for injuries suffered by his customers attaches only for such injuries as result from his actionable negligence. *Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33. The proprietor does owe to his customers the duty to exercise ordinary care to maintain in a reasonably safe condition those portions of his premises which he may expect they will use during business hours, and to give warning of hidden peril or unsafe conditions insofar as these can be ascertained by reasonable inspection and supervision. *Dawson v. Light Co.*, 265 N.C. 691, 144 S.E. 2d 831. If the unsafe condition is created by third parties or by an independent agency, a showing must be made that it had existed for such length of time that the store proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the danger or given warning of its presence. No inference of negligence on the part of the store proprietor arises from the mere fact of a customer's fall on the floor of his store during business hours,

the doctrine of *res ipsa loquitur* not being applicable. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E. 2d 537; *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281. See: Annotation, 62 A.L.R. 2d 6.

[6] Considering plaintiff's evidence in the light of these well-established principles, we are of the opinion that judgment of nonsuit in the present case was proper. Taking plaintiff's evidence as true, considering it in the light most favorable to her, and giving her the benefit of every reasonable inference which may legitimately be drawn therefrom, as we are required to do in passing upon a ruling on motion for nonsuit, *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783, all that has been shown is that on a rainy afternoon defendant allowed water to accumulate on the asphalt tile floor immediately inside the entrance to its store; that plaintiff entered the store as a customer; and that plaintiff there fell and was injured. In at least two respects this showing is insufficient to impose liability on defendant: First, plaintiff's evidence failed to show that defendant was in anywise negligent or had failed to exercise ordinary care to maintain its premises in a reasonably safe condition for its customers; and second, plaintiff's evidence failed to show that her fall and injuries were caused by any slippery condition of the floor or by any other dangerous condition on defendant's premises.

[7] The proprietor of a business establishment is not required to take extraordinary precautions for the safety of his invitees, the measure of his duty in this respect being to exercise reasonable or ordinary care. 65 C.J.S., Negligence, § 63(121), p. 888.

[8] In *Dawson v. Light Co., supra,* a customer-invitee sued the defendant to recover damages for personal injuries sustained when she slipped and fell on a wet or damp floor inside defendant's office. In approving judgment of nonsuit, the Court, speaking through Parker, J. (later C.J.) said:

> "No inference of actionable negligence on defendant's part arises from the mere fact that on a rainy day plaintiff suffered personal injuries from a fall occasioned by slipping on some dampness or on 'a little mud' and 'a little bit of water' just inside the door of defendant's office. . . .
>
> "There is an absence of any evidence showing that it is a common practice or precaution of prudent storekeepers or keepers of offices under similar conditions to have on rainy days a mat or other covering at the entrance of their stores or offices or on the floors of their stores or offices for invitees entering to wipe their feet on. There is no evidence here of any structural

> or unsafe defect at the entrance to defendant's office or in respect to the floor of its office. Plaintiff has no evidence tending to show that defendant did or omitted to do anything which a storekeeper or the keeper of an office of ordinary care and prudence would do under the same circumstances for the protection of its customers or other invitees. Under the facts and conditions shown here, the mere fact that defendant had no mat at the entrance to its office or on the floor of its office when the fact that it was raining was as apparent to plaintiff as to defendant is not negligence."

Justice Parker's opinion then quoted with approval from the decision in *Sears, Roebuck & Co. v. Johnson,* 91 F. 2d 332, 339, as follows:

> " 'If what was shown in this case was sufficient to permit recovery, it would require store owners to have a mopper stationed at the doors on rainy days for the sole purpose of mopping up after every customer entering or leaving the premises. Every store owner would be required to be an insurer against such accidents to public invitees who came in on rainy days with wet shoes.' "

We think the case presently before us is controlled by the reasoning of *Dawson v. Light Co., supra,* and that in this case there was no evidence to show that defendant failed to exercise ordinary care to maintain its premises in a reasonably safe condition. The case of *Powell v. Deifells, Inc.,* 251 N.C. 596, 112 S.E. 2d 56, cited by the plaintiff, is distinguishable. In that case a customer in defendant's store slipped on a wet floor while looking at merchandise and at a point in the main aisle some 20 to 25 feet from the entrance door. It had been raining all morning and at times the rain was mixed with snow. One of the clerks and the store manager, on adverse examination, testified that the floor was slippery when wet and that defendant customarily put mats at the door on rainy days and mopped with a dry mop if any water accumulated, but that on the day in question mats were not placed at the door and the store was not mopped. Under those circumstances the Court held that the question of defendant's negligence was for the jury. In the present case there was no evidence of snow or anything other than rain water being involved; plaintiff fell, not while her attention was directed to examining merchandise within the store, but immediately at the entrance; there was here no evidence that the floor was slippery when wet, and no evidence that the defendant failed to

follow usual precautionary procedures customarily employed by it in rainy weather.

[6] Furthermore, in the present case plaintiff's evidence completely fails to establish that any condition of defendant's floor or premises caused her to fall. She testified merely that on stepping inside the entrance door "down I went in a big puddle of water." Plaintiff's attorney, in his brief on this appeal, states that the floor was covered with asphalt tile and "was slippery when wet." The record before us, however, is totally devoid of any evidence that the floor here in question was in fact slippery when wet.

The judgment of nonsuit is

Affirmed.

CAMPBELL and GRAHAM, JJ., concur.

MAMIE B. QUINN v. P & Q SUPERMARKET, INC.

No. 691SC476

(Filed 17 December 1969)

1. Negligence §§ 5.1, 52— definition of invitee

The distinction between a licensee and an invitee is determined by the nature of the business bringing a person to the premises, an invitee being a person who goes upon the premises for the mutual benefit of himself and the person in possession and whose visit is of interest or advantage to the invitor.

2. Negligence §§ 5.1, 59— definition of licensee

A licensee is one who goes upon the premises for his own interest, convenience or gratification, with the consent of the person in possession, and is neither a customer nor a servant nor a trespasser.

3. Negligence §§ 5.1, 52— injury in supermarket after business hours — status of customer

Plaintiff, who was the wife of the president of defendant supermarket, had the status of an invitee at the time of her injury in the supermarket after regular business hours, where she entered the store with the permission of her husband in order to purchase some groceries.

4. Negligence § 57— injury to invitee — supermarket premises — issue of negligence

Plaintiff, who was an invitee at the time of her injury in defendant's supermarket, was entitled to have the issue of negligence submitted to

the jury if her evidence, and the legitimate inferences from it, tended to show the defendant breached a legal duty which it owed her, and that the breach of, or failure to perform, that duty proximately caused her injury.

5. Negligence §§ 5.1, 57— injury to invitee — supermarket premises — oil on floor — sufficiency of evidence

In invitee's action for injuries sustained in a supermarket when she slipped and fell on an oily substance which had dripped onto the floor from a defective flourescent light ballast, the evidence of negligence by the supermarket's proprietor was sufficient to be submitted to the jury where the evidence would support a finding that (1) the proprietor, at closing time, smelled an odor similar to that emitted by a defective ballast, but he made no search of the premises, (2) the proprietor knew from previous experience that defective ballasts might leak oil onto the floor, and (3) the proprietor did not warn the invitee, who entered the store later in the evening, that there was a possibility of oil on the floor.

6. Corporations § 27— liability for tort of employees

A corporation is liable for the torts and wrongful acts or omissions of its agents or employees acting within the scope of their authority or the course of their employment.

7. Negligence §§ 5.1, 53— liability of store proprietor to invitee — knowledge of danger

The proprietor of a store will be charged with knowledge of a dangerous condition created by his own negligence or the negligence of his employee acting within the scope of his employment, or of a dangerous condition of which his employee has notice.

8. Negligence §§ 5.1, 57— duty of store proprietor to invitee — safe condition of premises

It was the duty of supermarket proprietor to exercise ordinary care to keep the premises plaintiff invitee was expected to use in a reasonably safe condition so as not to expose her unnecessarily to danger, and to give warning of hidden conditions and dangers of which he had knowledge, or in the exercise of reasonable supervision and inspection should have had knowledge, and of which plaintiff had less or no knowledge.

9. Negligence §§ 5.1, 53— what constitutes reasonably safe premises — uses by invitees

What constitutes a reasonably safe condition of premises depends upon the uses which the proprietor invites his business guests to make of them and those which he should reasonably anticipate they will make, and also upon the known or reasonably foreseeable characteristics of the invitees.

10. Negligence §§ 5.1, 53— liability of store proprietor — notice of unsafe premises

A proprietor is charged with notice of an unsafe condition, arising from dangerous substances on the floor of the aisles of its store, if the unsafe condition has remained for sufficient time for the proprietor to know, or by the exercise of reasonable care to have known, of its existence.

APPEAL by plaintiff from *Parker, (Joseph W.), J.,* 28 April 1969 Session, CHOWAN County Superior Court.

The plaintiff is the wife of Henry G. Quinn, President of the defendant P & Q Supermarket, Inc.

On Tuesday, 21 August 1962, between 9:30 and 10:00 in the evening, plaintiff's husband called the plaintiff and told her to come and get her groceries and also asked that she bring their daughter, Glenna A. Farmer, to the P & Q Supermarket to help him paint some display advertising signs. Plaintiff liked to do her own shopping and she had mentioned to her husband at dinner that night that she needed some groceries. She had bought groceries at night before and it was not unusual for the general public to do so if there was someone in the store after regular business hours. Regular business hours were from 7:00 a.m. until 6:00 p.m.

When they arrived, lights were on in the store and Mr. Floars, an electrician, was there doing some refrigeration work. They went to Mr. Quinn's office. When Mr. Floars left, Glenna accompanied him to the door to see that it was properly locked. When Glenna did not return promptly, Mr. Quinn told the plaintiff to go and close the door and see that Glenna was not on the street.

Upon returning with Glenna, plaintiff, while carrying a small dog in her arms, slipped on an oily substance which had dripped from an overhead light fixture. As she lay on the floor where she fell, the oily substance dripped from the light fixture into her hair, eyes and onto her clothes. The light under which she fell was not lighted. It had overheated and the substance had run out. The substance was dark-colored and the floors were also dark. The light was subsequently repaired by Mr. Floars.

The substance was not on the floor when it was swept that evening at 6:00 p.m. However, when Glenna and Mr. Quinn left the store at closing time, about 6:00 p.m. that evening, they smelled an odor similar to that emitted by a faulty light fixture "ballast." They did not locate the faulty "ballast," but they did not search for it. The light fixture had "Todd" ballasts in them which had caused trouble before. When they burned out they emitted an odor and would leak oil.

As a result of her fall, plaintiff sustained injury to her right hip and leg and brings this action for damages alleging the negligence of the P & Q Supermarket, Inc. in allowing the floor to become and remain slippery. At the close of plaintiff's evidence, judgment of involuntary nonsuit was entered. Plaintiff appealed.

Thomas Chears, Jr., for plaintiff appellant.

Leroy, Wells, Shaw & Hornthal, by Dewey W. Wells, for defendant appellee.

BROCK, J.

At the outset, it is necessary to determine whether plaintiff's status at the time of the injury was that of a licensee or an invitee.

[1, 2] "The distinction between a licensee and an invitee does not depend upon whether there is an 'invitation' to come on the premises, but is determined by the nature of the business bringing him to the premises, an invitee being a person who goes upon the premises for the mutual benefit of himself and the person in possession, whose visit is of interest or advantage to the invitor, while a licensee is one who goes upon the premises for his own interest, convenience or gratification, with the consent of the person in possession, and is *neither a customer* nor a servant nor a trespasser." 6 Strong, N.C. Index 2d, Negligence, § 59; *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408.

[3] Plaintiff's evidence, which on a judgment of compulsory nonsuit must be considered in the light most favorable to her, shows that on 21 August 1962 at about 9:30 or 10:00 in the evening she drove her car to the P & Q Supermarket. She did so for two purposes. First, to take her daughter to help Mr. Quinn paint some signs; and second, so she might buy some groceries. The first purpose was fulfilled when she arrived at the supermarket with Glenna. However, to accomplish the second purpose, it was necessary for her to go into the supermarket. Plaintiff's testimony showed that she liked to do her own grocery shopping and that she had mentioned to her husband that night at dinner that she needed to buy some groceries. She testified further that "Mr. Quinn called and told me to come and get my groceries" and that when they arrived, Mr. Quinn let them both into the store.

From this it is reasonable to infer that Mr. Quinn allowed plaintiff to enter so she might buy some groceries. This would be of mutual benefit to both plaintiff and defendant and advantageous to defendant, thereby giving plaintiff the status of an invitee. *Pafford v. Construction Co., supra.*

While most cases in our reports have involved injuries sustained during regular business hours, we see no reason why it should be required that the injury occur during regular business hours for the customer to have invitee status. So long as the person goes upon

the premises for the mutual benefit of himself and the person in possession, and the visit is of interest or advantage to the invitor, the person will be considered, at least initially, an invitee.

[4] Nevertheless, to withstand a motion for judgment of nonsuit, the evidence, interpreted in the light most favorable to the plaintiff, must be sufficient to support a finding of negligence by the defendant which was a proximate cause of the plaintiff's injury. The plaintiff was entitled to have the issue of negligence submitted to the jury if her evidence, and the legitimate inferences from it, tended to show the defendant breached a legal duty which it owed her, and that the breach of, or failure to perform, that duty proximately caused her injury. We are of the opinion the evidence presented by plaintiff is sufficient to withstand defendant's motion for involuntary nonsuit.

[5] Plaintiff's evidence showed that when her daughter and Mr. Quinn left the store at closing time, about 6:00 p.m., they smelled an odor similar to that emitted by a faulty light fixture ballast and that while they did not locate the faulty ballast, they did not search for it. It was also in evidence that the "Todd" ballasts, present in some of the light fixtures, had caused trouble before, in that when a light burned out the ballasts emitted an odor and would leak oil. Mr. Floars, an electrician, testified that when the light fixtures overheated the fluid would run out of them mostly onto the floor; that he had repaired the fixture that was leaking when the plaintiff slipped by replacing the "Todd" ballast with a new type, the liquid in which hardened whenever it touched the outside of the fixture; and that he had replaced ten or more of the "Todd" ballasts in defendant's store before.

Therefore, it would be reasonable to infer, and the jury would be justified in so finding, that even though Mr. Quinn smelled the odor, he left the store at 6:00 p.m. that evening knowing there was a light fixture that had become overheated and burned out, thus causing it to leak oil, and possibly that this oil was leaking onto the floor. And that, nevertheless, when the plaintiff came to the store later that night, Mr. Quinn opened the door for her and allowed her to come in to get some groceries without giving her any warning.

[6] "It is elementary knowledge that a corporation in its relations to the public is represented and can act only by and through its duly authorized officers and agents. (Citation omitted.) The general rule is well established that a corporation is liable for the torts and wrongful acts or omissions of its agents or employees acting within the scope of their authority or the course of their employ-

ment." *Raper v. McCrory-McLellan Corp.,* 259 N.C. 199, 130 S.E. 2d 281.

[7] Also "[t]he inviter will be charged with knowledge of a dangerous condition created by his own negligence or the negligence of his employee acting within the scope of his employment, or of a dangerous condition of which his employee has notice." *Raper v. McCrory-McLellan Corp., supra.*

[8] Plaintiff was an invitee and therefore it was the duty of the defendant to exercise ordinary care to keep the premises plaintiff was expected to use in a reasonably safe condition, so as not to expose her unnecessarily to danger, and to give warning of hidden conditions and dangers of which he had knowledge, or in the exercise of reasonable supervision and inspection should have had knowledge and of which the plaintiff had less or no knowledge. *Hedrick v. Tigniere,* 267 N.C. 62, 147 S.E. 2d 550; *Brady v. Coach Co.,* 2 N.C. App. 174, 162 S.E. 2d 514; *Britt v. Mallard-Griffin, Inc.,* 1 N.C. App. 252, 161 S.E. 2d 155.

[9] "What constitutes a reasonably safe condition of premises depends, of course, upon the uses which the proprietor invites his business guests to make of them and those which he should anticipate they will make. (Citation omitted.) It also depends upon the known or reasonably foreseeable characteristics of the invitees." *Hedrick v. Tigniere, supra.*

"The measure of his [defendant-proprietor's] duty in this respect is reasonable or ordinary care, and in determining whether such care has been exercised it is proper to consider the nature of the property, the uses and purposes for which the property in question is primarily intended, and the particular circumstances of the case." *Hedrick v. Tigniere, supra.*

[10] A proprietor is charged with notice of an unsafe condition, arising from dangerous substances on the floor of the aisles of its store, if the unsafe condition has remained for sufficient time for the proprietor to know, or by the exercise of reasonable care to have known, of its existence. *Long v. Food Stores,* 262 N.C. 57, 136 S.E. 2d 275.

When Mr. Quinn allowed the plaintiff to enter the supermarket to buy groceries, he knew or should have anticipated that in shopping for the groceries she would have to walk along some, if not all, of the aisles in the supermarket.

Whether Mr. Quinn exercised reasonable or ordinary care when he failed to inspect the premises when he was on notice that a fixture

had burned out, and to keep the premises plaintiff was to use in a reasonably safe condition, and whether he warned the plaintiff of any hidden dangers or unsafe conditions of which he had knowledge or of which in the exercise of reasonable supervision and inspection he should have had knowledge, we think are questions properly to be determined by the jury.

Also, in our opinion the evidence does not show contributory negligence as a matter of law on the part of the plaintiff.

Plaintiff's evidence is sufficient to make out a *prima facie* case. The judgment of involuntary nonsuit was improvidently entered.

Reversed.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES T. KING

No. 6915SC516

(Filed 17 December 1969)

1. Automobiles § 127— driving under influence of intoxicants — sufficiency of evidence

In this prosecution for driving under the influence of intoxicating liquor, the State's evidence *is held* sufficient for the jury where it tends to show that defendant's automobile was weaving in the highway, that defendant got out of his automobile with difficulty and staggered when he tried to walk, that defendant had a strong odor of alcohol about him, that defendant talked thick-tongued, and that a breathalyzer test showed defendant to have a blood alcohol content of .23%.

2. Criminal Law §§ 118, 163— statement of contentions — failure to object at trial

Where defendant did not object to the court's statement of the State's contentions at the time they were given, objections thereto will not be considered for the first time on appeal.

3. Automobiles § 126; Criminal Law § 64— breathalyzer results — qualification of expert witness

In this prosecution for driving under the influence of intoxicating liquor, the evidence was sufficient to qualify as an expert the officer who administered a breathalyzer test to defendant, and the officer's testimony of the test results was properly admitted, where the evidence shows that the officer had received 68 hours of instruction for the breathalyzer machine and that he was licensed by the State Board of Health to administer the test, and a copy of the license to do so was introduced in evidence.

4. Automobiles § 126; Criminal Law § 64— breathalyzer results — qualification of witness

A person holding a valid permit to administer breathalyzer tests issued by the State Board of Health is qualified to administer such a test, and when such permit is introduced in evidence, the permittee is competent to testify as to the results of the test.

5. Criminal Law § 75— in-custody statements — failure to warn of right to court-appointed counsel — defendant not indigent

In this prosecution for driving under the influence of intoxicating liquor, the trial court did not err in the admission of statements made by defendant to the arresting officer after his arrest, notwithstanding the officer failed to warn defendant that he had the right to a court-appointed lawyer if he could not afford to hire one, where defendant was an educated schoolteacher who was not an indigent and who made no incriminating statements, but at all times denied that he was under the influence of intoxicating beverages.

APPEAL by defendant from *Clark, J.*, 9 June 1969 Session, ALAMANCE County Superior Court.

The defendant was tried on a warrant charging him with unlawfully and willfully driving a motor vehicle on one of the highways of the State while under the influence of intoxicating liquors. To this charge the defendant entered a plea of not guilty.

The defendant was first tried in the District Court where he was found guilty and given a 90-day sentence suspended upon condition that he pay a fine of $100 and the court costs. The defendant appealed from this judgment to the Superior Court where he was tried *de novo*. From a jury verdict of guilty and judgment thereon, the defendant appealed to this court.

The evidence on behalf of the State tended to show that on 24 December 1968 about 3:00 o'clock P.M. North Carolina State Highway Patrolman Charlie Oakley observed the defendant driving in a northerly direction on Interstate Highway 85 going toward Durham. The defendant was driving a Pontiac automobile at a speed of approximately 50 miles per hour. The patrolman noticed the automobile weaving in the highway, that is he was weaving to the left of the center line and then back to the right line at the shoulder of the road. The patrolman observed this happening several times and thereupon stopped the defendant by sounding the siren, and the defendant pulled over and stopped. The patrolman asked him to get out of the vehicle, and when he attempted to do so, the patrolman observed that he got out with difficulty, and when he tried to walk, he staggered; and the patrolman smelled the odor of alcohol on him. The defendant talked thick-tongued and motioned with his hands

very much, and the odor of alcohol was very strong on his breath. The patrolman placed the defendant under arrest and carried the defendant in the patrol car to the patrol barracks on Interstate No. 85. At the time the patrolman was in his uniform. He testified that:

> "I told Mr. King going on in to the patrol barracks that he had the right to remain silent, he had the right to make no statement, anything that he said could be used for or against him in Court, and he had the right to have an attorney."

The trial court conducted a *voir dire* examination in the absence of the jury. On the *voir dire* examination the patrolman testified that after he arrested the defendant, the trip to the patrol barracks took about 10 or 15 minutes. It was during this trip that the patrolman advised the defendant that he had the right to remain silent. The defendant advised the patrolman that he knew what his rights were. The defendant stated that he was a schoolteacher and that the automobile, which was a late model Pontiac, belonged to him.

The defendant also testified on the *voir dire* examination. It was brought out that he was 41 years of age, taught school at a junior high school in the Greensboro City School System and, in addition to that, operated a restaurant business known as "King's Barbecue" in Greensboro. The defendant has a B.S. degree from A & T College and has done work on his Master's degree at A & T College and at the University of North Carolina. The defendant testified that he was not an indigent and made no contention that he did not have ample funds with which to employ counsel.

After the *voir dire* examination the Court entered the following order:

> "The Court finds the following facts: That the defendant was arrested on Interstate Highway 85 near Graham, North Carolina, about 3:10 P.M. on the 24th day of December, 1968. That at the scene the defendant was advised that he was under arrest on the charge of driving under the influence of intoxicating liquor, and was driven by Trooper Oakley to the Patrol Barracks, a drive taking about ten minutes, and during said time he advised the defendant of his constitutional rights as required by the United States Supreme Court under the *Miranda* decision, except that said officer did not advise the defendant that he had the right to a court appointed lawyer if he could not afford to hire one, and the Court further finds that the defendant is a graduate of A & T College and is now working on his Master's degree at the University of North Carolina, Greensboro, that he was employed as a school teacher by the Greens-

boro City Schools and that he was the operator of King's Barbecue, a restaurant in Greensboro, and that the defendant has not contended that he was an indigent and has stated to the Court that he was not an indigent. That soon after arriving at the Patrol Barracks the defendant was asked questions and answered the questions and that at no time was the defendant either threatened nor was any promise made to force him to answer the questions by Trooper Oakley.

The Court concludes that his statements of admission were freely, voluntarily, knowingly and intelligently made."

Thereafter the Court permitted the State to introduce in evidence the questions that had been asked the defendant and his answers thereto.

The questions and answers which were admitted in evidence comprised a routine form questionnaire eliciting such information as where the defendant was going, where he had started, what his occupation was, what, if anything, he had had to drink, whether he was ill and taking any medicine and other questions pertaining to his physical condition. The answers indicated that the defendant was under no physical handicaps; that his occupation was a teacher; that he had had a drink of Johnny Walker at 2:00 o'clock P.M. at his home and that he was not under the influence of any alcoholic beverage.

North Carolina State Highway Patrolman R. D. Woodruff administered a breathalyzer test to the defendant at 3:34 P.M. on 24 December 1968. The test reading was .23 of 1% blood alcohol.

Officer Woodruff had nothing to do with making the arrest of the defendant. He testified that he administered the test in accordance with the rules laid down by the State Board of Health. He further testified that he had been trained as a breathalyzer machine operator and had attended a school conducted by the Department of Community Colleges, Guilford Technical Institute, and that at that school received 68 hours of instruction for the breathalyzer machine; that subsequently he had been licensed by the North Carolina State Board of Health to administer the test, and a copy of the license given to him was introduced in evidence as an exhibit, and it indicated that such license was in full force and effect at the time the test was administered.

The defendant offered testimony tending to show that on the day in question his activities had been perfectly normal and he gave a detailed description of what he had done during the day including

about 2:00 o'clock having a drink in a 6-ounce cup of 60% water and 40% alcohol. He described his driving as perfectly normal, and his testimony refuted the testimony of the State tending to show that he was in any way under the influence of any intoxicating beverage on the occasion in question. He also offered testimony from various witnesses who testified as to the good character of the defendant.

Attorney General Robert Morgan and Staff Attorney T. Buie Costen for the State.

Hampton, Comer and Harrelson by Wallace C. Harrelson for defendant appellant.

CAMPBELL, J.

The defendant makes four contentions wherein error was committed in the trial.

[1] The defendant contends that his motion for judgment as of nonsuit should have been sustained for that there was insufficient competent evidence to sustain a conviction. There is no merit in this contention. The evidence on behalf of the State when considered in the light most favorable to the State was ample and sufficient to sustain a conviction. There was raised a dispute of facts for the jury, and the jury decided these against the defendant.

[2] The defendant next contends that the trial court committed error in the charge to the jury in that the court expressed an opinion in violation of G.S. 1-180. There is no merit in this contention. The trial court correctly instructed the jury as to the pertinent law and applied the same to the evidence in order to give a satisfactory explanation. The trial judge gave the respective contentions of both the State and the defendant and in doing so clearly designated the same as contentions. The defendant at no time objected to the statement of such contentions at the time they were given by the trial judge. The following rule would be applicable:

> "There are in the record many exceptions lodged to the contentions by the State given in his Honor's charge and these exceptions are preserved in the assignments of error, and some of them are set out in the appellant's brief, but in no instance did the defendant object to the statement of such contentions at the time they were given, and objections thereto for the first time being made upon appeal in this Court would seem to be untenable." *State v. Baldwin,* 226 N.C. 295, 37 S.E. 2d 898 (1946).

[3] The third contention of the defendant is to the effect that the trial court committed error in permitting the introduction in evidence of the results of the breathalyzer test. The defendant asserts that Officer Woodruff who gave the breathalyzer test to the defendant was not shown to be a qualified person to give such test. The defendant relies upon the case of *State v. Mobley,* 273 N.C. 471, 160 S.E. 2d 334 (1968). The instant case is readily distinguishable from the *Mobley* case. In the *Mobley* case it was held that the evidence was entirely too meager to show the qualifications of the person making the test. In the instant case the evidence reveals that Officer Woodruff had received 68 hours of instruction for the breathalyzer machine and that he was licensed by the North Carolina State Board of Health to administer the test, and a copy of the license to do so was introduced in evidence. The relevant statute provides:

> ". . . The State Board of Health is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Board of Health. . . ." G.S. 20-139.1(b).

[4] We are of the opinion that a person holding a valid permit issued by the State Board of Health is qualified to administer a breathalyzer test. When such permit is introduced in evidence, the permittee is competent to testify as to the results of the test.

[5] The fourth contention made by the defendant is that there was error in admitting the testimony of the arresting Officer, Oakley, when the defendant had not been sufficiently warned and advised as to his constitutional rights to remain silent. The defendant relies upon the case of *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171 (1968). The *Thorpe* case is readily distinguishable from the instant case.

In the *Thorpe* case the defendant was a "dull, retarded, uneducated indigent" 20 years of age who had not even completed the third grade in school. As a result of questioning the defendant, many incriminating statements were procured by the officers. In the instant case the defendant was an educated schoolteacher who was not an indigent and who made no incriminating statements, but to the contrary at all times denied that he was under the influence of any intoxicating beverages. Before admitting any statements of the defendant in the instant case the trial judge conducted a *voir dire* examination and entered an order finding the facts based upon competent evidence, and the findings made by the trial judge supported

his conclusion that the statements made by the defendant were "freely, voluntarily, knowingly and intelligently made."

We think the statements made by the defendant to Officer Oakley were competent. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966).

The defendant had a fair and impartial trial free from any prejudicial error in law. The jury as the trier of the facts found the facts to be contrary to the contentions of the defendant. We find in law

No error.

PARKER and GRAHAM, JJ., concur.

LUCILLE CLEMMONS v. LIFE INSURANCE COMPANY OF GEORGIA
No. 695SC437

(Filed 17 December 1969)

1. Trial § 29— voluntary nonsuit as a matter of right

When the defendant has asserted no counterclaim and demanded no affirmative relief, the plaintiff may take a voluntary nonsuit as a matter of right at any time before the verdict is accepted and made known.

2. Trial § 29— voluntary nonsuit as a matter of right — timeliness of motion — verdict

Plaintiff is entitled to a judgment of voluntary nonsuit as a matter of right, where his motion for nonsuit was made after the jury's verdict had been delivered to the trial judge and found by him to be determinative of the issues, but before the contents of the verdict had been made known to any person other than the members of the jury and the trial judge.

APPEAL by defendant from *Peel, J.*, 12 May 1969 Civil Session of NEW HANOVER Superior Court.

Plaintiff sued to recover compensatory and punitive damages from the defendant for an assault which plaintiff alleged had been made upon her by Morris Weeks, an agent of the defendant, while at her home for the purpose of collecting an insurance premium. On a previous appeal of this case, an order of the superior court sustaining demurrer to the complaint was reversed. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761. The case then came on for trial in the superior court, when both plaintiff and defendant offered evidence. The case was submitted to the jury on the following issues:

FIRST: Was the plaintiff, Lucille Clemmons, assaulted by Morris Weeks as alleged in the complaint?

ANSWER:

SECOND: If so, at the time of said assault was Morris Weeks acting as the agent or employee of the defendant, Life Insurance Company of Georgia, and acting within the scope and course of his employment with said defendant?

ANSWER:

THIRD: What amount, if any, is the plaintiff entitled to recover of the defendant, Life Insurance Company of Georgia, as compensation for her injuries and damages as alleged in the complaint?

ANSWER:

FOURTH: What amount, if any, is the plaintiff entitled to recover of the defendant, Life Insurance Company of Georgia, as punitive damages?

ANSWER:

After the jury retired to consider its verdict, the court took a ten-minute recess. During the recess, the deputy sheriff who was acting as bailiff advised the court that the jury wanted to come in, whereupon the court instructed the deputy to tell the jury to wait until the recess was over. Before the jury returned to the box, counsel for plaintiff asked the court whether the jury had arrived at a verdict. The court stated that its recollection was that the deputy sheriff said the jury wanted to come in. As the jurors were returning to the box, the deputy brought the issues into the courtroom and handed them to the judge. The court looked at the issues, saw that the answer to issue No. 1 was "No," and that the other issues were not answered. The court found that such an answer was determinative of the issues, but made no statement. As the court was handing the issues to the clerk and before any announcement was made, and before any person other than the judge and jury knew the verdict, counsel for plaintiff stated in open court, "Plaintiff takes a voluntary nonsuit." The court at first denied plaintiff's motion for voluntary nonsuit and ordered the clerk to proceed with the taking of the verdict. The deputy clerk then took the verdict as follows:

> DEPUTY CLERK: "Ladies and Gentlemen of the jury, please stand. Ladies and Gentlemen, you have all agreed, and your answer to first issue, 'No,' so say you all?"
>
> JURORS: "Yes."

The court thereafter reconsidered the matter and declined to sign judgment on the verdict as tendered by defendant, and instead entered judgment of nonsuit. Defendant appeals, the only assignment of error being to the court's action in refusing to sign judgment on the verdict as tendered by defendant and in signing judgment of nonsuit as submitted by plaintiff.

W. G. Smith and Jerry L. Spivey, for plaintiff appellee.

Marshall & Williams, by Lonnie B. Williams, for defendant appellant.

PARKER, J.

It is a generally recognized principle of English-American law that a plaintiff is not bound to prosecute his action to a finish merely because he has begun it, but may, up to some point in the litigation, abandon his action without losing his right to come back on another day. The sole question presented by this appeal is whether plaintiff's voluntary nonsuit in this case was taken in apt time to entitle him to judgment of nonsuit as a matter of right.

[1] While under the practice in a number of jurisdictions a plaintiff may no longer take a voluntary nonsuit after the jury has retired to consider their verdict, 27 C.J.S., Dismissal and Nonsuit, § 20, p. 344, North Carolina has continued up until the present time to follow the common-law rule which permitted the plaintiff to take a nonsuit at any time before the verdict. "When the defendant has asserted no counterclaim and demanded no affirmative relief, the plaintiff may take a voluntary nonsuit as a matter of right at any time before the verdict." *Mitchell v. Jones,* 272 N.C. 499, 158 S.E. 2d 706. We note that this rule of practice has been changed by the adoption of our new Rules of Civil Procedure. Rule 41(a)(1)(i), as rewritten by Chap. 895 of the 1969 Session Laws, provides that an action or any claim therein may be dismissed by the plaintiff without an order of court "by filing a notice of dismissal *at any time before the plaintiff rests his case.*" (Emphasis added.) The new rules, however, will not become effective until 1 January 1970, and disposition of the present appeal must be controlled by the existing practice in this State.

"The rule is uniformly observed in this State that a plaintiff, in an ordinary civil action, against whom no counterclaim is asserted and no affirmative relief is demanded, may as a matter of right, take a voluntary nonsuit and get out of court at any time before verdict,

and his action in so doing is not reviewable, and it is error for the court to refuse to permit him to take the voluntary nonsuit." *Insurance Co. v. Walton,* 256 N.C. 345, 123 S.E. 2d 780. In that case the jury had returned to the courtroom to render its verdict, and while the deputy sheriff was on the way to the judge's bench to deliver the issues to the judge, plaintiff's attorney arose and moved to be permitted to take a voluntary nonsuit. The trial judge at first refused the motion and took the verdict, which was rendered against the plaintiff. Subsequently the trial court allowed the motion of plaintiff for voluntary nonsuit, and on appeal the Supreme Court affirmed, holding that the plaintiff had acted in apt time to withdraw his suit and had a right to do so. In arriving at this decision, the opinion of the Supreme Court written by Moore, J., cited G.S. 1-224 which provides: "In actions where a verdict *passes* against the plaintiff, judgment shall be entered against him." (Emphasis added.) The opinion also laid stress upon the language which had been employed by Chief Justice Pearson in the early case of *Graham v. Tate,* 77 N.C. 120, quoting from the decision in that case as follows: "A plaintiff can at any time before verdict withdraw his suit, or, as it is termed, 'take a nonsuit'. . . . (A)ccording to the course of the court, the plaintiff is at liberty to take a nonsuit by announcing his purpose to absent himself even after the judge has charged the jury and their verdict is made up; provided he does so before the verdict is *made known.*" (Emphasis theirs.)

