NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vi

District Court Judges viii

Attorney General, Superior Court Solicitors x

Table of Cases Reported xi

Table of General Statutes Construed xvi

Constitution of North Carolina Construed xviii

Constitution of United States Construed xviii

Rules of Practice Construed xviii

Disposition of Petitions for Certiorari to Court of Appeals xix

Disposition of Appeals to Supreme Court xx

Opinions of the Court of Appeals 1-725

Amendment to Rules of Court of Appeals 727

Analytical Index 730

Word and Phrase Index 790

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[1]Died 27 June 1970.
[2]Appointed effective 28 May 1970 to succeed Leo Carr who died 5 April 1970.

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[1]Retired 30 June 1970.
[2]Resigned effective 13 July 1970.
[3]Appointed Chief Judge 13 June 1970. Succeeded by Charles Graham McLean, Lumberton.
[4]Resigned 30 June 1970.
[5]Appointed Chief Judge 30 June 1970.

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[1]Resigned 17 July 1970. Succeeded by Robert Bruce White, Jr.
[2]Resigned 24 July 1970.
[3]Appointed 22 April 1970.
[4]Appointed 1 July 1970.
[5]Appointed 28 May 1970 to succeed Thomas D. Cooper, Jr.

CASES REPORTED

PAGE

ABC Board, Waggoner v. ... 692
Adkins, Gregory v. ... 305
Advertising, Inc. v. Harper ... 501
Allen v. Allen ... 555
Allred v. City of Raleigh ... 602
Alphin, S. v. ... 60
Alphin, S. v. ... 75
American Credit Co., Inc. v. Insurance Co. ... 663
American Motorists Insurance Co., Lichtenberger v. ... 269
Anderson, Carlton v. ... 264
Andrews, Sheppard v. ... 517
Ashford, S. v. ... 320
Associated Petroleum Carriers, Utilities Comm. v. ... 408
Atkeson, Meeks v. ... 631
Atkins v. Parker ... 446
Atkinson, S. v. ... 355
Atlantic Microfilm Corp. v. Turner. 258
Attorney General, Utilities Comm. v. ... 576
Auto Co. v. McLain ... 567

Bahadur v. McLean ... 488
Ballentine, Elliott v. ... 682
Bank v. Printing Co. ... 359
Barringer v. Weathington ... 126
Basden v. Sutton ... 6
Beck Distributing Corp. v. Parts, Inc. ... 483
Beck, Tuttle v. ... 337
Black, S. v. ... 324
Blair Auto Company, Inc. v. McLain ... 567
Blizzard, S. v. ... 395
Board of Alcoholic Control, Waggoner v. ... 692
Board of Commissioners, Yoder v. ... 712
Board of Education, Fries v. ... 341
Bonavia v. Torreso ... 21
Bowen, *In re* ... 236
Bradley v. Texaco, Inc. ... 300
Bradshaw, S. v. ... 97
Brewer, Tharpe v. ... 432
Brown, S. v. ... 372
Bryant, S. v. ... 282
Builders, Inc. v. Hollar ... 14
Building Co. v. Peacock ... 77
Bumgarner & Bowman Builders, Inc. v. Hollar ... 14
Burk v. Insurance Co. ... 209
Burke County Board of Commissioners, Yoder v. ... 712
Bush, Umphlett v. ... 72
B.V.D. Co., Yaggy v. ... 590

Calhoun v. Calhoun ... 509
Capital Outdoor Advertising, Inc. v. Harper ... 501
Carlton v. Anderson ... 264
Carter v. Murray ... 171
Carter, S. v. ... 74
Case Credit Corporation v. Equipment Co. ... 29
Caudle, S. v. ... 276
Caviness, S. v. ... 541
Cherry v. Smallwood ... 56
City of Raleigh, Allred v. ... 602
City of Raleigh, Mobile Home Sales v. ... 289
City of Raleigh, Shoffner v. ... 468
Coats & Burchard Co., Crabtree v. ... 624
Collins, S. v. ... 67
Commissioner of Motor Vehicles, Taylor v. ... 473
Construction Co., Gunter v. ... 545
Construction Co., Meares v. ... 614
Continental Timbers, Inc., Conway v. ... 10
Conway v. Timbers, Inc. ... 10
County of Burke Board of Commissioners, Yoder v. ... 712
County of Rowan Board of Education, Fries v. ... 341
Crabtree v. Coats & Burchard Co. ... 624
Cranford, Steed v. ... 378
Cranford, Steed v. ... 382
Credit Co. v. Insurance Co. ... 663
Credit Corp. v. Equipment Co. ... 29
Currie, S. v. ... 439
Curtis, S. v. ... 707

Davenport, Kelly v. ... 670
Davis, *In re* ... 697
Davis, Insurance Co. v. ... 152
Dennis, S. v. ... 390
Distributing Corp. v. Parts, Inc. ... 483
Drug Corp., Farmer v. ... 538
Duke, Sutton v. ... 100

Eagle Equipment Company, Credit Corp. v. ... 29
Ealy, S. v. ... 42

	PAGE
Edwards, Newell v.	650
Edwards, Wilder v.	513
Elliott v. Ballentine	682
Epps v. Miller	656
Equipment Co., Credit Corp. v.	29
Etheridge v. R. R. Co.	140
Falco Corp. v. Hood	717
Farmer v. Drug Corp.	538
Farr, *In re*	250
Freeman, S. v.	571
Fries v. Board of Education	341
Flowers, Hales v.	46
Fox, S. v.	55
Fulk, S. v.	68
Garrett, Comr. of Motor Vehicles, Taylor v.	473
Gas Co. v. Weeks	40
Gattison, S. v.	70
Gibson v. Jones	534
Gilley, Quadro Stations v.	227
Godwin, S. v.	62
Goldman v. Parkland	400
Gordon v. Gordon	206
Gregory v. Adkins	305
Gunter v. Construction Co.	545
Gwyn, S. v.	397
Haith, S. v.	552
Hales v. Flowers	46
Harper, Advertising, Inc. v.	501
Harris, S. v.	160
Hatcher v. Hatcher	562
Hayes, Insurance Co. v.	294
Heller v. Heller	120
Helms v. Long	451
Henry, Plummer v.	84
Herring, Roberts v.	65
High Point Motor Lodge, Inc., Supply Co. v.	701
Highway Comm., Mason v.	644
Hillcrest Building Co. of Goldsboro, N. C., Inc. v. Peacock	77
Hodge, Wickes Corp. v.	529
Holcomb v. Holcomb	329
Hollar, Builders, Inc. v.	14
Holloway, S. v.	147
Hood, Falco Corp. v.	717
Hoots, Realty Co. v.	362
Horton, S. v.	497
Hosiery Co., Tights, Inc. v.	369
Huffman, S. v.	92
Hurdle, Patrick v.	44
Hylton, Insurance Co. v.	244
Imperial Tobacco Group Ltd. v. Trust Co.	202
Imported Parts, Inc., Distributing Corp. v.	483
Indian Head Hosiery Company, Tights, Inc. v.	369
In re Bowen	236
In re Custody of Maxwell	59
In re Davis	697
In re Farr	250
In re Kluttz	383
In re Robertson	186
In re Spinks	417
Insurance Co., Burk v.	209
Insurance Co., Credit Co. v.	663
Insurance Co. v. Davis	152
Insurance Co. v. Hayes	294
Insurance Co. v. Hylton	244
Insurance Co., Lichtenberger v.	269
Jackson, S. v.	386
J. I. Case Credit Corporation v. Equipment Co.	29
Johnson v. Johnson	310
Johnson, S. v.	53
Johnson, S. v.	68
Johnson, S. v.	282
Johnson, S. v.	574
Jones, Gibson v.	534
Jones, S. v.	147
Jones, S. v.	160
Jones, S. v.	166
Jordan v. Williams	33
Kelly v. Davenport	670
Kirby, S. v.	366
Kluttz, *In re*	383
Lancaster, Rozier v.	506
Land Corp. v. Styron	25
Leffew v. Orrell	333
Lewis, S. v.	178
Lexington State Bank v. Printing Co.	359
Lichtenberger v. Insurance Co.	269

	PAGE
Littlejohn v. Publishing Co.	1
Locklear, S. v.	375
Locklear, S. v.	493
Long, Helms v.	451
Long, Marrone v.	451
Lundy Packing Company, Moody v.	463
McClam, S. v.	477
McCloud, S. v.	132
McLain, Auto Co. v.	567
McLean, Bahadur v.	488
McPherson, S. v.	160
Marrone v. Long	451
Martin, S. v.	18
Martin, S. v.	532
Mason v. Highway Comm.	644
Maxwell, *In re* Custody of	59
Meares v. Construction Co.	614
Meeks v. Atkeson	631
Melton, S. v.	721
Microfilm Corp. v. Turner	258
Miles, S. v.	552
Miller, Epps v.	656
Milton, S. v.	425
Mitchell, S. v.	49
Mobile Home Sales v. Tomlinson	289
Moody v. Packing Co.	463
Morgan, Utilities Comm. v.	576
Motor Lodge, Supply Co. v.	701
Murray, Carter v.	171
Nationwide Mutual Insurance Co. v. Davis	152
Nationwide Mutual Insurance Co. v. Hayes	294
Newell v. Edwards	650
Newsome, S. v.	525
Nixon Construction Co., Meares v.	614
Noll Construction Co., Gunter v.	545
Norfolk Southern Railway Company, Etheridge v.	140
N. C. Board of Alcoholic Control, Waggoner v.	692
N. C. Commissioner of Motor Vehicles, Taylor v.	473
N. C. State Highway Comm., Mason v.	644
Northwestern Mutual Insurance Co. v. Hylton	244
Orrell, Leffew v.	333
Oxidine, S. v.	107
Packing Co., Moody v.	463
Parker, Atkins v.	446
Parker, S. v.	191
Parkland of Dallas, Inc., Goldman v.	400
Parnell-Martin Supply Co., Inc. v. Motor Lodge	701
Parts, Inc., Distributing Corp. v.	483
Patrick v. Hurdle	44
Paul A. Bennett Realty Company v. Hoots	362
Peacock, Building Co. v.	77
Peeler v. Peeler	456
Peoples Bank and Trust Co. of Rocky Mount, Tobacco Group Ltd. v.	202
Perdue, Stith v.	314
Perkins, S. v.	675
Perry, White v.	36
Petroleum Carriers, Utilities Comm. v.	408
Phelps, S. v.	282
Piedmont Publishing Co., Littlejohn v.	1
Plummer v. Henry	84
Prince v. Prince	638
Printing Co., Bank v.	359
Prudential Insurance Co., Burke v.	209
Publishing Co., Littlejohn v.	1
Quadro Stations, Inc. v. Gilley	227
Radford v. Radford	569
R. R. Co., Etheridge v.	140
Raleigh, Allred v.	602
Raleigh City Council, Mobile Home Sales v.	289
Raleigh Mobile Home Sales, Inc. v. Tomlinson	289
Raleigh, Shoffner v.	468
Ray, S. v.	129
Realty Co. v. Hoots	362
Rhoades, Texas v.	388
Roberts v. Herring	65
Robertson, *In re*	186
Rogers, S. v.	572
Rowan County Board of Education, Fries v.	341
Royal, S. v.	559
Rozier v. Lancaster	506

	PAGE
Shankle, S. v.	564
Sheppard v. Andrews	517
Shoemaker, Thompson v.	687
Shoffner v. City of Raleigh	468
Shore v. Shore	197
Simmons, S. v.	282
Smallwood, Cherry v.	56
Sparrow, S. v.	107
Spencer, S. v.	282
Spinks, *In re*	417
Spooner's Creek Land Corp. v. Styron	25
Stafford, Underwood v.	220
Staley, S. v.	345
S. v. Alphin	60
S. v. Alphin	75
S. v. Ashford	320
S. v. Atkinson	355
S. v. Black	324
S. v. Blizzard	395
S. v. Bradshaw	97
S. v. Brown	372
S. v. Bryant	282
S. v. Carter	74
S. v. Caudle	276
S. v. Caviness	541
S. v. Collins	67
S. v. Currie	439
S. v. Curtis	707
S. v. Dennis	390
S. v. Ealy	42
S. v. Fox	55
S. v. Freeman	571
S. v. Fulk	68
S. v. Gattison	70
S. v. Godwin	62
S. v. Gwyn	397
S. v. Haith	552
S. v. Harris	160
S. v. Holloway	147
S. v. Horton	497
S. v. Huffman	92
S. v. Jackson	386
S. v. Johnson	53
S. v. Johnson	68
S. v. Johnson	282
S. v. Johnson	574
S. v. Jones	147
S. v. Jones	160
S. v. Jones	166
S. v. Kirby	366
S. v. Lewis	178
S. v. Locklear	375
S. v. Locklear	493
S. v. McClam	477
S. v. McCloud	132
S. v. McPherson	160
S. v. Martin	18
S. v. Martin	532
S. v. Melton	721
S. v. Miles	552
S. v. Milton	425
S. v. Mitchell	49
S. v. Newsome	525
S. v. Oxidine	107
S. v. Parker	191
S. v. Perkins	675
S. v. Phelps	282
S. v. Ray	129
S. v. Rogers	572
S. v. Royal	559
S. v. Shankle	564
S. v. Simmons	282
S. v. Sparrow	107
S. v. Spencer	282
S. v. Staley	345
S. v. Stovall	73
S., Surratt v.	398
S. v. Thomas	350
S. v. Walker	548
S. v. Williams	51
S. v. Wilson	76
S. v. Young	393
S. v. Zamot	425
S. v. Zimmerman	522
S. *ex rel* Utilities Commission v. Morgan	576
S. *ex rel.* Utilities Comm. v. v. Petroleum Carriers	408
State Board of Alcoholic Control, Waggoner v.	692
State Highway Comm., Mason v.	644
State of Texas v. Rhoades	388
Steed v. Cranford	378
Steed v. Cranford	382
Stith v. Perdue	314
Stovall, S. v.	73
Stuyvesant Insurance Co., Credit Co. v.	663
Styron, Land Corp. v.	25
Suburban Printing Company of Lexington, Bank v.	359

	PAGE
Suburban Rulane Gas Co. of N. C., Inc. v. Weeks	40
Supply Co. v. Motor Lodge	701
Surratt v. State	398
Sutton, Basden v.	6
Sutton v. Duke	100
Taylor v. Garrett, Comr. of Motor Vehicles	473
Texaco, Inc., Bradley v.	300
Texas v. Rhoades	388
Tharpe v. Brewer	432
Thomas, S. v.	350
Thompson v. Shoemaker	687
Tights, Inc. v. Hosiery Co.	369
Timbers, Inc., Conway v.	10
Tobacco Group Ltd. v. Trust Co.	202
Tomlinson, Mobile Home Sales v.	289
Torreso, Bonavia v.	21
Trust Co., Tobacco Group Ltd. v.	202
Turner, Microfilm Corp. v.	258
Tuttle v. Beck	337
Umphlett v. Bush	72
Underwood v. Stafford	220
Utilities Comm. v. Morgan	576
Utilities Comm. v. Petroleum Carriers	408
Waggoner v. Board of Alcoholic Control	692
Walker, S. v.	548
Weathington, Barringer v.	126
Weeks, Gas Co. v.	40
Wellons Village Shopping Center Drug Corp., Farmer v.	538
White v. Perry	36
Wickes Corp. v. Hodge	529
Wilder v. Edwards	513
Williams, Jordan v.	33
Williams, S. v.	51
Wilson, S. v.	76
Yaggy v. B.V.D. Co.	590
Yoder v. Board of Commissioners.	712
Young, S. v.	393
Zamot, S. v.	425
Zimmerman, S. v.	522

G.S.	
1-123	Wickes Corp. v. Hodge, 529
1-151	Sutton v. Duke, 100
1-172	Holcomb v. Holcomb, 329
1-180	State v. Ealy, 42
	State v. Sparrow, 107
	State v. Kirby, 366
	State v. Haith, 552
1-185	Gibson v. Jones, 534
1-250	Land Corp. v. Styron, 25
1-276	*In re* Spinks, 417
1A-1	Gordon v. Gordon, 206
	Wickes Corp.v. Hodge, 529
2-16(12)	*In re* Robertson, 186
6-20	Builders, Inc. v. Hollar, 14
7-130	*In re* Robertson, 186
7-133	*In re* Robertson, 186
7A-27	State v. Black, 324
7A-146	Johnson v. Johnson, 310
7A-196	Holcomb v. Holcomb, 329
	Kelly v. Davenport, 670
7A-244	Bonavia v. Torreso, 21
8-50.1	Johnson v. Johnson, 310
8-53	Wilder v. Edwards, 513
14-32	State v. Parker, 191
14-32(a)	State v. Parker, 191
14-32(b)	State v. Parker, 191
14-32(c)	State v. Parker, 191
14-33	State v. Haith, 552
14-34	State v. Currie, 439
14-54	State v. Melton, 721
14-55	State v. McCloud, 132
14-87	State v. Gwyn, 397
14-107	State v. McClam, 477
14-113.13	State v. Caudle, 276
14-113.17	State v. Caudle, 276
14-190	State v. Jones, 166
14-316.1	State v. Sparrow, 107
15-25.1	State v. Milton, 425
15-170	State v. Holloway, 147
15-179	State v. Horton, 497
15-184	State v. Lewis, 178
15-186	State v. Lewis, 178
15-186.1	State v. Lewis, 178
15-200.1	State v. Young, 393
18-129	Waggoner v. Board of Alcoholic Control, 692
20-28.1	Taylor v. Garrett, 473
20-71.1	Tuttle v. Beck, 337
20-71.1(a), (b)	Tuttle v. Beck, 337
20-72(b)	Insurance Co. v. Hayes, 294
20-131(a)	Meeks v. Atkeson, 631
20-139.1(b)	State v. Caviness, 541
20-141(b)(4)	Basden v. Sutton, 6

20-141(e)	Meeks v. Atkeson, 631
20-141(fl)	State v. Zimmerman, 522
20-154	Hales v. Flowers, 46
	Stith v. Perdue, 314
20-161.1	Tharpe v. Brewer, 432
20-173(a)	Carter v. Murray, 171
20-174.1(b)	State v. Spencer, 282
20-176(b)	State v. Spencer, 282
	State v. Zimmerman, 522
20-279.17	Taylor v. Garrett, 473
20-279.21	Lichtenberger v. Insurance Co., 269
20-279.21(b)(3)	Lichtenberger v. Insurance Co., 269
20-279.22	Insurance Co. v. Davis, 152
20-309(e)	Insurance Co. v. Davis, 152
20-310(a)	Insurance Co. v. Davis, 152
22-2	Carlton v. Anderson, 264
	Sheppard v. Andrews, 517
24-2	Bank v. Printing Co., 359
24-8	Bank v. Printing Co., 359
Ch. 28	*In re* Spinks, 417
29-14	Heller v. Heller, 120
20-14(2)	Heller v. Heller, 120
29-30	Heller v. Heller, 120
29-30(c)(2)	Heller v. Heller, 120
29-30(c)(4)	Heller v. Heller, 120
31-5.8	*In re* Farr, 250
44-8	Supply Co. v. Motor Lodge, 701
50-10	Gordon v. Gordon, 206
50-13.5(a)	Bonavia v. Torreso, 21
50-13.5(b)	Bonavia v. Torreso, 21
50-13.5(c)(2)(a)	Bonavia v. Torreso, 21
	In re Kluttz, 383
50-13.5(c)(5)	*In re* Kluttz, 383
50-13.7	*In re* Bowen, 236
50-13.7(a)	Allen v. Allen, 555
50-13.7(b)	*In re* Kluttz, 383
50-16.1(3)	Radford v. Radford, 569
	Peeler v. Peeler, 456
50-16.3(a)(1)	Hatcher v. Hatcher, 562
50-16.3(a)(2)	Peeler v. Peeler, 456
50-16.4	Peeler v. Peeler, 456
50-16.5	Peeler v. Peeler, 456
50-16.5(a)	Hatcher v. Hatcher, 562
50-16.8(f)	Hatcher v. Hatcher, 562
52-1	Heller v. Heller, 120
52-6	Calhoun v. Calhoun, 509
55-144	Crabtree v. Coats & Burchard Co., 624
55-145(a)(1)	Goldman v. Parkland, 400
	Crabtree v. Coats & Burchard Co., 624
62-111	Utilities Comm. v. Petroleum Carriers, 408
62-111(a)	Utilities Comm. v. Petroleum Carriers, 408
62-111(e)	Utilities Comm. v. Petroleum Carriers, 408

62-133	Utilities Comm. v. Morgan, 576
62-133(c)	Utilities Comm. v. Morgan, 576
62-262(e)(1)	Utilities Comm. v. Petroleum Carriers, 408
68-39	Sutton v. Duke, 100
110-21	State v. Sparrow, 107
110-39	State v. Sparrow, 107
115-80.1	Yoder v. Board of Commissioners, 712
115-179	Fries v. Board of Education, 341
148-45	State v. Rogers, 572
148-45(a)	State v. Alphin, 75
160-52	Mobile Home Sales v. Tomlinson, 289
Ch. 160, Art. 14	Allred v. City of Raleigh, 602
160-200	Mobile Home Sales v. Tomlinson, 289

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. IV, § 11	State v. Black, 324
Art. VII, § 6	Yoder v. Board of Commissioners, 712

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Art. IV, § 1	Bonavia v. Torreso, 21
	In re Kluttz, 383
IV Amendment	State v. Milton, 425
XIV Amendment	State v. Milton, 425

RULES OF PRACTICE CONSTRUED

No. 5	State v. Alphin, 60
	State v. Fulk, 68
	Umphlett v. Bush, 72
	State v. Stovall, 73
	State v. Brown, 372
No. 14	Shore v. Shore, 197
No. 16	State v. Rogers, 572
No. 19(a)	State v. Sparrow, 107
No. 19(c)	Builders, Inc. v. Hollar, 14
No. 27	State v. Rogers, 572
No. 28	Builders, Inc. v. Hollar, 14
	In re Custody of Maxwell, 59
	State v. Black, 324
	State v. Kirby, 366
	State v. Brown, 372
	Atkins v. Parker, 446
	State v. Rogers, 572
	Utilities Comm. v. Morgan, 576
No. 29	State v. Black, 324
No. 48	State v. Fulk, 68
	Umphlett v. Bush, 72
	State v. Black, 324
	Epps v. Miller, 656

DISPOSITION OF PETITIONS FOR CERTIORARI TO COURT OF APPEALS

SUPPLEMENTING CUMULATIVE TABLE REPORTED IN 6 N.C. APP. xviii.