In discussing the North Carolina practice as affected by G.S. 1-224 and by the decision in *Graham v. Tate, supra,* Justice Moore in *Insurance Co. v. Walton, supra,* said:

> "We conclude that a verdict 'passes,' when it has been accepted by the trial judge for record. And a plaintiff may take a voluntary nonsuit at any time before the verdict is accepted and before it is 'made known.' A verdict is accepted by the judge when he has inspected it and finds, or should as a matter of law find, that it is determinative of the issues involved. A verdict is 'made known' when its contents have been seen or heard by any person or persons other than the jury serving on the case, the trial judge, and a court official or court officials acting in the presence of the judge and under his direction with respect to the verdict."

[2] In the case before us, plaintiff's motion for nonsuit was made after the jury's verdict had been delivered to and inspected by the trial judge and after he had found that it was determinative of the issues involved in this case. However, the verdict had not yet been

"made known," in the sense defined in the *Walton* case. We note that the language employed by the Supreme Court in laying down the timeliness rule in *Walton* was expressly that "a plaintiff may take a voluntary nonsuit at any time before the verdict is accepted *and* before it is 'made known.'" (Emphasis added.) The court did not say that a plaintiff may take a voluntary nonsuit at any time before the verdict is *either* accepted *or* made known. Under the language employed by the Supreme Court, plaintiff's right to take a voluntary nonsuit did not expire until both events had occurred. Therefore, plaintiff's motion for voluntary nonsuit in the present case was made in apt time and the decision of the superior court so holding is

Affirmed.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. WALTER JONES

No. 692SC378

(Filed 17 December 1969)

1. Criminal Law § 164— refusal to nonsuit — assignment of error — evidence offered by defendant

Where defendant offers evidence in his own behalf, his assignment of error must be directed to the court's refusal to grant his motion for compulsory nonsuit at the close of all the evidence. G.S. 15-173.

2. Homicide § 14— presumptions from killing with deadly weapon

When the killing with a deadly weapon is admitted or established, presumptions arise (1) that the killing was unlawful, and (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree.

3. Homicide §§ 4, 5— specific intent to kill — second degree murder

A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder.

4. Homicide § 14— intentional use of deadly weapon — presumptions

The intentional use of a deadly weapon, when death proximately results from such use, gives rise to the presumptions of unlawfulness and malice.

5. Homicide § 21— second degree murder — sufficiency of evidence — physical facts — accidental death

In this prosecution for second degree murder, the physical facts as dis-

closed by defendant's evidence did not clearly establish an accidental shooting, and the case was properly submitted to the jury where the State's evidence tended to show that defendant intended to shoot a third person but mistakenly shot and killed the deceased.

6. Criminal Law § 76— inculpatory statements — Miranda warnings — necessity for voir dire — failure to object

In this prosecution for second degree murder, the trial court did not err in allowing the arresting officer to testify as to inculpatory statements allegedly made to him by defendant without requiring the State to show that the *Miranda* warnings were given and that defendant freely, voluntarily and understandingly made the statements, where defendant did not object to the officer's testimony or in any way indicate that he desired an examination of the officer and findings by the court.

7. Criminal Law § 115— submission of lesser degrees of crime charged

Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit to the jury the issue of defendant's guilt of such lesser included offense, and the error of failure to submit such issue is not cured by a verdict convicting defendant of the offense as charged.

8. Homicide § 30— second degree murder — failure to submit issue of manslaughter

In this prosecution for second degree murder, the trial court did not err in failing to submit to the jury the question of defendant's guilt of the lesser included offense of manslaughter.

9. Homicide § 2— intent to kill another — mistaken killing of deceased

If defendant intended to assault a third person with a deadly weapon, but by mistake assaulted deceased with a deadly weapon, thereby proximately causing his death, the presumptions would arise that the killing was unlawful and with malice, and defendant's guilt is the same as though he had killed the third person.

APPEAL by defendant from *Fountain, J.*, 28 April 1969 Session, WASHINGTON Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the felony of murder. Upon the case being called for trial the solicitor announced that the State would not seek a conviction of murder in the first degree, but would seek a verdict of guilty of murder in the second degree or any lesser included offense. Defendant entered a plea of not guilty.

The State offered evidence which tended to show the following: On 19 January 1969 defendant's wife and children had gone to the home of William and Juanita Hammie on West Water Street in the Town of Plymouth. The Hammie home was about three houses from defendant's home. The deceased, Jethroe Bonner, one William "Buddy" Boyd, and several other persons were also visiting in the

Hammie home. The deceased, Jethroe Bonner, lived next door to the Hammies. Jethroe Bonner left the Hammie house shortly before midnight to go to his home and about fifteen minutes later a shot was heard outside the Hammie house. When the light on the Hammie front porch was turned on, Jethroe Bonner was lying on the ground gasping for breath and defendant was "standing over him" with a shotgun in his hand. Defendant stated, "I shot the wrong man." The next day defendant told the arresting officer that he did not have anything against Jethroe Bonner and that he did not intend to shoot him, that he just made a mistake. He told the arresting officer that he had intended to shoot "Buddy" Boyd, but that he shot the wrong man. He further told the officer that he was standing about fifteen feet from Jethroe Bonner when the gun fired. Jethroe Bonner was dead upon arrival at the hospital. The cause of death was a wound in the chest from the load of one shotgun shell.

Defendant offered evidence which tended to show the following: "Buddy" Boyd had been "running around" with defendant's wife, and on several occasions had engaged in altercations with defendant. On the night in question, 19 January 1969, defendant went to the home of William and Juanita Hammie shortly before midnight to get his wife and children to come home. "Buddy" Boyd, who was also visiting at the Hammie residence, came out of the house and slapped defendant. A brief fight ensued. "Buddy" Boyd told defendant: "That's all right, you got me now but I will get something. I'll come back, I'm going to finish you off." Defendant then left the Hammie house and returned to his own home where he secured his shotgun. He obtained the shotgun to protect himself from "Buddy" Boyd. He then started back to the Hammie house to get his wife and children. As he walked along with the shotgun under his arm he did not see anyone. Jethroe Bonner suddenly grabbed the barrel of the shotgun, snatched the gun from under defendant's arm and it fired, the load from the shell striking Jethroe in the chest. Defendant did not see Jethroe Bonner until after he snatched the gun.

From a verdict of guilty of murder in the second degree, and from judgment of imprisonment, defendant appealed.

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

W. L. Whitley for defendant.

BROCK, J.

[5] Defendant assigns as error the refusal of the trial judge to allow his motion for nonsuit renewed at the close of all the evidence.

Defendant strenuously argues that the physical facts as disclosed by defendant's evidence clearly establish that the shooting was accidental, that Jethroe Bonner himself caused the shotgun to fire when he snatched it by the barrel. He argues that the size of the wound and the lack of profuse bleeding clearly indicates that the shot was fired at close range, and that this physical fact shows that Bonner pulled the barrel to his own chest as defendant testified. However, defendant overlooks the fact that there is absolutely no evidence in this record to indicate the size of the wound, and no positive evidence of the amount of bleeding. Nevertheless, even if the shot was fired at close range, such a physical fact would also be consistent with the State's evidence that the defendant intended to shoot "Buddy" Boyd, but that he shot the wrong man. Defendant himself testified that it was extremely dark that night and this testimony would tend to explain a misidentification of an intended victim.

[1] It is true that defendant's evidence to some extent contradicts that of the State, but this conflict was for the jury, not the Court, to resolve. Where defendant offers evidence in his own behalf, his assignment of error must be directed to the Court's refusal to grant his motion for compulsory nonsuit at the close of all the evidence. G.S. 15-173; *State v. Cotten,* 2 N.C. App. 305, 163 S.E. 2d 100. And all of the evidence actually admitted, whether competent or incompetent, including that offered by defendant, if any, which is favorable to the State, must be taken into account and so considered by the Court in ruling upon a motion for nonsuit. *State v. Walls,* 4 N.C. App. 661, 167 S.E. 2d 547.

Defendant further argues that the State failed to offer evidence that defendant intentionally killed the deceased; he relies heavily upon *State v. Gregory,* 203 N.C. 528, 166 S.E. 387. The holding in *Gregory* has been amplified as follows: "In *S. v. Gregory* (citation) where the defense was that an *accidental* discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an *intentional killing* with a deadly weapon; and since the *Gregory case* it has been often stated that these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, *intentional killing,* is not used in the sense that a specific intent *to kill* must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. (Citations)" *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

[2-5] When the killing with a deadly weapon is admitted or

established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889; *State v. Gordon, supra.* A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder. *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638; *State v. Gordon, supra.* The intentional use of a deadly weapon, when death proximately results from such use, gives rise to the presumptions. *State v. Gordon, supra.* When considered in the light of the foregoing principles, and viewing the evidence in the light most favorable to the State, giving to the State the benefit of every reasonable inference that may be drawn, as must be done in passing upon a motion for nonsuit, *State v. Adams,* 2 N.C. App. 282, 163 S.E. 2d 1, we hold that the State's evidence was sufficient to require submitting the case to the jury.

[6] Defendant argues that he is entitled to a new trial because of error in allowing the arresting officer to testify as to inculpatory statements allegedly made to him by defendant without requiring a showing by the State that all of the *Miranda* warnings were given and that defendant freely, voluntarily and understandingly made the statements. Defendant did not object to the officer's testimony; nor did he in any way indicate that he desired an examination of the officer and findings by the trial judge upon the question. Defendant was content to allow the officer to relate his statements, and he cannot raise this objection for the first time on appeal. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481. We note also that William Hammie, as a witness for the State, testified, without objection, that defendant told him at the scene, "I shot the wrong man."

[7, 8] Defendant assigns as error that the trial judge refused to submit to the jury the question of defendant's guilt of the lesser included offense of manslaughter. "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, . . ." G.S. 15-170. Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit to the jury the issue of defendant's guilt of such lesser included offense, and the error of failure to submit such issue to the jury is not cured by a verdict convicting defendant of the offense as charged. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652. However, the necessity for submitting to the jury the issue of defendant's guilt of a lesser included offense arises when and only when there is evidence from which the jury could find that

such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27; *State v. Williams,* 2 N.C. App. 194, 162 S.E. 2d 688. In this case there is no evidence that requires submitting to the jury the issue of his guilt of voluntary manslaughter. Also, there is no evidence of culpable negligence in his handling of the shotgun, and therefore the issue of his guilt of involuntary manslaughter does not arise. Upon the evidence in this case we hold that the trial judge was correct in refusing to submit an issue of manslaughter to the jury.

Defendant assigns as error several portions of the trial judge's instructions to the jury. We have considered the instructions in their entirety, and when read contextually, as must be done, we perceive no error prejudicial to defendant.

[9] If defendant intended to assault "Buddy" Boyd with a deadly weapon, but by mistake assaulted Jethroe Bonner with a deadly weapon, thereby proximately causing Bonner's death, the presumptions would arise that the killing was unlawful and that it was done with malice; and defendant's guilt is the same as though he had killed "Buddy" Boyd. See *State v. Heller,* 231 N.C. 67, 55 S.E. 2d 800; *State v. Burney,* 215 N.C. 598, 3 S.E. 2d 24.

Defendant strongly contended, and his evidence tended to show, that Jethroe Bonner caused his own death by snatching the barrel of the gun to his chest and causing it to fire the fatal shot. Under proper instructions from the Court the jury considered defendant's contention of an accidental shooting, but they resolved the conflict in the evidence against defendant. In our opinion the evidence supports the verdict and the verdict supports the judgment.

No error.

BRITT and VAUGHN, JJ., concur.

RUBY GRAVES v. CHARLES M. HARRINGTON AND C. M. HARRINGTON, JR., TRADING AND DOING BUSINESS AS HYMAN SUPPLY COMPANY

No. 695SC541

(Filed 17 December 1969)

1. Negligence § 35— nonsuit for contributory negligence — sufficiency of evidence

In this action for personal injuries sustained by plaintiff when her face struck pipe protruding from defendants' truck as she left her place of

employment, plaintiff's evidence did not disclose contributory negligence on her part as a matter of law but presented jury questions as to whether she was contributorily negligent in failing to see the pipe, in walking down the pedestrian ramp under the circumstances disclosed by the evidence, and in momentarily turning her head when a co-employee called to her to "watch out."

2. Customs and Usages; Negligence § 27— warning flag — customs

In this action for personal injuries sustained by plaintiff when her face struck pipe protruding from defendants' truck as she left her place of employment, the trial court did not err in the admission of testimony concerning the absence of a red flag on the end of defendants' load of pipe and in the admission of testimony concerning the custom of parking trucks at the plant of plaintiff's employer.

3. Appeal and Error § 45— abandonment of assignments of error

Assignments of error not discussed in the brief are deemed abandoned.

4. Damages §§ 3, 13— evidence of medical treatment — failure to show proximate cause

In this action for personal injuries sustained by plaintiff when her face struck pipe protruding from defendants' truck as she was leaving her place of employment, the trial court erred in the admission of testimony by plaintiff as to medical treatment she received over a year after the complaint in this action was filed, and of expense and loss of time from work by reason of such treatment, where no connection was shown between the accident in question and the necessity for such treatment, and there were no facts in evidence from which a layman of average intelligence would know what caused the necessity for such treatment.

APPEAL by defendants from *Bone, E.J.*, 28 April 1969 Session, NEW HANOVER Superior Court.

Plaintiff brings this action to recover damages for personal injuries allegedly caused by the negligence of defendants.

Plaintiff's evidence tended to show the following: On 16 March 1966 plaintiff was employed by Garver Manufacturing Company in the City of Wilmington, North Carolina. At about 2:45 p.m. of that day plaintiff, along with other employees of Garver, completed her work and was leaving her place of employment to go home. The usual and customary route for employees of Garver from the building to the parking lot was by a door at the back of the building, down a ramp, and into the parking lot. The ramp provided for employees of Garver was for pedestrian traffic only; a ramp for loading and unloading trucks was separately constructed for ingress and egress through a different door at the back of the building.

On 16 March 1966, shortly before 2:45 p.m., defendants' driver was delivering a load of six or eight pieces of ¾ inch galvanized

pipe, twenty-one feet in length. The pipe was a "silverish gray" color and protruded six to eight feet beyond the rear end of defendants' truck. Defendants' driver backed the truck up to the lower end of the pedestrian ramp so that the pipe extended six to eight feet over the ramp at a height of about five and one-half feet above the lower end of the pedestrian ramp. The pipe did not protrude the full width of the ramp. When defendants' driver parked the truck in this position, Mr. Rivenbark, the safety coordinator for Garver Manufacturing Company, told him he had parked at the wrong place; that "he needed to move his truck because his pipe sticking over there was dangerous with no warning flag on it and someone was liable to get hurt." Without moving the truck, defendants' driver went on into the building to get the receiving clerk to accept delivery.

While defendants' driver was still in the building, plaintiff and several other employees of Garver left the building to go home. The sun was shining brightly and vision was difficult for a few minutes after coming out of the artificially lighted building. Two of plaintiff's co-workers, who were slightly ahead of plaintiff, did not see the protruding pipe until they were beside it. Plaintiff was walking to the right of one of her co-workers, Mrs. Matthews, and when Mrs. Matthews came abreast of the pipe she saw it and called to plaintiff to "watch out." Just as Mrs. Matthews called out, plaintiff looked towards Mrs. Matthews and immediately plaintiff's face struck the protruding pipe. Plaintiff did not see the pipe until after her face struck it. As a result of striking the pipe plaintiff suffered a fracture of her nose and a fracture of her jaw for which she was hospitalized.

Plaintiff's evidence further tended to show loss of time from work, medical expenses, pain and suffering, and some present injury.

Defendants' evidence tended to show the following: On the day in question defendants' driver was delivering to Garver Manufacturing Company three twenty-one foot lengths of black galvanized pipe. Defendants' driver did not back the truck up to the pedestrian ramp; he parked the truck parallel with the loading ramp and none of the pipe was protruding over the pedestrian ramp. No one said anything to him about the way he parked the truck.

From a jury verdict in favor of plaintiff, and judgment entered thereon, defendants appealed.

Aaron Goldberg and Herbert P. Scott, by Aaron Goldberg, for plaintiff.

Poisson & Barnhill, by M. V. Barnhill, Jr., for defendants.

BROCK, J.

[1] Defendants assign as error the refusal of the trial judge to grant defendants' motion for judgment of involuntary nonsuit. Defendants contend that plaintiff's evidence discloses that she was contributorily negligent as a matter of law. We do not agree.

Whether, under the circumstances as disclosed by the evidence, plaintiff, in the exercise of that degree of care which a reasonably prudent person would exercise for his own safety, could or should have seen the pipe was a question for jury determination under proper instructions from the Court. It was likewise for jury determination whether plaintiff exercised due care for her own safety in walking down the pedestrian ramp under the circumstances disclosed by the evidence. And further, it was a question for jury determination whether plaintiff acted as a reasonable and prudent person in momentarily turning her head when Mrs. Matthews called out to her to "watch out." This assignment of error is overruled.

[2] Defendants assign as errors (Assignments Nos. 1 and 2) that the trial court admitted testimony concerning the absence of a red flag on the end of defendants' load of pipe, and admitted testimony concerning the custom of parking trucks at the Garver Manufacturing Company plant. These assignments of error are overruled.

[3] Defendants' assignment of error No. 3 is not discussed in their brief and is therefore deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

By assignment of error No. 7, defendants contend the Court erred in its charge to the jury. Since there must be a new trial we do not deem it necessary to discuss this assignment of error.

[4] Defendants assign as error that the trial court allowed plaintiff to testify concerning treatment at Duke University Medical Center in January 1968 without showing connection between the 16 March 1966 accident and the necessity for the treatment received in 1968. This assignment of error has merit.

Plaintiff offered evidence, through her own testimony and that of the doctor, that she was treated immediately after the accident by Dr. Hooper Johnson; that he hospitalized her for a fracture of her nose and a fracture of the middle third of her face. This fracture was demonstrated by observing motion when pressure was applied to her upper teeth; it was treated by securing a wire from the back teeth onto the cheekbone on both the right and left side. The wires were removed on 22 April 1966; the doctor felt that he got good results; and he did not see plaintiff again until 20 January 1969.

Plaintiff further offered evidence, through her own testimony and that of the doctor, that she was examined by Dr. Robert A. Moore in November and December 1966. Dr. Moore detected some swelling and tenderness over the right cheek and the upper jaw, the right maxilla.

Thereafter plaintiff was allowed, over objection, to testify that in December 1967 (approximately a year after her last visit to Dr. Moore) she saw a Dr. Dorman; where and for what is not disclosed. Plaintiff offered no evidence from Dr. Dorman. Also, over objection, plaintiff was allowed to testify that she was operated on at Duke University Medical Center in January 1968 (approximately twenty-two months after the accident, and over a year after the complaint was filed in this action). It is interesting to note that when plaintiff first mentioned Duke University Medical Center in her testimony, it was in reply to a question from her counsel as follows:

"Q. Did you have some loss subsequent to that?

"A. Yes, when I went to Duke.

"OBJECTION.

"MR. GOLDBERG: I am not contending for it."

The only reasonable interpretation of counsel's reply to the objection is that plaintiff was not contending she was entitled to damages by reason of whatever treatment she received at Duke. Nevertheless, plaintiff was allowed to continue with testimony of expense and loss of time from work by reason of her treatment at Duke. Plaintiff was allowed to testify, over objection, that at Duke: "They cut the ends of my jawbone off to relieve some of the pressure." There is not a scintilla of medical evidence to relate the necessity for such an operation to the March 1966 accident. In order for plaintiff to be entitled to recover damages for the hospitalization at Duke University Medical Center, she must show that the damages claimed were the natural and probable result of the negligence complained of. 3 Strong, N.C. Index 2d, Damages, § 2, p. 165. There are no facts in evidence from which a layman of average intelligence would know what caused the necessity for the operation in January 1968, and the jury could only indulge in speculation as to why it was necessary to cut off the ends of plaintiff's jawbones. "Where 'a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony.'" *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753.

The admission of this testimony without proper connection and foundation constituted prejudicial error which entitles defendants to a

New trial.

BRITT and VAUGHN, JJ., concur.

BRENDA ESTELLE FORD, MINOR BY HER NEXT FRIEND, JOHNNY FORD v. WILLIE LLOYD JONES AND MARY ARMSTRONG HUMPHREY

AND

FRANCES RANDALL FORD v. WILLIE LLOYD JONES AND MARY ARMSTRONG HUMPHREY

No. 695DC452

(Filed 17 December 1969)

1. Negligence § 37— instructions on negligence — allegation and proof

Before a breach of law or duty may be submitted for jury determination there must be both allegation and proof of such breach.

2. Automobiles § 90— accident case — instructions — careless and reckless driving

In an action arising out of a collision between the automobiles of plaintiff and defendant at an uncontrolled intersection, instruction as to plaintiff's careless and reckless driving in violation of G.S. 20-140 was properly submitted to the jury, where the evidence tended to show that plaintiff was a considerable distance from the intersection when she saw defendant's car approaching from her left at a high rate of speed, that plaintiff continued toward the intersection at an excessive speed and failed to apply her brakes until it was too late to avoid the collision, and that at the time of collision defendant had already entered the intersection and had the right of way.

3. Trial § 33— instructions — applying statute to the evidence

It is error for the trial court to read the provisions of a statute to the jury without giving an explanation thereof in connection with the evidence, where such explanation is necessary to inform the jury as to the meaning of the statute and as to its bearing on the case.

4. Automobiles § 90— accident case — instructions — reckless driving

Instructions on the issue of negligence which incorporate the provisions of the reckless driving statute, G.S. 20-140, without applying the statute to the evidence, *held* prejudicial.

APPEAL from *Tillery, District Judge,* April 1969 Civil Session, NEW HANOVER District Court.

These are civil actions arising from a collision between an automobile owned by plaintiff Frances Randall Ford and operated by her daughter, the minor plaintiff Brenda Estelle Ford, and an automobile owned by defendant Mary Armstrong Humphrey and operated by defendant Willie Lloyd Jones. The minor plaintiff's suit sought to recover damages for her personal injuries and her mother's suit was for damages to her automobile. Defendants answered in both cases denying agency and negligence. In the minor plaintiff's case defendant Jones counterclaimed to recover for his personal injuries and the defendant Humphrey counterclaimed for damages to her automobile. The cases were consolidated for trial.

The accident occurred at approximately 9:30 p.m., 20 August 1967, in an uncontrolled intersection in the City of Wilmington. The speed limit was 35 miles an hour. The plaintiffs' evidence tended to show that as the minor plaintiff approached the intersection she observed the defendants' vehicle approaching from her left at a speed in excess of 40 miles per hour. She immediately applied her brakes. Her car came to a stop just before the collision. The defendants' car continued into the intersection without reducing its speed and struck plaintiffs' car with sufficient force to turn it completely around in the intersection. There was an odor of alcohol about defendant Jones and about the car he was driving. The minor plaintiff stated on cross-examination that she first saw the lights of defendants' car moving toward the intersection at a high rate of speed when she was half a block from the intersection, but at that time she thought he would stop. She also admitted testifying on adverse examination that she did not swerve or blow her horn but just lifted her hands from the wheel and "let her go."

Defendants' evidence was that when defendant Jones got to the intersection plaintiffs' car was half way down the block; that Jones tried to clear the intersection but because his car did not have sufficient "pickup" and because of the high rate of speed of plaintiffs' vehicle he was unable to do so. Plaintiffs' car skidded 52 feet into the intersection before striking defendants' car in the right side. It continued skidding for an additional 14 feet after the collision. Both cars were extensively damaged.

The jury answered all issues against plaintiffs and awarded damages to defendants on their counterclaims. Plaintiffs appealed from the judgment entered on the verdict.

Aaron Goldberg and Herbert P. Scott for plaintiff appellants.

James, James & Crossley by John F. Crossley for defendant appellees.

GRAHAM, J.

After reviewing the evidence with commendable accuracy the court instructed the jury that the plaintiff was invoking the alleged violation by defendant of one or more statutes including the statute on reckless driving. The court then stated the provisions of the reckless driving statute (G.S. 20-140) and other statutes allegedly violated and charged:

> "[T]hat if the plaintiff has fulfilled the responsibility put upon him by law to the extent that the evidence, by its quality and convincing power, has satisfied you by its greater weight, that at the time and place complained of the defendant Willie Jones was negligent either in respect to reckless driving or in failing to keep a proper lookout, or in failing to yield right of way as the court has defined those terms to you; that it would be your duty to answer the second issue 'YES'. If, on the other hand, the plaintiff has so failed to satisfy you as to one or all of those allegations or things, the court charges you it will be your duty to answer the second issue 'NO'."

In instructing as to the minor plaintiff's negligence the court stated: "I have given you earlier in this charge while discussing the second issue [negligence of defendant Jones] the law as it relates to reckless operation — reckless driving." The court then charged that if the jury found that on the occasion complained of the minor plaintiff operated her automobile on a public highway or street at the time and place complained of and was negligent in that she drove her automobile recklessly or violated other enumerated statutes and that such act or acts was a proximate cause of the collision the issue as to the minor plaintiff's negligence should be answered yes.

Plaintiffs assign as error the summarized portions of the charge contending that (1) the evidence was insufficient to support a charge as to reckless driving and (2) that if the evidence was sufficient the court nevertheless erred by failing to adequately explain the law of reckless driving and to apply the law to the facts of the case.

[1] Before a breach of law or duty may be submitted for jury determination there must be both allegation and proof of such breach. *Motor Freight v. DuBose,* 260 N.C. 497, 113 S.E. 2d 129; *Sugg v. Baker,* 258 N.C. 333, 128 S.E. 2d 595. Where there is no evidence that the person charged with negligence drove his vehicle in such a manner as to constitute reckless driving it is error for the court to charge that reckless driving is an element of negligence to be considered by the jury. *Roberts v. Freight Carriers,* 273 N.C. 600, 160

S.E. 2d 712; *Williams v. Boulerice,* 269 N.C. 499, 153 S.E. 2d 95; *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62; *Nance v. Williams,* 2 N.C. App. 345, 163 S.E. 2d 47.

[2] We conclude that the evidence and pleadings in this case afford a basis for an instruction on reckless driving as an element of negligence. There was evidence from which the jury could find that when the minor plaintiff was a considerable distance from the intersection she saw defendants' car approaching the intersection at a high rate of speed and that she nevertheless continued toward the intersection at an excessive and unlawful speed; that she failed to apply her brakes or bring her car under control until it was too late to avoid the collision; and that she entered the intersection and struck defendants' vehicle in the side at a time when defendants' vehicle was already in the intersection and had the right of way. The jury could further find that such acts import a thoughtless disregard for the consequences or a heedless indifference to the safety and rights of others. Such findings would support a conclusion that the minor plaintiff operated her car in violation of G.S. 20-140. That would constitute negligence *per se* and, if a proximate cause of the collision, would constitute actionable negligence.

[3, 4] We further conclude, however, that the instructions given were insufficient in that the court did not adequately explain the law of reckless driving and did not explain to the jury, as required by G.S. 1-180, what facts they might find from the evidence that would constitute reckless driving. It is error for a trial court to read the provisions of a statute to a jury without giving an explanation thereof in connection with the evidence where such explanation is necessary to inform the jury as to the meaning of the statute and as to its bearing on the case. *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; *Toler v. Brink's, Inc.,* 1 N.C. App. 315, 161 S.E. 2d 208. The jury must not be left to apply the law to the facts and to decide for themselves what the party did, if anything, which would constitute reckless driving. *Roberts v. Freight Carriers, supra; Ingle v. Transfer Corp.,* 271 N.C. 276, 156 S.E. 2d 265; *Sugg v. Baker, supra; Dunlap v. Lee, supra.*

The charge given by the court here is similar to instructions considered and found defective in other recent cases. *Roberts v. Freight Carriers, supra; Ingle v. Transfer Corp., supra; Nance v. Williams, supra.* We find the following in *Ingle v. Transfer Corp., supra* at p. 284:

> "The language in each section of the reckless driving statute, G.S. 20-140, defines culpable negligence. *Dunlap v. Lee, supra.* 'Culpable negligence is such recklessness or carlessness, prox-

imately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.' *State v. Cope,* 204 N.C. 28, 30, 167 S.E. 456, 458. The intentional, wilful or wanton violation of a safety statute or ordinance which proximately results in injury is culpable negligence; an unintentional violation, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not. *State v. Cope, supra.*"

In *Roberts v. Freight Carriers, supra,* Sharp, J., stated at p. 609:

"Once the judge has given the jury the instructions which the pleadings and evidence require on the law of civil negligence, there is no need for him to superimpose an explanation of the law of criminal negligence. If plaintiff's evidence does not establish civil negligence, *a fortiori,* it will not prove reckless driving, which is criminal negligence. If, however, a party has properly pleaded reckless driving and the judge undertakes to charge upon it, G.S. 1-180 requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then (as he did here) leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving."

We hold that the portion of the charge excepted to constitutes prejudicial error requiring a new trial.

New trial.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. MILTON LEE BUCK, JR.

No. 697SC423

(Filed 17 December 1969)

1. Criminal Law § 104— nonsuit — consideration of evidence

On motion for judgment as of nonsuit in a criminal case, the evidence must be considered in the light most favorable to the State, and if there is any competent evidence to support the allegation of the bill of indictment, the case is one for the jury.

2. Homicide § 14— presumptions from the use of a deadly weapon

Where death proximately results from the intentional use of a deadly weapon, the presumptions arise (1) that the killing was unlawful and (2) that it was done with malice, thereby constituting the felony of murder in the second degree.

3. Homicide § 21— second-degree murder — use of knife — nonsuit

In a prosecution for murder in the second degree committed with a knife, there was sufficient evidence of defendant's guilt to require submission of the case to the jury.

4. Homicide § 27— instruction on involuntary manslaughter

In a prosecution for murder in the second degree, the trial court is not required to instruct the jury on involuntary manslaughter where there is no evidence to support such instruction.

5. Criminal Law § 112— instruction on circumstantial evidence

If the charge of the court is correct as to burden and measure of proof, the court is not required, absent a specific request, to instruct the jury on the definition and consideration of circumstantial evidence.

6. Indictment and Warrant § 11— identification of victim — variance

Where the indictment charged the defendant with the murder of "Sidney Lee Summerlin" and there was evidence that "Sidney Zeno Summerlin" was the victim, there is no fatal variance when there is other evidence that the two names described the same person; moreover, a variance as to middle names is usually immaterial.

APPEAL by defendant from *May, S.J.*, 24 February 1969 Term, EDGECOMBE Superior Court.

The defendant, Milton Lee Buck, Jr., (Buster), was tried upon a bill of indictment charging him with the murder of Sidney Lee Summerlin. When the case was called for trial, the solicitor announced that he would not try the defendant for murder in the first degree but would, instead, try him for murder in the second degree or manslaughter.

The defendant, in open court, entered a plea of not guilty to the charge and trial was by jury. The jury returned a verdict of guilty to murder in the second degree. The court entered judgment that the defendant be imprisoned for not less than twelve nor more than fifteen years in the State's Prison.

From the judgment imposed, the defendant appealed, assigning errors.

Robert Morgan, Attorney General, by Jean A. Benoy, Deputy Attorney General, and Russell G. Walker, Jr., Staff Attorney, for the State.

Cameron S. Weeks for the defendant appellant.

HEDRICK, J.

The defendant's first assignment of error is to the overruling of his motion for judgment as of nonsuit.

The State's evidence is summarized as follows: On the afternoon of 7 December 1968 several men were gathered at Braddy's Amoco Station on Trade Street in the Town of Tarboro, North Carolina. They had made several trips to the local ABC store and they had been talking and drinking together all afternoon. Among those present were the deceased, Sidney Summerlin, and the defendant, Buster Buck. Buster went into the bathroom, and the deceased went to the door and held the doorknob. Buster was very upset when he could not get out and told him to let go of the door or he would kick it in. The deceased released the door and walked away. Buster kicked a panel out of the door. Dick Braddy, operator of the station, pushed open the door and told Buster he would have to fix it. The evidence showed that Braddy had been whittling and had a knife in his hand and that after they had exchanged several words, Buster said, "Well, you've got a knife and I've got one. Let's go." Braddy folded his knife, put in in his pocket, and told Buster to leave. Buster went to the front of the station and stood with the knife in his hand with the blade open. Gary Scott testified:

> "I started over towards Buster and told him that he was wrong. He pushed me. Then Sidney grabbed the broom. Dick Braddy told Sidney to put the broom down, that he didn't want any trouble in the station. Dick Braddy asked Buster Buck two or three times to leave. Then Buster left."

After Buster left the station, he turned and yelled that he "had something for you." The evidence does not indicate to whom he was talking, but it does show that the deceased responded. David Mitchell Chappell testified that "Sidney went outside. Sidney had the broom in his hand but as he started out the door he laid the broom up against the drink box. The drink box is right there at the door. Sidney and Buster started fighting."

Gary Scott testified:

> "Sidney walked over to the door with the broom in his hand. Buster told him to come on out. Then Buster (sic) put the broom down by the drink machine and walked outside. They started tussling. When I saw Sidney walk outside I did not see him have anything but the broom, which he put down. I never saw Sidney with a knife, a pistol, or anything."

James Earl Kea testified that he was about three feet from the door when the deceased went out and that ". . . Milton Buck had his knife in his right hand. . . . As Sidney got close to Buck, I don't know whether he was afraid Sidney was going to hit him or not but he did like that (witness indicating) and they went together fighting."

They began fighting and both fell to the ground where they continued to scuffle. They fought until Gary Scott stopped the fight by placing his foot on the side of Buster Buck's head. Kea testified that at that time Buster had Sidney's head back and asked Sidney if he wanted to die. Buster got up off Sidney and struck Scott, knocking him down. Each witness testified that they did not see Buster strike the deceased with a knife but that they first saw the blood on the chest of the deceased when they turned him over. They rushed the deceased to the hospital where he died shortly thereafter.

Dr. John I. Brooks, a Tarboro physician, testified that he saw Sidney Summerlin in the emergency room of Edgecombe General Hospital on 7 December 1968. Dr. Brooks testified as to the appearance of the victim and described the wounds he found on his body. He stated that in his opinion Summerlin died of hemorrhagic shock or blood loss from the wounds which were on his body. On cross-examination, in response to a question asked by the defendant's attorney, Dr. Brooks stated that in his opinion the wounds could have been caused by a knife.

[1] The well settled rule in this jurisdiction is that in a criminal case when there is a motion for judgment as of nonsuit, "the evidence must be considered in the light most favorable to the State, and if when so taken there is any competent evidence to support the allegation of the bill of indictment, the case is one for the jury. And, on such motion the State is entitled to the benefit of every reasonable inference that may be fairly deduced from the evidence." *State v. Block,* 245 N.C. 661, 663, 97 S.E. 2d 243 (1957); *State v. Richardson,* 2 N.C. App. 523, 163 S.E. 2d 423 (1968).