Case	*Reported*	*Disposition in Supreme Court*
Barringer v. Weathington	7 N.C. App. 126	Denied, 276 N.C. 327
Bradley v. Texaco, Inc.	7 N.C. App. 300	Denied, 276 N.C. 575
Burk v. Insurance Co.	7 N.C. App. 209	Denied, 276 N.C. 497
Conway v. Timbers, Inc.	7 N.C. App. 10	Denied, 276 N.C. 183
Distributing Corp. v. Parts, Inc.	7 N.C. App. 483	Denied, 276 N.C. 575
Epps v. Miller	7 N.C. App. 656	Denied, 276 N.C. 727
Etheridge v. R. R. Co.	7 N.C. App. 140	Denied, 276 N.C. 327
In re Davis	7 N.C. App. 697	Allowed, 277 N.C. 111
In re Farr	7 N.C. App. 250	Allowed, 276 N.C. 497
In re Spinks	7 N.C. App. 417	Denied, 276 N.C. 575
Insurance Co. v. Davis	7 N.C. App. 152	Denied, 276 N.C. 327
Insurance Co. v. Hayes	7 N.C. App. 294	Allowed, 276 N.C. 497
Insurance Co. v. Hylton	7 N.C. App. 244	Denied, 276 N.C. 497
Land Corp. v. Styron	7 N.C. App. 25	Allowed, 276 N.C. 183
Lichtenberger v. Insurance Co.	7 N.C. App. 269	Denied, 276 N.C. 575
Meeks v. Atkeson	7 N.C. App. 631	Allowed, 276 N.C. 727
Microfilm Corp. v. Turner	7 N.C. App. 258	Denied, 276 N.C. 497
Shore v. Shore	7 N.C. App. 197	Denied, 276 N.C. 497
Supply Co. v. Motor Lodge	7 N.C. App. 701	Allowed, 276 N.C. 728
State v. Ashford	7 N.C. App. 320	Denied, 276 N.C. 498
State v. Blackburn	6 N.C. App. 510	Denied, 276 N.C. 575
State v. Blizzard	7 N.C. App. 395	Denied, 276 N.C. 498
State v. Caudle	7 N.C. App. 276	Allowed, 276 N.C. 498
State v. Huffman	7 N.C. App. 92	Denied, 276 N.C. 328
State v. Jackson	7 N.C. App. 386	Denied, 276 N.C. 498
State v. Lewis	7 N.C. App. 178	Denied, 276 N.C. 328
State v. Walker and Fleeman	6 N.C. App. 447	Denied, 277 N.C. 117
State v. Walker	7 N.C. App. 548	Allowed, 276 N.C. 575
Stith v. Perdue	7 N.C. App. 314	Denied, 276 N.C. 498
Sutton v. Duke	7 N.C. App. 100	Allowed, 276 N.C. 328
Taylor v. Garrett	7 N.C. App. 473	Denied, 276 N.C. 576
Tharpe v. Brewer	7 N.C. App. 432	Denied, 276 N.C. 576
Tights, Inc. v. Hosiery Co.	7 N.C. App. 369	Denied, 276 N.C. 728
Tuttle v. Beck	7 N.C. App. 337	Denied, 276 N.C. 498
Yaggy v. B.V.D. Co.	7 N.C. App. 590	Denied, 276 N.C. 728
Yoder v. Board of Commissioners	7 N.C. App. 712	Denied, 276 N.C. 729

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Supplementing Cumulative Table Reported in 6 N.C. App. xxii

Case	*Reported*	*Disposition on Appeal*
Allred v. City of Raleigh	7 N.C. App. 602	P e n d i n g
Carlton v. Anderson	7 N.C. App. 264	276 N.C. 564
Goldman v. Parkland	7 N.C. App. 400	277 N.C. 223
Highway Comm. v. School	5 N.C. App. 684	276 N.C. 556
Marrone v. Long and Helms v. Long	7 N.C. App. 451	277 N.C. 246
Mobile Home Sales v. Tomlinson	7 N.C. App. 289	276 N.C. 661
State v. McCloud	7 N.C. App. 132	276 N.C. 518
State v. McPherson	7 N.C. App. 160	276 N.C. 482
State v. Mitchell	7 N.C. App. 49	276 N.C. 404
State v. Sparrow	7 N.C. App. 107	276 N.C. 499
State v. Spencer	7 N.C. App. 282	276 N.C. 535
Surratt v. State	7 N.C. App. 398	276 N.C. 725
Utilities Comm. v. Morgan	7 N.C. App. 576	P e n d i n g

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1969

RUBY MAE LITTLEJOHN v. PIEDMONT PUBLISHING COMPANY

No. 6921SC551

(Filed 17 December 1969)

1. Libel and Slander § 18— punitive damages — actual malice

Punitive damages for libel may not be awarded on a showing of implied malice alone, but it must be shown that the publication in question was prompted by actual malice or that the defamation was recklessly or carelessly published.

2. Libel and Slander § 15— evidence to rebut malice — general denial

In an action for libel, defendant may, under a general denial of malice and absent any affirmative pleading, offer evidence to rebut a showing by plaintiff that the publication was made maliciously.

3. Libel and Slander § 15— evidence to rebut malice — general denial — compensatory damages

While evidence for the purpose of rebutting a showing of malice in an action for libel or slander may be admitted under a general denial, defendant must plead mitigating circumstances and affirmative defenses in order to offer evidence thereof to reduce the amount of compensatory damages.

4. Libel and Slander § 15— evidence to rebut malice — pleadings — consideration on issue of damages

Without proper allegations of an affirmative defense or mitigating circumstances, a defendant in a libel action may offer evidence tending to show good faith only for the purpose of negating malice and only when malice has been pleaded or proved by the plaintiff, and such evidence, without proper affirmative allegation, may not be considered on the issue of compensatory damages.

5. Libel and Slander § 14— pleadings — good faith publication

In this action for libel based upon an article printed by defendant newspaper stating that plaintiff's ex-husband had divorced her for adultery, when in fact plaintiff had obtained a divorce from her ex-husband on the ground of two years separation, the trial court erred in striking from defendant's further answer allegations of facts tending to show that the reporter and photographer responsible for the article were led, through conversations with plaintiff's ex-husband, reasonably to conclude that he had divorced plaintiff on the ground of adultery, defendant being entitled to plead such facts for the purpose of mitigating compensatory damages as well as for rebutting any showing of malice.

6. Pleadings § 41— general motion to strike

Where motion to strike paragraphs of defendant's further answer is not directed to any specific allegation claimed to be redundant, irrelevant or evidentiary, the paragraphs should not be stricken in their entirety if they contain any proper allegations.

7. Libel and Slander § 14— evidentiary pleadings — motion to strike — good faith publication

In this action for libel, the trial court erred in striking from defendant's further answer allegations of the circumstances surrounding the publication of the article and facts tending to show lack of bad faith in publishing the article, notwithstanding such allegations are somewhat evidentiary, since the nature of such mitigating facts requires that they be placed in greater detail than other types of defenses.

8. Libel and Slander § 14— motion to strike — inference from published article — damages

In this action for libel based upon a newspaper article stating that plaintiff's ex-husband divorced his wife for adultery, the trial court did not err in striking from defendant's further answer allegations that the article in question did not contain the new married name of plaintiff and that any damage plaintiff has suffered resulted from the institution of this suit and not from publication of the article, it being unnecessary to call attention in the answer to what the article, which was pleaded by plaintiff in its entirety, does or does not contain and to argue inferences to be drawn therefrom.

ON certiorari to review an order of *Seay, J.*, at the 9 June 1969 Session of FORSYTH County Superior Court.

Plaintiff filed this civil action on 19 February 1969. Her complaint alleges in substance that the corporate defendant publishes the *Winston-Salem Journal,* a newspaper of general circulation; that on or about 27 January 1969 defendant caused to be published in said paper an article entitled "The Other Side of Divorce"; that a picture of plaintiff's ex-husband, William R. Fulk, accompanied the article and a statement appeared therein that "[a]fter 14 years of marriage and two years of separation, Fulk divorced his wife for

adultery"; that plaintiff is the person referred to in the article as having been divorced on grounds of adultery; that statements in the article were untrue, libelous, defamatory, and were made without just cause and provocation and with malice toward plaintiff. Plaintiff also alleges that a retraction published by defendant at the plaintiff's request was not full, fair or adequate. She prays for recovery of compensatory and punitive damages in substantial sums.

Defendant answered on 20 March 1969 admitting that it published the alleged article and that the plaintiff was not divorced by William R. Fulk on grounds of adultery but had obtained a divorce from him on the grounds of two years separation. Other allegations bearing on the question of the alleged libel were denied. In addition, the defendant's answer contained a further answer and defense consisting of four paragraphs. Plaintiff moved to strike all of the further answer and defense except for an admission in paragraph 3 that plaintiff was not divorced for adultery but obtained a divorce on grounds of a two years separation, and the first sentence of paragraph 4 relating to the retraction.

Plaintiff's motion to strike was allowed in its entirety by order of Judge Thomas W. Seay, dated 11 June 1969. Defendant's petition to this court for certiorari to review Judge Seay's order was granted on 16 July 1969.

Wilson & Morrow by John F. Morrow for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge and Charles F. Vance, Jr., for defendant appellant.

GRAHAM, J.

[5] The first three paragraphs of defendant's further answer and defense allege in somewhat narrative form the circumstances surrounding the publication of the article in question and also facts tending to show that the reporter and photographer who were responsible for the article were led, through conversations with William R. Fulk, to reasonably conclude that Fulk had divorced his wife on grounds of adultery.

[1, 2] Defendant contends that unless it pleads facts showing a lack of bad faith in publishing the article, it will be precluded from offering any evidence to rebut plaintiff's allegations of malice and to protect itself from an award of punitive damages. Such is not the case. In this jurisdiction punitive damages may not be awarded on a showing of implied malice alone. To support such an award it must

be shown by the plaintiff that the publication in question was prompted by actual malice, or that the defamation was recklessly or carelessly published. *Hartsfield v. Hines,* 200 N.C. 356, 157 S.E. 16; *Bouligny, Inc., v. Steelworkers,* 270 N.C. 160, 154 S.E. 2d 344; *Roth v. News Co.,* 217 N.C. 13, 6 S.E. 2d 882 (and cases therein cited). It follows that the defendant may under a general denial of malice, and absent any affirmative pleading on its part, offer evidence to rebut a showing by the plaintiff that the publication was made maliciously. "It may be difficult to determine what facts may be shown under a general denial, but since the plaintiff is required to prove all the material facts of his case which are controverted, the defendant may show any facts which go to deny the existence of the cause of action, . . ." 1 McIntosh, N.C. Practice & Procedure 2d, § 1236, p. 669.

[3] While evidence for the purpose of rebutting a showing of malice may be admitted under a general denial, the law in this jurisdiction is that in an action for libel or slander a defendant must plead mitigating circumstances and affirmative defenses in order to offer evidence thereof to reduce the amount of compensatory damages. *Harrell v. Goerch,* 209 N.C. 741, 184 S.E. 489; *Upchurch v. Robertson,* 127 N.C. 127, 37 S.E. 157; *Knott v. Burwell,* 96 N.C. 272, 2 S.E. 588; *Smith v. Smith,* 30 N.C. 29. The right to do so is expressly given by G.S. 1-158 which states in part as follows:

> "The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances."

[4] The result is that without proper allegations of an affirmative defense or mitigating circumstances, a defendant may offer evidence tending to show good faith, but only for the purpose of negating malice, and not at all when malice has not been pleaded or proved by the plaintiff. Such evidence, without proper affirmative allegation, may not be considered on the issue of compensatory damages.

[5] It is obvious that the facts pleaded in the first three paragraphs of defendant's further answer, if proved, would tend to mitigate general damages as well as rebut any showing of malice. Defendant is entitled to plead such facts for this purpose. In fact it is necessary that it do so in order to present evidence in mitigation. We therefore conclude that the allegations stricken from the first three paragraphs were proper and should not have been stricken.