[2] The North Carolina Supreme Court, speaking through Parker, C.J., in *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305 (1968), said:

> ". . . 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. Gordon,* 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 the 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."

[3] When the above principles are applied to the evidence in this case, there was plenary evidence to justify its submission to the jury, and there was no error by the trial court in overruling defendant's motion for judgment as of nonsuit. This assignment of error is overruled.

[4] The defendant next assigned as error the refusal of the court to grant his request for instructions regarding involuntary manslaughter.

"In the case of *State v. Satterfield,* 198 N.C. 682, 684, 153 S.E. 155 (1930), Adams, J. said: 'This offense (involuntary manslaughter) consists in the unintentional killing of one person by another without malice (1) by doing some unlawful act not amounting to a felony *or naturally dangerous to human life;* or (2) by negligently doing some act which in itself is lawful; or (3) by negligently failing or omitting to perform a duty imposed by law. These elements are embraced in the offense as defined at common law. Wharton, Homicide, 7; 1 Crim. Law (11 Ed.) 622; 1 McClain on Crim. Law, 303, sec. 335; Clark's Crim. Law 204. The definition includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act done in a culpably negligent way, and from the negligent omission to perform a legal duty.' (emphasis added.)" *State v. Hamilton and State v. Beasley,* 1 N.C. App. 99, 160 S.E. 2d 79 (1968).

See also *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485 (1959), where this definition was quoted with approval.

> "To constitute involuntary manslaughter, the homicide must have been without intention to kill or inflict serious bodily injury, and without either express or implied malice. *S. v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485; *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155; 40 C.J.S., Homicide, sec. 56." *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963).

The evidence presented in the instant case does not require the court to include instructions on involuntary manslaughter.

[5] The defendant's next assignment of error was to the failure of the judge to instruct the jury concerning the law of circumstantial evidence.

The record on appeal does not reveal to us any request by the defendant that the court define circumstantial evidence or instruct the jury on how to appraise such evidence. Indeed, the defendant only requested that the court instruct the jury on the law concerning involuntary manslaughter and the law concerning accident and misadventure. It is settled law that if the charge of the court is correct as to burden and measure of proof, then absent a specific request to instruct the jury as to circumstantial evidence, the failure to so charge is not reversible error. *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207 (1947). The charge is free from prejudicial error.

[6] The defendant's fourth assignment of error was to the court's refusal to grant his motion to set aside the verdict, for a new trial, and in arrest of judgment, and in signing the judgment. The defendant contends that there was a fatal variance between the evidence and the allegations in the bill of indictment in that the indictment charged the defendant with the murder of "Sidney Lee Summerlin" and the evidence at the trial was that "Sidney Zeno Summerlin" was the victim. Appellant contends that the record is devoid of any evidence that these two names described the same person. We find this contention to be untenable. The first witness for the State, Raymond Earl Joyner, a Tarboro police officer, stated that he ". . . knew Sidney Lee or Sidney Zeno Summerlin." The North Carolina Supreme Court, speaking through Clark, J., in *State v. Hester,* 122 N.C. 1047, 1050 (1898), said:

> "Besides middle names and middle initials are immaterial and variances in that respect will not be considered, for the common law recognizes only one Christian name, 17 A. & E. Enc., 114,

and judicial notice will be taken of the ordinary abbreviations of Christian names."

See also an excellent annotation in 15 A.L.R. 3d 963, 981.

The fifth and sixth assignments of error are not based on exceptions taken and are therefore not properly taken.

We have, however, considered these assignments of error and have found no prejudicial error.

After a careful examination of the record, we find

No error.

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

STATE OF NORTH CAROLINA v. MEXON DIGGS

No. 697SC509

(Filed 17 December 1969)

1. Criminal Law § 104— motion for nonsuit — consideration of evidence

Upon motion for nonsuit in a criminal case, all the evidence upon the whole record tending to sustain a conviction is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom.

2. Forgery § 1— elements of the crime

To constitute the offense of forgery, (1) there must be a false making or alteration of some instrument in writing, (2) there must be a fraudulent intent, and (3) the instrument must be apparently capable of effecting a fraud.

3. Forgery § 2— sufficiency of evidence

In this prosecution for forgery of a check, the State's evidence *is held* sufficient for the jury where it tends to show that defendant admitted to officers that he wrote the check in question and did not have permission from the person whose name appeared as drawer of the check to sign his name, that the person named thereon as payee whose signature purportedly appeared on the back of the check had neither signed the back of the check nor given defendant permission to sign her name thereon, that defendant had gotten another person to cash the check for him, and the check itself was introduced in evidence.

4. Forgery § 2; Criminal Law § 106— sufficiency of evidence aliunde defendant's confession

In this prosecution for forgery, there was sufficient extrinsic evidence corroborating defendant's confession to warrant submission of the case to

the jury, where the forged check was introduced in evidence, endorsements appearing on the back thereof indicated it had been negotiated, and there was independent evidence that the signatures of the persons whose names appeared thereon as drawer and as payee were not genuine.

5. Criminal Law § 106— corpus delicti — evidence aliunde confession

When the State offers evidence of the *corpus delicti* in addition to defendant's confession of guilt, defendant's motion for nonsuit is correctly denied.

6. Criminal Law § 76— admission of confession — necessity for voir dire — failure to object

In this forgery prosecution, the trial court did not err in the admission of the testimony of two police officers concerning defendant's extrajudicial admission without conducting a voir dire hearing and making findings of fact as to the voluntariness of defendant's statements, where defendant made no objection at the trial to the officer's testimony.

7. Criminal Law §§ 75, 162— confessions — necessity for objection

A general objection, if timely made, is sufficient to challenge the admissibility of a confession, but objection is waived if not made at the proper time and cannot be raised for the first time on appeal.

ON Certiorari from *Fountain, J.*, December 1968 Criminal Session of WILSON Superior Court.

Defendant, represented by court-appointed counsel, was tried on his plea of not guilty to a bill of indictment charging him with forging a check in the amount of $42.00, payable to one Emma Smith, and purporting to have been drawn by one Robert Smith. The State introduced the check in evidence and offered the testimony of the two police officers who had arrested defendant. These officers testified that after arresting the defendant and reading the warrant to him, they told defendant "he had the right to remain silent, that anything he said would be used against him in a court of law, that he had a right to have an attorney present with him before any question was asked, if he desired one, and that if he could not afford to hire a lawyer, one would be appointed to represent him." The officers testified that after they had given these warnings to the defendant, he did not request an attorney before he answered their questions. The officers testified that they had told the defendant that according to their information defendant had written the check, had gotten another man to go to the store and cash it for him, and that Robert Smith had never given defendant permission to sign his name to the check. The officers testified that defendant had admitted to them that their information was right.

The State also offered the testimony of Emma Smith, who testified that Robert Smith was her son, that he was in the Army on the

date the check was issued, that the signature "Robert Smith" on the check was not her son's handwriting, and that she had never signed the back of the check nor had she given defendant permission to sign her name on the back of the check.

The defendant took the stand and testified that he knew Robert Smith and Emma Smith, but that he had not signed the check or written any part of it and that the only time he had ever seen it was when it was shown to him by the officers. Defendant also testified that the officers had advised him of his rights and had told him they had information that he had written the check, but he denied that he had admitted to them that their information was right or that he had ever made any incriminating statement.

The jury returned a verdict of guilty, and judgment was imposed thereon sentencing defendant for a term of eighteen months. Defendant gave notice of appeal, but requested that his court-appointed counsel be relieved of further duties, stating to the court that he would privately employ counsel to effect his appeal. Defendant failed to raise necessary funds to retain private counsel in apt time to perfect his appeal. The superior court then appointed defendant's present counsel, who had not represented him at his trial, to represent him, and this Court thereafter granted defendant's petition for writ of certiorari to perfect a late appeal.

Attorney General Robert Morgan and Staff Attorney T. Buie Costen, for the State.

Narron & Holdford, by William H. Holdford and Henry C. Babb, Jr., for defendant appellant.

PARKER, J.

[1] Defendant assigns as error the refusal of the court to grant his motion of nonsuit made at the conclusion of the State's evidence and renewed at the conclusion of all of the evidence. There is no merit in this assignment of error. It is elementary that upon a motion for nonsuit in a criminal case, all the evidence upon the whole record tending to sustain a conviction is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169. When the evidence in the present case is so considered, it is sufficient to establish every essential element of the crime charged and to require submission of the case to the jury.

[2, 3] "Three elements are necessary to constitute the offense of forgery: (1) There must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud." *State v. Phillips,* 256 N.C. 445, 124 S.E. 2d 146. Defendant admitted to the officers that he had written the check in question and that he did not have permission from the person whose name appeared as drawer of the check to sign his name. The person whose name appeared on the face of the check as payee and whose signature purportedly appeared on the back, testified that she had never signed the back of the check nor had she given defendant permission to sign her name thereon. This evidence was sufficient to establish the false making of the instrument. Defendant's admission to the officers that he had gotten another man to go to the store and cash the check for him was sufficient to establish his fraudulent intent. The check itself, which was introduced in evidence, was on its face such an instrument as was capable of effecting a fraud.

[4, 5] There is also no merit in defendant's contention that there was not in this case sufficient evidence *aliunde* his confession to carry the case to the jury. The check itself was introduced in evidence; endorsements appearing on the back thereof indicated it had been negotiated. There was independent evidence that the signature of the persons whose names appeared thereon as drawer and as payee were not genuine; the purported payee herself so testified. "When the State offers evidence of the corpus delicti in addition to defendant's confession of guilt, defendant's motion to nonsuit is correctly denied." *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53. In the case before us there was sufficient extrinsic evidence corroborating defendant's confession to warrant submitting the case to the jury.

[6, 7] Defendant contends he is entitled to a new trial because of failure of the trial judge to conduct a *voir dire* hearing and to make findings of fact as to the voluntariness of his confession. Apart from the fact that this contention is not based upon any appropriate assignment of error, the contention is without merit. At his trial defendant made no objection to the testimony of the two police officers concerning his extrajudicial admissions. A general objection, if timely made, would have been sufficient, *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481, but unless objection is made at the proper time it is waived. *State v. Edwards,* 274 N.C. 431, 163 S.E. 2d 767. He cannot raise the objection for the first time on appeal. *State v. Jones,* 6 N.C. App. 712, 171 S.E. 2d 17. (Opinion by Brock, J., filed this date.) It should also be noted that in the present case de-

fendant admitted on cross-examination that the officers had advised him of his rights. He has never contended that any confession or admission allegedly made by him was involuntary; he simply denied that he made any.

In the trial we find

No error.

CAMPBELL and GRAHAM, JJ., concur.

MERCY BOSTON, QUEEN MOORE AND WIFE, JULIA MOORE v. HENRY L. FREEMAN AND WIFE, CAROLYN S. FREEMAN

No. 692DC433

(Filed 17 December 1969)

1. Courts § 14; Injunctions § 12— district court — jurisdiction of chief judge — issuance of temporary injunction

A chief judge of the district court has jurisdiction to enter, in chambers in one county, a temporary restraining order in an action pending in the district court of another county in the judicial district, to return the order for hearing before him, and to enter an order continuing the restraining order in effect in the district court of the other county until the trial of the case on its merits. G.S. 7A-190, G.S. 7A-191, G.S. 7A-192.

2. Evidence § 3— judicial notice — chief judge of district court

The Court of Appeals will take judicial notice that a certain person has been duly elected and has qualified as a judge of the district court, and further that he has been properly designated by the Chief Justice of the Supreme Court as the chief district judge of a certain judicial district.

3. Judgments § 5— interlocutory orders — temporary restraining order

A temporary restraining order, made permanent pending trial of the cause on its merits, is an interlocutory order.

4. Courts § 5— concurrent original jurisdiction — application for a restraining order

An application for a restraining order pending trial on the merits is a justiciable matter of a civil nature which is cognizable in the General Court of Justice, and the original general jurisdiction to hear the application and issue such order is vested concurrently in the superior court division and the district court division. G.S. 7A-240.

APPEAL by defendants from an order entered by *Ward, District Judge,* on 13 June 1969, in BEAUFORT County.

This action is to recover damages from defendants for disturbing and damaging graves in a family cemetery, and to restrain defendants from further disturbing said cemetery. Plaintiffs allege that in 1962 they conveyed to defendants an eighty-acre tract of land upon which a family cemetery, covering approximately three-fourths of an acre, had been maintained, and that approximately one hundred of Plaintiffs' relatives and ancestors were buried therein. Plaintiffs further allege that defendants have hauled dirt from the cemetery and have exposed some of the graves. Plaintiffs prayed for $2,500.00 actual and $2,500.00 punitive damages and for a restraining order.

On 24 May 1969, Ward, District Judge, in chambers in Beaufort County, upon the *ex parte* application of plaintiffs, issued a temporary restraining order, restraining defendants from disturbing the cemetery; the temporary order was made returnable before himself in Beaufort County on 13 June 1969. Upon the return, defendants filed a motion to dissolve the order upon grounds that a District Court Judge lacks jurisdiction to enter a restraining order except in domestic relations and custody matters. After hearing argument, Judge Ward continued the restraining order in effect until the trial of the case on its merits. Defendants appealed.

LeRoy Scott for plaintiffs-appellees.

Bailey & Bailey, by Carl L. Bailey, Jr., for defendants-appellants.

BROCK, J.

There has been no motion by defendant under G.S. 7A-257 to transfer this case to a different trial division, and no order of transferral under G.S. 7A-259. Defendant asserts by this appeal that the order appealed from is void for lack of jurisdiction. Plaintiffs and defendants state the question raised by this appeal as follows: "Does a District Court Judge have jurisdiction to issue a temporary restraining order, to hear same, and to continue it in effect until trial?"

[1] The question as stated by the parties presents a much broader question of jurisdiction and procedure than is actually raised by the appeal. To answer the question as stated would call for an application of the question to many and varied circumstances which would have to be hypothetical. We therefore confine ourselves to the question raised by the appeal in this case: Does the Chief Judge of the District Court of the Second Judicial District have jurisdiction in Beaufort County to enter a temporary restraining order in an ac-

tion pending in the District Court in Martin County, return the same for hearing before himself in Beaufort County, and enter an order in Beaufort County continuing the restraining order in effect in the District Court in Martin County until trial of the case on its merits?

[2] We take judicial notice that Hallett S. Ward has been duly elected and has qualified as a Judge of the District Court of the Second Judicial District, and further that he has been properly designated by the Chief Justice of the Supreme Court of North Carolina as the Chief District Judge of the Second Judicial District. The Second Judicial District is composed of the counties of Beaufort, Hyde, Martin, Tyrrell, and Washington. Therefore the two counties involved in this lawsuit, Beaufort and Martin, lie within the Second Judicial District.

[3] "The district courts shall be deemed always open for the disposition of matters properly cognizable by them. . . ." G.S. 7A-190. "All trials on the merits shall be conducted in open court . . . . All other proceedings, hearings, and acts may be done or conducted by a judge in chambers . . . and at any place within the district; . . . ." G.S. 7A-191. ". . . The chief district judge . . ., may in chambers hear motions and enter interlocutory orders in all causes pending in the district courts of the district. . . ." G.S. 7A-192. Therefore, Judge Ward had jurisdiction, in chambers in Beaufort County, to enter interlocutory orders in a cause pending in Martin County. And a temporary restraining order, made permanent pending trial of the cause on its merits, is an interlocutory order. McIntosh, N.C. Practice 2d, § 2192, and § 2216.

Defendants argue stressfully that the Judicial Department Act of 1965, G.S. Chapter 7A, retains jurisdiction for injunctive relief in the Superior Court Division, except that conferred upon the District Court Division, in domestic relations and custody matters by G.S. 50-13.3(b), G.S. 50-13.4(f), and G.S. 50-16.7(f). It is clear that G.S. Chapter 50 was extensively rewritten during the 1967 Session of the General Assembly and is not a part of the Judicial Department Act of 1965; although in some respects they must be construed with reference to each other.

[4] Under the Judicial Department Act of 1965, G.S. Chapter 7A, ". . . [O]riginal general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. . . . [T]he original civil jurisdiction so vested in the trial divisions is

vested concurrently in each division." G.S. 7A-240. There are exceptions to the concurrent original general jurisdiction of the superior court division and the district court division contained in G.S. 7A-240 (claims against the State), G.S. 7A-241 (probate and administration of decedents' estates) and G.S. 7A-251 (appeals from the clerk), but they are not pertinent to this appeal. An application for a restraining order pending trial on the merits is a justiciable matter of a civil nature which is cognizable in the General Court of Justice and the original general jurisdiction to hear the application and issue such order is vested concurrently in the superior court division and the district court division. G.S. 7A-240. "Except as otherwise provided in this chapter, the civil procedure provided in Chapter 1 of the General Statutes applies in the district court division of the General Court of Justice. Where there is reference in Chapter 1 of the General Statutes to the superior court, it shall be deemed to refer also to the district court in respect of causes in the district court division." G.S. 7A-193.

In civil matters as to which the trial divisions have concurrent original jurisdiction, G.S. 7A-243 through G.S. 7A-250 designate the superior court division or the district court division as proper or improper for trial. ". . . But no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding." G.S. 7A-242.

Defendant argues that by subsection (a) of G.S. 7A-245 it was the legislative intent that jurisdiction of injunctive relief be retained solely in the superior court division. We construe that statute exactly to the contrary. It is the clear intent of the statute that jurisdiction of injunctive relief generally should be vested concurrently in the superior court division and the district court division because even the four types of injunctive relief which the legislature suggested should be heard in the superior court division are not confined jurisdictionally to that division; the statute merely specifies that the superior court division is the *proper* division for the trial of such actions. The intent of the legislature is further clarified by subsection (b) of G.S. 7A-245 which provides: "When a case is otherwise properly in the district court division, a prayer for injunctive or declaratory relief by any party not a plaintiff on grounds stated in this section is not ground for transfer." Therefore, under subsection (b) a prayer for injunctive relief of any of the types enumerated

in subsection (a) is not even grounds for transfer to the superior court division unless such injunctive relief is prayed for by a party plaintiff. So it is abundantly clear that the district court division has jurisdiction to grant injunctive relief in cases docketed in that division.

Defendant argues that under G.S. Chapter 1, particularly the provisions of G.S. 1-485 and G.S. 1-493, judges of the superior court division retain the jurisdiction to grant injunctive relief. However, following the provisions of G.S. 7A-193, the references in Chapter 1 of the General Statutes to the superior court are deemed to refer also to the district court. Therefore G.S. 1-485 as so modified reads: ". . . The order may be made by any judge of the superior court [also of the district court]. . . ." And G.S. 1-493 as so modified reads: "The judges of the superior court [also of the district court] have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. . . ."

The Judicial Department Act of 1965 makes it abundantly clear that the district court judge had jurisdiction to enter the order appealed from.

Affirmed.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT WALKER, ALIAS ROBERT HILL

No. 6919SC531

(Filed 17 December 1969)

1. Larceny § 1— taking and carrying away — nonremoval from premises of owner

There must be a taking and carrying away of the personal property of another to complete the crime of larceny, although it is not necessary that the property be completely removed from the premises of the owner.

2. Larceny § 7— larceny of rings — sufficiency of evidence — asportation

Evidence that defendant entered a jewelry store and was observed as he put some rings from a tray into his pocket, that upon the approach of the store owner defendant took the rings out of his pocket and threw them on the floor, and that he ran from the store at the mention of the police, *is held* sufficient to permit an inference that defendant removed

the rings from the tray with intent to deprive the owner of their possession permanently and to convert them to his own use.

3. Larceny § 1— length of time of defendant's possession — severance

The fact that rings belonging to a jewelry store may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the rings from their original status was such as would constitute a complete severance from the possession of the owner.

4. Criminal Law §§ 33, 86— cross-examination of defendant — motive — inconsistent statements

In larceny prosecution, cross-examination of defendant concerning his statement to police officers that he took the rings from a jeweler's tray because he had a girl pregnant and needed some money to get her out of trouble, *held* relevant to show motive and to show that defendant had made prior statements inconsistent with his testimony on trial.

5. Criminal Law § 113— instructions — statement of evidence — slight inaccuracies

Slight inaccuracies in the statement of the evidence will not be held for reversible error when not called to the attention of the court at the time.

6. Criminal Law § 117— instructions — scrutiny of defendant's testimony

It was proper for the trial court to instruct the jury to scrutinize carefully the testimony of defendant as an interested witness and to give the testimony the same weight as that of a disinterested witness if they believed the testimony and found it to be true.

7. Larceny § 3— grand and petty larceny

The distinction between grand larceny and petty larceny has been abolished by statute. G.S. 14-70.

8. Larceny § 8— instructions — submission of issue of misdemeanor

In a prosecution upon indictment alleging the felonious larceny of rings of a value of $1501.25, the court should have submitted to the jury the issue of defendant's guilt of misdemeanor-larceny, where the evidence of the State did not show that defendant took all of the rings nor did it show the value of those rings that were taken.

9. Larceny §§ 5, 8— felonious larceny — value of property stolen — burden of proof — instructions

Except in those cases where G.S. 14-72 is inapplicable, the State in a prosecution for felonious larceny must prove beyond a reasonable doubt that the value of the stolen property was more than two hundred dollars, and the trial judge must so instruct the jury even though no request is made for such instruction.

10. Larceny §§ 9, 10— larceny of property in excess of $200 value — verdict — misdemeanor larceny — judgment in excess of statute

In a prosecution upon indictment alleging the felonious larceny of rings of a value of $1501.25, a verdict finding the defendant guilty as charged

in the bill of indictment must be considered as a verdict of guilty of larceny of personal property having a value of $200 or less, a misdemeanor, where the trial court failed to instruct the jury as to its duty to fix the value of the property; hence, judgment of four to six years' imprisonment imposed upon the verdict is in excess of the legal maximum and is vacated and the cause remanded for the pronouncement of judgment as for misdemeanor-larceny.

APPEAL by defendant from *Crissman, J.*, May 1969 Criminal Session of ROWAN County Superior Court.

Defendant was tried and convicted upon a bill of indictment charging him with the felonious larceny of certain rings of the value of $1501.25.

The State's evidence tended to show that the defendant entered the store of Reliable Jewelers, Inc. in Salisbury at about 10 a.m. on 17 January 1969. Shortly thereafter he was seen attempting to put some rings in his pocket. Some were dropping to the floor. When one of the store owners approached him, defendant took some rings out of his pocket and threw them onto the floor. Defendant denied to the store owner that he had taken anything and asked that he be searched. However, when told that the police would search him, defendant ran. He was apprehended later in the morning several blocks from the store. The tray from which the rings were removed contained thirty-five rings with a total value of $1501.25. All of the rings were accounted for within a short time after the incident and the State's witnesses admitted that defendant did not remove any of the rings from the store premises.

Defendant testified in his own behalf that he went to the store to get a watchband and while there accidentally knocked a tray of rings from the counter. As he was picking the rings up and replacing them on the counter a store owner accused him of having stolen some of them. He testified that when the police were mentioned he became frightened and ran.

The verdict of the jury was that the defendant was guilty of "grand larceny" and from a judgment of imprisonment for not less than four years nor more than six years defendant appealed assigning error.

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

George L. Burke, Jr., for defendant appellant.

GRAHAM, J.

[1-3] Defendant's motions for judgment of nonsuit were properly overruled. While there must be a taking and carrying away of the personal property of another to complete the crime of larceny, it is not necessary that the property be completely removed from the premises of the owner. "The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation." *State v. Jones,* 65 N.C. 395, 397. Taken in the light most favorable to the State, the evidence permits an inference that defendant removed the rings from the place where they were kept with the intent to deprive the owner of their possession permanently and to convert them to his own use or the use of some other person. The fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the rings from their original status was such as would constitute a complete severance from the possession of the owner. *State v. Green,* 81 N.C. 560; *State v. Jackson,* 65 N.C. 305; 52A C.J.S., Larceny, § 6, p. 427. There was testimony that defendant was successful in putting some of the rings in his pocket. This, standing alone, constitutes sufficient evidence to go to the jury on the question of asportation. For a case directly in point see *People v. Lardner,* 300 Ill. 264, 133 N.E. 375, 19 A.L.R. 721.

[4] Defendant assigns as error the overruling of his objection to a question asked him on cross-examination about a statement he made to police officers that he took the rings because he had a girl pregnant and needed some money to get her out of trouble. Defendant admitted having made the statement. This cross-examination was relevant for the purpose of showing that defendant had a motive for the alleged crime. Stansbury, N.C. Evidence 2d, § 83. It was also competent to show that defendant had made prior statements inconsistent with his testimony at the trial. Stansbury, N.C. Evidence 2d, § 46.

[5, 6] Defendant further assigns as error various portions of the charge, contending that the court misstated some of the evidence, erred in instructing the jury to carefully scrutinize defendant's testimony, and overly stressed the State's contentions. These contentions are without merit. Slight inaccuracies in the statement of the evidence will not be held for reversible error when not called to the attention of the court at the time. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Sterling,* 200 N.C. 18, 156 S.E. 96. The court not only instructed the jury to carefully scrutinize the testi-

mony of the defendant as an interested witness but also that if they believed his testimony and found it to be true they were to give to it the same weight as that of a disinterested witness. This instruction was proper. 3 Strong, N.C. Index 2d, Criminal Law, § 117. The contentions of the State and defendant were, in our opinion, fairly stated.

Defendant's remaining assignments of error challenge the court's failure to instruct the jury as to its duty in fixing the value of the property taken and the failure of the court to submit to the jury the possible verdict of misdemeanor-larceny. These assignments of error are well taken.

[7] The record reflects that the verdict of the jury was that the defendant was guilty of "grand larceny." The distinction between grand larceny and petty larceny has been abolished in this State for many years. G.S. 14-70. (For a discussion of the history of the larceny statutes in this State see opinion of Bobbitt, J. [now C.J.], in *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.) While there is no longer a crime in this State designated as "grand larceny" we nevertheless consider the verdict of the jury as tantamount to a verdict finding the defendant guilty as charged in the bill of indictment. The bill of indictment charges the crime of felony-larceny in that it charges that the value of the property taken was in excess of two hundred dollars. G.S. 14-72 declares that the larceny of property of the value of not more than two hundred dollars is a misdemeanor except where the larceny is from the person or by breaking and entering. It also provides that in all cases of doubt the jury shall, in the verdict, fix the value of the property stolen.

[8] The only evidence concerning value in the instant case was that the total value of the thirty-five rings in the tray was $1501.25. The evidence, however, did not show that the defendant took all of the rings, nor did it show the value of those which he did take. Under these circumstances the evidence of value was equivocal and susceptible of diverse inferences. The court should therefore have submitted to the jury under appropriate instructions the issue of the defendant's guilt of misdemeanor-larceny.

There was also error in the failure of His Honor to instruct the jury that in order to convict the defendant of felony-larceny they were required to find beyond a reasonable doubt that he was guilty of larceny and that the value of the property stolen was more than two hundred dollars.

[9] The recent case of *State v. Jones,* 275 N.C. 432, 168 S.E. 2d

380, reaffirmed the decision of *State v. Cooper, supra,* and made clear that except in those cases where G.S. 14-72 is inapplicable, the State must prove beyond a reasonable doubt that the value of the stolen property was more than two hundred dollars in order to convict of felony-larceny, and the trial judge must so instruct the jury even though no request is made for such instruction. The reason for this requirement is that the defendant's plea of not guilty places in issue every essential element of the offense, including the element of value of the property stolen, and the credibility of the testimony must be passed upon by the jury.

[10] Since the jury was not instructed as to their duty to fix the value of the property in question, the effect is that the jury failed to find that the larceny of which defendant was convicted related to property of a value of more than two hundred dollars. Consequently, as in *State v. Jones, supra,* the verdict here must be considered as a verdict of guilty of larceny of personal property of a value of two hundred dollars or less. This is a misdemeanor and the judgment entered herein imposed a sentence greater than the maximum allowed therefor. The judgment is therefore vacated and this decision will be certified to the Superior Court of Rowan County for the pronouncement of judgment herein as upon a verdict of guilty of misdemeanor-larceny.

Error and remanded.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. RANDY LIGHTSEY

No. 6910SC534

(Filed 17 December 1969)

1. Criminal Law § 76— order admitting confession — sufficiency of findings

Order entered by the trial court in admitting defendant's confession was not inadequate in failing to specifically find that the confession was "uninfluenced by fear or hope of reward," the court's finding that "defendant knowingly, freely and voluntarily made a statement" being sufficient to negate the possibility that defendant was influenced by fear or hope of reward.

2. Criminal Law § 75— confessions — waiver of right to counsel

Statement by defendant, after having been advised of his rights by officers and asked if he understood his rights, that he had been in trouble enough to know his rights, *is held* sufficient to indicate that defendant intelligently waived his right to counsel at his in-custody interrogation.

3. Criminal Law §§ 114, 122— instructions — hung jury — expression of opinion by court

Where the jury, after having deliberated for an hour and twenty minutes, returned to the courtroom and advised the court that it stood divided and that some of the jury members thought another police officer should testify, the trial court did not express an opinion on the sufficiency of the State's evidence by instructing the jury that the solicitor had the duty to prosecute the case and determine what evidence would be introduced, that the jury was to find its verdict from the evidence it had heard, and that the jury should continue its deliberations and try to reach a verdict.

4. Criminal Law § 140— consecutive sentences

In this larceny prosecution, imposition of sentence "to begin at the expiration of any and all sentences the defendant is now serving in the North Carolina Department of Correction" clearly indicates the intent of the trial judge that the sentences of defendant be served consecutively without resort to evidence *aliunde*.

APPEAL by defendant from *Godwin, S.J.*, July 1969 Assigned Criminal Session (2nd Week), WAKE County Superior Court.

The defendant was tried on a proper bill of indictment charging him with larceny of a 1967 Mercury Cougar automobile with a value in excess of $200.00. The bill of indictment contained a second count charging the defendant with receiving the automobile knowing it to have been stolen, but the charge contained in the second count was dismissed by the trial court.

The defendant entered a plea of not guilty, and from a jury verdict of guilty of larceny of property with a value in excess of $200.00 and a prison sentence of five years imposed on this verdict, the defendant appealed.

The evidence on behalf of the State was to the effect that on 24 October 1968 Sanders Motor Company had a 1967 model Mercury Cougar automobile on its sales lot in the City of Raleigh; that that night the defendant took this automobile and drove it to Charlotte. The defendant had previously seen the automobile on the lot with keys in the ignition switch. There was one key in the switch and a similar key on the key ring attached. The defendant took the key off the key ring, and two days later returned and took the automobile. In Charlotte the defendant was driving the automobile with three companions at an excessive speed and observed a police car

overtaking him. The defendant stopped the automobile, and he and his companions ran. The defendant was not apprehended at the time, and a few days later stole a Chevrolet automobile in Charlotte which he drove to Raleigh and abandoned on the streets of Raleigh.

Police officers in Raleigh assigned to investigate the automobile stolen from Sanders Motor Company, upon information received by them, took out a warrant for the defendant's arrest.

On Monday, 28 October 1968 Officers Morris and Gilbert went to an address in Raleigh where they found the defendant and placed him under arrest. Before admitting what the defendant told the officers while on the way to the police station after his arrest, the trial court conducted a *voir dire* and one of the arresting officers testified that the defendant was told:

> "That he had a right to make no statement; that any statement he did make would be used against him in court; that he had a right to an attorney; and that if he could not afford an attorney, the State would appoint one for him."

The defendant was then asked if he understood his rights. The defendant replied that "he had been in trouble enough to know his rights." The defendant did not request an attorney; and when asked if he would talk about this particular incident, he did do so, and stated in substance what has previously been set out.

The trial judge then entered the following order:

> "The court finds as a fact that prior to the time that the defendant made any statement to the witness Morris or Detective Gilbert on the day of his arrest, which was prior to the issuance of a search warrant thereafter executed by Officers Morris & Gilbert, or answered any questions put to him by either of them with regard to the offense charged in the warrant that he was advised that, by Officer Morris that he was under arrest; that the warrant for his arrest was read to him by Officer Morris; that he was advised by Officer Morris that he had the right to legal counsel; that if he were unable to employ counsel, that counsel would be furnished to him without expense to him; that he was entitled to have counsel to confer with counsel and have counsel with him before making any statement or answering any questions; that the defendant advised that he had theretofore been in trouble that he knew what his rights were and that the defendant voluntarily, freely and understandingly waived his right to confer with and have counsel present with him prior to making any statement that he may have made to

Officers Morris and Gilbert on the day of arrest and during such time as either of said officers may have interrogated him with regard to the matters and things alleged in the charge contained in the warrant for his arrest and that the defendant knowingly, freely and voluntarily made a statement to Officer Morris as he rode in a police car which transported him from his home to the office of the Wake County magistrate in the City of Raleigh and before a search was conducted of the premises whereat he resided by virtue of a search warrant thereafter issued.

The court further finds as a fact that the defendant was advised and that he understood that he was not required to make any statement to or answer any questions put to him by either Officer Morris or Officer Gilbert and that he was advised and understood that any statement he made could and probably would be used against him in evidence upon his trial."

Upon a jury verdict of guilty, the trial court entered a judgment containing this provision:

"It is ADJUDGED that the defendant be imprisoned for the term of five (5) years in the State Prison to be assigned to work under the supervision of the Commissioners of Correction. This sentence to begin at the expiration of any and all sentences the defendant is now serving in the North Carolina Department of Correction."

Attorney General Robert Morgan, Deputy Attorney General Jean A. Benoy and Special Assistant Maurice W. Horne for the State.

Ralph McDonald for defendant appellant.

CAMPBELL, J.

[1] The defendant on this appeal presents four questions for decision. The first question is, were the findings and order of the trial court, prior to the admission of the defendant's confession, sufficient and supported by the evidence? We find that the evidence was sufficient to sustain the findings and order of the trial court. The order itself was adequate. The defendant asserts that in order to be adequate the order should specifically provide that the confession was "uninfluenced by fear or hope of reward." The order of the trial court found "that the defendant knowingly, freely and voluntarily made a statement." This order negated any possibility that the defendant was influenced by fear or hope of reward and was sufficient and adequate.

[2] The second question is, was the defendant sufficiently informed that he had a right to an attorney before he made any statement to the arresting officers and did he waive the right to an attorney? The defendant relies upon *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171 (1968). We think the *Thorpe* case is readily distinguishable from the instant case.

In the *Thorpe* case the Court held that counsel had not been "intelligently waived." It was pointed out in the *Thorpe* case

> "At this stage of the proceeding the officers had in custody a dull, retarded, uneducated, indigent boy 20 years old who had left school before he completed the third grade. In giving the advice with respect to counsel, the officers did not explain to him that he was entitled to counsel during the interrogation. To his inexperienced mind, in all probability, he understood the officers to mean that counsel would be made available at his trial. Counsel at in-custody questioning upon arrest was something relatively new at that time. His failure to request counsel at the interrogation is understandable. The failure to make the request under these circumstances was not a waiver of the right to legal representation during the questioning."