[6, 7] Plaintiff contends, however, that her motion was properly allowed in that the pleadings stricken were irrelevant, redundant and evidentiary. It is true that such matter may be stricken from a pleading on motion of the person aggrieved thereby. G.S. 1-153; *Revis v. Asheville,* 207 N.C. 237, 176 S.E. 738; *Bank v. Easton,* 3 N.C. App. 414, 165 S.E. 2d 252. Here, plaintiff did not direct her motion to any specific allegation claimed by her to be irrelevant, redundant or evidentiary. Therefore, if the paragraphs involved contained any proper allegations they should not have been stricken in their entirety. *Johnson v. Petree,* 4 N.C. App. 20, 165 S.E. 2d 757. The allegations are certainly relevant and are in no sense redundant. While they may appear somewhat evidentiary, we fail to see how the circumstances surrounding the publication of the article could otherwise be pleaded. The nature of such mitigating facts requires that they be pleaded in greater detail than is often necessary with respect to other types of affirmative defenses.

[8] Allegations ordered stricken from paragraph 4 of the further answer allege that the article in question did not contain the new married name of plaintiff and any damage the plaintiff has suffered, largely, if not entirely, resulted from the institution of this suit and not from the publication of the article. The article has been pleaded in its entirety by the plaintiff and will be before the jury. It is unnecessary to call attention in the answer to what the article does or does not contain and to argue inferences to be drawn therefrom. Such arguments will undoubtedly be available to the defendant at the proper time and no prejudice will result from having this matter stricken from the answer.

That portion of the court's order striking allegations from paragraphs 1, 2 and 3 of defendant's further answer is reversed. That portion striking portions of paragraph 4 is affirmed.

Reversed in part and affirmed in part.

CAMPBELL and PARKER, JJ., concur.

SARAH A. BASDEN, ADMINISTRATRIX OF THE ESTATE OF EDWARD DENNY BASDEN, DECEASED v. MORRIS LEE SUTTON, ORIGINAL DEFENDANTS AND JOHN ISAAC COOPER AND ARCHIE LEON LANIER, ADDITIONAL DEFENDANTS

No. 694SC414

(Filed 17 December 1969)

1. Automobiles § 51— accident case — excessive speed — wet highway — nonsuit

Evidence tending to show that, at the time defendant's automobile struck plaintiff's intestate, the defendant was driving at a speed of 60 mph in a 55 mph zone, that the highway was wet, and that it was nighttime and raining, *held* sufficient to make out a *prima facie* case of defendant's negligence in driving in excess of 55 mph. G.S. 20-141(b)(4).

2. Automobiles § 30— speed restriction — 55 mph

A violation of G.S. 20-141(b)(4) relating to the 55 mph speed restriction is negligence per se.

3. Negligence § 13— contributory negligence — duty to use ordinary care

The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided.

4. Automobiles § 83— accident case — contributory negligence — pedestrian — nonsuit

In an action by an administrator to recover damages for the wrongful death of her intestate, the administrator's evidence *is held* sufficient to establish the contributory negligence of her intestate as a matter of law, where it tended to show that the intestate was assisting several persons in removing tobacco that had fallen on the highway from an overturned truck, that the intestate was last seen standing on the shoulder of the highway as defendant's car approached at a rapid rate of speed, and that after the accident the intestate's body was found in the west lane of the highway under tobacco and partially under the defendant's car.

APPEAL by plaintiffs from *Cohoon, J.*, 10 March 1969 Civil Session, DUPLIN County Superior Court.

Plaintiff seeks to recover damages for the wrongful death of her intestate. It was stipulated that plaintiff is the duly qualified administratrix of the estate of Edward Denny Basden; that Edward Denny Basden died on the night of 2 October 1964; that on that night, John Isaac Cooper was operating a pickup truck as the agent of Archie Leon Lanier and within the scope of his employment; that Archie Leon Lanier was the owner of the pickup truck; that at the time of the trip leading up to the accident, Norman Whaley and Edward Denny Basden were riding in the truck which was pulling a trailer; that Whaley had his tobacco in the truck and Cooper and Basden

had their respective loads of tobacco on the trailer in separate piles; that the truck was being driven to Wilson, North Carolina, so that the tobacco of all three could be sold on the Wilson market; that Lanier, as landlord, had an interest in the tobacco of Cooper and Whaley.

Additional defendants Cooper and Lanier were brought in by motion of original defendant Sutton upon his cross action against them for contribution.

The evidence, viewed in the light most favorable to plaintiff, tends to show:

N.C. Highway 111 runs in a north-south direction from Kenansville northerly to Goldsboro. North of the scene of the accident complained of is a slight curve. From the curve to the collision scene is four-tenths of a mile. From the collision scene south the road is straight but is uphill. The paved portion of the road is 20 feet 7 inches wide, and the shoulder is 12 feet 10 inches wide. The truck in which plaintiff's intestate had been a passenger was headed in a northerly direction, and had come down the hill toward the Lane house which was situate on the east side of the highway. The highway was wet, and it was raining. The truck's headlights were on low beam. The trailer, attached to the truck "swung to the right and went back to the left and popped two bolts in the tongue and overturned." The tobacco landed on the left-hand lane, or southbound lane. A clear plastic cover, which had been on the bottom of the trailer, was on top of the tobacco. The pile of tobacco on the highway was about 3½ feet high and about 8 feet wide. The truck and trailer were pulled to the side of the road with about a foot of the truck and about a foot of the trailer on the paved portion of the road. The headlights remained on low beam and the trailer remained overturned. The occupants of the truck got out and were standing at the rear thereof deciding what to do when a motorist came by, stopped, and left with them a flashlight while he went to call a patrolman. One of the truck passengers went to get another truck with which to haul the tobacco away from the scene. Plaintiff's intestate, Cooper, and Whaley began moving the tobacco from the highway to the shoulder of the road. Whaley testified that "In between cars we laid tobacco aside and Mr. Basden would catch them coming from the south and I catch them coming back. I mean by 'catch them' to flag them. As to how we flagged them, we would go to the back of the pickup and wave the light back and forth across the road." The distance from the pile of tobacco and the rear of the pickup truck was 80 feet 4 inches. At least two cars had come

from the north after the first motorist stopped and before the Sutton car. To flag the cars from the north Whaley stood in the left lane at the rear of the pickup truck and waved the light back and forth across the road. There was sufficient room for vehicles to get by the truck and tobacco. Vehicles coming from the north remained on the paved portion and took the east lane of traffic. The four vehicles which were flagged going north followed their same lane of traffic and cut around the pickup a little bit. At the times cars were not coming, the flashlight was used for the purpose of furnishing light to lift the tobacco off the highway onto the shoulder of the road. When the Sutton car was first seen approaching, the three men were at the south end of the pile of tobacco. "All of us were standing on the shoulder of the road." Basden handed Whaley the light and said "catch that one". Whaley saw the headlights of the Sutton car as he crossed the river bridge, which is "just before that curve". "When you come off that bridge you take the curve." Whaley testified that he observed the Sutton car approach for better than one-half a mile and, in his opinion, its speed was about 60 miles per hour. The Sutton car did not reduce its speed. When Whaley started flagging, the Sutton car was four-tenths of a mile away. When the Sutton car got pretty close to him, about 20 feet, he jumped off the road. The Sutton car passed him and struck the pile of tobacco, went up and came down and settled on top of the tobacco. Whaley next remembered Cooper coming from the field. He testified "The last time I saw Mr. Basden he was on the shoulder of the road. Cooper, the last time I saw him before the accident occurred, was on the shoulder too." Basden's body was found on the west side of the highway under tobacco and partially under the front of the Sutton car. There were no marks on the pavement leading from the tobacco back to the north.

At the close of plaintiff's evidence, defendant's motion for judgment as of involuntary nonsuit was granted, and plaintiff appealed, assigning this as the only error.

Wallace, Langley and Barwick by R. S. Langley and F. E. Wallace, Jr., for plaintiff appellant.

Marshall and Williams by Lonnie B. Williams for original defendant Sutton appellee.

Gavin and Gavin by Vance B. Gavin and Rivers D. Johnson, Jr., for additional defendants.

MORRIS, J.

Plaintiff's exception and assignment of error presents two questions on appeal: (1) Did plaintiff offer sufficient evidence to make out a *prima facie* case of actionable negligence against the defendant? and (2) If so, does plaintiff's evidence establish the contributory negligence of her intestate as a matter of law?

The law imposes upon a motorist certain positive duties and requires of him constant care and attention.

> "He must at all times operate his vehicle with due caution and circumspection, with due regard for the rights and safety of others, and at such speed and in such a manner as will not endanger or be likely to endanger the lives or property of others. G.S. 20-140; . . .
>
> He must operate his vehicle at a reasonable rate of speed, keep a proper lookout for persons on or near the highway, *Cox v. Lee, ante* [230 N.C.], 155, decrease his speed when any special hazard exists with respect to pedestrians, G.S. 20-141(c) . . ." *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462 (1949).

[1, 2] There was evidence here that Sutton was operating his car at a speed of about 60 miles per hour at a time when the highway was wet, when it was raining, and at a place where the posted speed limit was 55 miles per hour. G.S. 20-141(b)(4) makes it unlawful, in this circumstance, to operate a passenger car in excess of 55 miles per hour. A violation of G.S. 20-141(b)(4) is negligence *per se. Price v. Miller,* 271 N.C. 690, 157 S.E. 2d 347 (1967).

We think the plaintiff offered sufficient evidence of actionable negligence on the part of defendant Sutton to carry the case to the jury.

[3] The crucial question remains of the contributory negligence as a matter of law of plaintiff's intestate.

> "The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. (citations omitted.)" *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499 (1963).

[4] Plaintiff's own evidence shows that her intestate was standing on the shoulder of the road when the Sutton car was seen approaching at a rapid rate of speed. His body was found in the west lane of the highway partially under the Sutton car. The conclusion is inescapable that he left a position of safety and placed himself

in a position of danger with full knowledge of all the circumstances and the danger inherent in attempting to remove tobacco until the approaching car had passed. The evidence is that one of his companions jumped from the path of the oncoming car and one went in the field. Plaintiff's intestate failed to exercise ordinary care to protect himself from injury.

It is manifest from plaintiff's own evidence, which is all the evidence, that the negligence of her intestate was at least a proximate cause of his injuries and death. In our opinion, no other conclusion can reasonably be drawn. The judgment of the trial court allowing the motion for nonsuit must, therefore, be

Affirmed.

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

CHARLES CONWAY v. CONTINENTAL TIMBERS, INC.

No. 693SC464

(Filed 17 December 1969)

1. Appeal and Error § 59— matters on review — judgments on motion to nonsuit

In passing upon whether a judgment of nonsuit was properly granted, all the evidence which supports the plaintiff's claim must be taken as true and considered in the light most favorable to him, resolving all discrepancies and contradictions in his favor and giving him the benefit of every reasonable inference which legitimately may be drawn therefrom.

2. Negligence § 29; Automobiles § 61— accident — backing — improper use of forklift

In an action to recover for injuries received by plaintiff when a motorized forklift operated by defendant's employee backed into the vehicle driven by plaintiff, evidence tending to show that the employee was operating the forklift at a speed in excess of that which was prudent under the existing conditions and that he failed to keep a reasonably careful lookout while backing, *held* sufficient to establish a *prima facie* case of the employee's negligence.

3. Negligence § 35— contributory negligence — nonsuit

When opposing inferences are possible from plaintiff's evidence, nonsuit on the basis of contributory negligence as a matter of law should be denied.

4. Negligence § 35— contributory negligence — nonsuit

Nonsuit for 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.

5. Negligence § 35— contributory negligence — nonsuit — accident with forklift

In an action to recover for injuries received by plaintiff when a motorized forklift operated by defendant's employee backed into the motorized vehicle driven by plaintiff, plaintiff's evidence tending to show that he drove his unlighted vehicle from behind a row of trucks into the employee's path of travel without warning or notice and without maintaining a proper lookout, *held* not to justify a finding of contributory negligence as a matter of law, where the evidence also tended to show that plaintiff emerged from the row of trucks in a prudent manner and stopped immediately upon seeing the employee's vehicle traveling toward him.