In the instant case after having been advised by the officers as to his rights, the defendant was asked if he understood his rights, and he replied "that he had been in trouble enough to know his rights." We think this was sufficient to indicate that the defendant "intelligently waived" his right to counsel at his in-custody interrogation and justified the finding of the trial court that he had. *State v. Bines,* 263 N.C. 48, 138 S.E. 2d 797 (1964).

[3] The third question is, was error committed by the trial court by expressing an opinion as to the sufficiency of the proof on behalf of the State in a supplemental charge? No exceptions were taken to the original charge. After the jury had deliberated for an hour and twenty minutes, the jury returned to the courtroom and advised the court that the jury stood divided. The foreman announced that some members of the jury thought another police officer should testify. The trial judge then instructed the jury as follows:

> "I told you on Monday, then I told you again on yesterday during the trial of this case that the solicitor has the duty and responsibility to prosecute those criminal cases that come into the Superior Court; that he must exercise his discretion about what evidence to introduce during the trial of the case. When the solicitor announced that he rests his case — that the State rests, I advised you of that and you heard him announce that

the State rests its case and I told you that then the State had introduced all of the evidence that it intended to introduce. So it is now too late to reopen and introduce additional evidence. Neither the jury nor the presiding judge determines what witnesses are to testify. You are to find your verdict from the evidence you have heard. Now can I offer you any additional advice or instructions?

I can say this to you, ladies and gentlemen, I am certain that none of you will depart from any conscientious beliefs and feelings that you have regarding the issue that you have under consideration. I am certain that you are reasonable people and that you have only deliberated for a matter of about an hour and 20 minutes. So I am going to suggest to you that you return to your jury room and continue your deliberation and see if you can't come to an agreement. If you find there are some further instructions regarding the law in this case that you would like for me to comment upon, if you will come back and let me know that I will be glad to render you any assistance I can in that connection. I cannot assist you in finding your verdict, that is your responsibility. Incidentally, if you find that you would like to take a recess during your deliberation we normally recess about mid-morning, about halfway between 9:30 and 1:00 o'clock, if you find that you would like to take a recess during your deliberations and let me know about it, I will be glad for you to do so."

The supplementary instructions do not constitute an expression of an opinion within the prohibition of G.S. 1-180. The additional admonition with regard to their continued deliberation was in keeping with rules previously approved by our Appellate Court. *State v. Fuller,* 2 N.C. App. 204, 162 S.E. 2d 517 (1968).

[4] The fourth question is, was the starting date of the sentence imposed so indefinite that it ran concurrently with any other sentences being served by the defendant?

We think that the sentence in this case clearly indicates the intent of the trial judge that the sentences of the defendant are to be served consecutively, and this sufficiently appears without resort to evidence *aliunde. In Re Smith,* 235 N.C. 169, 69 S.E. 2d 174 (1952).

In the trial and sentence of the defendant we find

No error.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. NATHANIEL JACOBS

No. 6910SC542

(Filed 17 December 1969)

1. Criminal Law § 42— bloodstained pants — sufficiency of identification

In this prosecution for breaking and entering, bloodstained pants allegedly worn by defendant on the occasion of the break-in were sufficiently identified for admission in evidence where defendant's grandmother testified she put the pants in water to soak the morning after the crime, that she "reckoned" they were the pants defendant was wearing when he came home on the night in question, and that she gave the pants to a police officer, and the police officer testified that the pants were in the same condition as when he received them from defendant's grandmother and that the pants had been in his locker since they were given to him.

2. Criminal Law § 55— blood grouping test results

In this prosecution for breaking and entering, the trial court properly admitted expert testimony of the results of blood grouping tests performed on blood samples taken from the scene of the crime and from the defendant, notwithstanding the witness testified that he could not determine whether the two samples came from the same person.

3. Burglary and Unlawful Breakings § 5— breaking and entering — sufficiency of circumstantial evidence

In this prosecution for breaking and entering, the State's evidence *is held* sufficient for submission to the jury where it tends to show that the proprietor of the store which was broken and entered shot one of the intruders, that defendant and his uncle were seen walking around the store prior to the break-in, that defendant was bleeding when apprehended the day after the crime and had two wounds in his buttocks, and that blood samples taken from the crime scene and from defendant were both type A.

APPEAL by defendant from *Carr, J.*, 4 August 1969 Session of WAKE Superior Court.

Defendant was indicted for breaking and entering with the felonious intent of larceny. The jury found him guilty as charged and he was sentenced to serve not less than four years nor more than six years.

The State's evidence tended to show that about 1:25 a.m. on the morning of 19 April 1969 the W. L. Hamilton Grocery Store was entered through a window located in the rear of the store. W. L. Hamilton, the proprietor of the store, fired two shots from a pistol towards a noise in the store, the first shot hitting the unseen person. Blood was found in the area where the wounded person has escaped. The defendant had been seen in the vicinity of the store several hours earlier in the company of his uncle, walking up and down the

street and in back of the store. The two were later seen near the store by the same witness who testified that the uncle was holding defendant as though he had been hurt. The evidence further tended to show that a fire poker had been discovered outside the store near the window which looked like one that had been missing from the house of defendant's grandmother, where he had been staying. There is testimony that the grandmother was awakened by the defendant standing over her bed on the morning in question and that when she awoke, defendant went into another room and lay down on a lounge chair and that she saw blood on the defendant's pants at that time. Blood was found on the lounge chair, on a spread on which defendant slept and on a pair of pants belonging to defendant which were found near the lounge chair. There is further evidence which tended to show that defendant was bleeding when apprehended on the afternoon after the break-in and that he had two wounds in his buttocks where something had gone through both of his buttocks. The pants had two holes in the rear, above the hip pockets. There was expert testimony that the blood of the defendant and the blood scraped from the scene of the crime were of type A.

Defendant offered no evidence.

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

L. Bruce Gunter for defendant appellant.

MORRIS, J.

[1] Defendant's first exception was to the introduction of the pair of pants into evidence. He contends that the pants which were allegedly worn on the occasion of the break-in were not sufficiently identified and should not have been admitted into evidence. We think there is sufficient testimony in the record to warrant admission of the pants into evidence. The defendant's grandmother testified in response to the solicitor's questions as follows:

"Q. Listen to my question. Did you put the pants that he was wearing that night when he came home in soak the next morning?

A. I put them there in there. I reckon it was the ones he had on."

"Q. Did you put the pair of pants he was wearing that night in soak the next morning?

A. I told you that I dropped them in the bath tub and run water on them.

Q. Was that the pair of pants that Nathaniel Jacobs was wearing when he came home that night?

A. No sir. I didn't ask him. I just dropped them in the tub and run water over them. That is all I done to them.

Q. To what? Did that to what pair of pants?

A. Them there.

Q. These that I have right here?

A. Yes, sir.

Q. Well, was that the pair that Nathaniel Jacobs was wearing when he came home that night?

A. I don't know. I reckon so."

"Q. And you say that they were his pants that he was wearing that night, didn't you?

A. I reckon they were. I won't over there when it happened. I don't know nothing about what happened."

She also testified that she told a police officer that "they were Nathaniel Jacobs' pants, . . ."

Police Officer J. H. Bowers testified that defendant's "grandmother gave me the pants Saturday evening about 3:00 o'clock, and I picked up a bloody spread at the same time. The pants were in substantially the same condition when I got them as they are now. They have been in my locker since I have had them."

This testimony provides some evidence that the pants are what they are purported to be and objections to its sufficiency goes to the weight to be given the testimony rather than to the admissibility of the pants into evidence. 22A C.J.S., Criminal Law, § 709, pp. 949-951. The weight to be given the testimony and the credibility of the witnesses are for the jury. 2 Strong, N.C. Index 2d, Criminal Law, § 103.

[2] Defendant's second exception is to the court's refusal to strike the testimony of the SBI chemical specialist relating to blood samples taken from the scene of the crime and from the defendant. The witness testified that both blood samples demonstrated the A blood grouping factor but that he "could not make a test to determine whether or not the blood in the scrapings was some of the same blood or from the same person as the flood from" the defendant and that he did not know whether the two samples came from the same person. There is respectable authority that such testimony re-

lating to blood test results may be admitted into evidence. 46 A.L.R. 2d 1000; McCormick on Evidence, § 177 (1954); 29 Am. Jur. 2d, Evidence, § 106.

In *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968), cert. denied, 393 U.S. 1042 (1969), the defendant's bloodstained clothing was held to be properly admitted into evidence after chemical analysis had disclosed that the stains on the clothing were made by human blood of the same type as the victim's blood. In the *Peele* case the question was whether defendant's bloodstained clothing was admissible into evidence after chemical analysis was performed, whereas in the case at bar the question is whether the testimony itself is admissible. Also, in the *Peele* case the comparison was made between blood found on defendant's clothing and the blood of the victim, whereas in the case at bar the comparison was made between the blood taken from the scene of the crime and the blood of the defendant. We hold that the testimony relating to the blood grouping tests was admissible.

[3] Defendant's third exception is to the court's refusal to dismiss the case at the close of the evidence. In *State v. Colson,* 1 N.C. App. 339, 161 S.E. 2d 637 (1968), cert. denied, 393 U.S. 1087 (1969), is was said:

> "[H]owever, to withstand a motion of nonsuit in a criminal case it is not required that the evidence exclude every reasonable hypothesis other than that of defendant's guilt. It is required that there be substantial evidence of all material elements of the offense, and it is immaterial whether the substantial evidence is circumstantial or direct or both. As was said by Higgins, J., in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431: '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.' "

In this case there was enough evidence of the material elements of the crime to submit the case to the jury.

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

STATE OF NORTH CAROLINA v. DAVID LEON MITCHELL

AND

STATE OF NORTH CAROLINA v. CHARLES McKINZIE

AND

STATE OF NORTH CAROLINA v. MATHEW McKINZIE

No. 695SC548

(Filed 17 December 1969)

1. Criminal Law § 60— reason fingerprints not taken — nonexpert testimony

Defendants were not prejudiced when the court allowed a police officer who had not been qualified as a fingerprint expert to testify that no fingerprints were taken from a pistol because it was wet.

2. Robbery § 4— aiding and abetting — sufficiency of evidence

In this armed robbery prosecution, the State's evidence was sufficient for submission of the case against two defendants to the jury under the law of aiding and abetting where it tended to show that, although they did not say anything or exhibit any weapon, they were with the actual perpetrator of the robbery before, during and after the robbery and when they were arrested.

3. Criminal Law § 113— instructions — aiding and abetting — undue emphasis

In this prosecution of three defendants for armed robbery, fact that the law pertaining to aiding and abetting was mentioned in more than one place in the charge is not undue emphasis and did not prejudice the two defendants against whom the case was submitted to the jury under the law of aiding and abetting.

4. Criminal Law §§ 102, 116, 165— failure of defendants to testify — argument of solicitor — instructions

Prejudicial effect of any remarks the solicitor may have made relating to the failure of defendants to take the stand was removed when, immediately upon objection by defendants' counsel to the solicitor's remarks, the court admonished the solicitor not to make inferential observations that would suggest that defendants had not taken the stand, and the court charged the jury that defendants had the absolute right not to take the stand and that the fact they did not could not be considered prejudicial to their case.

5. Criminal Law § 132— motion to set aside verdict as contrary to weight of evidence

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial judge, whose ruling will not be disturbed in the absence of abuse of that discretion.

6. Indictment and Warrant §§ 4, 14— hearsay testimony before grand jury — quashal of indictment

An indictment is not subject to quashal on the ground that the testimony before the grand jury was based on hearsay.

STATE *v.* MITCHELL AND STATE *v.* MCKINZIE

APPEAL by defendants from *Mintz, J.*, 21 July 1969 Session, NEW HANOVER Superior Court.

All three defendants were found guilty by a jury of armed robbery. Defendant Mitchell was sentenced to serve a term of not less than nine nor more than twelve years; defendant Charles McKinzie was sentenced to serve a term of not less than five nor more than six years and defendant Mathew McKinzie was sentenced to serve a term of not less than five nor more than seven years.

The evidence for the State tends to show that about 11:30 p.m. on 20 June 1969 Wilbur Lunn had left his aunt's house in the 1000 block of North 6th Street in Wilmington and was walking down 6th Street just behind the three defendants, none of whom he knew. As Lunn was preparing to cross the street, defendant Mitchell pulled a black, pearl handled pistol which looked like a .22 caliber and told Lunn to drop his pocketbook, keep walking and not to look back. Lunn did as he was told. After he had walked 200 or 250 feet he was told by Mitchell to come back and get his wallet. Lunn testified that he begged the defendants not to shoot him and was told by Mitchell that he was not going to be shot, that he should just pick up his wallet and walk on. Lunn testified that he walked about 150 yards to a house and called the police. He later discovered that $5.00 had been removed from his wallet. He testified that he had not heard either of the McKinzies say anything. Lunn identified a .22 caliber pistol, State's Exhibit No. 1, as looking like the same gun with which he was held up.

Police Officer J. F. Newber testified that while on duty on the night in question he received a call about 11:30 p.m. to go to the 900 block of North 6th Street, where he talked with Lunn. Lunn reported he had been robbed, gave a description of his assailants and pointed in the direction that they had last been seen. Newber began patrolling the area and first saw the defendants walking together near the railroad bridge on 6th Street about two blocks from where he had talked to Lunn. He notified a detective, Officer Fredlaw, and apparently, though it is not clear from the record, they both made the arrest about four blocks from where Officer Newber had talked with Lunn.

Police Lieutenant C. E. Wilson testified that about 6:10 a.m. on the morning following the alleged robbery he went to the vicinity of the railroad bridge and found a .22 caliber pistol which he identified as State's Exhibit No. 1. On cross-examination he testified that he did not take any fingerprints from the pistol. On redirect examina-

tion he testified, after defendants' objection was overruled, that he did not get any fingerprints because the pistol was "good and wet".

The State rested its case, defendants presented no evidence and moved for nonsuit, which motion was denied. After the charge of the court defendants moved the court to set aside the verdict and grant a new trial because of the improper argument of the solicitor to the jury, to set aside the verdict as being contrary to the weight of the evidence, to set aside the verdict for errors committed in the trial and to arrest the judgment. All motions were denied.

From judgments entered on the jury verdict, defendants appealed.

Attorney General Robert Morgan by Trial Attorney Robert G. Webb for the State.

James L. Nelson for defendant appellants.

MORRIS, J.

[1] By assignment of error No. 1 defendants contend that it was error for the court to allow Police Lieutenant Wilson to testify with reference to not having taken any fingerprints from the pistol without first having found him to be an expert. This contention is without merit and is overruled. See *State v. McClain,* 4 N.C. App. 265, 166 S.E. 2d 451 (1969). Defendants could not be prejudiced by the lack of evidence against them implicit in the State's admission that no fingerprints had been taken from the pistol.

[2] Assignments of error Nos. 3, 4, 5, and 6 are concerned with questions pertaining to the McKinzie brothers. It is their contention that there was not sufficient evidence as to them to withstand motion for nonsuit and also that the court overinstructed the jury on the law of aiding and abetting thereby prejudicing their right to a fair determination by the jury. In view of the surrounding circumstances, there was sufficient evidence introduced by the State for the case against the McKinzie brothers to be submitted to the jury for consideration under the law of aiding and abetting. *State v. McCabe; State v. Loften,* 1 N.C. App. 461, 162 S.E. 2d 66 (1968). The uncontroverted testimony of the State's witnesses placed the McKinzie brothers with Mitchell before, during and after the robbery and at the time Mitchell and the McKinzie brothers were arrested. We think the evidence, taken as a whole, does more than point the finger of suspicion toward the McKinzies. We hold that the evidence in this case was sufficient to withstand the motion for nonsuit.

[3] In reviewing the charge of the court to the jury concerning aiding and abetting, we find no prejudicial error. The mere fact that the law pertaining to aiding and abetting was mentioned in more than one place in the charge is not undue emphasis and did not prejudice the defendants. These assignments of error are overruled.

[4] Defendants next contend that their motion for a new trial should have been granted because of the improper argument of the solicitor. Although the record is silent as to what the solicitor said which defendants contend was improper, there is indication that the solicitor may have made observations from which it could be inferred that the defendants had not taken the stand to defend themselves. This, of course, would not be proper argument. However, if the trial court takes proper action to remove any prejudicial effect which might have resulted from the solicitor's remarks, such remarks will not be held to be reversible error. *State v. Stephens,* 262 N.C. 45, 136 S.E. 2d 209 (1964). The record indicates that immediately upon objection by defendants' counsel to the solicitor's remarks, whatever they were, the court admonished the solicitor that he must not make inferential observations that would suggest that the defendants had not taken the stand. Also the court's charge to the jury contained a statement to the effect that the defendants had the absolute right not to take the stand and the fact that they did not could not be considered prejudicial to their case. We think that any prejudicial effect of any remarks the solicitor may have made was effectively removed by the court's statements at the time and later by the court's charge to the jury.

[5] By assignment of error No. 9 defendants contend that it was error to refuse their motion to set aside the verdict as being contrary to the weight of the evidence. This contention is without merit and is overruled. Whether to grant such a motion is within the discretion of the trial judge and will not be disturbed in the absence of abuse of that discretion. *State v. Massey,* 273 N.C. 721, 161 S.E. 2d 103 (1968); *State v. Kirby,* 4 N.C. App. 380, 166 S.E. 2d 833 (1969). No abuse has been shown.

[6] Defendants' last assignment of error is addressed to the refusal of the court to allow their motion in arrest of judgment. Defendants contend that the indictments were based on the hearsay testimony of two police officers, one of whom was not called to testify at the trial, and therefore subject to quashal. This contention is without merit and is overruled. An indictment is not subject to quashal on the ground that the testimony before the grand jury was based on hearsay. *State v. Wall,* 273 N.C. 130, 159 S.E. 2d 317

(1968); *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785 (1968); *State v. Levy,* 200 N.C. 586, 158 S.E. 94 (1931).

Other assignments of error are not brought forward and are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Defendants have had a fair trial, free from prejudicial error.

Affirmed.

MALLARD, C.J., and HEDRICK, J., concur.

ANNIE L. HURDLE v. THE ALBEMARLE HOSPITAL, INC.

No. 691SC432

(Filed 17 December 1969)

Hospitals § 3— liability for injury to patient — negligence of employee

In an action on behalf of an eighty-eight year old arthritic patient who allegedly sustained a broken leg when an orderly employed by defendant hospital lifted the patient from a wheelchair and put her on the bed, the evidence is insufficient to support a finding that the patient's injury was proximately caused by any negligence of the orderly, and submission of the case to the jury was erroneous.

APPEAL by defendant from *Parker, J.,* 5 May 1969 Term of PASQUOTANK Superior Court.

This is a civil action tried before a jury in which the plaintiff seeks damages for injuries allegedly caused by an employee of the Albemarle Hospital.

Plaintiff is an eighty-eight year old incompetent person for whom suit was brought by Agnes Hurdle White who was duly appointed by the Clerk of the Superior Court of Pasquotank County as next friend, both plaintiff and next friend being residents of Camden County, North Carolina.

Plaintiff alleges that on 5 August 1968, while a patient at the Albemarle Hospital, she suffered fractures of both bones of her leg due to the negligent manner in which an orderly, Robert Johnson, lifted her and dropped her from her wheelchair into her bed causing her to cry out. This, together with allegations that the employee, an orderly named Robert Johnson, "did handle the plaintiff, a female patient, without the presence and help of a nurse, as required by the

hospital orders" and that said Johnson "did move the plaintiff from her wheelchair without the assistance of at least one other person, contrary to the hospital orders" constituted the allegations of negligence on which the plaintiff's claim was founded. Plaintiff did not allege negligence in the selection and retention of the employee, nor managerial or administrative negligence on the part of the hospital.

The jury answered the issues in favor of the plaintiff and from judgment thereon the defendant appeals.

Thomas Chears, Jr., and Steingold and Steingold of Norfolk, Virginia, by J. Cameron Mann for plaintiff appellees.

Hall and Hall by John H. Hall for defendant appellant.

VAUGHN, J.

We deem it necessary to comment upon but one of the questions presented upon appeal by the defendant. The defendant frames the question, to which we respond in the affirmative, as follows:

> "1. Did the Court commit reversible error in failing to grant defendant's motion for judgment of nonsuit, entered when plaintiff rested, and renewed at the conclusion of the evidence?"

The complaint alleged that the employee of the defendant, upon moving the plaintiff from her wheelchair to her bed, "dropped the plaintiff on the bed in such a manner as to cause her legs to become entangled and severely bent in a backwards position which caused the plaintiff to cry out," and that approximately two hours later the plaintiff was found by her daughter to have suffered broken bones in her leg.

The evidence failed to disclose any "dropping" of the plaintiff. The complete testimony of the only eyewitness to the alleged incident, Mrs. Dorothy Whitehurst, a witness for the plaintiff, is as follows:

> "On August 5, 1968, I was in the Albemarle Hospital as a patient, and had been there since June 16. I was a patient in the same room with Mrs. Annie Hurdle. I was next to the window on one side of the room, and she was over there by the closet on the other side of the room. I saw an orderly in the afternoon of August 5, 1968, take Mrs. Hurdle up from the bed and put her in the wheelchair. They then pushed her out in the hall, and the nurse fed her supper about 5:00. The same orderly brought her back in the room, he took her up, and put her back to bed, his name was Bob Johnson. He taken her underneath

her arms, and lifted her over his head when he taken her out of the wheelchair, and put her back on the bed. (The witness illustrated by showing that the orderly took Mrs. Hurdle under her armpits, and lifted her up in that manner.)

I know Mrs. White, and she is the daughter of Mrs. Hurdle. She came in the room later, and Mrs. White, like she did every time she came, she would generally straighten Mrs. Hurdle's legs out, and sit her up in the bed for awhile until the nurses came and were going to fix her for bed that night. When Mrs. White taken hold of Mrs. Hurdle's legs to start to straighten them she hollered and started crying. She was not able to move herself in bed."

Plaintiff's physician, Dr. Wassink, testified in substance as follows. He admitted plaintiff to the hospital some three weeks earlier because there was no other place for her to stay. She had been suffering from arthritis for years. She had previously sustained a fracture of her hip and for two or three years prior to that time she was bedridden and unable to walk. Neither of her legs would ever be weight bearing. She has a condition known as osteoporosis which he described as a condition by which the calcium disappears from the bone and therefore leaves the bone in a weakened condition and "causes what you might say soft bones." The calcium in plaintiff's right leg had disappeared to a considerable extent. He could not say whether plaintiff had enough strength to have caused her leg to be fractured through her own movements. It would be possible for the fracture to have been caused by "natural causes." It would be unusual if it happened spontaneously. For at least three weeks prior to August 5th he had had her taken from her bed and placed in a wheelchair once or twice a day. A sheet was tied in front of her so she wouldn't fall out of the chair. The plaintiff's general mental condition was such that she was clear at times and at times would be slightly confused. She gave no history as to how the fracture occurred. Results of the x-ray report were introduced by the plaintiff which read: "X-ray on 8-6-68 showed a fractured tibia and fibula with severe osteoporosis. /s/ Dr. Wassink."

The plaintiff's daughter, Mrs. White, testified that she visited her mother on 5 August 1968 at about 6:30 or 7:00 and that

"[w]hen I walked in I saw a different expression on my mother's face. She was lying on her left side and I said 'Mama, that is all right. I am going to sit you up and you'll be comfortable.' So, as usual, I pulled the cover down to straighten her legs out, I mean by straightening her legs out to pull them down a little,

> they were kind of bent over, and I wanted to get her over on her back. I started cranking the bed, and then I went back to straighten her up a little more before I sat her all the way up. That is my usual procedure with her. On this particular night as soon as I turned the covers down and took hold of her legs, she was lying on her left side, and she hollered, 'Oh, my leg,' and she said 'You are pulling my leg off.' I wasn't even touching it then."

She noticed a knot about the size of her fist right above the ankle on the inside of her right leg. She had not observed the knot on the previous night when she arrived to make her mother comfortable and have her sit up before time for her to retire for the night. When she moved her on the previous night, plaintiff did not make any complaint. Plaintiff had not tried to stand on either leg for the last six or seven years.

The administrator of the hospital testified as a witness for the plaintiff, in pertinent part as follows. The hospital had no standard or regulation for transferring a patient in bed to a wheelchair but a nurse was required to be present when an orderly handled a female patient. Plaintiff offered into evidence a paperwriting which was identified by the administrator as an "incident report." The report stated that a nurse was present when the patient was moved.

The defendant offered evidence from the orderly and nurse who were present at the time the plaintiff was taken from and returned to her bed along with that of the nurse in charge of the floor. Although this evidence tended to show that the plaintiff was at all times handled in a careful and prudent manner, it is not to be considered unless favorable to the plaintiff, and except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff.

Suffice to say that defendant's evidence casts no additional light on how, when or why plaintiff's leg was broken. Evidence from the nurse who was present and from the orderly, not in conflict with plaintiff's evidence, (as contrasted with her allegations) tended to show the nurse held the wheelchair while the orderly lifted the plaintiff and placed her in the bed *on her back;* that she was in no way dropped and gave no indication of pain; that plaintiff's knees were usually bent and that on this occasion pillows were placed under them for support.

The evidence has been set forth in considerable detail. We do not deem it necessary to enumerate all the random conclusions

which could arise therefrom except to say that viewing the evidence with liberality, we reach the conclusion that the case should not have been submitted to the jury. Negligence on the part of the defendant as the proximate cause of plaintiff's injury does not appear. The evidence does not bridge the hiatus between the act complained of and the injury.

Under the circumstances of this case, the fact that the injury occurred while the plaintiff was under the care of the defendant does not afford any evidence that it arose from the negligence of the defendant's employee. This is not a case where the very nature of the injury is inconsistent with any hypothesis other than that the employee was negligent, or that, indeed, the injury was proximately caused by such negligence if it could be assumed to have existed. On the contrary, the injury is such that it can be explained by the existence of the diseased bone and by other circumstances consistent with due care.

Defendant's motion for nonsuit at the close of the evidence should have been allowed. The judgment of the superior court is

Reversed.

BROCK and BRITT, JJ., concur.

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ANALYTICAL INDEX

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UNIFORM COMMERCIAL CODE

VENUE

WILLS
WITNESSES

ACTIONS

§ 5. Wrongful Act as Basis of Cause of Action

A party will not be allowed to take advantage of his own wrong. *Curry v. Staley*, 165.

ADVERSE POSSESSION

§ 2. Hostile and Permissive Use

Where plaintiff's entry into possession was with permission of the owner, such possession did not become adverse until acts of dominion done in character of owner were such as to give notice to the owner that permissive use was disclaimed. *Board of Education v. Lamm*, 656.

§ 23. Burden of Proof

Party asserting title by adverse possession has the burden of proof on that issue. *Board of Education v. Lamm*, 656.

§ 24. Relevancy of Evidence

Trial court properly admitted testimony of declaration by plaintiff's agent accompanying and characterizing transfer of possession of property in question as exception to hearsay rule. *Board of Education v. Lamm*, 656.

Error in admission of testimony by defendant's witnesses of declarations by titleholder at approximate time he put plaintiff in possession and on two occasions while it has been in possession, that the county was using the property as long as it was used for school property and the property would go back to him when school was discontinued, held not prejudicial where other evidence to same effect was properly admitted. *Ibid.*

§ 25.1. Instructions

Trial court properly charged that if jury believed entry into possession was permissive, such possession did not become adverse until the acts of dominion done in character of owner were such as to give notice to owner that permissive use was disclaimed. *Board of Education v. Lamm*, 656.

In action involving claim of adverse possession to school property, trial court did not err in failing to charge jury upon statute prohibiting county board of education from contracting for erection or repair of any school building unless the site on which it is located is owned by the board of education and the deed is properly registered. *Ibid.*

APPEAL AND ERROR

§ 1. Jurisdiction in General

Civil proceedings are appealable directly from the district court to the Court of Appeals. *Cline v. Cline*, 523.

§ 4. Theory of Trial in Lower Court

Theory on which case was tried in superior court must be theory of case on appeal. *Beverages v. New Bern*, 632.

§ 6. Judgments and Orders Appealable

Appeal from interlocutory injunction is not premature. *Decker v. Coleman*, 102.

Appeal lies from order awarding alimony and counsel fees pendente lite. *Kearns v. Kearns*, 319.

APPEAL AND ERROR — Continued

Appeal from order of Industrial Commission removing Workmen's Compensation case from hearing docket pending determination of common-law action for personal injuries is dismissed as premature. *Morse v. Curtis*, 620.

Failure of trial court to grant defendant's motion for nonsuit presents no question for consideration on appeal where trial court set aside verdict in defendant's favor. *Reece v. Reece*, 606.

§ 16. Jurisdiction and Powers of Lower Court

Where proceeding under the Uniform Reciprocal Enforcement of Support Act was appealable directly from the district court to the Court of Appeals, a judge of the superior court had no authority to grant an extension of time to perfect the appeal from the district court. *Cline v. Cline*, 523.

§ 24. Necessity for Exceptions

Exceptions not filed in the record are deemed abandoned. *Cline v. Cline*, 523.

§ 26. Assignments of Error to Judgment

Assignments of error to entry of judgment presents face of record proper for review. *Christenson v. Ford Sales*, 137.

§ 39. Time of Docketing

Appeal is subject to dismissal for failure to docket the record on appeal within 90 days after date of judgment appealed from. *State Bar v. Temple*, 437; *Young v. Ins. Co.*, 443; *Dixon v. Dixon*, 623; *Reece v. Reece*, 606.

Authority of trial tribunal to extend the time for docketing record on appeal in Court of Appeals cannot be exercised by order allowing appellant additional time to serve his case on appeal. *Reece v. Reece*, 606; *Kurtz v. Ins. Co.*, 625.

Authority of trial tribunal for good cause to extend the time for docketing the record on appeal in the Court of Appeals may not be exercised after the 90-day period for docketing has expired. *Dixon v. Dixon*, 623.

§ 45. Failure to Discuss Assignments of Error in Brief

Assignments of error not set out in the brief are deemed abandoned. *Enterprises v. Heim*, 548; *Graves v. Harrington*, 717.

§ 46. Burden to Show Error

The burden is on appellant not only to show error but that the alleged error was prejudicial. *Huffines v. Westmoreland*, 142; *Hill v. Shanks*, 255.

§ 47. Harmless Error

Judgment will not be set aside on appeal for harmless error. *Herring v. McClain*, 359; *Board of Education v. Lamm*, 656.

§ 50. Harmless Error in Instructions

Where it was stipulated that plaintiff lost his sense of smell in the accident complained of, plaintiff was not prejudiced by instruction that there was evidence in the case tending to show that plaintiff had lost his sense of smell. *Hill v. Shanks*, 255.

§ 54. Review of Discretionary Matters

Action of trial judge in setting aside judgment in his discretion is not reviewable on appeal. *Reece v. Reece*, 606.

APPEAL AND ERROR — Continued

§ 57. Review of Findings

Findings of fact which are supported by competent evidence are binding on appeal. *Styron v. Supply Co.*, 675.

§ 58. Review of Equity Proceedings

On appeal from interlocutory order, the Court of Appeals may review the findings of fact as well as the conclusions of law. *Register v. Griffin*, 572.

§ 62. New Trial and Partial New Trial

Court of Appeals has discretionary power to grant a partial new trial. *Kinney v. Goley*, 182.

In appeal from consolidated trial of action by driver of one automobile involved in a collision against driver of second automobile involved, and actions by two passengers in the first automobile against both drivers, petition by first driver that only a partial new trial be awarded is denied by the Court of Appeals. *Ibid.*

§ 63. Remand

The Court of Appeals will remand a cause in order that a necessary party may be brought in. *Highway Comm. v. Gamble*, 568.

ARREST AND BAIL

§ 3. Arrest Without Warrant

The arrest of defendant without a warrant on a charge of unlawful possession of tablets containing the narcotic drug LSD is lawful where the officers who made the arrest had reasonable ground to believe defendant had committed a felony and would evade arrest if not immediately taken into custody. *S. v. Roberts*, 312.

In determining whether officers had reasonable grounds to believe that defendant would evade arrest if not taken into immediate custody, the court must necessarily take into consideration the nature of the felony, the hour of the day or night, the character and reputation of the neighborhood where the arrest was made, the number of suspects, the number of officers available for assistance, and the likely consequences of the officers' failure to act promptly. *Ibid.*

§ 9. Right to Bail

Trial court did not abuse its discretion in fixing bail in amount of $10,000 pending appeal. *S. v. McDonald*, 627.

ASSAULT AND BATTERY

§ 4. Criminal Assault

Criminal assault is governed by common law rules in this State. *S. v. Hill*, 365.

A criminal assault may occur either by an intentional offer or attempt by force and violence to do injury to the person of another or by a show of violence causing the reasonable apprehension of immediate bodily harm or injury whereby another is put in fear and thereby forced to leave a place where he has a right to be. *Ibid.*

ASSAULT AND BATTERY — Continued

§ 7. Assault on a Female

Assault on a female is not a simple assault but is a misdemeanor punishable in discretion of the court. *S. v. Hill*, 365.

§ 11. Indictment and Warrant

There is no fatal variance where indictment charges assault with a pistol and further alleges assault occurred "by shooting him with a pistol" and the evidence discloses the victim was not shot but was beaten with a pistol. *S. v. Muskelly*, 174.

§ 15. Instructions Generally

Instruction that jury might find assault with intent to kill if defendant intended either to kill or inflict great bodily harm is prejudicial error. *S. v. Muskelly*, 174.

In joint trial of two defendants for two offenses of felonious assault, charge susceptible to construction that jury could find both defendants guilty on each count if it found that either defendant feloniously assaulted either victim is error. *Ibid.*

In prosecution for assault with a deadly weapon, defendant was not prejudiced by instruction of court relating to apprehension of prosecutrix and person who shoved her out of area of danger. *S. v. Hill*, 365.

§ 16. Submitting Questions of Guilt of Lesser Degrees of Offense

Where in a prosecution for assault with a deadly weapon the evidence tends to show assault on a female at least, it is not error to fail to submit the question of guilt of simple assault. *S. v. Hill*, 365.

§ 17. Verdict and Punishment

Maximum punishment for defendant sentenced for crime of assault on a female after 28 May 1969 is six months, notwithstanding statute provided punishment of two years at time assault was committed. *S. v. Mitchell*, 534.

ATTORNEY AND CLIENT

§ 3. Scope of Attorney's Authority

An attorney is presumed to have authority to act for the client whom he professes to represent. *Alexander v. Board of Education*, 92.