6. Principal and Agent § 4— proof of agency — negligence of forklift operator

There was sufficient evidence to support a jury finding that the operator of a forklift was the agent and employee of a corporate defendant at the time the operator backed into a vehicle driven by plaintiff, where the president of defendant testified that the operator was employed by defendant on the day of the accident and was "running the show."

APPEAL by plaintiff from *Cowper, J.*, March 1969 Session of CARTERET Superior Court.

This is a civil action in which the plaintiff, Charles Conway, brought suit for personal injuries sustained as a result of a collision which occurred on the premises of the Port Terminal of the North Carolina State Ports Authority in Morehead City, North Carolina, on 29 November 1965.

The plaintiff was operating a "mule," a motorized vehicle, and the alleged employee of the defendant, R. S. Durham, was operating a forklift on West Road at the time of the collision. The plaintiff was employed by the North Carolina State Ports Authority as a watchman and was acting in this capacity at the time of the injury.

Evidence presented by the plaintiff tended to show that the plaintiff was driving to various warehouses for the purpose of turning on lights as darkness was approaching; that he proceeded down West Road in a southern direction, West Road having a row of covered Marine trucks parked in the middle; that having reached the front of the row of trucks, he edged out from the front until his vision was not blocked as he looked to his right; that he saw movement to his right and immediately stopped; that he saw a forklift driven by

Durham coming at him fifteen to eighteen feet away at a speed in the opinion of the plaintiff to be twenty miles per hour; that the forklift was backing toward him with Durham looking down at his right rear wheel; that the plaintiff attempted to put the "mule" in reverse but was unable to before impact, and that as a result of the collision the plaintiff suffered injury to his spine when the "mule" turned over and plaintiff was struck by a loose battery.

At the close of the plaintiff's evidence, the defendant's motion for judgment of nonsuit was granted and the plaintiff appeals.

Nelson W. Taylor for plaintiff appellant.

Wheatley and Mason by C. R. Wheatley, Jr., for defendant appellee.

VAUGHN, J.

[1] The question presented by this appeal is whether the judgment of nonsuit was properly granted. In passing upon this question it is elementary that all the evidence which supports the plaintiff's claim must be taken as true and must be considered in the light most favorable to him, resolving all discrepancies and contradictions in his favor and giving him the benefit of every reasonable inference which legitimately may be drawn therefrom. *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783.

[2] The evidence presented by the plaintiff tended to show that the defendant was negligent in several respects, including that Durham was operating his forklift at a speed in excess of that which was prudent under the existing conditions, that Durham failed to keep a reasonably careful lookout, and that he was backing his vehicle. We shall refrain from a discussion of the evidence but suffice to say that we are of the opinion that the plaintiff established a *prima facie* case which, nothing else appearing, should have been presented to the jury.

> "It is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty also requires that the operator must be reasonably vigilant, and that he must anticipate and expect the presence

of others." *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332. "It is the duty of a driver not merely to look but to keep a lookout in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330.

[3-5] It is a well-established rule that when opposing inferences are possible from the plaintiff's evidence, nonsuit on the basis of contributory negligence as a matter of law should be denied. *Atwood v. Holland*, 267 N.C. 722, 148 S.E. 2d 851. Nonsuit 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. What then did the evidence in this case disclose? In the light most favorable to the plaintiff it tends to show that as the plaintiff came past the trucks about six feet, he was barely moving, that he edged out until he could see to his right and that he stopped at the moment he saw movement to his right; that he saw the forklift about fifteen to eighteen feet from him backing toward him; that he tried to get the "mule" in reverse but could not do so by the time the forklift struck the right front of the "mule."

[5] We do not think from this evidence the negligence of the plaintiff is so clearly established that no other reasonable inference or conclusion can be drawn. The evidence is sufficient to support a jury determination that the plaintiff proceeded in a prudent manner past a row of trucks that were obstructing his vision of an intersection and that having passed the intersection he stopped immediately upon seeing a vehicle coming in his direction. The unfavorable aspects of the plaintiff's evidence would tend to show that the plaintiff was proceeding in a vehicle not equipped with lights and that without warning or notice and without maintaining a proper lookout drove his vehicle into Durham's path of travel. There are, therefore, opposing inferences that can be gleaned from the plaintiff's evidence and the issue is then in the province of the jury.

[6] The only remaining basis upon which the judgment of nonsuit could have been properly entered is failure of the plaintiff to offer sufficient evidence of agency to support a jury finding of agency. We are of the opinion that there was sufficient evidence that Durham was acting as the agent and servant of the defendant to repel nonsuit.

In *Scott v. Lee*, 245 N.C. 68, 95 S.E. 2d 89, the Supreme Court quoted from the brief of the plaintiff approving his apt statement:

"Plaintiff does not contend that the only inference which can be drawn from the evidence shows the defendant to be the owner of said Ford truck, but to the contrary the plaintiff realizes the evidence and reasonable inferences to be drawn therefrom are in conflict, and therefore the trial judge usurped the province of the jury by refusing to allow them to pass on the issues."

The facts of that case differ as the plaintiff was relying on G.S. 20-71.1(a) to take his case to the jury, but the quoted statement is applicable to the case at bar. The ultimate issue for the jury is whether the operator was in fact the agent of the defendant and then and there acting within the scope of his agency. *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295. The burden is on the plaintiff to offer evidence upon which a jury determination can be supported. In the light most favorable to the plaintiff evidence offered at trial tended to show by the testimony of Walter H. Zinglemann, President of Continental Timbers, Inc., that on 29 November 1965 Durham was employed by the defendant and that he was "running the show." Witnesses J. C. Steele and Thurston Rice testified that earlier on that day they had seen Durham working in and about the defendant's warehouses driving a forklift and that they knew him to be an employee of the defendant. It would not be an unsupportable determination for the jury to conclude that Durham was an employee of the defendant and that he was operating the forklift in the course of his employment.

For the foregoing reasons we hold that the involuntary nonsuit was improperly granted and that the plaintiff is entitled to a

New trial.

BROCK and BRITT, JJ., concur.

BUMGARNER & BOWMAN BUILDERS, INC. v. CLYDE E. HOLLAR, JR., AND WIFE, DORIS S. HOLLAR

No. 6925SC501

(Filed 17 December 1969)

1. Appeal and Error § 24— failure to include assignments of error in record or brief

Where the record and brief contain no assignments of error as required by Rules 19(c) and 28, only the face of the record proper is presented for review.

2. Deeds § 19— restrictive covenants — construction

Restrictive covenants are not favored and are to be strictly construed against limitation on use.

3. Deeds § 19— restrictive covenants — intent of parties

The intention of the parties governs the construction of restrictive covenants, and such intention must be gathered from study and consideration of all the covenants contained in the instrument creating the restrictions.

4. Deeds § 19— restrictive covenants — garden utility shed

Construction of a garden utility shed does not violate restrictive covenants in a deed providing that no structure shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling and that no trailer, separate basement, tent, shack, garage or other outbuildings erected on the lot shall be used as a residence, temporarily or permanently.

5. Costs § 3— taxing of costs — equitable action — discretion of court

In an action for an injunction to prevent defendants from violating restrictive covenants in a deed, taxation of costs against the plaintiff is within the court's discretion and is not reviewable on appeal, the action being equitable in nature. G.S. 6-20.

APPEAL by plaintiff from *Bryson, J.*, April 1969 Session of CATAWBA Superior Court.

Plaintiff developed a subdivision for the purpose of establishing an exclusive, restricted residential district and sold and conveyed a certain lot therein to defendants. Defendants purchased said lot with knowledge of certain restrictions contained in the deed, three of which are as follows:

"2. All lots in said subdivision as shown on said plat shall be known and described as residential lots and no part of said lots shall be used for any type of business or stores. No structure shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling."

"4. No trade or business and no noxious or offensive activities shall be carried on upon any lot or tract, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood. No livestock or poultry may be kept on this property.

5. No trailer, separate basement, tent, shack, garage or other outbuildings erected on these residential lots shall be, at any time, used as a residence, temporarily or permanently."

Plaintiff's complaint alleges that defendants have constructed a structure approximately ten feet square in size which is going to be

used as a kennel for the housing, raising, breeding and selling of dogs and that in constructing said structure has violated the terms and provisions of the restrictions contained in the deed. Defendants' answer admits that construction has begun on a small yard and garden utility shed for the storage of yard and garden tools and machinery but denies the remaining substantive allegations of the complaint.

Plaintiff seeks a permanent injunction against defendants to prevent them from violating the restrictions set forth in the deed, particularly the restrictions contained in paragraphs 2 and 4, a mandatory injunction ordering defendants to cease building said structure and to tear it down, an order commanding defendants to show cause why such injunctions should not be granted and to have costs taxed against defendants.

The court held that the construction by the defendant is not a violation of the restrictions contained in the deed, but that plaintiff is entitled to an order prohibiting defendants from using said building for any business purpose, specifically the raising of dogs for purposes of sale. The court then ordered that plaintiff be denied the relief prayed for in the complaint restraining defendants from construction of said utility building, that defendants are enjoined from carrying on a trade or business upon said premises, specifically the business of raising dogs for purposes of sale and that costs be taxed against plaintiff. Plaintiff excepted and appealed.

Kenneth D. Thomas for plaintiff appellant.

Sigmon & Sigmon by Jess Sigmon, Jr., for defendant appellee.

MORRIS, J.

[1] The record and brief contained no assignments of error as required by Rules 19(c) and 28, Rules of Practice in the Court of Appeals of North Carolina. This failure to comply with the rules would in this case ordinarily present for review only errors appearing on the face of the record proper. *Trust Co. v. Henry,* 267 N.C. 253, 148 S.E. 2d 7 (1966). We have, nevertheless, considered the exceptions listed in the record.

[4] The primary question presented by plaintiff's exceptions is whether the shed being constructed violates the restrictions contained in the deed, specifically paragraphs 2, 4 and 5 quoted above. It is plaintiff's position that the shed is a structure and that the construction thereof is a violation of the last sentence of paragraph

2 of the restrictions. Defendant concedes that the shed is a structure. However, it is defendants' position that the construction of the shed is not in violation of the restrictions, because paragraph 2, when considered in relation to paragraph 5, is ambiguous and susceptible to various interpretations.

[2, 3] Decision must depend on the construction of paragraphs 2 and 5 in the restrictions. "Restrictive covenants are not favored and are to be strictly construed against limitation on use. In the absence of clear and unequivocal expressions, restrictive covenants are not to be expanded and all doubts are to be resolved in favor of the free use of the property." *Hullett v. Grayson,* 265 N.C. 453, 144 S.E. 2d 206 (1965). "In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Long v. Branham,* 271 N.C. 264, 156 S.E. 2d 235 (1967). Using these guidelines, we reach the conclusion that the construction of the shed by the defendants is not a violation of the restrictions contained in the deed.

Paragraph 2, standing alone, is not ambiguous and would serve to prohibit any structure on the lot except one detached single family dwelling. However, when paragraph 2 is read in conjunction with paragraph 5, the real meaning of the restrictions and intent of the parties become doubtful. Paragraph 5 could reasonably be construed to mean that the enumerated structures or other outbuildings could be erected on the lot so long as they were not used as a temporary or permanent residence. Indeed, the use of the word "outbuilding" in paragraph 5, when taken without consideration of the provisions of paragraph 2, implies that other structures separated from the dwelling may be erected on the lot so long as they are not used as a residence. An outbuilding is defined in Black's Law Dictionary, 4th Ed., as "[S]omething used in connection with a main building. (Citation omitted). A small building appurtenant to a main building, and generally separated from it; an outhouse. (Citation omitted)." It is defined in Webster's Third New International Dictionary (1968) as "a building separate from but accessory to a main house." Additionally, paragraph 5 does not provide that none of the structures enumerated shall be erected but, when considered alone, is susceptible of the interpretation that if any or all of them should be erected on a lot, none could be used as a residence.

[4] Concededly, paragraph 5 is also susceptible of interpretation as defining, by enumeration, those structures which cannot be used

as a "detached single family dwelling". In view of the apparent ambiguity of the restrictions when considered together, we are compelled to resolve these doubts in favor of the defendants. *Long v. Branham, supra; Hullett v. Grayson, supra.*

[5] Plaintiff excepted to the court's assessment of costs against plaintiff. This action is equitable in nature, and the taxing of costs is within the discretion of the court and the court's action is not reviewable. G.S. 6-20; *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326 (1963).

Affirmed.

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

STATE OF NORTH CAROLINA v. JOSEPH MARTIN

No. 696SC384

(Filed 17 December 1969)

1. Municipal Corporations § 30— mobile homes — violation of zoning ordinance

The evidence *is held* sufficient for the jury in this prosecution for unlawfully parking or storing a mobile home or trailer in violation of a municipal zoning ordinance.

2. Statutes § 4— construction — constitutionality

If a statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted.

3. Municipal Corporations § 30— Ahoskie zoning ordinance — mobile home parks

Zoning ordinance of the Town of Ahoskie clearly and concisely establishes the standards and procedures for obtaining approval of a mobile home park by the Town Council.

4. Municipal Corporations § 30— zoning ordinance — constitutionality — nonconforming uses — applicability to defendant

In this prosecution for unlawfully parking or storing a mobile home in violation of a municipal zoning ordinance, sections of the zoning ordinance attacked by defendant as unconstitutional relating to duties of the building inspector with reference to nonconforming uses in existence at the time the ordinance was adopted do not apply to defendant, where the evidence shows that defendant moved his mobile home into the municipality more than two years after adoption of the ordinance.

5. Municipal Corporations § 30— Ahoskie zoning ordinance — maintenance permits — discretion of building inspector — constitutionality

Zoning ordinance of the Town of Ahoskie does not authorize the building inspector in his unbridled discretion to determine whether or not a temporary maintenance permit for a mobile home park should be issued, the ordinance specifically providing that no maintenance permit may be issued for any mobile home park not in operation when the ordinance was adopted, and the ordinance being specific as to the conditions under which such permit may be issued.

6. Municipal Corporations § 30— violation of zoning ordinance — failure to enforce against others

It is no defense to a charge of unlawfully parking a mobile home in violation of a municipal zoning ordinance that the ordinance has not been enforced against the owners of other mobile homes parked in the town.

APPEAL by defendant from *Bundy, J.*, April 1969 Term of HERTFORD Superior Court.

Defendant was tried on a warrant charging in essence that on or about 11 September 1968 he did unlawfully park or store a mobile home or trailer in the Town of Ahoskie in violation of Article 5, Section 2 of the zoning ordinance. Evidence for the State tended to show the following. The ordinance was duly adopted by the town on 24 January 1966. On or about 3 September 1968 the defendant caused the trailer to be placed behind a service station in the town. Prior to placing the trailer the defendant was advised by the building inspector that to do so would be unlawful. After the trailer was placed on the lot, the building inspector sent a written notice to the defendant advising him that he was in violation of the ordinance and requested that he comply with the ordinance by 10 September 1968. The evidence further tended to show that he and his wife were living there as of the date of the trial on 21 April 1969. The lot on which the trailer is located is not within an approved mobile home park and no maintenance permit has been issued. The defendant offered no evidence.

From a verdict of guilty and judgment thereon the defendant appeals.

Attorney General Robert Morgan by Staff Attorney Edward L. Eatman, Jr., for the State.

Jones, Jones and Jones by Joseph J. Flythe for defendant appellant.

VAUGHN, J.

[1] Defendant's assignment of error based on the failure of the court to allow his motion for nonsuit at the close of the evidence is

overruled. Taking the evidence in the light most favorable to the State, as we are required to do, it was clearly sufficient to withstand motion for nonsuit.

Defendant contends that the ordinance which he is charged with violating is unconstitutional and assigns as error the denial of his motion to quash the warrant.

> "A municipal ordinance is presumed to be valid, and the burden is upon the complaining party to show its invalidity or inapplicability. And a municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless it is clearly so, and every reasonable intendment will be made to sustain it." 5 Strong, N.C. Index 2d, Municipal Corporations, § 8, p. 626.

[2] If a statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted. *State v. Dorsett,* 3 N.C. App. 331, 164 S.E. 2d 607.

The defendant specifically contends that the entire article of the zoning ordinance which deals with mobile homes, trailers and mobile home parks is unconstitutional because (1) ". . . there is an unconstitutional attempt to confer on the Ahoskie Building Inspector a naked arbitrary power to make a determination without standards of legislative guidance as to who and when and where and for what purpose a trailer home may be parked within the Town of Ahoskie . . ." and (2) the building inspector is authorized ". . . in his unbridled discretion, to determine whether additional temporary permits for the period of 120 days may be issued. . . ."

[3] The section of the ordinance under which defendant was convicted makes it unlawful to store or park a mobile home in the town except in approved mobile home parks. Although defendant does not contend that he has attempted to establish an approved mobile home park and therefore that section is not relevant here, the ordinance clearly and concisely establishes the standards and procedures for obtaining approval of such park by the Town Council.

[4] The sections which the defendant specifically attacks relate to duties of the building inspector with reference to nonconforming uses which were in existence at the time of the adoption of the ordinance. As is the case here, zoning ordinances generally make special provisions for land uses existing at the time of the enactment or effective at the time of their enactment or effective date. 58 Am. Jur., Zoning, § 146, p. 1021. The evidence here tends to show that defendant moved his trailer into the town more than two years

after the adoption of the ordinance. The sections he questions would not therefore apply to him.

[5] The ordinance specifically provides that no maintenance permit may be issued for any mobile home park not in operation on the date of the ordinance. With reference to nonconforming parks in operation upon the effective date of the ordinance, the ordinance provides that "subject only to the provisions of this ordinance" the building inspector may issue temporary maintenance permits for renewal periods of 120 days. The ordinance is specific as to the conditions under which such a permit may be issued. This authority must also be read in the light of Article 9, Section 4 of the ordinance which in pertinent part provides:

> "It is the intention of this ordinance that all questions arising in connection with the enforcement of the ordinance shall be presented first to the Building Inspector and that such questions shall be presented to the Board of Zoning Adjustment only on appeal from the Building Inspector; and that from the decision of the Board of Adjustment recourse shall be had to the courts as provided by law."

This assignment of error is overruled.

[6] The defendant attempts to show by the cross-examination of plaintiff's witnesses that other trailers were parked in the town and that the ordinance had not been enforced against them. It is no defense to a criminal charge nor to one of this type that others have not been penalized or the law enforced as to them. *Gastonia v. Parrish,* 271 N.C. 527, 157 S.E. 2d 154.

No error.

BROCK and BRITT, JJ., concur.

DIANE J. BONAVIA v. SAMUEL R. TORRESO AND INEZ TORRESO

No. 691DC448

(Filed 17 December 1969)

1. Pleadings § 19— demurrer — consideration of facts not in pleading

In passing upon a demurrer the court may not consider any fact not appearing in the pleading and the legal instruments incorporated therein.

2. Pleadings § 19— effect of demurrer

A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated.

3. Divorce and Alimony § 22; Infants § 8— child custody proceeding — jurisdiction of district court — physical presence in State

In this child custody proceeding instituted in the district court, the complaint is not demurrable for lack of jurisdiction on the ground that it appears on the face of the complaint that the child is a resident of Connecticut, it not so appearing on the face of the complaint, and the district court having jurisdiction since it appears on the face of the complaint that the child is physically present in this State. G.S. 50-13.5(c)(2)(a), G.S. 50-13.5(a) and (b), G.S. 7A-244.

4. Divorce and Alimony § 22; Infants § 8; Constitutional Law § 26— child custody proceeding — adopted child — full faith and credit — demurrer

In this child custody proceeding, the complaint is not subject to demurrer on the ground that plaintiff is claiming custody of an adopted child and seeks to attack an adoption judgment of another state which is entitled to full faith and credit under Art. 4, Sec. 1, of the U. S. Constitution, where plaintiff alleges circumstances under which she signed a purported consent to adoption, but it does not appear on the face of the complaint that an adoption proceeding was ever instituted or completed in this or any other state.

5. Pleadings § 22— speaking demurrers

Defendant's demurrer to the complaint in this child custody proceeding is a "speaking demurrer" since it invokes the aid of supposed facts which do not appear in the complaint.

APPEAL by plaintiff from *Privott, District Judge,* at the May 1969 Session of DARE District Court.

In her complaint filed 28 February 1969, plaintiff alleges. (summarized unless otherwise indicated)

Plaintiff is a resident of Dare County, North Carolina, and defendants are residents of the State of Connecticut. Plaintiff is the mother of Lisa Danielle Torreso (Lisa) who was born on 2 January 1961. The feme defendant is plaintiff's mother and the male defendant is plaintiff's stepfather.

"V. That plaintiff, during the latter part of the year 1961, after many months of mental pressure, accompanied by many threats of physical harm directed at the plaintiff by the defendants, signed a paper while not in the exercise of her own free will, which is purported to have been a consent to adoption. That defendants threatened that if plaintiff, unmarried at that time, did not sign the paper, the defendants had made arrangements to have the plaintiff com-

mitted to an institution for the insane; and that plaintiff was so constantly harassed with threats by the defendants that her free will and judgment was deprived her."

In August 1968, pursuant to a telephone call to plaintiff from her mother, plaintiff and her husband went to Connecticut, got Lisa and her clothes and brought her back to North Carolina where plaintiff entered Lisa in school at Buxton. Plaintiff is now married and she and her husband have a six-year-old son. Plaintiff's husband is gainfully employed and makes proper provision for himself, plaintiff and the two children. The four of them enjoy many family activities together including religious worship services.

Defendants have had extensive marital difficulties, including quarrels, physical violence, and numerous separations, all of which have had an adverse effect on Lisa's physical and mental health. Plaintiff and her family are highly regarded in their community and Lisa's best interests would be served if her custody were awarded to plaintiff. Plaintiff prays that Lisa's temporary and permanent custody be awarded to plaintiff.

On 14 May 1969, defendants filed a demurrer to the complaint alleging that the complaint does not state facts sufficient to constitute a cause of action against the defendants for that:

"I. It appears upon the face of the Complaint that the Court does not have jurisdiction of the subject matter of this litigation, to wit, the minor child, a resident of Connecticut.

II. That the Complaint is a statement of a defective cause of action in purportedly claiming custody in an adopted child.

III. It purports to attack or set aside an adoption judgment.

IV. That plaintiff may not, by collateral attack, set aside a judgment entitled to full faith and credit under Article 4, Section 1, of the Constitution of the United States."

From judgment of the district court sustaining the demurrer and dismissing the action, plaintiff appealed.

Kellogg & Wheless by Dwight H. Wheless for plaintiff appellant.

McCown & McCown by Wallace H. McCown for defendant appellees.

BRITT, J.

[1, 2] In passing upon a demurrer, the court is confined to a consideration of the pleading and the legal instruments incorporated

therein and may not consider any fact not appearing therein. 6 Strong, N.C. Index 2d, Pleadings, § 19, pp. 327, 328. A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated. *McLeod v. McLeod,* 266 N.C. 144, 146 S.E. 2d 65.