§ 6. Withdrawal of Attorney from Case

An attorney of record may not abandon his client's case in court without justifiable cause and permission of the court. *S. v. Penley*, 455.

AUTOMOBILES

§ 2. Suspension of License

In any case in which a license is suspended after re-examination of the licensee under the authority of G.S. 20-29.1, the Commissioner of Motor Vehicles is required to notify the licensee of such suspension, although no requirement for notice appears in the statute. *S. v. Hughes*, 287.

§ 3. Driving After Suspension or Revocation

To constitute a violation of G.S. 20-28(a) there must be (1) operation of

AUTOMOBILES — Continued

a motor vehicle by a person (2) on a public highway (3) while his operator's license is suspended or revoked. *S. v. Hughes*, 287.

Uniform Traffic Ticket sufficiently charged defendant with offense of driving a motor vehicle while his license was permanently revoked in violation of G.S. 20-28. *S. v. Letterlough*, 36.

Copy of defendant's driving record under seal and certification of Department of Motor Vehicles was properly admitted in evidence. *Ibid; S. v. Hughes*, 287.

Solicitor's argument to jury that defendant had been driving while license revoked for three or more offenses is held not prejudicial. *S. v. Letterlough*, 36.

Form of driver's license record used by Department of Motor Vehicles is disapproved *S. v. Hughes*, 287.

In prosecution for driving while license was suspended, notation on defendant's driving record of figures "06 26 68" which appear in the column headed "Mail Date of Suspension Mth Day Yr" is insufficient to show that defendant had been notified that his license was suspended. *Ibid.*

§ 7. Safety Statutes

A police officer, when in pursuit of a lawbreaker, is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act, but he is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. *Collins v. Christenberry*, 504.

§ 8. Attention to Road, Lookout and Due Care

The driver of a motor vehicle has the duty to keep an outlook in the direction in which he is traveling and is held to the duty of seeing that which he ought to have seen. *Hill v. Shanks*, 255.

§ 9. Turning

A motorist undertaking to make a left turn may properly assume that the oncoming motorist will exercise due care. *Johnson v. Douglas*, 109.

§ 16. Passing Vehicles Traveling in Same Direction

The duties that automobile drivers owe one another when traveling in the same direction are governed by the circumstances of each case. *Racine v. Boege*, 341.

Statute requiring driver of vehicle about to be overtaken to yield right-of-way does not apply to highway patrolman who set up running roadblock in attempt to stop a car being pursued by another patrolman. *Collins v. Christenberry*, 504.

§ 17. Right Side of Road and Passing Vehicles Traveling in Opposite Direction

Motorist proceeding on the right side of the highway may properly assume that an approaching automobile will remain on its own side of the road. *Johnson v. Douglas*, 109.

§ 19. Right of Way at Intersections

Motorist traveling on a dominant street who knew that stop sign had been erected for traffic on an intersecting street but was unaware that stop sign had been temporarily removed was entitled to assume that traffic on the intersecting street would yield the right-of-way; motorist on the servient street

AUTOMOBILES — Continued

who was unaware that a stop sign had been erected or that it had been removed was entitled to rely upon rule granting vehicle on the right the right-of-way when two vehicles approach an intersection at the same time. *Douglas v. Booth*, 156.

While the green signal of a traffic light merely gives permission to make a turn, it is an invitation to proceed ahead, and although a motorist facing the green light has permission to make a turn and proceed under what is actually a red light, a party crossing his path following a green light has the superior right. *Wagoner v. Butcher*, 221.

Provisions of G.S. 20-155(c) requiring motorists to yield the right-of-way to pedestrians within a marked or unmarked crosswalk "except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices" do not subordinate the right-of-way of a pedestrian to that of a turning vehicle at an intersection controlled by traffic signals which are favorable to both. *Ibid.*

§ 40. Pedestrians

The pedestrian's right-of-way is limited by provision of G.S. 20-174(a) which requires every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection to yield the right-of-way to vehicles upon the roadway. *Wagoner v. Butcher*, 221.

Where gutter repair work and barricades prevented exit from the street within crosswalk lines, pedestrian did not forfeit the right-of-way at an intersection by stepping a few feet outside the painted crosswalk lines to skirt a barricade. *Ibid.*

Pedestrian who has the right-of-way may assume, even to the last moment, that motor vehicles will recognize such preferential right. *Ibid.*

Even a pedestrian with right-of-way must exercise ordinary care for his own safety. *Ibid.*

Crossing a street without a right-of-way is not negligence per se. *Ibid.*

Provisions of G.S. 20-155(c) requiring motorists to yield the right-of-way to pedestrians within a marked or unmarked crosswalk "except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices" do not subordinate the right-of-way of a pedestrian to that of a turning vehicle at an intersection controlled by traffic signals which are favorable to both. *Ibid.*

Principle that the right to proceed is superior to the right to turn applies to a pedestrian crossing an intersection with a favorable light. *Ibid.*

A pedestrian following the traffic lights and continuing his straight course has the right to rely on the presumption that motorists will obey provisions of G.S. 20-154(a) which require a driver, before starting, stopping or turning from a direct line, first to ascertain that such movement can be made in safety, and to give a clearly audible signal by horn if any pedestrian may be affected by such movement. *Ibid.*

Effect of G.S. 20-173(a) is to give a pedestrian the right-of-way at an intersection controlled by traffic signals only when he is moving with the green light. *Ibid.*

§ 43. Pleadings and Parties

Complaint is sufficient to show actionable negligence by defendant while aiding a stalled vehicle and does not disclose as a matter of law that defend-

AUTOMOBILES — Continued

ant's negligence was insulated by alleged negligence of the drivers of other vehicles involved in the collisions in question. *Grimes v. Gibert*, 304.

In automobile accident case, plaintiff is properly nonsuited where there is a fatal variance between pleading and proof. *LaVange v. Lenoir*, 603.

§ 44. Presumptions and Burden of Proof

Plaintiff's evidence held sufficient under doctrine of res ipsa loquitur in action for damages caused to his parked automobiles when they were struck by another automobile. *Allen v. Schiller*, 392.

§ 45. Relevancy and Competency of Evidence

In action by femme plaintiff to recover for personal injuries resulting from an automobile accident, trial court properly struck plaintiff's testimony that her husband was injured in the collision and later died. *Huffines v. Westmoreland*, 142.

During the course of the adverse examination of plaintiff, action of the trial court in striking plaintiff's testimony on cross-examination by her counsel that she was knocked unconscious by the collision, that she did not remember if the traffic light was green, and that her best description of what occurred at the intersection was that it was "just like a dream," *held* harmless error where plaintiff had testified to these same matters on direct examination. *Huffines v. Westmoreland*, 142.

In action by feme plaintiff to recover for personal injuries allegedly arising out of an automobile accident, trial court properly struck as irrelevant and unresponsive plaintiff's answer, in reply to defendant's inquiry as to her injuries and the treatment thereof, that she had been more worried about her injured husband at the time of the treatment. *Ibid.*

Testimony by pursuing police officers as to speed of defendant's automobile 1½ miles from collision held properly admitted in manslaughter prosecution. *S. v. Paschal*, 334.

§ 46. Opinion Testimony as to Speed

What is a reasonable opportunity to observe the vehicle and judge its speed is a question that must be determined by the trial judge in each case from the facts as they appear in the evidence. *Johnson v. Douglas*, 109.

Testimony of witness as to speed of an oncoming automobile was properly excluded where witness did not see the car continuously. *Ibid.*

Trial court properly excluded plaintiff's opinion testimony of speed of defendant's automobile where the evidence shows she did not observe defendant's car for sufficient time and physical facts at scene make it without probative value. *Hall v. Kimber*, 669.

§ 47. Physical Facts at Scene

Physical facts at scene do not support inference that defendant's speed was excessive or that he failed to keep his car under reasonable control. *Hall v. Kimber*, 669.

§ 50. Nonsuit on Issue of Negligence

In action by plaintiff guest passenger, evidence is held sufficient for jury on issue of driver's negligence in failing to keep proper lookout, failing to keep car under proper control, and speeding. *Yelton v. Dobbins*, 483.

Plaintiff's evidence held sufficient to show that injury was proximately caused by accident complained of. *Batten v. Duboise*, 445.

AUTOMOBILES — Continued

If the variance between a plaintiff's allegations and proof could not have misled the defendant to his prejudice, it will not be deemed material and therefore fatal. *Hall v. Kimber*, 669.

§ 56. Following Too Closely; Hitting Parked Vehicle

Plaintiff's evidence held sufficient under doctrine of res ipsa loquitur in action for damages caused to his parked automobiles when they were struck by another automobile. *Allen v. Schiller*, 392.

The rule that a rear-end collision furnishes some evidence that the following motorist was negligent is not to be automatically applied in every case. *Racine v. Boege*, 341.

Plaintiff's evidence is sufficient to show that rear-end collision was caused by defendant's driving at an unsafe speed in a fog bank. *Ibid.*

§ 57. Exceeding Reasonable Speed at Intersection and Failing to Yield Right-of-Way

Where defendant approached intersection on servient street without knowledge that stop sign for servient street had been erected or that it had been temporarily removed, defendant was entitled to rely on rule granting vehicle on the right the right of way, and plaintiff's action was properly nonsuited where her evidence discloses that defendant entered the intersection from plaintiff's right before plaintiff entered the intersection. *Douglas v. Booth*, 156.

In action by guest passenger against driver of truck which allegedly caused automobile in which plaintiff was riding to wreck, evidence is deemed sufficient for jury on issue of truck driver's negligence in failing to stop for a stop sign, failure to keep proper lookout, and failure to keep vehicle under proper control. *Yelton v. Dobbins*, 483.

In action for personal injuries received in a collision which occurred when the automobile in which plaintiff was a passenger attempted to cross two lanes of a divided four-lane highway, there is a fatal variance between plaintiff's allegations and proof relating to right-of-way where plaintiff's allegations would make applicable one set of statutes and decisions and plaintiff's proof would make applicable another set of statutes and decisions. *Hall v. Kimber*, 669.

Physical facts at scene do not support inference that defendant's speed was excessive or that he failed to keep his car under reasonable control. *Ibid.*

§ 58. Turning and Hitting Turning Vehicles

In an action for damages arising out of a collision between plaintiff's truck, which was making a left turn across defendant's lane of travel, and defendant's oncoming automobile, there was ample evidence of defendant's negligence and plaintiff's contributory negligence to require submission of the issues to the jury. *Johnson v. Douglas*, 109.

§ 62. Striking Pedestrians

Evidence held sufficient for jury in action for injuries sustained when automobile struck soldier marching in drill formation. *Hill v. Shanks*, 255.

§ 66. Identity of Driver

In manslaughter prosecution, evidence of position of bodies in wrecked automobile held sufficient to show defendant was driver. *S. v. Paschal*, 334.

Circumstantial evidence held sufficient to show that defendant's intestate

AUTOMOBILES — Continued

was driver of automobile which struck plaintiff's parked automobiles. *Allen v. Schiller*, 392.

Position of bodies and condition of automobile after wreck held sufficient evidence that defendant's intestate was driver of automobile at time of accident. *Morris v. Bigham*, 490.

§ 77. Contributory Negligence in Passing Vehicle Traveling in Same Direction

In action by highway patrolman for personal injuries received in automobile collision, evidence that plaintiff patrolman was attempting to stop defendant with a "running roadblock" is held not to disclose that plaintiff was contributorily negligent as a matter of law. *Collins v. Christenberry*, 504.

Plaintiff was not contributorily negligent as a matter of law in passing on the right a left-turning vehicle which had stopped ahead of him at an intersection. *Ford v. Smith*, 539.

§ 79. Contributory Negligence in Intersectional Accident

In action for personal injuries received by plaintiff motorcyclist in collision at intersection controlled by traffic lights, plaintiff's evidence does not show as a matter of law that plaintiff failed to keep a proper lookout or failed to keep his vehicle under proper control. *Ford v. Smith*, 539.

§ 80. Turning or Hitting Vehicle Making Turn

In an action for damages arising out of a collision between plaintiff's truck, which was making a left turn across defendant's lane of travel, and defendant's oncoming automobile, there was ample evidence of defendant's negligence and plaintiff's contributory negligence to require submission of the issues to the jury. *Johnson v. Douglas*, 109.

§ 83. Pedestrian's Contributory Negligence

Evidence held not to disclose that soldier crossing intersection in drill formation was contributorily negligent as a matter of law in failing to see oncoming vehicle. *Hill v. Shanks*, 255.

Evidence held not to disclose contributory negligence as a matter of law on part of pedestrian who started across intersection with traffic light in her favor. *Wagoner v. Butcher*, 221.

§ 87. Insulating Negligence

Complaint is sufficient to show actionable negligence by defendant while aiding a stalled vehicle and does not disclose as a matter of law that defendant's negligence was insulated by alleged negligence of the drivers of other vehicles involved in the collisions in question. *Grimes v. Gibert*, 304.

§ 90. Instructions in Auto Accident Cases

Instructions which would permit the jury to find the party guilty of aspects of negligence in the operation of an automobile, regardless of whether such negligence had been alleged, are erroneous. *Johnson v. Douglas*, 109.

Instruction in automobile accident case which charged on two aspects of negligence in the conjunctive was not prejudicial. *Herring v. McClain*, 359.

Where appellant's testimony was in conflict with the indisputable physical facts established by appellant's other evidence, trial court was not required to charge on facts established by the testimony. *Ibid.*

Trial court correctly instructed jury as to standard of care required of police officer while engaged in his official duties. *Collins v. Christenberry*, 504.

AUTOMOBILES — Continued

Trial court did not err in failing to instruct jury that if they should find plaintiff passenger was injured by negligence of defendant truck driver they should also find that defendant automobile driver was injured and that defendant automobile owner was damaged by negligence of defendant truck driver. *Yelton v. Dobbins*, 483.

In action arising out of two-car collision at an uncontrolled intersection, evidence supported an instruction as to plaintiff's careless and reckless driving. *Ford v. Jones*, 722.

Instructions which incorporate the provisions of the reckless driving statute without applying the statute to the evidence are prejudicial. *Ibid.*

§ 94. Contributory Negligence of Passenger

Evidence does not show contributory negligence by automobile passenger as a matter of law. *Morris v. Bigham*, 490.

§ 105. Sufficiency of Evidence on Issue of Respondeat Superior

G.S. 20-71.1 applies when the plaintiff, by appropriate allegations, seeks to hold an automobile owner liable under the doctrine of respondeat superior for the negligence of a nonowner operator. *Allen v. Schiller*, 392.

Proof of ownership and registration of automobile involved in a collision while driven by a nonowner is sufficient to take case to jury on issue of agency of driver for owner. *Ibid.*

Plaintiff's evidence in wrongful death action placing title to automobile in non-driver owner is sufficient to require submission of case to jury on issue of driver's agency. *Morris v. Bigham*, 490.

§ 112. Competency and Relevancy of Evidence in Manslaughter Prosecution

Testimony by pursuing police officers as to speed of defendant's automobile 1½ miles from collision held properly admitted in manslaughter prosecution. *S. v. Paschal*, 334.

§ 113. Sufficiency of Evidence in Manslaughter Prosecution

In manslaughter prosecution, evidence of position of bodies in wrecked automobile held sufficient to show defendant was driver. *S. v. Paschal*, 334.

§ 116. Elements of Offense of Speeding

The statute, G.S. 29-141, restricting two and one-half ton trucks to a maximum speed of 45 mph while passenger cars are permitted to be operated at speed of 55 mph is held constitutional. *S. v. Bennor*, 188.

§ 126. Competency of Evidence of Driving Under Influence

Person holding valid permit to administer breathalyzer test issued by the State Board of Health is competent to testify as to results of such a test when the permit is introduced in evidence. *S. v. King*, 702.

§ 127. Sufficiency of Evidence of Driving Under Influence

Evidence held sufficient for jury in prosecution for driving under influence of intoxicants. *S. v. King*, 702.

§ 129. Instructions in Prosecution for Driving Under Influence

In prosecution for driving under the influence of intoxicants, defendant was not prejudiced by trial court's inadvertent use of the word "qualities"

AUTOMOBILES — Continued

rather than "faculties" in portion of the charge defining "under the influence." *S. v. Bledsoe*, 195.

§ 130. Punishment for Violation of G.S. 20-138

In a conviction of a first offense of driving under the influence, suspension of sentence of 18 months' imprisonment upon condition that defendant pay $3000 in reparation to the prosecuting witness is reasonable, but the case is remanded for imposition of a sentence of imprisonment within the statutory maximum. *S. v. Gallamore*, 608.

BANKS AND BANKING

§ 11. Transactions With Agents

Where plaintiff alleged that he volunteered to advance the defendant bank the amount owing defendant by a third person on an automobile loan and that he authorized the defendant to draw a sight draft on the plaintiff's account in another bank and instructed defendant to attach the loan papers to the draft, and where the draft was accepted and paid either by plaintiff personally or by plaintiff's bank in consideration of delivery to plaintiff of the certificate of title to the automobile, the unconditional acceptance and payment of the draft concluded the transaction between plaintiff and defendant, and plaintiff may not thereafter recover from defendant upon allegations that defendant failed to attach the note of the third person to the draft. *Johnson v. Hooks*, 432.

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.

BOUNDARIES

§ 15. Verdict and Judgment

In a hearing upon a judgment by default and inquiry that was obtained by plaintiffs in an action arising out of a boundary line dispute between plaintiffs and adjoining landowners, plaintiffs are not entitled to an order permanently restraining the defendant landowners from using portion of a dirt path that lies upon plaintiff's lands, where there was no demand for relief in plaintiffs' complaint which would empower the court to issue a permanent restraining order. *Meir v. Walton*, 415.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence and Nonsuit

Fingerprint evidence held sufficient to take case to jury in prosecution for felonious breaking and entering. *S. v. Blackmon*, 66.

Where there is sufficient evidence that a building has been broken into and entered and that property has been stolen therefrom by such breaking and entering, the possession of such stolen property recently after the larceny raises presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS — Continued

If stolen article is type not normally and frequently traded in lawful channels, inference of guilt from possession of the article would survive a longer time interval than if the article were a type normally and frequently traded in lawful channels. *Ibid.*

Elapse of 27 days between crime and discovery of defendant's possession of stolen article held not too great for doctrine of recent possession to apply where article was handmade special-purpose tool not normally available in the community. *S. v. Blackmon*, 66.

Even though property found in defendant's possession is not listed in the bill of indictment and is not owned by the same person whose property defendant is charged in the indictment with stealing, a presumption that defendant stole the property listed in the indictment arises if the property found in defendant's possession was recently stolen at the same time and place as the property listed in the indictment. *Ibid.*

Question of defendant's guilt of breaking and entering was properly submitted to the jury. *S. v. Blackburn*, 510; *S. v. Walker*, 447.

In this prosecution for felonious breaking and entering and felonious larceny, defendant's motion for nonsuit was properly overruled where a State's witness testified that she saw defendant enter the victim's apartment after pulling nails from the door hinge, and saw defendant carry a television set from the apartment and place it in a taxi. *S. v. Wilson*, 618.

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.

Circumstantial evidence, including evidence that store proprietor shot one intruder and that defendant had been shot, held sufficient for jury in breaking and entering prosecution. *S. v. Jacobs*, 751.

§ 6. Instructions

In prosecution for breaking and entering with intent to commit felonious larceny, trial court properly instructed jury that requisite felonious intent must be applied to specific crime alleged. *S. v. Wilson*, 618.

§ 8. Sentence and Punishment

The trial court did not abuse its discretion in imposing a sentence of imprisonment of six to ten years upon defendant's plea of guilty of felonious breaking and entering and in fixing bail pending appeal in the amount of $10,000. *S. v. McDonald*, 627.

Use of symbol B&E and L&R in judgment and commitment is disapproved. *S. v. Dickerson*, 131.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 8. Pleadings

Allegations that grantee of executor's deed knew that beneficiaries under will objected to sale of the property and that purchase price was inadequate held insufficient to state cause of action for cancellation of executor's deed. *Motyka v. Nappier*, 544.

§ 10. Sufficiency of Evidence

Mere inadequacy of price standing alone is not sufficient ground for setting aside sale by executor. *Motyka v. Nappier*, 544.

CHARITIES AND FOUNDATIONS

§ 3. Liability for Injury to Patrons

Rule of charitable immunity was overruled only as to cause of action arising after 20 January 1967. *McEachern v. Miller*, 42.

CONSPIRACY

§ 1. Elements of Civil Conspiracy

A conspiracy is an agreement between two or more persons to commit an unlawful act or to do a lawful act in an unlawful manner. *Curry v. Staley*, 165.

A civil action for conspiracy is an action for damages resulting from wrongful or unlawful acts committed by one or more conspirators pursuant to a formed conspiracy. *Ibid.*

§ 2. Actions for Civil Conspiracy

Allegations that employer and employer's accountant set up the account books in a new restaurant so as to give false appearance that plaintiff was the owner, thereby subjecting him to liability for taxes, are held insufficient to state a cause of action for civil conspiracy. *Curry v. Staley*, 165.

§ 3. Nature and Elements of Criminal Conspiracy

If two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design. *Curry v. Staley*, 165.

CONSTITUTIONAL LAW

§ 6. Legislative Powers

The Legislature has prerogative to decide what laws shall be changed and when. *Simmons v. Wilder*, 179.

§ 13. Safety Legislation

The statute, G.S. 29-141, restricting two and one-half ton trucks to a maximum speed of 45 mph while passenger cars are permitted to be operated at speed of 55 mph is held constitutional. *S. v. Bennor*, 188.

§ 18. Rights of Free Press, Speech and Assemblage

Right of a person to freedom of speech and peaceably to assemble and petition the Government for redress of grievances is not absolute but must give way to the compelling interest of the State to operate its courts of justice. *In re Hennis*, 683.

Defendant was not denied right to freedom of speech when he was summarily punished for direct contempt of court for picketing courthouse during trial with sign calling for impeachment of the presiding judge. *Ibid.*

§ 26. Full Faith and Credit to Foreign Judgments

A foreign child-custody decree is entitled to full faith and credit in the courts of this State unless a change of circumstances is shown which would justify a modification of the decree. *Rothman v. Rothman*, 401.

§ 28. Necessity for Indictment

Trial court erred in accepting defendant's plea of guilty of felony of receiving stolen goods when defendant had not been indicted for such offense and had not waived bill of indictment. *S. v. Cassada*, 629.

CONSTITUTIONAL LAW — Continued

§ 29. Right to Trial by Duly Constituted Jury

Defendant has burden of proving allegations of racial discrimination in selection of prospective jurors. *S. v. White*, 425.

§ 30. Due Process in Trial

Every person charged with crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Cox*, 18.

§ 31. Right of Confrontation and Time to Prepare Defense

Trial court properly refused to permit defendant's attorney to interview his co-defendant without the presence of the co-defendant's court-appointed counsel. *S. v. Penley*, 455.

In this felonious larceny prosecution, defendant was not denied an adequate opportunity to prepare for trial by the fact that the case was called for trial at the same term of court at which counsel was appointed, where the record shows that defendant refused to allow counsel to move for a continuance but insisted that the case be tried when called. *S. v. Smith*, 580.

§ 32. Right to Counsel

Defendant's waiver of right to counsel may not be presumed from the fact that a confession was obtained or that the record is silent concerning such a waiver. *S. v. Mills*, 347.

Defendants were not prejudiced by failure of court to appoint counsel to represent them until approximately four weeks after they were arrested. *S. v. Jackson*, 406.

Trial court properly ordered the trial to proceed with court appointed counsel for defendant notwithstanding defendant's general expression of dissatisfaction with counsel. *S. v. Moore*, 596.

§ 35. Ex Post Facto Laws

Defendant sentenced for crime of assault on a female after effective date of 1969 amendment rewriting G.S. 14-33 and reducing maximum sentence of imprisonment for the crime is entitled to be sentenced under the amendment, notwithstanding crime was committed prior to such date. *S. v. Mitchell*, 534.

§ 36. Cruel and Unusual Punishment

Punishment not exceeding statutory limit cannot be considered cruel and unusual in the constitutional sense. *S. v. Powell*, 8.

§ 37. Waiver of Constitutional Guaranties

The courts of this State have no power, even by consent, to try a defendant in a criminal prosecution for a felony and determine his guilt or innocence without a jury. *S. v. Norman*, 31.

CONTEMPT OF COURT

§ 2. Direct or Criminal Contempt

A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess which tend to subvert or prevent justice. *In re Hennis*, 683.

Defendant was not denied right to freedom of speech when he was sum-

CONTEMPT OF COURT — Continued

marily punished for direct contempt of court for picketing courthouse during trial with sign calling for impeachment of the presiding judge. *Ibid.*

Behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due its authority, may be punished for contempt. *Ibid.*

§ 4. Summary Proceedings

Defendant was not denied due process when court summarily sentenced him for direct contempt committed in presence of court without full trial at which defendant was represented by counsel and had opportunity to present evidence. *In re Hennis*, 683.

Trial court had power to punish defendant summarily for direct contempt where, during conduct of a trial, defendant picketed the courthouse wearing a sign calling for impeachment of the presiding judge, defendant placed himself in a position to be seen from the courtroom, and his conduct caused the proceedings of the court to be interrupted. *Ibid.*

§ 7. Punishment for Contempt

Punishment of 20 days in jail for direct contempt is not excessive. *In re Hennis*, 683.

§ 8. Appeal and Review

The facts found by the court in summarily punishing a person for direct contempt are binding upon the judge at a habeas corpus hearing and upon the Court of Appeals. *In re Hennis*, 683.

CORPORATIONS

§ 27. Liability of Corporation for Torts

A corporation is liable for the torts of its employees acting within the scope of their authority or the course of their employment. *Quinn v. Supermarket*, 696.

COSTS

§ 1. Recovery as Matter of Right by Successful Party

Costs usually follow a final judgment. *Register v. Griffin*, 572.

§ 3. Taxing of Costs in Discretion of Court

In a declaratory judgment action to construe the provisions of a trust, trial court has the discretion to tax all costs against the plaintiff. *Dillon v. Bank*, 584.

COUNTIES

§ 5. County Zoning

A zoning ordinance is presumed to be valid and constitutional. *Beverages v. New Bern*, 632.

Evidence that a zoning ordinance has made property less valuable is insufficient ground, standing alone, for invalidating it. *Ibid.*

COURTS

§ 5. Concurrent Original Jurisdiction

The original general jurisdiction to hear an application for a restraining order is vested concurrently in the superior court and the district court. *Boston v. Freeman*, 736.

COURTS — Continued

§ 14. Jurisdiction of Inferior Court

A chief judge of the district court has jurisdiction to enter in one county a temporary restraining order in action pending in the district court of another county in the judicial district. *Boston v. Freeman*, 736.

CRIMINAL LAW

§ 1. Nature and Elements of Crime

The proof of every crime consists of proof of the corpus delicti and proof that defendant is the perpetrator of the crime. *S. v. Macon*, 245.

§ 15. Venue

Defendant's motion for a change of venue or for a special venire from another county on the ground he cannot get a fair trial because of widespread publicity was properly denied by trial court. *S. v. Penley*, 455.

§ 16. Exclusive Jurisdiction

The district court has exclusive original jurisdiction of misdemeanors, G.S. 7A-272, including actions to determine liability of persons for the support of dependents in any criminal proceeding. *Cline v. Cline*, 523.

§ 23. Plea of Guilty

A plea of guilty to a valid warrant or indictment, if voluntarily and understandingly entered, is equivalent to conviction, no other proof of guilt being required, and the court has power to impose sentence thereon, but a valid sentence may not be imposed upon a conditional plea of guilty. *S. v. Norman*, 31.

Record shows defendant's guilty pleas were voluntarily entered. *S. v. Heritage*, 442.

Where defendant was being tried upon indictments charging him with felonious breaking and entering and felonious larceny, the trial court erred in accepting during trial defendant's plea of guilty of the felony of receiving stolen goods when defendant had not been indicted for such offense and had not waived a bill of indictment. *S. v. Cassada*, 629.

§ 25. Plea of Nolo Contendere

A voluntary plea of nolo contendere, when accepted by the court, is equivalent to a plea of guilty insofar as the court's authority to impose sentence is concerned, but a valid sentence may not be imposed upon a conditional plea of nolo contendere. *S. v. Norman*, 31.

Although trial court questioned defendant, upon his tender of pleas of nolo contendere through counsel, as to whether he wanted to enter "a plea of nolo contendere to all of these charges and permit the judge to try the case, to hear the facts, and to determine whether or not you are guilty or not guilty," the record as a whole disclosed that defendant's pleas of nolo contendere were unconditionally accepted and that the court heard evidence only for the purpose of fixing punishment. *S. v. Norman*, 31.

§ 26. Plea of Former Jeopardy

Defendant has the burden of proving his plea of former jeopardy. *S. v. Wiley*, 193.

Evidence held sufficient to support court's findings that defendant had not been prosecuted for the same offense for which he was on trial. *Ibid.*

CRIMINAL LAW — Continued

Defendant's plea of former jeopardy raises questions of fact and law for the trial judge to determine. *Ibid.*

§ 33. Facts Relevant to Issues

Defendant's statement to police officer that he stole some rings because his girlfriend was pregnant and needed money is relevant to show defendant's motive and that he made prior inconsistent statements. *S. v. Walker*, 740.

§ 42. Articles and Clothing Connected with the Crime

Pistol used in armed robbery was properly admitted into evidence. *S. v. Culbertson*, 327.

Trial court properly admitted articles of clothing removed from defendant after his valid arrest and sent to F.B.I. for laboratory analysis. *S. v. Walker*, 447.

Bloodstained pants allegedly worn by defendant during commission of a crime were sufficiently identified for introduction into evidence. *S. v. Jacobs*, 751.

§ 43. Photographs

Trial court properly admitted for illustrative purposes photographs of tire tracks found at the crime scene and photographs of tires on defendant's car. *S. v. Walker*, 447.

Trial court properly admitted for illustrative purposes four photographs depicting body of deceased and inside of house where homicide occurred. *S. v. McCain*, 558.

Photographs of defendant from which the prosecuting witness had identified the witness as perpetrator of the offense were properly admitted into evidence. *S. v. Penley*, 455.

Photographs showing the location and appearance of the body of the victim of a homicide were properly admitted in evidence. *S. v. Barrow*, 475.

Photographs purporting to show defendant on the night of the offense with a mustache and short growth of beard were properly admitted despite defendant's contention of prejudice. *S. v. McGuinn*, 554.

Photographs otherwise competent for the purpose of illustrating the testimony of a witness are not rendered inadmissible solely because they may tend to arouse prejudice. *Ibid.*

§ 50. Opinion Testimony

Trial court properly admitted testimony by a detective that in his opinion deceased was dead when he observed him at the crime scene. *S. v. McCain*, 558.

§ 55. Blood Tests

Trial court properly admitted expert testimony of results of blood grouping tests performed on blood samples taken from crime scene and from defendant. *S. v. Jacobs*, 751.

§ 60. Evidence of Fingerprints and Footprints

Fingerprint evidence held sufficient to take case to jury in breaking and entering and larceny prosecution. *S. v. Blackmon*, 66.

Evidence of footprints and tire tracks found at the scene of a crime is competent, and the probative force, if any, of such evidence is for the jury. *S. v. Culbertson*, 327.

CRIMINAL LAW — Continued

Where deputy sheriff testified that he was not a fingerprint expert, trial court properly refused to permit defendant to cross-examine the officer in an attempt to show that defendant's fingerprints had not been found on the automobile used in the offense. *S. v. Penley*, 455.

Trial court did not err in admitting testimony by police officer who had not been qualified as fingerprint expert that no fingerprints were taken from a pistol because it was wet. *S. v. Mitchell*, 755.

§ 61. Evidence of Shoe Prints and Tire Tracks

Evidence of footprints and tire marks found at scene of a crime is competent. *S. v. Culbertson*, 327.

Trial court properly admitted plaster cast of tire track found at crime scene. *S. v. Walker*, 447.

§ 64. Evidence of Intoxication

Person holding valid permit to administer breathalyzer test issued by State Board of Health is competent to testify as to results of such test when the permit is introduced in evidence. *S. v. King*, 702.

§ 66. Evidence of Identity by Sight

Testimony of assault victim relating to her identification of defendant at a police station at time when defendant was not in a lineup and did not have counsel present and had not waived counsel is held properly admitted. *S. v. Williams*, 14.

The photographs of defendant from which the prosecuting witnesses had identified defendant as the perpetrator of the offenses charged against him, *held* properly admitted in evidence *S. v. Penley*, 455.

In automobile larceny prosecution, testimony by prosecuting witness that he saw defendant driving stolen automobile was not rendered incompetent by fact that witness on cross-examination expressed some doubt as to correctness of his identification. *S. v. Smith*, 580.

Photographs purporting to show defendant on the night of the offense with a mustache and short growth of beard were properly admitted despite defendant's contention of prejudice. *S. v. McGuinn*, 554.

Trial court's findings and conclusion that victim's in-court identification of defendant as the perpetrator of the robbery was not based on an illegal pretrial lineup but was based on the witness' observations of defendant during the robbery held supported by clear and convincing evidence presented on voir dire. *S. v. Stamey*, 517.

Defendants' contention that the prosecuting witness' testimony at *voir dire* hearing was influenced by the trial court's statement that a *voir dire* hearing would be conducted in compliance with decision of the Court of Appeals and that "It might well be that . . . the identity of both defendants was based on factors complete and independent of the line-up identity," *is held* to be without merit. *Ibid.*

§ 67. Evidence of Identity by Voice

Trial court properly prevented defendant from developing on cross-examination evidence as to defendant's speech defect. *S. v. Penley*, 455.

§ 70. Tape Recordings

Defendant was not prejudiced by the exclusion of a tape recording made by a speech therapist in an interview with the defendant, where the tape re-

CRIMINAL LAW — Continued

cording was merely corroborative of the lengthy testimony of the speech therapist that defendant had a speech defect. *S. v. Penley*, 455.

§ 73. Hearsay Testimony

In kidnapping and armed robbery prosecution, trial court properly excluded hearsay testimony. *S. v. Penley*, 455.

§ 75. Voluntariness of Confession; Admissibility

Testimony by SBI agent as to defendant's incriminating statements is properly admitted into evidence where trial court found on voir dire that the *Miranda* rules were complied with. *S. v. Macon*, 245.

A confession can be obtained by mental as well as by physical coercion. *S. v. Mills*, 347.

Where defendant at the time of his arrest and during his interrogation unequivocally requested that he be permitted to contact his lawyer, but the request was denied by the arresting officers, the confession obtained during the interrogation is not admissible in evidence. *Ibid.*

Trial court properly admitted testimony by police officer concerning incriminating statements made by defendant while defendant was in custody of police immediately following his arrest. *S. v. Corn*, 613.

In a homicide prosecution, the trial court did not err in allowing the solicitor, over objection, to impeach defendant by use of defendant's signed confession which was not admitted in evidence. *S. v. Barrow*, 475.