[3] Defendants contend first that the District Court of Dare County does not have jurisdiction of the subject matter of this litigation for that it appears upon the face of the complaint that the minor child, Lisa, is a resident of Connecticut. This contention has no merit. In the first place, it does not appear upon the face of the complaint that Lisa is a resident of Connecticut. Furthermore, G.S. 50-13.5(a) and (b) clearly provide that except in certain cases a civil action is proper procedure to determine custody of a minor child, and G.S. 50-13.5(c)(2)(a) provides that the courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when "[t]he minor child resides, has his domicile, or is physically present in this State." See *Rothman v. Rothman,* 6 N.C. App. 401. G.S. 7A-244 provides that the district court division is the proper division of the General Court of Justice for the trial of civil actions and proceedings for child custody. The complaint alleges that Lisa came from Connecticut to North Carolina in August 1968 and has resided and attended school in North Carolina since that time. The complaint was not demurrable for lack of jurisdiction.

[4] In paragraphs numbered II, III and IV, defendants contend that the complaint reveals that plaintiff is claiming custody of an adopted child and that plaintiff seeks to attack or set aside an adoption judgment entitled to full faith and credit under Article 4, Section 1 of the United States Constitution. This contention is without merit. In paragraph V of the complaint set forth above, plaintiff alleges the circumstances under which she signed a purported consent to adoption, but it does not appear upon the face of the complaint that an adoption proceeding was ever completed, in this or any other state; in fact, it does not appear that an adoption proceeding was ever instituted.

In *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860, in an opinion by Ervin, J., it is said:

> "* * * The only office of a demurrer is to test the legal sufficiency of the facts stated in the pleading of an adversary. In consequence, it is not permissible for a demurrant to incorporate in his demurrer facts not shown by the pleading challenged by the demurrer. Where a demurrer to a complaint invokes the aid of a supposed fact which does not appear in the complaint, it

is a 'speaking demurrer,' and offends both the common law and code systems of pleading. The court will not consider the supposed fact introduced by the 'speaking demurrer' in passing on the legal sufficiency of the facts alleged in the complaint. (Citing numerous authorities)"

[5] The demurrer under consideration is a "speaking demurrer," for it invokes the aid of supposed facts which do not appear in the complaint. When these supposed facts are disregarded and recourse is had to the complaint itself, we hold that plaintiff alleged sufficient facts to invoke the jurisdiction of the District Court of Dare County to pass upon the question of Lisa's custody. Of course, we do not presume to foresee the allegations defendants will plead in their answer.

The judgment sustaining the demurrer is

Reversed.

BROCK and VAUGHN, JJ., concur.

SPOONER'S CREEK LAND CORPORATION v. ROMA STYRON AND WIFE, CATHERINE STYRON

No. 693SC398

(Filed 17 December 1969)

1. Controversy Without Action § 1— scope of remedy — sufficiency of deed — necessary parties

The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under G.S. 1-250; however, all persons having an interest in the controversy must be parties to the end that they may be concluded by the judgment and that the controversy be finally adjudicated.

2. Dedication § 1— dedication by map — subdivision streets and parks — rights acquired

Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks, and playgrounds kept open for his reasonable use; and this right may not be extinguished or diminished except by agreement or estoppel.

3. Dedication § 1— dedication to public

A dedication must be made to the public and not to part of the public.

4. Deeds § 20; Parties § 1; Dedication § 1; Vendor and Purchaser § 10— action for specific performance — subdivision map — park area — necessary parties

Where a contract for the sale of a tract of land in a subdivision provided that the tract would be conveyed to defendant free and clear of all encumbrances, and where there is a map of the subdivision on which the word "PARK" appears in the area embracing the tract in question and other parties have purchased lots in the subdivision with reference to the map, equity will not compel the defendant to comply with the contract until the other parties have been brought into the action as necessary parties and their rights, if any, have been determined with respect to the park.

5. Judgments §§ 1, 17— void judgment — citizen not party to the action

A judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void as to him.

6. Controversy Without Action § 2— determination on agreed facts

Upon submission of a controversy without action under G.S. 1-250, the cause is for determination on the agreed facts and the court is without authority to find additional facts or to infer or deduce further facts from those given.

7. Controversy Without Action § 2— hearing on ultimate facts

Ordinarily it is only when ultimate, not merely evidentiary, facts are contained in the agreed statement that there is a genuine submission of an agreed case.

8. Controversy Without Action § 2— ultimate facts — evidentiary facts

Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; evidentiary facts are those subsidiary facts required to prove the ultimate facts.

9. Controversy Without Action § 2— nature of facts admitted

The facts admitted must be so conclusive and comprehensive in their character as to present only bare questions of law for the court.

BRITT, J., dissents.

APPEAL by defendants from *Cowper, J.,* 10 April 1969 Session of CARTERET Superior Court.

Under the provisions of G.S. Chapter 1, Article 25, the parties submitted a controversy without action. The facts in the agreed case pertinent to this appeal are as follows. Plaintiff and defendant entered into a contract to respectively sell and buy a tract of land on Bogue Sound. The defendants refused to accept the deed or pay the purchase price on the ground that the plaintiff could not convey fee simple unencumbered title to the property. On a map entitled "Spooner's Creek Harbor, Inc., Section No. 1," the word "PARK"

appears on the area which includes the tract in question. The agreed case also provided:

> "It is also agreed that other parties have purchased lots within Spooner's Creek Harbor, Inc., Section 1, with reference to the aforesaid map. No use of the area designated as 'PARK' on said map has been made for any purpose. No public body has done anything to accept the area as a park. It is an undeveloped tract of woodsland bordering the waters of Bogue Sound."

The trial judge made certain findings of fact including a finding that "the area designated as 'PARK' on the aforesaid map is not a part of Spooner's Creek Harbor, Inc., Section No. 1, subdivision as shown on the aforesaid map but is an area adjacent thereto and that no dedication of the area marked 'PARK' on said map nor offer to dedicate said area as a park was intended to be made by such designation . . ."

The court concluded as a matter of law that there has been no dedication of said area as a "PARK" either for public use or by purchasers of lots within the subdivision and the plaintiff could convey fee simple unencumbered title.

From a judgment ordering specific performance defendants appeal.

Nelson W. Taylor for plaintiff appellees.

Boshamer and Graham by Otho L. Graham for defendant appellants.

VAUGHN, J.

[1] The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under G.S. 1-250; however, all persons having an interest in the controversy must be parties to the end that they may be concluded by the judgment and the controversy be finally adjudicated as in the case of an action. *Peel v. Moore,* 244 N.C. 512, 94 S.E. 2d 491; *Realty Corp. v. Koon,* 216 N.C. 295, 4 S.E. 2d 850.

[2, 3] The principle is well settled that where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use. In a strict sense it is not a dedication, for a dedication must be made to the public and not to part of the public. It is a right in the nature of an ease-

ment appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished or diminished except by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. *Realty Co. v. Hobbs,* 261 N.C. 414, 135 S.E. 2d 30.

[4, 5] The agreed statement of facts in this case discloses that "other parties have purchased lots within Spooner's Creek Harbor, Inc., Section 1, with reference to the aforesaid map." Although these purchasers clearly have an interest in the controversy, they are not parties to this controversy without action. It is axiomatic that judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void as to him. *The Board of Health v. Brown,* 271 N.C. 401, 156 S.E. 2d 708. Since others have purchased lots within the subdivision with reference to the map, no judicial declaration should be made which has no binding effect, but which might seriously cloud and interfere with such rights as they might have. *Britt v. Children's Homes,* 249 N.C. 409, 106 S.E. 2d 474.

[4] Except for certain restrictions not relevant to this appeal, the contract between the plaintiff and the defendant provided that the property would be conveyed free and clear of all encumbrances. Under such circumstances equity will not compel the defendant to comply with the contract until the rights, if any, of purchasers of lots in the subdivision have been determined. *Story v. Walcott,* 240 N.C. 622, 83 S.E. 2d 498; *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344.

[6-9] Three of the four assignments of error brought forward by the defendant are exceptions to "findings of fact" by the trial judge. Upon submission of a controversy without action under G.S. 1-250, the cause is for determination on the agreed facts. The court is without authority to find additional facts or to infer or deduce further facts from those given. *Sparrow v. Casualty Co.,* 243 N.C. 60, 89 S.E. 2d 800; *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413; *Realty Corp. v. Koon, supra,* and cases cited. Ordinarily it is only when ultimate, not merely evidentiary facts are contained in the agreed statement that there is a genuine submission of an agreed case. 3 Am. Jur. 2d, Agreed Case, § 33, p. 744. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639. The facts admitted must be so conclusive

and comprehensive in their character as to present only bare questions of law for the court. *Trustees v. Banking Company,* 182 N.C. 298, 109 S.E. 6.

It may well be that agreement on the ultimate facts in this controversy would require too grave and serious an admission, if not a fatal one, on the part of one or more of the litigants. If so, the facts may be determined in the crucible of actual controversy before a jury, or by the court if the present litigants as well as all other necessary parties can agree to waive trial by jury.

Reversed.

BROCK, J., concurs.

BRITT, J., dissents.

J. I. CASE CREDIT CORPORATION vs. EAGLE EQUIPMENT COMPANY, INC., H. M. BARNES, JR., BERYL T. BARNES, VERNON H. BARNES, MARIE H. BARNES, LOTIS W. JOYNER AND DOROTHY B. JOYNER

No. 697SC537

(Filed 17 December 1969)

1. Parties § 1— necessary parties

Necessary parties must be brought into the action.

2. Parties § 4— proper parties

Proper parties may be brought into the action, but whether they are brought in or not is a matter within the discretion of the court.

3. Parties §§ 1, 8— joinder of parties — rights affected

The party to be joined must have rights which will be directly affected by the judgment in the case involved.

4. Parties §§ 1, 4— necessary parties — action on farm equipment financing plan — manufacturer — finance company

In an action by a finance company against a farm equipment sales company and against individual defendants who had guaranteed to the finance company and to a farm equipment manufacturer the unconditional fulfillment of all obligations incurred by the equipment company under a floor plan financing agreement, the manufacturer was not an indispensable party to the suit and thus was not a necessary party, where (1) the manufacturer and the finance company were two separate corporations and each submitted bills for their respective accounts with the equipment company

and (2) all merchandise and material returned by the equipment company to the manufacturer was credited toward the debt of the equipment company with the finance company, and there was no allegation of overpayment to the manufacturer.

APPEAL by individual defendants, H. M. Barnes, Jr., Beryl T. Barnes, Vernon H. Barnes, Marie H. Barnes, and Eagle Equipment Company, Inc., from *Hubbard, J.*, 7 April 1969 Session of the WILSON County Superior Court.

Eagle Equipment Company (Eagle), through its president, H. M. Barnes, Jr., entered into two agreements, an Agricultural Dealer's Sales Contract and Purchase Agreement, and a Utility Dealer's Sales Contract and Purchase Agreement with J. I. Case Company (Case) on 11 November 1963, the contracts taking effect on 30 January 1964. In consideration of the execution of these two agreements and Floor Plan Financing Agreements and a Financing Agreement, entered into on 11 November 1963, two contracts labeled "guarantee" agreements were executed between all the individual parties defendant and both Case and J. I. Case Credit Corporation (Credit). These stated that the individual defendants would "unconditionally guarantee to Case and Credit the complete fulfillment of all obligations and undertakings by Eagle Equipment Company, Inc., of Wilson, North Carolina . . . including, without limitation, the payment of any and all indebtedness, notes or accounts. . . ." Eagle Equipment Company continued to be a dealer for Case merchandise until May, 1966 at which time the relationship was discontinued by mutual consent.