Fact that defendant was not warned of his right to court-appointed counsel did not render incompetent statements made by defendant where defendant was an educated schoolteacher, was not indigent and made no incriminating statements. *S. v. King*, 702.

A general objection is sufficient to challenge admissibility of a confession, but objection is waived if not timely made. *S. v. Diggs*, 732.

Statement by defendant that he had been in trouble enough to know his rights, held an intelligent waiver of his right to counsel at his in-custody interrogation. *S. v. Lightsey*, 745.

§ 76. Determination and Effect of Admissibility of Confession

Whether or not defendant made the incriminating statements admitted in evidence is a question of fact for the jury. *S. v. Macon*, 245.

In order that a confession be properly admitted in evidence, the State must show that defendant knowingly waived his right to counsel. *S. v. Mills*, 347.

Order entered by trial court in admitting defendant's confession was not inadequate in failing to expressly find that the confession was uninfluenced by fear or hope of reward where court found defendant knowingly, freely and voluntarily made the statement. *S. v. Lightsey*, 745.

Trial court did not err in admission of testimony by police officer concerning defendant's extrajudicial admissions without conducting voir dire hearing and making findings of fact, where defendant made no objection at the trial to the officer's testimony. *S. v. Jones*, 712; *S. v. Diggs*, 732.

§ 80. Records and Private Writings

Trial court properly refused to admit in evidence an affidavit offered by defendant where person who had made affidavit was not available for cross-examination. *S. v. Letterlough*, 36.

In a homicide prosecution, defendant was not entitled to examine the

CRIMINAL LAW — Continued

typewritten transcript of notes made by an SBI agent during his interrogation of defendant. *S. v. Macon*, 245.

§ 84. Evidence Obtained by Unlawful Means

Admission of search warrant used to search defendants' automobile was not prejudicial. *S. v. Culbertson*, 327.

In prosecution charging defendant with unlawful possession of LSD tablets, trial court properly admitted the tablets into evidence where they were found in defendant's possession by a search incident to a lawful arrest without a warrant. *S. v. Roberts*, 312.

Evidence seized during a search of defendant's automobile without a warrant was properly admitted where defendant gave his consent to the search. *S. v. Blackburn*, 510.

Evidence of a different offense from the crime for which defendant was arrested and lawfully searched is competent evidence on the trial of such defendant for that different offense. *Ibid.*

§ 85. Character Evidence Relating to Defendant

If specific acts are relevant and competent as evidence of something other than character, they are not inadmissible because they incidentally reflect upon character. *S. v. Penley*, 455.

Solicitor properly cross-examined defendant's witness to elicit fact that defendant had been "running around" with defendant's alibi witness. *Ibid.*

§ 86. Credibility of Defendant

Solicitor may impeach defendant's credibility by cross-examination as to collateral matters. *S. v. McGuinn*, 554.

There is no merit to defendant's contention that the question asked him on cross-examination as to the date of his marriage was prejudicial in that subsequent examination as to the age of his children disclosed he had two children by his wife prior to the marriage. *Ibid.*

Defendant's statement to police officer that he stole some rings because his girlfriend was pregnant and needed money is relevant to show defendant's motive and that he made prior inconsistent statements. *S. v. Walker*, 740.

Trial court erred in bringing defendant's FBI record to attention of jury by questioning defendant from the record about prior convictions and about the record itself. *S. v. Dickerson*, 131.

§ 88. Cross-Examination

Trial court properly sustained objection to repetitious questioning of prosecutrix as to colors of clothing worn by defendant's counsel and the solicitor. *S. v. Cox*, 18.

Trial court properly prevented defendant from developing on cross-examination evidence as to defendant's speech defect. *S. v. Penley*, 455.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Defendant was not prejudiced by fact that trial judge instructed jury with regard to the nature of corroborative testimony after such testimony was given, rather than before. *S. v. Hardee*, 147.

In a prosecution of two brothers for armed robbery, testimony of the officer who sought to arrest defendants that the defendants' father had stated to him on the night of the robbery, in reply to his questions as to the whereabouts of the sons, that he did not know where they were and that "they

have been in so much trouble that I have got tired of looking for them," *held* competent to impeach the father's testimony that one of his sons was at home on the night of the robbery. *S. v. Culbertson*, 327.

Evidence which tends to corroborate a party's witnesses is competent and is properly admitted upon the trial for that purpose, even though otherwise incompetent. *Ibid.*

In homicide prosecution the trial court did not err in allowing the solicitor, over objection, to impeach defendant by use of defendant's signed confession which was not admitted in evidence. *S. v. Barrow*, 475.

§ 91. Time of Trial and Continuance

A motion for a continuance is addressed to the sound discretion of the trial judge, whose ruling thereon is subject to review only in case of manifest abuse. *S. v. Penley*, 455.

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

Trial court properly denied defendant's motion for continuance based on ground that his attorney had just learned that the co-defendant had changed his story and implicated a person other than defendant. *Ibid.*

§ 92. Consolidation of Counts

Where the defenses of the defendants in a consolidated prosecution were not inconsistent, the trial court properly refused to try each defendant separately. *S. v. Wall*, 422.

The granting or refusing of the motion for a separate trial is a matter which rests in the sound discretion of the trial judge. *Ibid.*

Trial court did not err in consolidating for trial cases against two defendants charged in separate indictments with the crimes of felonious breaking and entering, felonious larceny, and safecracking. *S. v. Walker*, 447.

Separate indictments charging two defendants with the same crime were properly consolidated. *S. v. Blackburn*, 510.

§ 95. Admission of Evidence Competent for Restricted Purpose

Absent a special request, the trial court is not required to restrict the admission of impeachment evidence or to instruct the jury as to the effect of such evidence. *S. v. Culbertson*, 327.

§ 98. Custody of Witnesses

Denial of defendant's motion to sequester witnesses is in the discretion of the trial court and not reviewable. *S. v. Hardee*, 147; *S. v. Barrow*, 475.

§ 99. Conduct of Court and Expression of Opinion During Trial

G.S. 1-180 does not apply to the charge alone, but prohibits trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion. *S. v. Cox*, 18.

Comments by trial court during lengthy colloquy with defense counsel which reflected court's impatience with defense counsel's reluctance to abide by court's ruling upon evidence held not to constitute an expression of opinion. *Ibid.*

Defendants were not prejudiced by the fact that trial court asked that de-

fendants be identified by their counsel after having been pointed out in open court by the prosecutrix. *Ibid.*

A remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. *Ibid.*

The criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury, and in applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. *Ibid.*

Trial court expressed an opinion on the evidence in taking over cross-examination of defendant concerning prior convictions. *S. v. Dickerson*, 131.

§ 101. Custody and Conduct of Jury.

Defendant in homicide prosecution was not prejudiced by fact trial court allowed two deputy sheriffs who were witnesses for the State to act as court officers during the trial, but the practice of putting the jury in custody of an officer who is a key witness for the State is disapproved. *S. v. Macon*, 245.

Trial court properly denied defendant's motion for mistrial on ground that nonjuror entered jury room during deliberations. *S. v. Riera*, 381.

§ 102. Argument and Conduct of Solicitor

In prosecution charging defendant with driving a motor vehicle while his license was permanently revoked, solicitor's argument to jury was not prejudicial. *S. v. Letterlough*, 36.

Trial court did not abuse its discretion in permitting solicitor to argue to the jury that they were not to believe defendant's girl friend who "he is living in sin with," where defendant's witness had testified that defendant "sometimes" lived in the home where she and her mother lived. *Ibid.*

Prejudicial effect of remarks by solicitor relating to failure of defendants to take the stand were removed when court admonished solicitor not to make such statements and charged jury that fact defendants did not take stand could not be considered prejudicial to their case. *S. v. Mitchell*, 755.

§ 104. Consideration of Evidence on Motion to Nonsuit

On motion for judgment as of nonsuit in a criminal case, the evidence must be considered in the light most favorable to the State. *S. v. Buck*, 726; *S. v. Diggs*, 732.

§ 105. Necessity for Motion to Nonsuit

Defendant waives motion for nonsuit by thereafter introducing evidence. *S. v. Jackson*, 406.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

If there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. *S. v. Powell*, 8.

Fingerprint evidence held sufficient to take case to jury in breaking and entering and larceny prosecution. *S. v. Blackmon*, 66.

Nonsuit should not be granted on ground that the prosecuting witness was not worthy of belief. *S. v. Hardee*, 147.

CRIMINAL LAW — Continued

A confession must be corroborated by evidence of the corpus delicti. *S. v. Macon*, 245.

To establish a prima facie showing of the corpus delicti, prosecution need not eliminate all inferences tending to show a non-criminal cause of death. *Ibid.*

It is the function of the jury to determine the facts in the case from the evidence. *S. v. Martin*, 616.

In this prosecution for forgery, there was sufficient extrinsic evidence corroborating defendant's confession to warrant submission of the case to the jury, where the forged check was introduced in evidence, endorsements appearing on the back thereof indicated it had been negotiated, and there was independent evidence that the signatures of the persons whose names appeared thereon as drawer and as payee were not genuine. *S. v. Diggs*, 732.

When the State offers evidence of the *corpus delicti* in addition to defendant's confession of guilt, defendant's motion for nonsuit is correctly denied. *Ibid.*

§ 107. Nonsuit for Variance

Fatal variance between indictment and proof may be taken advantage of by motion to nonsuit. *S. v. Muskelly*, 174.

§ 112. Instructions on Burden of Proof and Presumptions

Trial court properly instructed jury on circumstantial evidence. *S. v. Paschal*, 334.

Absent a specific request, the court is not required to instruct the jury on definition and consideration of circumstantial evidence. *S. v. Buck*, 726.

§ 113. Statement of Evidence and Application of Law Thereto

Slight inaccuracy in stating evidence should be called to court's attention in time for correction. *S. v. Blackmon*, 66.

Refusal of trial court to grant defendant's oral request to instruct jury with regard to nature of corroborative testimony was not error. *S. v. Hardee*, 147.

Failure of trial court to define corroborative evidence in charge was not error. *Ibid.*

Charge susceptible to construction that jury could find both defendants guilty on each count if it found that either of the defendants committed either of the crimes charged is error *S. v. Muskelly*, 174.

Slight inaccuracies in statement of the evidence will not be held reversible error. *S. v. Walker*, 740.

Fact that law pertaining to aiding and abetting was mentioned in more than one place in the charge was not undue emphasis. *S. v. Mitchell*, 755.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Fact that trial judge began his charge by saying that "defendant is brought into this court by means of a warrant and comes to this court by appeal" is not prejudicial. *S. v. Letterlough*, 36.

Where court expresses an opinion upon the evidence while stating the contentions, defendant is not required to bring it to the trial judge's attention before verdict, but the question can be considered for the first time on appeal. *S. v. Powell*, 8.

The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. *Ibid.*

CRIMINAL LAW — Continued

The fact that an expression of opinion in the charge was unintentional or inadvertent does not make it less prejudicial. *Ibid.*

Where the State relied upon expert fingerprint testimony, statement by the trial court in the charge that the opinions of expert witnesses were "not necessarily conclusive" *is held* not to constitute an expression of opinion on the evidence, the portion of the charge relating to the weight the jury was to give to the testimony of expert witnesses being correct when considered as a whole. *S. v. Blackmon*, 66.

Recapitulation of evidence relating to circumstances of arrest of one defendant held not to constitute powerful summing up against defendants amounting to expression of opinion. *Ibid.*

Trial court did not express opinion on credibility of defendant as a witness during recapitulation of defendant's testimony by referring to a person who defendant testified aided him in escaping as "Cadillac." *S. v. Smith*, 580.

Where jury advised court it stood divided and that some members felt another police officer should testify, trial court did not express an opinion by instructing jury that solicitor had duty to determine what evidence would be introduced and that jury should continue deliberations and try to reach verdict from evidence it had heard. *S. v. Lightsey*, 745.

§ 115. Instruction on Lesser Degree of Crime

Necessity for submission of lesser degrees of crime charged. *S. v. Jones*, 712.

§ 116. Charge on Failure of Defendant to Testify

Absent a proper request from defendant, trial judge is not required to instruct the jury upon defendant's right not to testify and as to how his failure to testify is to be considered. *S. v. Powell*, 8.

Prejudicial effect of remarks by solicitor relating to failure of defendants to take the stand was removed when court admonished solicitor not to make such statements and charged jury that fact defendants did not take stand could not be considered prejudicial to their case. *S. v. Mitchell*, 755.

§ 117. Charge of Character Evidence and Credibility of Witness

In the absence of a request, the trial court is not required to charge on the credibility of the witnesses. *S. v. Hardee*, 147.

In the absence of a request, it is within the discretion of the trial court to instruct the jury on the rule of scrutiny of accomplice's testimony, *S. v. Wall*, 422.

Trial court did not err in failing to instruct jury that prosecuting witnesses were interested witnesses. *S. v. Williams*, 611.

Trial court properly instructed jury to scrutinize carefully testimony of defendant as an interested witness. *S. v. Walker*, 740.

§ 118. Charge on Contentions of the Parties

In stating defendant's contentions in a prosecution for attempted armed robbery, statement by trial judge that defendant "admits he is guilty of carrying a concealed weapon" is held a fundamental misconstruction of defendant's contentions. *S. v. Powell*, 8.

Statement in the charge that defendant contended that "you ought not to believe what the State's witnesses say about him" held not erroneous. *S. v. Lawson*, 1.

Objections to court's statement of State's contentions will not be consid-

CRIMINAL LAW — Continued

ered for first time on appeal where no objection was made at the trial. *S. v. King*, 702.

§ 122. Additional Instructions After Initial Retirement of Jury

Where jury advised court it stood divided and that some members felt another police officer should testify, trial court did not express an opinion by instructing jury that solicitor had duty to determine what evidence would be introduced and that jury should continue deliberations and try to reach verdict from evidence it had heard. *S. v. Lightsey*, 745.

Trial judge's statement at the close of his charge to the jury is held not to have put undue pressure upon the jury to hasten their deliberations. *S. v. Macon*, 245.

§ 124. Sufficiency and Effect of Verdict

A verdict of guilty or not guilty relates only to the offense charged, not to surplus or evidential matters alleged. *S. v. Muskelly*, 174.

§ 131. New Trial for Newly Discovered Evidence

Where defendant was convicted of assaulting his wife, defendant's motion for a new trial on the ground of newly discovered evidence was properly denied where such evidence tended to show that at the time of the trial defendant's wife was pregnant by another man and that she later falsely alleged in a divorce action that the child had been born of her marriage to defendant, since at most the evidence would tend only to impeach one of the witnesses against defendant and is not of such a nature as to show that on another trial a different result would probably be reached. *S. v. Sherron*, 435.

Motion for new trial on ground of newly discovered evidence is addressed to sound discretion of trial court. *Ibid; State Bar v. Temple*, 437.

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

Motion to set aside verdict as contrary to weight of evidence is addressed to discretion of trial judge. *S. v. Mitchell*, 755.

§ 134. Form and Requisites of Judgment

Use of symbols B/E and L&R in judgments and commitments is disapproved. *S. v. Dickerson*, 131.

§ 138. Severity of Sentence and Determination Thereof

Since trial judge is in the best position to determine appropriate punishment for defendant, he must of necessity be allowed to exercise wide discretion within statutory limits. *S. v. Powell*, 8.

G.S. 15-184 now provides that a defendant not admitted to bail pending the appeal shall receive credit toward satisfaction of his sentence for all time spent in custody pending the appeal. *S. v. Hardee*, 147.

Defendant is entitled to more lenient punishment for a crime provided by legislature while his trial was pending. *S. v. Mitchell*, 534.

§ 140. Concurrent and Cumulative Sentences

Imposition of sentence "to begin at the expiration of any and all sentences the defendant is now serving in the North Carolina Department of Correction" clearly indicates the intent of the trial judge that the sentences of defendant be served consecutively without resort to evidence *aliunde*. *S. v. Lightsey*, 745.

CRIMINAL LAW — Continued

§ 142. Suspended Sentences and Judgments

An appeal is allowed from a suspended sentence to test allegations of errors of law. *S. v. Gallamore*, 608.

In a drunken driving prosecution, suspension of defendant's sentence on condition that he pay the prosecuting witness the sum of $3000 is reasonable. *Ibid.*

§ 151. Appeal and Stay Bonds

Trial court did not abuse its discretion in fixing bail pending appeal in the amount of $10,000. *S. v. McDonald*, 627.

§ 155.5. Docketing of Transcript of Record

Court of Appeals dismisses defendant's appeal for failure to comply with several rules. *S. v. Wooten*, 628.

§ 157. Necessary Parts of Record Proper

The record proper in a criminal case consists of the bill of indictment or warrant, the plea on which the case is tried, the verdict and the judgment from which appeal is taken, but does not include the charge and the evidence. *S. v. Moore*, 596.

§ 158. Presumptions as to Matters Omitted

The Court of Appeals will not presume that photographic identification of defendant was unfairly made in the absence of any evidence to that effect. *S. v. Penley*, 455.

§ 159. Form and Requisites of Transcript

Appeal is subject to dismissal for failure of appellant to provide statement of the evidence in narrative form. *S. v. Riera*, 381.

§ 161. Form and Requisites of Exceptions

The appeal itself is an exception to the judgment, *S. v. Alston*, 200; *S. v. Moore*, 596.

§ 162. Objections, Exceptions and Assignments of Error, and Motions to Strike

Defendant waived any right to have alleged prejudicial portion of State witness' answer stricken where record indicated that defendant made no immediate objection to the answer but waited until an additional question had been asked and answered before making a motion to strike and for a mistrial. *S. v. Letterlough*, 36.

Failure of trial court to instruct jury not to consider the answer of a witness which was stricken on motion held not erroneous. *S. v. Culbertson*, 327.

General objection to testimony which is competent in part will not be entertained. *S. v. Hill*, 365.

Trial court did not err in overruling defendant's general objections to testimony by the prosecutrix which showed that defendant had previously been convicted of assaulting her, where in each instance the prosecutrix testified at length in response to proper questions by the solicitor and portions of the statements objected to were admissible. *Ibid.*

When a general objection is interposed and overruled, it will not be considered reversible error if the evidence is competent for any purpose. *S. v. Walker*, 447.

An objection to the admission of evidence is necessary to present defendant's contention that the evidence was incompetent, and defendant must ordinarily object to the question at the time it is asked and to the answer when given. *S. v. Barrow*, 475.

Where objection is made not to the question but only to the answer of a witness, its exclusion is discretionary with the court. *Ibid.*

Where court sustained objection to improper question asked by defense counsel in presence of jury, court's ruling was not rendered improper by fact that question was properly asked in absence of the jury. *S. v. Clontz*, 587.

The Court of Appeals will not consider error in the charge and the evidence which has not been made the subject of an exception or assignment of error. *S. v. Moore*, 596.

Objection to admission of confession is waived if not timely made and cannot be raised for first time on appeal. *S. v. Diggs*, 732.

§ 163. Exceptions and Assignments of Error to Charge

An assignment of error to the charge must be based on a proper exception. *S. v. Culbertson*, 327.

The court will not consider a broadside exception to the charge. *S. v. Penley*, 455.

Assignment of error that "the court erred in his charge to the jury" is broadside and ineffectual. *S. v. Jackson*, 406.

The Court of Appeals will not consider error in the charge which has not been made the subject of an exception or assignment of error. *S. v. Moore*, 596.

Objections to court's statement of State's contentions will not be considered for first time on appeal where no objection was made at the trial. *S. v. King*, 702.

§ 164. Assignment of Error to Refusal of Motion for Nonsuit

Where defendant offers evidence, assignment of error must be directed to the court's refusal to grant motion for nonsuit at close of all of the evidence. *S. v. Jones*, 712.

§ 165. Exceptions and Assignments of Error to Remarks of Solicitor

Prejudicial effect of remarks by solicitor relating to failure of defendants to take the stand was removed when court admonished solicitor not to make such statements and charged jury that fact defendants did not take stand could not be considered prejudicial to their case. *S. v. Mitchell*, 755.

§ 166. The Brief

Assignments of error not brought forward in the brief are deemed abandoned. *S. v. Paschal*, 334; *S. v. Clontz*, 587; *S. v. Corn*, 613.

§ 167. Burden of Showing Prejudicial Error

Defendant must show that the error complained of was prejudicial. *S. v. Macon*, 245; *S. v. Barrow*, 475.

§ 168. Harmless and Prejudicial Error in Instructions

Defendants were not prejudiced by slight reference to an illegal lineup made by the court in recapitulating the evidence. *S. v. Stamey*, 517.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Trial court properly refused to admit in evidence an affidavit offered by

CRIMINAL LAW — Continued

defendant where person who made affidavit was not available for cross-examination. *S. v. Letterlough*, 36.

Admission of testimony over objection is ordinarily harmless when testimony of the same import is thereafter introduced without objection. *S. v. Barrow*, 475.

The rule that an objection to the admission of testimony is waived when like evidence is thereafter admitted without objection or is subsequently offered by the objecting party himself is not applicable where the objecting party offers the evidence for the purpose of impeaching the credibility or establishing the incompetency of the evidence in question. *S. v. Hill*, 365.

Defendant's objection to admission of testimony by prosecutrix that defendant had previously been convicted of assaulting her was waived when defendant thereafter testified to the same effect on direct examination. *Ibid.*

§ 170. Harmless and Prejudicial Error in Remarks of Court and Incidents During Trial

A remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. *S. v. Cox*, 18.

The criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury, and in applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. *Ibid.*

Defendant was not prejudiced by refusal of trial court to grant co-defendant's motion to discharge co-defendant's court appointed counsel. *S. v. Blackburn*, 510.

§ 175. Review of Findings and Discretionary Orders

Findings of trial court upon voir dire are binding on appeal when supported by competent evidence. *S. v. Stamey*, 517.

The appellate court cannot find the facts. *Yarborough v. State*, 663.

§ 177. Disposition of Cause

Where court imposes sentence in excess of limit prescribed by law, judgment must be vacated and case remanded for proper sentence, giving defendant credit for time served under excessive sentence. *S. v. Mitchell*, 534.

§ 181. Post-Conviction Hearing

Order in post-conviction hearing is set aside and the cause remanded for additional findings of fact where the trial court failed to make any findings of fact in regard to defendant's confession. *Yarborough v. State*, 663.

CUSTOMS AND USAGES

Trial court properly admitted testimony concerning absence of a red flag on end of defendant's load of pipe and testimony concerning custom of parking of trucks at plant of plaintiff's employer. *Graves v. Harrington*, 717.

DAMAGES

§ 11. Punitive Damages

In order to award punitive damages in an action for fraud, the defend-

DAMAGES — Continued

ant's fraudulent conduct must contain the additional elements of insult, indignity, malice, oppression or bad motive. *Poplin v. Ledbetter*, 170.

In plaintiffs' action to recover actual and punitive damages on the ground that defendant had fraudulently given plaintiffs a worthless check in the amount of $1400 to induce plaintiffs to convey to a third party a lot upon which defendant had built a house, the evidence *is held* insufficient to be submitted to the jury on the issue of punitive damages, there being no evidence upon which to support a finding of aggravated fraud. *Ibid.*

§ 12. Necessity for and Sufficiency of Pleading Damages

Trial court did not err in refusing to allow plaintiff to testify with respect to his loss of the sense of taste where there was no allegation in the complaint concerning loss of sense of taste. *Hill v. Shanks*, 255.

§ 13. Competency of Evidence on Issues of Compensatory Damages

Trial court erred in admission of testimony by plaintiff as to medical treatment she received over a year after the complaint was filed, where no connection was shown between the accident in question and necessity for such treatment. *Graves v. Harrington*, 717.

§ 16. Instructions on Measure of Damages

Where it was stipulated that plaintiff lost his sense of smell in the accident complained of, plaintiff was not prejudiced by trial court's instruction that there is evidence in the case tending to show that plaintiff has lost his sense of smell. *Hill v. Shanks*, 255.

DEATH

§ 3. Nature of Action for Wrongful Death

Wrongful death action must be asserted in strict conformity with statute. *Simmons v. Wilder*, 179.

§ 7. Damages

Reference in record on appeal to omission from record of testimony as to health, character, education and working habits of plaintiff's intestate is sufficient to show pecuniary loss in death of plaintiff's intestate. *Morris v. Bigham*, 490.

DECLARATORY JUDGMENT ACT

§ 2. Proceedings

In a declaratory judgment action to construe the provisions of a trust, trial court had the discretion to tax all costs, with the exception of attorneys' fees, against plaintiff. *Dillon v. Bank*, 584.

DEEDS

§ 19. Restrictive Covenants

A restrictive covenant creates a negative easement constituting an interest in land. *Goodrow v. Martin, Inc.*, 599.

In action in which plaintiff seeks to set forth cause of action based upon defendant's allegedly having sold plaintiff a house located closer to the lot line than allowed by restrictive covenants, complaint fails to state cause of action based upon violation of the restrictive covenants. *Ibid.*

DEEDS — Continued

§ 24. Covenants Against Encumbrances

A restrictive covenant whereby the beneficial use of land by the owner is restricted is an encumbrance within the covenant against encumbrances. *Goodrow v. Martin, Inc.*, 599.

In this action in which plaintiff seeks to set forth a cause of action based upon defendant's allegedly having sold plaintiff a house which is located closer to the lot line than allowed by restrictive covenants upon the property, the complaint fails to state a cause of action for a breach of the covenant against encumbrances. *Ibid.*

DIVORCE AND ALIMONY

§ 17. Alimony Upon Divorce from Bed and Board

In wife's action for divorce from bed and board and for permanent alimony, judgment ordering the husband to pay the wife alimony in the amount of $175 per month and child support of $175 per month, as well as $1900 for counsel fees and $1400 for accumulated alimony and child support payments under prior orders, *held* supported by the findings and evidence. *Swink v. Swink*, 161.

§ 18. Alimony and Subsistence Pendente Lite

The amount to be awarded for alimony *pendente lite* and counsel fees rests in the sound discretion of the trial judge. *Dixon v. Dixon*, 623.

In order awarding subsistence and counsel fees pendente lite and temporary child custody, trial court erred in requiring defendant husband to maintain in effect all policies of insurance without changing the beneficiaries, but properly required the husband to provide for the furnishing of the residence where plaintiff and children resided and to pay all debts of the parties. *Kearns v. Kearns*, 319.

Order requiring husband to pay subsistence pendente lite and awarding temporary child custody is not void for failure of plaintiff wife to give defendant five days notice prior to the first hearing on the motion, where the order was signed only after a second hearing and husband was given adequate notice prior to such hearing. *Ibid.*

No abuse of discretion is shown in award of $1500 as counsel fees pendente lite and $750 per month for maintenance and support of the wife and two children. *Ibid.*

Where an order provides for payment for support of a minor child and for alimony or alimony *pendente lite*, the order must separately state and identify each allowance. *Ibid.*

Provisions of G.S. 50-16.1 et seq. control applications for alimony pendente lite in actions commenced after 1 October 1967. *Blake v. Blake*, 410.

Under former G.S. 50-16, the trial court, when making an award of alimony *pendente lite*, was not required to set forth in his order any findings of fact where there was no allegation of adultery by the wife. *Ibid.*

G.S. 50-16.8(f) requires the trial judge to make findings of fact when an application is made for alimony *pendente lite*. *Ibid.*

Trial court erred in directing husband to pay alimony pendente lite and counsel fees of the wife without making findings of fact upon evidence presented at the hearing as required by statute. *Ibid.*

In making findings of fact after a hearing upon an application for alimony *pendente lite*, it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented, but he must find the ultimate facts sufficient to establish that the defendant spouse is entitled to an award of alimony *pendente lite* under the provisions of G.S. 50-16.3(a). *Ibid.*

DIVORCE AND ALIMONY — Continued

§ 21. Enforcing Alimony Payment

The husband's income from a trust created in another jurisdiction and administered by a bank in this State is subject to execution to satisfy the wife's judgment for alimony, child support and counsel fees. *Swink v. Swink*, 161.

§ 22. Child Custody; Jurisdiction and Procedure

In a proceeding in this state to determine the custody of a child who had been awarded to one parent by a custody decree of a court of another state, the doctrine of *res judicata* is inapplicable to bar an inquiry as to whether circumstances had changed since the date of the decree. *Rothman v. Rothman*, 401.

A decree awarding custody of a minor child, entered by the court of another state in a divorce action, is entitled to full faith and credit in the courts of this State unless a change of circumstances requiring modification of the decree is shown. *Ibid.*

A court acquires jurisdiction in a child custody proceeding when the child is physically present within the boundaries of the State. *Ibid.*

§ 23. Child Support

Where an order provides for payment for support of a minor child and for alimony or alimony *pendente lite*, the order must separately state and identify each allowance. *Kearns v. Kearns*, 319.

The amount allowed by the court for support of the children of the marriage will be disturbed only where there is a gross abuse of discretion. *Swink v. Swink*, 161.

The husband's income from a trust created in another jurisdiction and administered by a bank in this State is subject to execution to satisfy the wife's judgment for alimony, child support and counsel fees. *Ibid.*

§ 24. Child Custody

The primary consideration in custody cases is the welfare of the child. *Rothman v. Rothman*, 401.

To justify modification of a child custody decree it must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified. *Ibid.*

When there has been a finding that both parents are fit and suitable to have custody, the judge's order awarding custody is conclusive when supported by evidence. *Kearns v. Kearns*, 319.

In hearing to determine custody of minor children, court erred in refusing to hear testimony of the children. *Ibid.*

EASEMENTS

§ 3. Creation of Easement by Implication

The essentials necessary to the creation of an easement by implication upon severance of title are: (1) a separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. *Dorman v. Ranch, Inc.*, 497.

EASEMENTS — Continued

§ 6. Actions to Establish Easement

Plaintiff's evidence is sufficient to support a finding of an easement by implication upon severance of title in a roadway extending across defendant's property from a highway to plaintiff's property. *Dorman v. Ranch, Inc.*, 497.

§ 8. Nature and Extent of Easement

An easement extends to all uses directly or incidentally conducive to the advancement of the purpose for which the land was acquired, and to no others. *Statesville v. Bowles*, 124.

EMINENT DOMAIN

§ 1. Nature and Extent of Power

State Highway Commission possesses the power of eminent domain. *Highway Comm. v. School*, 684.

§ 2. Acts Constituting a Taking

A substantial or unreasonable interference with an abutting landowner's access to a highway constitutes a taking of a property right for which the owner may recover just compensation. *Highway Comm. v. Yarborough*, 294.

Where the completion of a controlled-access highway project through a landowner's property so restricted landowner's access to the highway that it would be necessary to construct streets up to 1858 feet in length on both sides of the highway in order to develop the property as a residential area, such restriction was a taking of a property right for which compensation must be paid. *Ibid.*

§ 3. Public Purpose

What constitutes a public use such as to subject property to eminent domain is incapable of a precise definition. *Highway Comm. v. School*, 684.

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

In a proceeding to establish a municipal sewer easement through respondent's land, the trial judge erred in refusing to instruct the jury that in awarding compensation the jury must consider that the fee remained in the landowners subject to the rights incident to the easement. *Statesville v. Bowles*, 124.

The use of property in combination with other property may be considered on the issue of damages if the possibility of combination is so reasonably sufficient and the use so reasonably probable as to affect the market value. *Ibid.*

Market value may not be arrived at by assessing separately the value of land and improvements and adding the two together. *Highway Comm. v. Yarborough*, 294.

It was proper to allow landowners' witnesses to express their opinion that the drainage easements acquired by the Highway Commission would result in an increased flow of water onto landowner's remaining property and thereby lessen its value. *Ibid.*

EMINENT DOMAIN — Continued

In highway condemnation proceeding to determine the issue of damages, trial court did not err in failing to instruct the jury that they were not to consider the question of interest in determining damages, where no special request was made for such instructions. *Ibid.*

§ 6. Evidence of Value

In a proceeding to establish a municipal sewer easement, trial court properly allowed expert testimony that the highest use of the land would be for the extension of a shopping center located on an adjacent tract of land. *Statesville v. Bowles*, 124.

It is common knowledge that in determining the value of a tract of land buyers and sellers give substantial weight to the fact it is bordered by successful business ventures. *Ibid.*

Witnesses who had been qualified as expert real estate appraisers were competent to express the opinion that the location of a municipal sewer line would prohibit grading to the depth necessary to prepare the property for commercial building. *Ibid.*

In a proceeding instituted by a municipality to establish a sanitary sewer line easement through respondents' land, testimony elicited on cross-examination of the municipality's consulting engineer concerning a proposed alternate location for the sewer line was not prejudicial to the municipality. *Ibid.*

It is competent for a witness to explain the value he placed on improvements in arriving at the total value of the property before the taking. *Highway Comm. v. Yarborough*, 294.

Trial court properly admitted testimony of landowner's son as to value of land. *Ibid.*

§ 7. Proceedings to Take Land and Assess Compensation

In this highway condemnation action, the trial court did not err in refusing to set aside a verdict awarding the landowner $73,200 as being against the greater weight of the evidence. *Highway Comm. v. Fry*, 370.

Trial court properly refused to dismiss jurors who had served in highway condemnation action tried immediately before present action and involving land next to the land in the instant case. *Ibid.*

Trial court properly allowed landowners' witnesses in highway condemnation proceeding to explain on redirect examination the statements elicited by the Highway Commission on cross-examination. *Highway Comm. v. Yarborough*, 294.

Where, in a condemnation proceeding between the highway commission and the landowner, the court must construe conflicting provisions of the landowner's deed to determine if the landowner's grantor retained a strip of land lying between the highway right-of-way and the tract conveyed to landowner, the grantor is a necessary party to the proceeding, and the cause will be remanded so that the necessary party may be brought in. *Highway Comm. v. Gamble*, 568.

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. *Highway Comm. v. School*, 684.

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.*

EMINENT DOMAIN—Continued

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.*

§ 14. Judgment, Nature and Extent of Rights Acquired

Where respective rights of the parties were not defined by the petition seeking condemnation of a sanitary sewer line easement, the general law regarding easements prevails. *Statesville v. Bowles*, 124.

EVIDENCE

§ 3. Facts Within Common Knowledge

It is common knowledge that in determining the value of land buyers and sellers give substantial weight to the fact it is bordered by successful business ventures. *Statesville v. Bowles*, 124.

The Court of Appeals will take judicial notice that a certain person has been elected as judge of the district court and has been designated as the chief district judge of a judicial district. *Boston v. Freeman*, 736.

§ 11. Transactions with Decedent or Lunatic

Daughter's testimony that prior to death of her mother in airplane crash the mother instructed her that the two named grandchildren in the policy were to share the proceeds with her remaining grandchildren is held not barred by the dead man's statute, G.S. 8-51, where daughter was not testifying in her own interest. *Ballard v. Lance*, 24.

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. *Whitley v. Redden*, 705.

§ 25. Photographs and Maps

Purported map of automobile accident scene is rendered inadmissible where witness who drew the map did not identify its representations with sufficient accuracy. *Huffines v. Westmoreland*, 142.

Trial court did not err in exclusion of photographs offered as substantive evidence. *Britt v. Smith*, 117.

§ 28.5. Affidavits

Although made under oath, affidavits are inherently weak as a method of proof. *In re Custody of Griffin*, 375.

In a proceeding to determine the custody of a minor child, the court erred in admitting affidavits in evidence. *Ibid.*

Despite the inherent weakness of affidavits, their use has been considered proper in certain limited situations in which the weakness of this method of proof is deemed substantially outweighed by the necessity for expeditious procedure. *Ibid.*

§ 31. Best and Secondary Evidence Relating to Writings

Answer of police officer stating the name of one defendant, in response to a question as to whether he had any recollection from his investigation of who was listed in his accident report as driver number one, did not have the

EVIDENCE — Continued

effect of permitting the officer to testify as to the contents of a report he had made. *Yelton v. Dobbins*, 483.

§ 35. Declarations as Part of Res Gestae

In adverse possession action, trial court properly admitted testimony of declaration by plaintiff's agent accompanying and characterizing transfer of possession of property as exception to hearsay rule. *Board of Education v. Lamm*, 656.

§ 42. Nonexpert Opinion Evidence as Shorthand Statement of Fact

Trial court properly excluded plaintiff's opinion testimony of 'speed of defendant's automobile where the evidence shows she did not observe defendant's car for sufficient time and physical facts at scene makes it without probative value. *Hall v. Kimber*, 669.

§ 49. Examination of Expert Witness

A hypothetical question to an expert witness may not be based on facts not in evidence. *Calhoun v. Kimbrell's*, 386.

EXECUTORS AND ADMINISTRATORS

§ 13. Proceedings to Sell or Mortgage Property to Make Assets to Pay Debts

Personalty is primarily liable for payment of a decedent's debts and real estate is secondarily liable. *Brunswick County v. Vitou*, 54.

§ 20. Claims on Notes, Mortgages, Loans and Contracts

Where old age assistance is terminated by death of the recipient, county's claim against recipient's estate must be satisfied out of personalty, if sufficient, before resorting to the real property. *Brunswick County v. Vitou*, 54.

FIRES

§ 3. Negligence in Causing Fires

A defendant may be held liable for his accumulation of inflammables where it is in a place to which fire will foreseeably fall, leap, or be thrown by the defendant's operations, and fire is communicated to such inflammables which then cause a greater fire. *Indemnity Co. v. Multi-Ply Corp.*, 467.

In action by fire insurers against the insured's tenant to recover for fire damage to insured's building, the evidence is insufficient to be submitted to jury on issue of defendant tenant's negligence in causing the fire in question or in causing greater fire damage to the building than would have occurred had lacquer used in the tenant's plywood finishing process been properly stored. *Ibid.*

FORGERY

§ 1. Elements of Forgery

Elements of the crime of forgery. *S. v. Diggs*, 732.

§ 2. Prosecution and Punishment

In this prosecution for forgery, there was sufficient extrinsic evidence corroborating defendant's confession to warrant submission of the case to the

FORGERY — Continued

jury, where the forged check was introduced in evidence, endorsements appearing on the back thereof indicated it had been negotiated, and there was independent evidence that the signatures of the persons whose names appeared thereon as drawer and as payee were not genuine. *S. v. Diggs*, 732.

FRAUD

§ 9. Pleadings

In an action by plaintiff beneficiaries under a will to have certain savings accounts declared to be held in trust by the individual defendants and to be distributed according to the will of testator, the plaintiffs alleging that the accounts are assets of the estate in which they would share but for the fraudulent acts of the defendants who had occupied a position of trust toward testator, the plaintiffs should be allowed to join as defendants all who participated in the alleged fraudulent acts as well as all who, with knowledge, received benefits from such acts. *Barnes v. Barnes*, 61.

HABEAS CORPUS

§ 2. Determination of Legality of Restraint

Facts found by court in summarily punishing person for direct contempt are binding upon the judge at habeas corpus hearing, the duty of the judge at the hearing being only to review the record and determine whether the court which imposed the sentence had jurisdiction and whether the facts found were sufficient to support imposition of sentence. *In re Hennis*, 683.

§ 3. Determination of Right to Custody of Children

In a proceeding to determine the custody of a minor child, trial court erred in admitting in evidence over the mother's timely objection affidavits offered by the child's grandparents which related to the mother's bad reputation. *In re Custody of Griffin*, 375.

An order awarding custody of a child may be modified only upon a showing of change of circumstances. *Ibid.*

Order of the court awarding custody to the child's paternal grandparents is erroneous, where the sole basis for the court's finding of fact as to the unfitness of the mother was contained in affidavits that were admitted in evidence over the mother's timely objection. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 3. Highway Patrol

A police officer, when in pursuit of a lawbreaker, is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act, but he is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. *Collins v. Christenberry*, 504.

Statute requiring driver of a vehicle about to be overtaken to yield right-of-way does not apply to highway patrolman who set up a running roadblock in an attempt to stop a car being pursued by another patrolman. *Ibid.*

In action by highway patrolman for personal injuries received in automobile collision, plaintiff's evidence that he was attempting to stop defendant with a running roadblock is held not to disclose plaintiff was contributorily negligent as a matter of law. *Ibid.*

HIGHWAYS AND CARTWAYS — Continued

§ 4. What Constitutes a State Highway or Public Road

A shipyard is entitled to maintain an action against the Highway Commission on a contract for the repair and reconditioning of seven ferries used in the State highway system. *Shipyard, Inc. v. Highway Comm.*, 649.

§ 7. Signs and Warnings; Liability of Contractor

Evidence held insufficient to show that paving contractor removed stop sign at intersection. *Douglas v. Booth*, 156.

§ 9. Actions Against Commission

A shipyard is entitled to maintain an action against the Highway Commission on a contract for the repair and reconditioning of seven ferries used in the State Highway system. *Shipyard, Inc. v. Highway Comm.*, 649.

HOMICIDE

§ 2. Parties and Offenses

If defendant intended to kill a third person but mistakenly killed deceased, defendant's guilt is the same as though he had killed the person intended. *S. v. Jones*, 712.

§ 3. Deadly Weapon

A knife may be used as a deadly weapon. *S. v. McCain*, 558.

§ 5. Murder in the Second Degree

Second degree murder defined. *S. v. McCain*, 558.

A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder. *S. v. Jones*, 712.

§ 14. Presumptions and Burden of Proof

Intentional use of a deadly weapon, when death proximately results from such use, gives rise to the presumptions of unlawfulness and malice. *S. v. McCain*, 558; *S. v. Jones*, 712; *S. v. Buck*, 726.

§ 15. Relevancy and Competency of Evidence

Trial court properly admitted testimony by detective that in his opinion deceased was dead when he observed him at the crime scene. *S. v. McCain*, 558.

§ 17. Evidence of Threats and Malice

Trial court properly sustained State's objection to question asked a defense witness as to what deceased had stated to him with regard to the defendant and what threat he had made to the witness. *S. v. Clontz*, 587.

§ 20. Photographs

Photographs showing the location and appearance of the body of the victim of a homicide were properly admitted in evidence. *S. v. Barrow*, 475.

Trial court properly admitted for illustrative purposes four photographs depicting the body of deceased and the inside of house where crime occurred. *S. v. McGuinn*, 554; *S. v. McCain*, 558.

HOMICIDE — Continued

§ 21. Sufficiency of Evidence and Nonsuit

Where the evidence is sufficient to support conviction of any one of the degrees of homicide, a general motion to nonsuit is properly overruled. *S. v. Lawson*, 1.

Circumstantial evidence may be used in homicide cases to establish the cause of death and the criminal agency. *Ibid.*

Circumstantial evidence held sufficient for jury to find that deceased died as result of bullet wound inflicted by defendant. *Ibid.*

Evidence of the State tending to show that the skeleton of a missing woman was found in a wooded area and that there were bullet holes in the skull consistent with death by shooting is held sufficient to establish a homicide corpus delicti; and such evidence, together with defendant's confession that he shot the woman during an argument and left her body in a wooded area, is sufficient to be submitted to the jury on the issue of second-degree murder or manslaughter. *S. v. Macon*, 245.

Evidence that defendant repeatedly stabbed deceased with a knife held sufficient for jury on issue of defendant's guilt of second degree murder. *S. v. McCain*, 558.

In prosecution for murder in the second degree committed with a knife, issue of defendant's guilt was properly submitted to the jury. *S. v. Buck*, 726.

In second degree murder prosecution, case was properly submitted to jury where State's evidence tended to show defendant intended to kill a third person but mistakenly shot and killed deceased. *S. v. Jones*, 712.

§ 23. Instructions in General

In this homicide prosecution, statement in the charge that defendant contended "that you ought not to believe what the State's witnesses say about him" *is held* not erroneous when read in context. *S. v. Lawson*, 1.

§ 27. Instructions on Manslaughter

The trial court is not required to instruct jury on manslaughter where there is no evidence to support such instruction. *S. v. Macon*, 245; *S. v. Buck*, 726; *S. v. Jones*, 712.

§ 28. Instructions on Defenses

Trial court was not required to charge the jury as to what would be sufficient legal provocation to reduce the crime of second-degree murder to manslaughter where there was no evidence of any legal provocation. *S. v. Macon*, 245.

Instructions on self-defense that defendant could use no more force than was reasonably necessary are erroneous, the correct rule being that defendant could use such force as was necessary or apparently necessary. *S. v. McGuinn*, 554.

§ 30. Submission of Guilt of Lesser Degrees of Crime

Trial court properly refused to submit issue of involuntary manslaughter. *S. v. Lawson*, 1.

The trial court is not required to instruct jury on manslaughter where there is no evidence to support such instruction. *S. v. Macon*, 245; *S. v. Buck*, 726; *S. v. Jones*, 712.

HOSPITALS

§ 3. Liability of Hospital to Patient

Rule of charitable immunity was overruled only as to cause of action arising after 20 January 1967. *McEachern v. Miller*, 42.

HOSPITALS — Continued

In an action on behalf of an eighty-eight year old arthritic patient who allegedly sustained a broken leg when an orderly employed by defendant hospital lifted the patient from a wheelchair and put her on the bed, the evidence is insufficient to support a finding that the patient's injury was proximately caused by any negligence of the orderly, and submission of the case to the jury was erroneous. *Hurdle v. Hospital*, 759.

HUSBAND AND WIFE

§ 1. Marital Rights, Privileges and Liabilities

Consortium is the conjugal fellowship of husband and wife, and the right of each to the company, cooperation, affection, and aid of the other in every conjugal relation. *Sebastian v. Kluttz*, 201.

The husband has the duty enforceable at law to support his wife. *Ibid.*

§ 5. Wife's Separate Estate, Contracts and Conveyances

In action to set aside deed of trust, trial court did not err in refusing to strike from defendant's answer allegations that because of a deed of separation plaintiff was a "free trader" when she executed the deed of trust. *Britt v. Smith*, 117.

In action to set aside deed of trust, nonsuit is properly allowed where evidence shows plaintiff wife and her husband had executed deed of separation recorded prior to execution of the deed of trust by the wife. *Ibid.*

§ 10. Requisites and Validity of Separation Agreements

The right of a married woman to support and maintenance is a property right which she may release by an agreement executed in accord with G.S. 52-6. *Sebastian v. Kluttz*, 201.

§ 11. Construction and Operation of Separation Agreements

The ordinary rules governing the interpretation of contracts apply to separation agreements. *Sebastion v. Kluttz*, 201.

§ 18. Nature and Elements of Abandonment and Nonsupport

The wilful failure of a husband to provide support is a misdemeanor. *Cline v. Cline*, 523.

§ 24. Alienation in General

Alienation of affections and criminal conversation are actions in tort. *Sebastian v. Kluttz*, 201.

The consent and apparent willingness on the part of the plaintiff's husband to be seduced cannot be claimed as a defense by the defendant in an action for alienation of affections. *Ibid.*

One who, without privilege to do so, purposely alienates a husband's affections from his wife, or who has sexual intercourse with him, is liable for the harm thereby caused to the wife's legally protected marital interests. *Ibid.*

§ 25. Competency and Sufficiency of Evidence of Alienation

In wife's action to recover damages for the alienation of affections of her husband, defendant's motion for nonsuit was properly denied. *Sebastian v. Kluttz*, 201.

In action for alienation of affections it was proper to admit the mortuary tables in evidence to prove wife's life expectancy. *Ibid.*

HUSBAND AND WIFE — Continued

§ 27. Criminal Conversation

The term "criminal conversation" is synonymous with "adultery". *Sebastian v. Kluttz*, 201.

The elements of criminal conversation are the actual marriage between the spouses and sexual intercourse between defendant and plaintiff's spouse during the coverture; alienation of affection is not a necessary element. *Sebastian v. Kluttz*, 201.

A valid separation agreement entered into between the spouses is not a bar to an action for alienation of affections or criminal conversation which accrued prior to the date of separation. *Ibid.*

§ 28. Sufficiency of Evidence of Criminal Conversation

Evidence in wife's action for criminal conversation is held sufficient to go to the jury. *Sebastian v. Kluttz*, 201.

§ 29. Damages and Instructions in Action for Criminal Conversation

In wife's action for criminal conversation, separation agreement between the wife and her husband in which the wife released all rights arising out of the marriage is held not to bar recovery for damages from defendant's tortious conduct that the wife may sustain after the separation agreement. *Sebastian v. Kluttz*, 201.

It was prejudicial error for trial court to fail to instruct jury that they should limit their award for future losses to the present cash value of such losses. *Ibid.*

In trial of wife's action for alienation of affections and criminal conversation, where the causes of action were so connected and intertwined that each cause of action became an element of damages in the other cause of action, only one issue of compensatory damages and one of punitive damages should have been submitted to the jury. *Ibid.*

Proper instruction as to the measure of damages for criminal conversation. *Ibid.*

INCEST

Testimony by 12-year-old prosecutrix that her father had had sexual intercourse with her on several occasions is sufficient evidence of sexual penetration to be submitted to jury. *S. v. Hardee*, 147.

INDICTMENT AND WARRANT

§ 4. Evidence and Proceedings Before Grand Jury

An indictment is not subject to quashal on the ground that the testimony before the grand jury was based on hearsay. *S. v. Mitchell*, 755.

§ 7. Form of Warrant

Use of the Uniform Traffic Ticket as a warrant should be discouraged. *S. v. Letterlough*, 36.

§ 9. Charge of Crime

A warrant meets the minimum standards for validity if it (1) informs the defendant of the charge against him, (2) enables him to prepare his defense, and (3) enables the court to proceed to judgment and thereby bars another prosecution for the same offense. *S. v. Letterlough*, 36.

INDICTMENT AND WARRANT — Continued

Use of the abbreviation "lic" in warrant charging driving a motor vehicle while license was permanently revoked is not fatal. *Ibid.*

Indictment is complete without evidentiary matters descriptive of the manner and means by which the offense was committed. *S. v. Muskelly*, 174.

§ 10. Identification of Accused

Where the indictment spells defendant's surname "Cuthbertson" but the record spells the surname "Culbertson", the doctrine of idem sonans is applicable. *S. v. Culbertson*, 327.

§ 11. Identification of Victim

A warrant for the larceny of property from "Belk's Department Store" is fatally defective in failing to allege sufficiently that the owner of the property allegedly stolen is either a natural person or a legal entity capable of owning property. *S. v. Thompson*, 64.

A variance between indictment and proof as to the middle name of the homicide victim was not material. *S. v. Buck*, 726.

§ 12. Amendment to Warrant

Where amendment to the warrant does not change the offense with which defendant is charged, the trial court has discretionary authority to allow the amendment. *S. v. Letterlough*, 36.

§ 14. Grounds and Procedures on Motion to Quash

Motion to quash is proper method to raise question of sufficiency of indictment. *S. v. Council*, 397.

An indictment is not subject to quashal on the ground that the testimony before the grand jury was based on hearsay. *S. v. Mitchell*, 755.

§ 17. Variance Between Averment and Proof

Verdict of guilty or not guilty relates only to the offense charged, not to surplus or evidential matters alleged. *S. v. Muskelly*, 174.

There is no fatal variance where indictment charges felonious assault "with a certain deadly weapon, to wit: a pistol" and further alleges the assault occurred by "shooting him with a pistol," and the evidence discloses that the victim was not shot but was beaten with a pistol. *Ibid.*

INFANTS

§ 9. Hearing and Grounds for Awarding Custody of Minor

Findings of fact by trial court held sufficient to support order awarding custody of a child to the paternal grandparents. *In re Morrison*, 47.

When there has been a finding that both parents are fit and suitable to have custody, the judge's order awarding custody is conclusive when supported by evidence. *Kearns v. Kearns*, 319.

In hearing to determine custody of minor children, court erred in refusing to hear testimony of the children. *Ibid.*

In a proceeding to determine the custody of a minor child, trial court erred in admitting in evidence over the mother's timely objection affidavits offered by the child's grandparents which related to the mother's bad reputation. *In re Custody of Griffin*, 375.

Trial court's order awarding custody of minor child to child's paternal grandparents is erroneous where sole basis for the court's findings of fact as

INFANTS — Continued

to the unfitness of the mother was contained in affidavits admitted over the mother's timely objection. *Ibid.*

Affidavits may be used in awarding temporary custody of a child. *Ibid.*

Where question of child's custody narrowed to a contest between the father and the maternal grandparents, trial court properly awarded custody to the father. *Roberts v. Short*, 419.

The welfare of the child is the polar star to guide the court in child custody cases. *Ibid.*

Question of child custody is addressed to the discretion of the trial court. *Ibid.*

INJUNCTIONS

§ 4. Injunction to Restrain Violation of Statute

Trial court erred in granting interlocutory injunction restraining defendants from violating city ordinance where plaintiffs failed to allege and offered no proof that defendants had in fact violated such ordinance. *Decker v. Coleman*, 102.

§ 12. Issuance, Continuance and Dissolution of Temporary Orders

Upon a show cause hearing to continue an injunction restraining a trustee from foreclosing a deed of trust, trial court was without authority to compel plaintiff to give up undetermined legal rights as a condition precedent to the continuing of the injunction. *Register v. Griffin*, 572.

A chief judge of the district court has jurisdiction to enter in one county a temporary restraining order in an action pending in district court of another county in the judicial district. *Boston v. Freeman*, 736.

INSURANCE

§ 6. Construction and Operation of Policies

Ambiguity in insurance contract should be construed strictly against the insurer and in favor of increased coverage of the insured. *Trust Co. v. Insurance Co.*, 277.

§ 68. Automobile Personal Injury Policies

The liability coverage of a family automobile policy is entirely different from the medical payments provision and is treated differently, the limitation provision of the liability coverage being controlling no matter how many different automobiles are designated in the policy. *Trust Co. v. Ins. Co.*, 277.

The medical payments provision of a family automobile policy for injuries received "through being struck by an automobile" is not limited to a pedestrian situation and does not require actual physical contact between the injured person and the striking automobile. *Ibid.*

Where insured paid separate premiums for two vehicles under family automobile policy providing medical payments of $5,000 per person, insurer is liable in an aggregate amount of $10,000 for medical payments for injuries received by insured in collision with another vehicle while operating one of the insured vehicles. *Ibid.*

§ 79. Liability Insurance

The liability coverage of a family automobile policy is entirely different from the medical payments provision and is treated differently, the limitation provision of the liability coverage being controlling no matter how many different automobiles are designated in the policy. *Trust Co. v. Ins. Co.*, 277.

INSURANCE—Continued

§ 105. Actions Against Insurer

In action to recover under insurance policy, complaint should show that loss sued for was covered by the contract of insurance. *Gordon v. Ins. Co.*, 185.

§ 106. Actions Against Insurer by Persons Injured

In action by injured third party to recover under automobile liability policy, complaint fails to state cause of action where it merely sets forth various legal conclusions joined by term "and/or" as to why automobile in question was insured by defendant. *Gordon v. Ins. Co.*, 185.

In an action to recover under an automobile liability insurance policy, use of the term "and/or" in the complaint is disapproved. *Ibid.*

JUDGMENTS

§ 5. Interlocutory and Final Judgments

A temporary restraining order, made permanent pending trial of the cause on its merits, is an interlocutory order. *Boston v. Freeman*, 736.

§ 15. Form and Effect of Default Judgment

Judgment by default final against one defendant who failed to answer the complaint does not prejudice the rights of the answering defendants in their defense against plaintiffs allegations. *Piney Mountain Properties v. Supply Co.*, 191.

In a hearing upon a judgment by default and inquiry that was obtained by plaintiffs in an action arising out of a boundary line dispute between plaintiffs and adjoining landowners, plaintiffs are not entitled to an order permanently restraining the defendant landowners from using portion of a dirt path that lies upon plaintiffs' lands, where there was no demand for relief in plaintiffs' complaint which would empower the court to issue a permanent restraining order. *Meir v. Walton*, 415.

§ 24. Setting Aside Judgment for Mistake or Excusable Neglect

Default judgment will not be set aside under G.S. 1-220 where there is inexcusable neglect on part of litigant. *Hodge v. First Atlantic Corp.*, 353.

§ 25. What Conduct Justifies Relief

Negligence of defendant's attorney in failing to file answer was not imputable to defendant where defendant employed the attorney in apt time and had furnished the attorney with all information necessary to file answer. *Hodge v. First Atlantic Corp.*, 353.

When a party knows or is chargeable with notice that his attorney will be unable to conduct his case on account of the attorney's departure from the state, extended serious illness, mental incompetency or death, the litigant's inaction will amount to inexcusable neglect. *Ibid.*

Where a defendant has employed reputable counsel and has turned the matter over to such counsel, neglect of the attorney in failing to file answer will not ordinarily be imputed to defendant, provided defendant has not also been negligent in failing to give his defense that attention which a man of ordinary prudence usually gives his important business *Ibid.*

§ 29. Meritorious Defense

Where the trial court found that defendant had asserted a meritorious

JUDGMENTS — Continued

defense, specific findings on this point were not necessary. *Hodge v. First Atlantic Corp.*, 353.

§ 30. Procedural Matters; Motion in Cause

If a fraud is perpetrated on the court whereby jurisdiction is apparently acquired when jurisdiction is in fact lacking, the judgment rendered thereon is a nullity and may be vacated on motion in the cause. *Alexander v. Bd. of Education*, 92.

If there has been fraud in obtaining a judgment, the court may set it aside upon motion if the action is still pending. *Ibid.*

§ 34. Trial, Determination and Judgment

Where the trial court found that defendant had asserted a meritorious defense, specific findings on this point were not necessary. *Hodge v. First Atlantic Corp.*, 353.

§ 35. Conclusiveness of Judgment and Bar in General

An estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it had it gone against him. *Morris v. Perkins*, 562.

In order for a judgment to constitute *res judicata* in a subsequent action, there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual. *Ibid.*

§ 36. Parties Concluded

In an action by plaintiff, a stockholder in a named corporation, against the defendants husband and wife, who were also stockholders in the corporation, in which action plaintiff asks (1) that a note executed by plaintiff to the husband and assigned by the husband to the corporation be cancelled and (2) that defendants be required to transfer to plaintiff 455 shares of stock in the corporation, which shares plaintiff lent to defendant as collateral for a loan, judgment rendered in a prior action between plaintiff and the corporation, which adjudicated the rights of the parties to the note assigned to the corporation, does not constitute a plea in bar to the present action, there being no identity of parties in the two actions, no privity among the parties, and no identity of subject matter in the two actions that would support the plea of *res judicata*. *Morris v. Perkins*, 562.

§ 45. Plea of Bar, Hearings and Determination

When a former judgment is set up as a bar or estoppel, the questions presented are whether the former adjudication was on the merits of the action, whether there is an identity of the parties and the subject matter in the two actions, and whether the merits of the second action are identically the same as will support a plea of *res judicata*. *Morris v. Perkins*, 562.

In determining whether a prior judgment of nonsuit operates as *res judicata* in a subsequent action, the trial court must defer a ruling on the plea until after all the evidence is presented upon the trial. *Blanton v. McLawhorn*, 576.

JUDICIAL SALES

§ 6. Rights and Title of Purchaser; Validity of Sale

In the absence of fraud or the knowledge of fraud, the purchaser at a judicial sale is required only to look at the proceeding to see if the court had jurisdiction of the parties and of the subject matter and if the judgment on its face authorized the sale. *Alexander v. Bd. of Education*, 92.

JURY

§ 2. Special Venires

Whether special venire should be called rests in sound discretion of trial judge. *Highway Comm. v. Fry*, 370.

§ 3. Competency and Qualification of Jurors

Fact that juror has served in case which has some similarity to case in which he is later asked to serve does not automatically disqualify him as to the latter trial. *Highway Comm. v. Fry*, 370.

Tales jurors must possess the statutory qualifications and are subject to the same challenges as regular jurors and may be examined by both parties on *voir dire*. *S. v. White*, 425.

§ 5. Selection of Jury Generally; Personal Disqualifications

Trial court properly refused to dismiss jurors who had served in highway condemnation action tried immediately before present action involving land next to land in instant condemnation case. *Highway Comm. v. Fry*, 370.

Statute authorizing court to order sheriff to summon tales jurors does not set forth any discretionary restrictions to be placed in fulfilling court's order. *S. v. White*, 425.

Absent proof that the sheriff has violated the discretionary trust placed in him when summoning tales jurors, he should remain free to use his best judgment in carrying out the court's order. *Ibid.*

§ 6. Examination of Jurors

Tales jurors must possess the statutory qualifications and are subject to the same challenges as regular jurors and may be examined by both parties on *voir dire*. *S. v. White*, 425.

§ 7. Challenges

Tales jurors are subject to same challenges as regular jurors. *S. v. White*, 425.

Defendant has burden of proving allegations of racial discrimination in selection of prospective jurors. *Ibid.*

Findings by trial court that sheriff made selection of tales jurors from telephone book without prejudice and without attempt to create racial imbalance are held supported by the evidence. *Ibid.*

Peremptory challenges must be exhausted before an objection to a juror will lie. *Highway Comm. v. Fry*, 370.

KIDNAPPING

§ 1. Elements of Offense and Prosecutions

In consolidated trial for kidnapping, armed robbery, and assault with intent to commit rape, issues of defendant's guilt were properly submitted to jury. *S. v. Penley*, 455.

LARCENY

§ 1. Elements of Crime

To constitute the crime of larceny it is not necessary that the property be completely removed from the premises of the owner. *S. v. Walker*, 740.

The fact that rings taken from a jeweler's tray were in defendant's possession for only an instant is immaterial where the removal of the rings constituted a complete severance from the possession of the owner. *Ibid.*

LARCENY — Continued

§ 3. Degrees of Crime

The distinction between grand larceny and petty larceny has been abolished by statute. *S. v. Walker*, 740.

§ 4. Warrant and Indictment

A warrant for the larceny of property from "Belk's Department Store" is fatally defective in failing to allege sufficiently that the owner of the property allegedly stolen is either a natural person or a legal entity capable of owning property. *S. v. Thompson*, 64.

§ 5. Presumptions and Burden of Proof

If stolen article is type not normally and frequently traded in lawful channels, inference of guilt from possession of the article would survive a longer time interval than if the article were a type normally and frequently traded in lawful channels. *S. v. Blackmon*, 66.

Even though property found in defendant's possession is not listed in the bill of indictment and is not owned by the same person whose property defendant is charged in the indictment with stealing, a presumption that defendant stole the property listed in the indictment arises if the property found in defendant's possession was recently stolen at the same time and place as the property listed in the indictment. *Ibid.*

Where there is sufficient evidence that a building has been broken into and entered and that property has been stolen therefrom by such breaking and entering, the possession of such stolen property recently after the larceny raises presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering. *Ibid.*

Except in those cases where G.S. 14-72 is inapplicable, the State in a prosecution for felonious larceny must prove beyond a reasonable doubt that the value of the stolen property was more than two hundred dollars. *S. v. Walker*, 740.

§ 7. Sufficiency of Evidence

Question of defendant's guilt of felonious larceny was properly submitted to jury. *S. v. Walker*, 447; *S. v. Blackburn*, 510.

Fingerprint evidence held sufficient to take case to jury in prosecution for breaking and entering and larceny. *S. v. Blackmon*, 66.

In this prosecution for felonious breaking and entering and felonious larceny, defendant's motion for nonsuit was properly overruled where a State's witness testified that she saw defendant enter the victim's apartment after pulling nails from the door hinge, and saw defendant carry a television set from the apartment and place it in a taxi. *S. v. Wilson*, 618.

Evidence held sufficient for jury in prosecution for larceny of automobile where witness testified he saw defendant driving the automobile the morning after it was stolen, notwithstanding the witness on cross-examination expressed some doubt as to the correctness of his identification of defendant. *S. v. Smith*, 580.

§ 8. Instructions

Elapse of 27 days between crime and discovery of defendant's possession of stolen article held not too great for court to instruct on doctrine of recent possession where article was handmade special-purpose tool not normally available in the community. *S. v. Blackmon*, 66.

In this prosecution for larceny of an automobile of a value of over $200,

LARCENY — Continued

the trial court did not err in failing to charge the jury with respect to larceny of property of a value less than $200. *S. v. Smith*, 580.

In a prosecution for the larceny of goods of a value of more than $200, the jury must be instructed that the State has the burden to prove beyond a reasonable doubt that the value of the property stolen was more than $200; where the State's evidence does not show the value of the property taken, the court should instruct the jury as to defendant's guilt of misdemeanor larceny. *S. v. Walker*, 740.

§ 9. Verdict

In a prosecution for felonious larceny of goods of a value of more than $200, a verdict finding defendant guilty as charged in the indictment must be considered as a verdict of guilty of larceny of personal property having a value of $200 or less, where trial court failed to instruct jury as to their duty to find the value of the goods; judgment of 4 to 6 years imprisonment is in excess of the legal maximum and is vacated and the cause remanded for pronouncement of judgment as for misdemeanor larceny. *S. v. Walker*, 740.

§ 10. Judgment and Sentence

Use of symbols B/E and L&R in judgment and commitment is disapproved. *S. v. Dickerson*, 131.

In a prosecution for felonious larceny of goods of a value of more than $200, a verdict finding defendant guilty as charged in the indictment must be considered as a verdict of guilty of larceny of personal property having a value of $200 or less, where trial court failed to instruct jury as to their duty to find the value of the goods; judgment of 4 to 6 years' imprisonment is in excess of the legal maximum and is vacated and the cause remanded for pronouncement of judgment as for misdemeanor larceny. *S. v. Walker*, 740.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action

A cause of action accrues at the time the right to institute and maintain a suit arises. *Sebastian v. Kluttz*, 201.

A cause of action accrues at the time of an invasion of a plaintiff's right, and nominal damages, at least, naturally flow from such invasion. *Land v. Pontiac, Inc.*, 197.

Plaintiff's cause of action against automobile manufacturer accrued at the time he purchased the automobile and not at the time the gas tank fell from the automobile, and the action was barred by the three-year statute of limitations. *Ibid.*

§ 14. Acknowledgment or New Promise

The statute providing that a new promise must be in writing to start the running of the statute of limitations is held inapplicable in an action to recover upon an express warranty. *Styron v. Supply Co.*, 675.

§ 18. Sufficiency of Evidence, Nonsuit and Directed Verdict

In action on an express warranty to recover expenditures incurred by plaintiff in correcting defects in air conditioning system, the action being instituted more than three years after the first defect appeared in the system, trial court properly ruled that plaintiff's action was not barred by the statute of limitations where defendant warranted that it would be responsible for the defects and performance of the system. *Styron v. Supply Co.*, 675.

MASTER AND SERVANT

§ 11. Agreements Not to Compete

Restrictive covenants in employment contracts, otherwise reasonable, will be enforced by a court of equity if they are no wider than reasonably necessary for the protection of the employer's business and do not impose undue hardship on the employee, due regard being had to the public interest. *Enterprises, Inc. v. Heim*, 548.

The burden is on the plaintiff to establish the reasonableness of an employment contract containing a restrictive covenant not to engage in competition. *Ibid.*

In an action by plaintiff to restrain its former employee from engaging in the silk screen processing business in the U. S. for a period of two years in violation of a restrictive covenant in the employment contract, the complaint is demurrable for lack of allegation that defendant was interfering with plaintiff's businesses throughout the country. *Ibid.*

§ 48. Employers Subject to Workmen's Compensation

Where corporate employer with less than five employees purchased workmen's compensation insurance, the employer and his employees become bound by the Workmen's Compensation Act, notwithstanding cancellation of the policy by the insurer prior to the accident and death of an employee, unless the employer had given notice to the Industrial Commission of his non-acceptance of the Act. *Crawford v. Pressley*, 641.

Evidence supported findings by the Industrial Commission that the employer's several businesses were distinct and separate and that the employer did not regularly employ five or more employees in the same business. *Ibid.*

§ 55. Injuries Compensable

Evidence in workmen's compensation proceeding held sufficient to support finding by the Industrial Commission that an employee "in some unknown manner" sustained a fall arising out of and in the course of his employment. *Calhoun v. Kimbrell's*, 386.

§ 77. Review of Award for Change of Condition

Findings by the Industrial Commission that, due to change of condition, plaintiff now has 12.5 per cent partial disability of her leg, held supported by competent evidence. *West v. Stevens*, 152.

§ 87. Exclusion of Common-Law Action

Trial court properly denied defendant's plea in bar to plaintiff's common-law action for personal injuries on ground that plaintiff should be limited to recovery under Compensation Act, where court found upon competent evidence that claimant was an independent contractor and not an employee of defendant and that claimant was not acting in the course of employment when injured. *Morse v. Curtis*, 591.

§ 96. Review in Court of Appeals

Court of Appeals may remand a proceeding to the Industrial Commission for additional findings of fact. *Crawford v. Pressley*, 641.

Findings by the Industrial Commission are binding upon appeal when supported by competent evidence. *West v. Stevens*, 152.

Appeal from order continuing workmen's compensation proceeding and removing it from the docket pending determination of common-law action brought by claimant is dismissed as premature. *Morse v. Curtis*, 620.

MORTGAGES AND DEEDS OF TRUST

§ 31. Report of Sale and Confirmation

Clerk of court is not required to notify trustor that foreclosure sale has been confirmed. *Britt v. Smith*, 117.

§ 40. Suits to Set Aside Foreclosure

In this action to set aside a trustee's deed, the trial court did not err in striking from plaintiff's complaint allegations of business relationships among certain defendants which attempt by innuendo to associate those defendants in a conspiracy, a conclusion not supported by factual allegations that the trustee failed to advertise properly and legally the subject property, and an allegation that the trustee knew that the sale price was inadequate. *Britt v. Smith*, 117.

Inadequacy of price alone is not sufficient to set aside a trustee's deed. *Ibid.*

In action to set aside deed of trust, trial court did not err in refusing to strike from defendant's answer allegations that plaintiff's wife was a "free trader" when she executed the deed of trust. *Ibid.*

Evidence held insufficient for jury in action to set aside foreclosure sale and underlying deed of trust executed by married woman who was separated from her husband. *Ibid.*

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

Petition to review annexation ordinance is not fatally defective in failing to allege specifically that petitioner will suffer material injury by alleged failure of municipality to comply with statutory procedures, particularly where the petition contains allegations from which material injury can be implied. *Adams-Millis Corp. v. Kernersville*, 78.

Lots containing a pond which were owned jointly by the owners of adjoining dwelling lots and were used as an accessory to the adjoining lots were properly classified as residential in determining whether an area met the 60% "use" test provided in G.S. 160-453.4(c). *Ibid.*

Municipality properly classified a landlocked lot with its fronting lot in single ownership as a single lot in determining whether an area met the 60% "use" test. *Ibid.*

Municipality properly classified as in industrial use a 14 acre tract adjoining parking lot at petitioner's industrial plant which contained a holding basin for industrial waste from petitioner's plant. *Ibid.*

Plans in an annexation report for extending services into areas to be annexed are not defective in failing to call for significant increase in personnel. *Ibid.*

Petitioner was not prejudiced by irregularity in the annexation procedure whereby an amendment to the annexation report was not submitted to the public 14 days prior to the public hearing, but was read at the outset of the public hearing, where the amendment related to annexation of an area which did not include petitioner's property and to plans for provision of water and sewer services, and petitioner did not except to the plans for such services. *Ibid.*

G.S. 160-453.5(g) does not exclude the simultaneous annexation of separate areas contiguous to the municipality which are also contiguous to each other, and if the areas to be annexed meet the standards prescribed by statute, it does not matter that they are contiguous. *Ibid.*

MUNICIPAL CORPORATIONS — Continued

Requirement of G.S. 160-453.5(e) that annexation ordinance contain specific findings that the area to be annexed is developed for urban purposes is met by statement in the ordinance that 64.2 percent of the total number of lots in said area are used for residential purposes, and 71.3 percent of the total residential and undeveloped acreage consists of lots and tracts five acres or less in size. *Ibid.*

§ 12. Liability of Municipal Corporation Generally

Municipality will not lose its governmental immunity solely because it is engaged in an activity which produces a profit. *McCombs v. Asheboro*, 234.

Municipal corporation is not liable in damages for death of six-year-old child who was killed when an open ditch dug by municipal employees during construction of a sewerage system collapsed. *Ibid.*

§ 14. Injuries in Connection with Sidewalks and Streets

Municipality may be held liable for injury to pedestrian caused by defect in its street or sidewalk where it is shown that officers of municipality knew or by ordinary diligence might have known of the defect, and the character of the defect was such that injuries to travelers using its streets or sidewalks in a proper manner might reasonably be foreseen. *Rockett v. Asheville*, 529.

§ 17. Contributory Negligence and Duty of Travelers

Plaintiff was contributorily negligent where she had discovered and was aware of a defective condition in a municipal sidewalk prior to accident but chose to continue her way over the area she contends was defective. *Rockett v. Asheville*, 529.

§ 21. Injuries in Connection with Sewers

Municipal corporation performs a governmental function when constructing a sewerage system and is not liable for personal injuries resulting from alleged negligent acts of employees in such construction, notwithstanding municipality charges for sewerage and sanitary services. *McCombs v. Asheboro*, 234.

Doctrine of attractive nuisance is not applicable to open excavation dug during municipal sewerage construction. *Ibid.*

§ 30. Zoning Ordinances and Building Permits

The power to zone has been delegated to cities and incorporated towns. *Decker v. Coleman*, 102.

Proviso of municipal zoning ordinance requiring defendants "to maintain inviolate" a 50-foot buffer zone between their property and adjacent residential area which by its terms applied only to property owned by defendant and not to property with the same zoning classification owned by other persons is held unconstitutional. *Ibid.*

Invalidity of proviso of a municipal zoning ordinance does not affect the validity of the remaining provisions. *Ibid.*

While the law does not require all areas of a defined class in a zoning ordinance to be contiguous, all areas in each class must be subject to the same restrictions. *Ibid.*

Zoning ordinance is presumed valid and constitutional exercise of the police power. *Beverages v. New Bern*, 632.

Zoning ordinance is invalid if it has the effect of completely depriving an owner of the beneficial use of his property. *Ibid.*

MUNICIPAL CORPORATIONS — Continued

Plaintiff's evidence held insufficient to support trial court's findings and conclusions that a zoning ordinance which changed zoning classification of plaintiff's property from business or commercial to office or institutional was invalid as confiscatory, where plaintiff's evidence tends only to show that the property would be more valuable in the market place under a business or commercial zoning classification. *Ibid.*

To establish invalidity of a zoning ordinance, plaintiff must show that the property could not reasonably be adapted to any use permissible under the ordinance and that that fact rendered the property valueless or virtually so. *Ibid.*

§ 31. Review of Order of Municipal Zoning Board

The courts may not substitute their judgment for that of the legislative body as to the wisdom of a zoning ordinance when question of whether ordinance is unreasonable is fairly debatable. *Beverages v. New Bern*, 632.

NARCOTICS — Continued

§ 1. Elements of Statutory Offenses Relating to Narcotics

Misdemeanor of unauthorized possession of narcotics is not a lesser included offense of the felony of possession of narcotics for purpose of sale. *S. v. Riera*, 381.

§ 3. Competency of Evidence

In prosecution charging defendant with the unlawful possession of LSD, trial court properly admitted in evidence the LSD tablets found in defendant's possession by a search incident to a lawful arrest without a warrant. *S. v. Roberts*, 312.

§ 4. Sufficiency of Evidence and Nonsuit

In prosecution for possession of narcotics for purpose of sale, evidence is held sufficient for jury under provisions of statute making possession of 100 or more capsules prima facie evidence that such possession is for purpose of sale. *S. v. Riera*, 381.

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence

A police officer, when in pursuit of a lawbreaker, is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act, but he is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. *Collins v. Christenberry*, 504.

§ 5.1. Business Places; Duties to Invitees

Store proprietor owes to his customers the duty to exercise ordinary care to maintain in a reasonably safe condition those portions of his premises which he may expect they will use and to give warning of hidden peril or unsafe conditions insofar as these can be ascertained by reasonable inspection and supervision. *Gaskill v. A. & P. Tea Co.*, 690; *Quinn v. Supermarket, Inc.*, 696.

The distinction between a licensee and an invitee is determined by the nature of the business bringing a person to the premises. *Quinn v. Supermarket, Inc.*, 696.

NEGLIGENCE — Continued

Plaintiff, who was the wife of the president of a supermarket, had status of an invitee at time of her injury in supermarket after regular business hours. *Ibid.*

In invitee's action for injuries sustained in supermarket when she slipped and fell on an oily substance which had dripped on the floor from a defective flourescent light ballast, issue of negligence by supermarket proprietor was sufficient to go to jury. *Ibid.*

The proprietor of a business establishment is not required to take extraordinary precautions for the safety of his invitees, the measure of his duty being to exercise reasonable or ordinary care. *Gaskill v. A & P Tea Co.*, 690.

No inference of negligence on the part of a store proprietor arises from the mere fact of a customer's fall on the floor of his store during business hours, the doctrine of *res ipsa loquitur* not being applicable. *Ibid.*

The mere fact that a proprietor has no mat or other covering on the floor at the entrance of its store during a period of rain is not negligence, and the proprietor cannot be held under a duty to keep a person stationed at the doors on rainy days for the purpose of mopping up after every customer entering or leaving the premises. *Ibid.*

If the unsafe condition is created by third parties or by an independent agency, a showing must be made that it had existed for such length of time that the store proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the danger or given warning of its presence. *Ibid.*

In this action for personal injuries sustained by plaintiff when she slipped and fell in defendant's grocery store, judgment of nonsuit was proper where plaintiff's evidence tended to show only that on a rainy afternoon defendant allowed water to accumulate on the asphalt tile floor immediately inside the entrance to its store, that plaintiff entered the store as a customer, and that plaintiff there fell and was injured. *Ibid.*

§ 8. Proximate Cause

Proximate cause defined. *Grimes v. Gibert*, 304.

It is not required that the negligence of defendant be the sole proximate cause of the injury or the last act of negligence in sequence of time in order to hold defendant liable therefor, it being sufficient if defendant's negligence is one of the proximate causes. *Ibid.*

Evidence held sufficient to show that injuries to plaintiff's leg were proximately caused by accident in question where plaintiff testified his leg had not been injured prior to the accident and that it had been discolored since the accident. *Batten v. Duboise*, 445.

There must be a causal relationship between the breach of duty by defendant and the injury received by plaintiff. *Ibid; Martin v. The Jewel Box*, 429.

§ 9. Foreseeability

Foreseeability, as an element of proximate cause, does not require that the tortfeasor should have foreseen the injury in the precise form in which it occurred. *Grimes v. Gibert*, 304.

§ 10. Concurring and Intervening Negligence

Complaint is sufficient to show actionable negligence by defendant while aiding a stalled vehicle and does not disclose as a matter of law that defendant's negligence was insulated by alleged negligence of the drivers of other vehicles involved in the collisions in question. *Grimes v. Gibert*, 304.

NEGLIGENCE — Continued

§ 13. Contributory Negligence in General

Contributory negligence is an affirmative defense. *Wagoner v. Butcher*, 221.

§ 27. Competency and Relevancy of Evidence of Negligence

Trial court properly admitted testimony concerning absence of a red flag on end of defendant's load of pipe and testimony concerning custom of parking of trucks at plant of plaintiff's employer. *Graves v. Harrington*, 717.

§ 29. Sufficiency of Evidence of Negligence

Plaintiff's testimony that she became nauseated as a result of inhaling the powder released from a flourescent light tube that fell from defendant's garbage can and broke on the sidewalk while plaintiff was passing by, held insufficient to withstand defendant's motion for nonsuit. *Martin v. The Jewel Box*, 429.

Negligence need not be established by direct evidence but may be inferred from attendant facts and circumstances. *Allen v. Schiller*, 392.

If the evidence negatives any actionable negligence on the part of defendant, nonsuit is proper. *Racine v. Boege*, 341.

Evidence which is inherently impossible or in conflict with indisputable facts or laws of nature is not sufficient to take the case to the jury. *Douglas v. Booth*, 156; *Herring v. McClain*, 359.

§ 35. Nonsuit for Contributory Negligence

Nonsuit for contributory negligence. *Wagoner v. Butcher*, 221; *Hill v. Shanks*, 255; *Collins v. Christenberry*, 504; *Rockett v. Asheville*, 529; *Ford v. Smith*, 539.

Plaintiff's evidence that she failed to see pipe protruding from defendant's truck does not disclose contributory negligence as a matter of law. *Graves v. Harrington*, 717.

§ 36. Nonsuit for Intervening Negligence

Question of intervening negligence is ordinarily for the determination of the jury. *Grimes v. Gibert*, 304.

§ 37. Instructions on Negligence

Trial court's instructions in automobile accident case which charged on two aspects of negligence in the conjunctive were not prejudicial. *Herring v. McClain*, 359.

Before a breach of law or duty may be submitted to the jury, there must be both allegation and proof of such breach. *Ford v. Jones*, 722.

§ 51. Attractive Nuisances and Injury to Children

Mere attractiveness of premises to children will not bring a case within the doctrine of attractive nuisance. *McCombs v. Asheboro*, 234.

The attractive nuisance doctrine is an exception to the general rules applicable to liability of owners or occupants for injuries sustained by others on their premises. *Ibid.*

Doctrine of attractive nuisance does not apply to open excavation dug during the construction of municipal sewerage system. *Ibid.*

§ 52. Definition of Invitee

The distinction between a licensee and an invitee is determined by the

NEGLIGENCE — Continued

nature of the business bringing a person to the premises. *Quinn v. Supermarket, Inc.*, 696.

Plaintiff, who was the wife of the president of defendant supermarket, had the status of an invitee at the time of her injury in the supermarket after regular business hours, where she entered the store with the permission of her husband in order to purchase some groceries. *Ibid.*

§ 53. Duties and Liabilities to Invitees

The proprietor of a business establishment is not required to take extraordinary precautions for the safety of his invitees, the measure of his duty being to exercise reasonable or ordinary care. *Gaskill v. A & P Tea Co.*, 690.

If the unsafe condition is created by third parties or by an independent agency, a showing must be made that it had existed for such length of time that the store proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the danger or given warning of its presence. *Ibid.*

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitee

No inference of negligence on the part of a store proprietor arises from the mere fact of a customer's fall on the floor of his store during business hours, the doctrine of *res ipsa loquitur* not being applicable. *Gaskill v. A & P Tea Co.*, 690.

In this action for personal injuries sustained by plaintiff when she slipped and fell in defendant's grocery store, judgment of nonsuit was proper where plaintiff's evidence tended to show only that on a rainy afternoon defendant allowed water to accumulate on the asphalt tile floor immediately inside the entrance to its store, that plaintiff entered the store as a customer, and that plaintiff there fell and was injured. *Ibid.*

The mere fact that a proprietor has no mat or other covering on the floor at the entrance of its store during a period of rain is not negligence, and the proprietor cannot be held under a duty to keep a person stationed at the doors on rainy days for the purpose of mopping up after every customer entering or leaving the premises. *Ibid.*

PARENT AND CHILD

§ 6. Right to Custody of Child

Findings of fact by trial court held sufficient to support award of custody of a child to the paternal grandparents. *In re Morrison*, 47.

Where question of child's custody narrowed to a contest between the father and the maternal grandparents, trial court properly awarded custody to the father. *Roberts v. Short*, 419.

Where the mother abandoned any claim she had to the custody of her daughter, the father alone has the natural and legal right to the custody of the child unless substantial and sufficient reasons require otherwise. *Ibid.*

Where one parent is dead, the surviving parent has the natural and legal right to the custody and control of the minor children of the marriage. *In re Custody of Griffin*, 375.

§ 9. Prosecutions for Abandonment and Nonsupport

The willful failure of a husband or parent to provide support is a misdemeanor. *Cline v. Cline*, 523.

PARENT AND CHILD — Continued

§ 10. Uniform Reciprocal Enforcement of Support Act

The district court has exclusive original jurisdiction to entertain a proceeding under the Uniform Reciprocal Enforcement of Support Act, and the proceeding is appealable directly to the Court of Appeals. *Cline v. Cline*, 523.

PARTIES

§ 1. Necessary Parties

Court of Appeals remands eminent domain proceeding in order that grantor of deed to landowner's property may be brought in as necessary party. *Highway Comm. v. Gamble*, 568.

PARTITION

§ 10. Validity and Effect of Sale

Trial court properly dismissed motion in the cause made in 1967 to set aside for fraud clerk's order of sale of land in partition proceedings which had been terminated in 1923 by the order of sale, since the statutory exception which permitted an attack for fraud in such case by motion in the cause was repealed by Ch. 719, § 2, of the Session Laws of 1949, effective 1 January 1950. *Alexander v. Bd. of Education*, 92.

In hearing upon motion in the cause to declare void clerk's order of sale in partition proceeding, the evidence is held insufficient to support a finding of fraud by attorney who represented the seller or that the attorney had no authority to file the partition proceeding. *Ibid.*

PHYSICIANS AND SURGEONS

§ 11. Malpractice Generally

A release of the original tort-feasor by an administrator bars a cause of action for wrongful death against the attending physician. *Simmons v. Wilder*, 179.

§ 19. Failure to Attend Patient

Evidence held insufficient for jury in action for wrongful death against a physician for failure to provide proper medical treatment to plaintiff's husband who had suffered gunshot wound. *McEachern v. Miller*, 42.

PLEADINGS

§ 1. Filing the Complaint

Where the copy of the order extending time for filing complaint was incomplete as delivered to defendant in that it did not show the particular day of the month to which time for filing complaint had been extended, such omission was a harmless irregularity and did not mislead or prejudice defendant nor affect the jurisdiction of the court. *Carriker v. Miller*, 58.

§ 2. Statement of Cause of Action

Plaintiff should do more than merely incorporate allegations in the nature of legal conclusions in his pleadings. *Gordon v. Ins. Co.*, 185.

The complaint must contain a demand for the relief to which plaintiff supposes himself entitled. *Meir v. Walton*, 415.

PLEADINGS — Continued

§ 7. Prayer for Relief

The relief to be granted depends upon whether the matters alleged and proved entitled the complaining party to the relief demanded. *Meir v. Walton*, 415.

§ 19. Office and Effect of Demurrer

The office of a demurrer is to test the sufficiency of a pleading. *Curry v. Staley*, 165.

Upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties. *Ibid.*

The demurrer admits the facts pleaded in the complaint, but not the conclusions of law. *Enterprises v. Heim*, 548.

§ 32. Motion to be Allowed to Amend Pleadings

A motion to amend after the beginning of trial is addressed to the discretion of the court and is not appealable. *Britt v. Smith*, 117; *Hill v. Shanks*, 255.

No abuse of discretion is shown in trial court's denial of plaintiff's motion made during trial for leave to amend his complaint to allege loss of sense of taste as element of damages. *Hill v. Shanks*, 255.

Trial court properly exercised its discretion in denying defendant's motion to be allowed to amend his answer, where the motion was made more than two years after the original action was filed. *Blanton v. McLawhorn*, 576.

§ 36. Variance Between Proof and Allegations

Trial court properly refused to allow plaintiff to testify with respect to his loss of sense of taste where there was no allegation in the complaint concerning such loss. *Hill v. Shanks*, 255.

§ 42. Right to Have Allegations Stricken on Motion

Where plaintiffs submitted to judgment of voluntary nonsuit as to one defendant prior to the trial, allegations relating to that defendant and transactions with him were properly stricken as irrelevant. *Britt v. Smith*, 117.

In this action to set aside a trustee's deed, the trial court did not err in striking from plaintiff's complaint allegations of business relationships among certain defendants which attempt by innuendo to associate those defendants in a conspiracy, a conclusion not supported by factual allegations that the trustee failed to advertise properly and legally the subject property, and an allegation that the trustee knew that the sale price was inadequate. *Ibid.*

POISONS

Plaintiff's testimony that she became nauseated as a result of inhaling the powder released from a flourescent light tube that fell from defendant's garbage can and broke on the sidewalk while plaintiff was passing by, held insufficient to withstand defendant's motion for nonsuit. *Martin v. The Jewel Box*, 429.

PROCESS

§ 2. Issuance and Service in General

Where the copy of the order extending time for filing complaint was incomplete as delivered to defendant in that it did not show the particular day of the month to which time for filing complaint had been extended, such omission was a harmless irregularity and did not mislead or prejudice defendant nor affect the jurisdiction of the court. *Carriker v. Miller*, 58.

PUBLIC WELFARE

When old age assistance is terminated by death of recipient, county's claim against recipient's estate must be paid out of the personal property of the estate, if sufficient, before resorting to the real property. *Brunswick County v. Vitou*, 54.

RAPE

§ 17. Assault with Intent to Commit Rape

Assault with intent to commit rape defined. *S. v. Mitchell*, 534.

§ 18. Prosecutions for Assault with Intent to Commit Rape

Assault on a female by a male person is a lesser included offense of assault with intent to commit rape. *S. v. Mitchell*, 534.

There is a presumption that a male person charged with assault with intent to commit rape is over 18 years of age. *Ibid.*

Evidence held sufficient to be submitted to jury on issue of defendant's guilt of assault with intent to commit rape. *Ibid.*

In a consolidated trial for kidnapping, armed robbery and assault with intent to commit rape, issues of defendant's guilt were properly submitted to jury. *S. v. Penley*, 455.

RECEIVING STOLEN GOODS

§ 7. Verdict and Judgment

Where defendant was being tried upon indictments charging him with felonious breaking and entering and felonious larceny, the trial court erred in accepting during trial defendant's plea of guilty of the felony of receiving stolen goods when defendant had not been indicted for such offense and had not waived a bill of indictment. *S. v. Cassada*, 629.

ROBBERY

§ 1. Nature and Elements of the Offense

Common law robbery defined. *S. v. Council*, 397.

To constitute the offense of robbery, the property taken must be such as is the subject of larceny. *Ibid.*

G.S. 14-87 does not change 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. *Ibid.*

The crime of robbery *ex vi termini* includes an assault on the person. *S. v. Powell*, 8.

§ 2. Indictment

In a robbery prosecution it is not necessary or material to describe accurately or prove the particular identity or value of the property other than to show that it was property of the person assaulted or in his care and had a value. *S. v. Council*, 397.

Indictment for robbery must contain description of the property sufficient to show that such property is the subject of robbery. *Ibid.*

Indictment for armed robbery which alleges property taken was "personal property of the value of ....." is fatally defective. *Ibid.*

In a consolidated prosecution of two defendants for armed robbery, the

ROBBERY — Continued

trial court properly refused to try each defendant separately where the defenses of the defendants were not inconsistent. *S. v. Wall*, 422.

§ 4. Sufficiency of Evidence and Nonsuit

In prosecution for attempted armed robbery by defendant who disguised himself in a woman's wig, there is sufficient evidence of an overt act by defendant to be submitted to the jury. *S. v. Powell*, 8.

In a prosecution for armed robbery, evidence of defendants' guilt *held* sufficient to be submitted to the jury. *S. v. Culbertson*, 327.

In a robbery prosecution it is not necessary or material to describe accurately or prove the particular identity or value of the property other than to show that it was property of the person assaulted or in his care and had a value. *S. v. Council*, 397.

Evidence held sufficient for jury in armed robbery prosecution. *S. v. Jackson*, 406.

Evidence held sufficient for jury in robbery prosecution. *S. v. Stamey*, 517.

In consolidated trial for kidnapping, armed robbery and assault with intent to commit rape, issues of defendant's guilt were properly submitted to jury. *S. v. Penley*, 455.

In a prosecution for armed robbery, evidence of defendant's guilt was sufficient to be submitted to the jury, notwithstanding defendant's contentions that the prosecuting witness was "obviously unreliable." *S. v. Martin*, 616.

In this armed robbery prosecution, the State's evidence was sufficient for submission of the case against two defendants to the jury under the law of aiding and abetting where it tended to show that, although they did not say anything or exhibit any weapon, they were with the actual perpetrator of the robbery before, during and after the robbery and when they were arrested. *S. v. Mitchell*, 755.

§ 5. Instructions and Submission of Lesser Degree of Crime

Indictment for armed robbery will support verdict of common law robbery. *S. v. Jackson*, 406.

In a prosecution for armed robbery, where the evidence tends to show that the defendant had committed the armed robbery as alleged in the indictment or that the defendant was innocent, the trial court is not required to instruct the jury on the lesser included offenses of assault with a deadly weapon and simple assault. *S. v. Martin*, 616.

§ 6. Verdict and Sentence

Judgment of confinement for not less than 15 nor more than 25 years for attempted armed robbery is not cruel and unusual. *S. v. Powell*, 8.

SAFECRACKING

Circumstantial evidence held sufficient for jury in safecracking prosecution. *S. v. Walker*, 447.

SALES

§ 10. Recovery of Goods or Purchase Price

In action for goods sold and delivered, jury question was presented where evidence was conflicting as to whether goods delivered met specifications of goods ordered. *Chemical Co. v. Plastics Co.*, 439.

SALES — Continued

§ 13. Actions to Rescind and Recover Purchase Price

There is a failure of consideration for an automobile sales contract if, at the time of the sale, the automobile could not be used for the purposes for which it was intended. *Christenson v. Ford Sales, Inc.*, 137.

Evidence held sufficient for jury in action to rescind automobile sales contract for total failure of consideration. *Ibid.*

In action to rescind automobile sales contract for failure of consideration, proper issue for jury was whether automobile was "worthless" at time of sale and not whether it was "virtually worthless." *Ibid.*

§ 14. Actions for Breach of Warranty

In action on an express warranty to recover expenditures incurred by plaintiff in correcting defects in air conditioning system, the action being instituted more than three years after the first defect appeared in the system, trial court properly ruled that plaintiff's action was not barred by the statute of limitations where defendant warranted that it would be responsible for the defects and performance of the system. *Styron v. Supply Co.*, 675.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

A search of defendant's person made after the arrest of defendant for carrying a concealed weapon in his automobile held lawful. *S. v. Blackburn*, 510.

§ 2. Consent to Search Without Necessary Warrant

Police officer's testimony on voir dire is held sufficient to support court's findings and conclusions that defendant consented to the search of his automobile. *S. v. Blackburn*, 510.

STATE

§ 4. Actions Against the State

The State may not be sued unless by statute it has consented to be sued or has otherwise waived its immunity from suit. *Shipyard, Inc. v. Highway Comm.*, 649.

A shipyard is entitled to maintain an action against the Highway Commission on a contract for the repair and reconditioning of seven ferryboats used in the State highway system. *Ibid.*

STATUTES

§ 5. General Rules of Construction

Statutes in derogation of the common law must be strictly construed. *Simmons v. Wilder*, 179.

The court may not interpolate the provisions in a statute which are wanting. *Ibid.*

Statute will not be literally interpreted when such would lead to absurd results and contravene purpose of statute. *Wagoner v. Butcher*, 221.

Statute in derogation of common law is strictly construed. *Shipyard, Inc. v. Highway Comm.*, 649.

§ 9. Curative Statutes

A remedial statute must be construed so as to remedy the existing evil. *Shipyard v. Highway Comm.*, 649.

TORTS

§ 4. Right of One Defendant to Have Others Joined for Contribution

The Uniform Contribution Among Tort-Feasors Act does not apply to litigation pending on 1 January 1968. *Simmons v. Wilder*, 179.

§ 7. Release from Liability and Covenant Not to Sue

G.S. 1-54.1, providing that release of a tort-feasor from liability for injuries does not bar action against attending physician for malpractice in treating the injuries, is inapplicable in action for wrongful death. *Simmons v. Wilder*, 179.

TRIAL

§ 10. Expression of Opinion on Evidence by Court

Trial court did not express an opinion on the evidence by questions asked various witnesses. *Yelton v. Dobbins*, 483.

§ 21. Consideration of Evidence on Motion to Nonsuit

Consideration of evidence on motion to nonsuit. *Hill v. Shanks*, 255; *Racine v. Boege*, 341; *Morris v. Bigham*, 490.

§ 22. Sufficiency of Evidence to Overrule Nonsuit

Evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury. *Douglas v. Booth*, 156; *Herring v. McClain*, 359.

§ 26. Nonsuit for Variance

Judgment of nonsuit is proper when there is a fatal variance between a plaintiff's allegations and proof. *Hall v. Kimber*, 669.

§ 29. Voluntary Nonsuit

Plaintiff was entitled to a judgment of voluntary nonsuit as a matter of right where his motion for nonsuit was made after jury's verdict had been delivered to trial judge but before the contents of the verdict had been made known to any person other than the jury and the judge. *Clemmons v. Ins. Co.*, 708.

§ 32. Form and Sufficiency of Instructions

The purpose of the charge is to eliminate irrelevant matters and bring the evidence into focus. *Johnson v. Douglas*, 109.

§ 33. Statement of Evidence and Application of Law Thereto

Instructions which would permit the jury to find the parties guilty of aspects of negligence in operation of an automobile regardless of whether such negligence had been alleged in the pleadings are erroneous. *Johnson v. Douglas*, 109.

It is error for the trial court to read the provisions of a statute to the jury without giving an explanation thereof in connection with the evidence. *Ford v. Jones*, 722.

§ 37. Instruction on Credibility of Witnesses

It was not incumbent upon trial court, absent a request, to instruct jury that heir to the property subject to eminent domain was an interested witness. *Highway Comm. v. Yarborough*, 294.

TRIAL — Continued

In this highway condemnation action, the trial court did not err in failing to instruct the jury that the landowner's son was an interested witness and that his testimony as to the value of the land should be scrutinized with care absent a request for instructions on this subordinate feature of the case. *Highway Comm. v. Fry*, 370.

§ 48. Power of Court to Set Aside Verdict

Action of trial judge in setting aside verdict in his discretion is not subject to review on appeal. *Reece v. Reece*, 606.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence

Motion to set aside the verdict is addressed to the sound discretion of the trial court. *Highway Comm. v. Yarborough*, 294.

In this highway condemnation action, the trial court did not err in refusing to set aside a verdict awarding the landowner $73,200 as being against the greater weight of the evidence. *Highway Comm. v. Fry*, 370.

§ 55. Effect of Order Setting Aside Verdict

Exception to failure of trial court to grant defendant's motion for nonsuit will not be considered on appeal where trial court set aside verdict in defendant's favor. *Reece v. Reece*, 606.

§ 57. Trial and Hearing by Court Under Agreement of Parties

In a trial by the court under agreement of the parties it will be presumed that the judge disregarded any incompetent evidence that may have been admitted. *Styron v. Supply Co.*, 675.

TRUSTS

§ 1. Creation of Written Trusts

The husband's income from a trust created in another jurisdiction and administered by a bank in this State is subject to execution to satisfy the wife's judgment for alimony, child support and counsel fees. *Swink v. Swink*, 161.

§ 6. Authority and Duties of Trustee and Right to Convey

The courts may not control a trustee in the exercise of discretionary powers except to prevent an abuse of those powers. *Dillon v. Bank*, 584.

In an action by a widow against the trustee of a trust established by plaintiff's deceased husband for the benefit of his two minor daughters, trial court properly found that trustee did not abuse its discretion in refusing to pay one-half of the mortgage debt on property owned by plaintiff as the surviving tenant by the entireties. *Ibid.*

§ 14. Creation of Constructive Trust

In declaratory judgment action to distribute proceeds of airline accident life insurance policy, insured's statement to her daughter that there was not enough room on the policy to name all of her grandchildren and that if anything happened to her the two named therein were to share proceeds of the policy with her remaining grandchildren is held to create a constructive trust in the policy proceeds in favor of the grandchildren not named in the policy. *Ballard v. Lance*, 24.

TRUSTS — Continued

The fact that the trustees are under 21 years of age does not affect a constructive trust, and the trust remains enforceable despite their minority. *Ibid.*

§ 16. Parties and Pleadings

In an action by plaintiff beneficiaries under a will to have certain savings accounts declared to be held in trust by the individual defendants and to be distributed according to the will of testator, the plaintiffs alleging that the accounts are assets of the estate in which they would share but for the fraudulent acts of the defendants who had occupied a position of trust toward testator, the plaintiffs should be allowed to join as defendants all who participated in the alleged fraudulent acts as well as all who, with knowledge, received benefits from such acts. *Barnes v. Barnes*, 61.

In an action by plaintiff beneficiaries under a will to have certain savings accounts declared to be held in trust by the individual defendants and to be distributed according to the will of testator, the plaintiffs alleging that the accounts are assets of the estate in which they would share but for the mutual mistake of the deceased and the two defendants as to the legal consequences of signing the signature cards furnished by the savings and loan institutions, joinder of the two defendants, who allegedly occupied position of trust toward deceased, *held* proper. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 3. Application

The Uniform Commercial Code does not apply to transactions entered into prior to the effective date of the Code. *Styron v. Supply Co.*, 675.

VENUE

§ 8. Removal for Convenience of Parties and Witnesses

A motion to remove a cause when the convenience of witnesses and ends of justice would be promoted is addressed to the sound discretion of the trial judge. *Patrick v. Hurdle*, 51.

When a motion to remove a cause is made, facts must be stated particularly and in detail in the affidavit, or judicially admitted, showing the grounds for such removal. *Ibid.*

Allegations in plaintiff's affidavit in support of a motion to remove cause to another county are held insufficient to support trial court's order that "the convenience of witnesses and the ends of justice would be promoted by the change". *Ibid.*

§ 8.5. Removal for Fair Trial

Motion to remove cause for prejudice is addressed to the sound discretion of the trial judge. *Patrick v. Hurdle*, 51.

WILLS

§ 1. Nature and Requisites of Testamentary Disposition of Property

Mere fact that the proceeds of a life insurance policy subject to a constructive trust are not payable until the death of the insured does not make the disposition testamentary. *Ballard v. Lance*, 24.

§ 2. Contracts to Devise or Bequeath

In action by husband as executor to seek construction of a will executed jointly by himself and his wife, findings and conclusions of the trial court

WILLS — Continued

that (1) there was no contract between the husband and wife to execute the joint will, and (2) the purported will itself does not constitute a contract between the spouses, held supported by the evidence. *Olive v. Biggs*, 265.

§ 8. Revocation of Will

In the absence of a valid contract, the concurrent execution of a joint, or reciprocal, will is not enough to establish a legal obligation to forbear revocation, either before or after the death of a party thereto. *Olive v. Biggs*, 265.

§ 28. General Rules of Construction

Where the primary purpose and a secondary purpose of a testator conflict and are inconsistent with each other, that purpose which is primary will control. *Olive v. Biggs*, 265.

§ 73. Actions to Construe Wills

In action to construe a will in which there was a conflict between the items relating to the disposition of the testator's property, the dominant or primary purpose of the testator controls. *Olive v. Biggs*, 265.

In an action to construe a purported will executed jointly by the husband and wife, it was proper to admit the testimony of a witness relating to what knowledge, if any, he may have had of the existence of a contract between the husband and wife which provided that the will was to remain in effect as the will of the surviving spouse at the time of such spouse's death, the testimony being relevant to an issue in the action. *Ibid.*

WITNESSES

§ 5. Evidence Competent for Purpose of Corroboration

Evidence which tends to corroborate a party's witnesses is competent and is properly admitted upon the trial for that purpose, even though otherwise incompetent. *S. v. Culbertson*, 327.

Where plaintiff's direct opinion testimony of defendant's speed was properly excluded, there was no error in exclusion of evidence concerning plaintiff's prior oral and written statements about defendant's speed. *Hall v. Kimber*, 669.

§ 7. Direct Examination

Trial court has discretion to permit leading questions. *Yelton v. Dobbins*, 483.

§ 8. Cross-Examination

Trial court properly sustained objection to repetitious questioning of prosecutrix as to colors of clothing worn by defendant's counsel and the solicitor. *S. v. Cox*, 18.

Trial judge may order a witness to stand aside if counsel disregards repeated warnings to refrain from repetitious and irrelevant questions. *Ibid.*

Trial court properly refused to admit in evidence affidavit offered by defendant where person who made the affidavit was not available for cross-examination. *S. v. Letterlough*, 36.

Trial court has duty to determine order of cross-examination when more than one party is entitled to cross examine. *Yelton v. Dobbins*, 483.

§ 9. Redirect Examination

Trial court properly allowed landowners' witnesses in highway condemnation proceeding to explain on redirect examination the statements elicited by the Highway Commission on cross-examination. *Highway Comm. v. Yarborough*, 294.

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