Pursuant to these agreements Case would sell merchandise to Eagle. Case would then in turn assign its interest to Credit for value and Credit would finance the purchase through a floor plan financing agreement. Monies received from the sale of the Case implements were thus to go to Credit and not to Case. Separate statements of Eagle's accounts with Case and Credit were made to Eagle each month.

On 13 May 1966 a tentative accounting was allegedly agreed to between representatives of Case, Credit and Eagle. The inventory of Case machines was given a value for credit upon return to Credit, contingent upon repairs being made on some machines by Eagle. Allegedly, these repairs were not accomplished, and a revised schedule was sent to Eagle on 1 June 1966 by the credit manager of Credit which reflected the reduced valuation of the machines which were to be returned not repaired. In the meantime, some $6,000 worth of spare parts and a Ford truck worth $2,000 were returned to Case.

Some $3,500 in "reserve account" credits would be due Eagle after all notes held by Credit for sales Eagle made were paid in full.

Upon the refusal of Eagle to pay the account of Credit as stated, this action was brought for $19,788.62 plus interest from 1 May 1966. In view of the complex nature of the facts, the trial judge appointed a Referee, to which both parties excepted. The Referee found that the contracts were entered into as stated above, including the floor plan financing agreements and the guarantee agreements. He also found that the representatives of Credit and Eagle established values for equipment to be returned to Credit, which were in some cases subject to the oral condition that the value would only apply if the equipment were repaired to proper working order.

During the hearing before the Referee on 27 and 28 August 1968, the defendants made a motion that Case be made a party defendant and that the hearing be continued. The Referee denied the motion. The defendants took an exception and gave notice of appeal to the Judge of the Superior Court. The taking of evidence before the Referee continued, however, and under date of 6 December 1968, the Referee filed his report with extensive findings of fact and conclusions of law. The Referee found that the corporate defendant and the individual defendants jointly and severally were indebted to the plaintiff in the sum of $19,756.60, together with interest thereon from 1 May 1966.

On 14 February 1969 the defendants filed a motion to strike the Referee's findings of fact and also filed exceptions to the Referee's report and decision. At the same time, the defendants made a motion to make Case a party to the action and that the matter be remanded to the Referee for further hearing.

On 5 June 1969 Hubbard, Judge Presiding, entered an order denying the motion of the defendants to make Case a party defendant.

From this last order the defendants appealed to this court.

Vernon F. Daughtridge, for defendant appellants.

Narron and Holdford by William H. Holdford, for plaintiff appellee.

CAMPBELL, J.

[1, 2] The question presented is whether Case is a necessary party defendant. If Case is a proper but not a necessary party, then the only attack which could be mounted on the decision in the trial

court would require a showing of an abuse of discretion. Necessary parties *must* be brought into the action. Proper parties *may* be brought into the action, but whether they are brought in or not is a matter within the discretion of the court.

In 1 McIntosh, N. C. Practice 2d, § 584, p. 292, it is stated:

> ". . . Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. . . ."

[3] The party to be joined must have rights which will be directly affected by the judgment in the case involved. *Pickelsimer v. Pickelsimer,* 255 N.C. 408, 121 S.E. 2d 586 (1961). See also *Corbett v. Corbett,* 249 N.C. 585, 107 S.E. 2d 165 (1959).

[4] In the instant case, Case and Credit were two separate corporations, and each submitted separate bills for their respective accounts with Eagle. Any merchandise and material returned by Eagle to Case was credited toward the debt of Eagle with Case. There has been no allegation of overpayment to Case, and even if there were, it would appear that this would be a matter between Case and Eagle alone. In this action between Credit and the defendants, Case is not involved, and the rights existing between Credit and the defendants can be adjudicated without affecting any rights of Case. Case is not an indispensable party to the instant suit, and thus is not a necessary party. If Case should be a proper party, no abuse of discretion by the trial judge has been shown in refusing to make Case a party to this action.

The order of Judge Hubbard refusing to make Case a party is Affirmed.

PARKER and GRAHAM, JJ., concur.

SARAH JORDAN, ADMINISTRATRIX OF THE ESTATE OF BOBBY GENE HARRELL, DECEASED v. THOMAS WILLIAMS, JR., AND THOMAS WILLIAMS, SR., AND SARAH BOND JORDAN, ADDITIONAL DEFENDANT

No. 696SC459

(Filed 17 December 1969)

1. Automobiles § 47— physical facts at accident scene

Physical facts at the scene of an accident may speak louder than the testimony of witnesses, and the interpretation of the physical facts is ordinarily the province of the jury.

2. Automobiles § 58— negligence in making U-turn — sufficiency of evidence

In this wrongful death action, plaintiff's evidence *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in making a U-turn in front of the automobile driven by plaintiff's intestate.

3. Witnesses § 4— impeachment of party's own witness — contradiction of such witness

While a party may not impeach his own witness, he may contradict such a witness by showing that the witness has previously made a contradictory statement or that the physical facts do not permit the inference that the occurrence in question happened as the witness said it did.

4. Witnesses § 4— contradiction of party's own witness

In this wrongful death action, the trial court did not err in permitting plaintiff to question plaintiff's witness, whose testimony was favorable to defendant, as to how he had answered certain questions at a previous hearing, since plaintiff was attempting to contradict the witness rather than impeach him.

APPEAL by defendants from *Bundy, J.*, May 1969 Session, BERTIE Superior Court.

Action for damages for the death of Bobby Gene Harrell (Harrell) in an automobile wreck which occurred on Highway No. 350, 3 miles west of Colerain, about 8:00 p.m. on 9 February 1968. The weather was clear, the highway dry, hard-surfaced and approximately 22 feet in width. The highway was straight and level for several hundred yards west of the point of collision. There were two vehicles involved, a 1967 Corvair automobile owned by Sarah Bond Jordan and driven at the time by her son-in-law, Harrell, who was alone in the automobile, and a 1960 Chevrolet automobile owned by the defendant, Thomas Williams, Sr., and driven at the time by his son, Thomas Williams, Jr. It was admitted in the pleadings that Williams, Jr., was driving the 1960 Chevrolet automobile under such circumstances as to make his father responsible.

Both vehicles prior to the collision were proceeding in an east-

erly direction. The Williams automobile was in front, and according to the contentions of the plaintiff, pulled over to the shoulder of the road on the south side and then turned back on the highway in an effort to make a U-turn and go back to the west. While the Williams automobile was making this maneuver the Harrell automobile struck the Williams automobile on the left front fender and then proceeded beyond the Williams automobile and came to rest off the hard surface and to the north of the highway. Harrell was removed unconscious from the automobile and died shortly thereafter without regaining consciousness.

The plaintiff contended that the defendants were negligent in making a U-turn in front of Harrell. The defendants denied negligence and alleged contributory negligence on the part of Harrell in that he was operating at an excessive rate of speed, not maintaining a proper lookout and failing to keep his vehicle under proper control. The defendants denied that the Williams vehicle ever started a U-turn but to the contrary had pulled off the highway onto the southerly shoulder thereof and was completely off the highway and motionless when it was struck by the Harrell vehicle. The defendants filed a cross action for property damage to the Williams Chevrolet automobile and for personal injuries received by Williams, Jr.

The jury returned a verdict for the plaintiff and awarded $10,000 damages. The defendants appealed assigning as error the refusal of the motion for judgment as of nonsuit at the close of all of the evidence and for failure of the trial court to exclude certain evidence.

Pritchett, Cooke and Burch by J. A. Pritchett for defendant appellants.

Jones, Jones and Jones by Joseph J. Flythe for plaintiff appellee.

CAMPBELL, J.

[1, 2] On a motion for judgment as of nonsuit the evidence is viewed in the light most favorable to the plaintiff. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969). When so viewed the evidence is susceptible to the interpretation that the actual collision occurred on the hard surface of the highway. It was open country and the maximum speed limit was 60 m.p.h. Debris was scattered all over the highway. The Williams automobile came to rest with the front end headed in a northerly direction at the center line of the highway, and the rear end was towards the southerly edge of the highway. This would be some evidence that the Williams vehicle was in the process of making a U-turn and Williams, Jr., told the

investigating highway patrolman that he intended to make a U-turn and go back towards Ahoskie. "Physical facts at the scene of an accident may speak louder than the testimony of witnesses. The interpretation of the physical facts is ordinarily the province of the jury." *Funeral Home v. Pride,* 261 N.C. 723, 136 S.E. 2d 120 (1964). Williams, Jr., denied that he had commenced making the U-turn and claimed that his automobile was standing motionless and completely off the hard surface of the highway on the shoulder on the south side.

We are of the opinion that the evidence when taken in the light most favorable to the plaintiff presented a jury question as to the factual situation, and the trial court correctly permitted the jury to determine the disputed facts. No exception was taken to the charge, and therefore it is presumed that the judge correctly instructed the jury as to the law involved and correctly applied the law to the facts in the case. The determination of the true facts was for the jury.

The second question presented by the appellants is that the trial court erred in permitting the plaintiff to question a witness Perry as to how he had answered certain questions on a previous hearing.

[3, 4] The witness Perry had been a passenger in the Williams automobile. He was called as a witness for the plaintiff and testified that Williams had driven onto the shoulder of the road and immediately was hit by the Harrell automobile; that Williams did not make any turn to the left and was completely off the pavement when hit. Counsel for plaintiff then proceeded to ask the witness if he had not testified at a previous hearing of this matter. Apparently, counsel for plaintiff was attempting to show that the witness Perry had on a previous occasion testified that Williams drove the 1960 Chevrolet automobile onto the highway into the position where it was found after the collision. The record is not clear as to just exactly what was sought to be elicited from this witness. Whatever it was, the defendants assert that it was error to permit such questions as it constituted improper impeachment by the plaintiff of the plaintiff's own witness. While a party may not impeach his own witness, he may contradict such a witness by showing that the witness has previously made a contradictory statement or that the physical facts do not permit the inference that the occurrence in question happened as the witness said it did. In the instant case, we find that the plaintiff here was attempting to contradict the witness Perry rather than

impeach him. Stansbury, N.C. Evidence 2d, § 40, p. 79. Likewise, see *Funeral Home v. Pride, supra.*

In the instant case we find no error in the trial.

Affirmed.

PARKER and GRAHAM, JJ., concur.

CLARENCE SAWYER WHITE v. RAYFORD WILSON PERRY

No. 696SC418

(Filed 17 December 1969)

1. Appeal and Error § 26— exception to signing of judgment

An exception to the signing and entry of the judgment presents for review the face of the record proper, which includes whether the facts found or admitted support the judgment.

2. Compromise and Settlement § 3; Pleadings § 31— pleading release obtained by insurer — ratification of release — bar to action — withdrawal of pleading

In this action for personal injuries and property damage resulting from an automobile collision, wherein plaintiff by a further reply pleaded a release and settlement obtained by his insurance carrier as a bar to defendant's counterclaim, and defendant amended his answer to allege the filing of the further reply as a plea in bar to plaintiff's action, the pleading of the release in plaintiff's further reply constituted a ratification by plaintiff of the settlement by his insurance carrier with defendant and bars plaintiff's cause of action, and withdrawal of plaintiff's further reply did not constitute a revocation of the ratification.

3. Compromise and Settlement § 3— consideration of withdrawn pleading

Although plaintiff's further reply alleging a release obtained by his insurer as a bar to defendant's counterclaim had been withdrawn as a pleading, the trial court properly considered the further reply in determining whether the allegation of the release constituted a bar to plaintiff's action.

4. Courts § 9— judgment on demurrer — demurrer to amended pleadings — consideration by another judge

The sustaining or overruling by a superior court judge of a demurrer with leave to amend the pleading does not preclude another superior court judge from thereafter ruling on a demurrer to the amended pleadings.

WHITE *v.* PERRY

APPEAL by plaintiff from *Bundy, J.,* May 1969 Session of BERTIE Superior Court.

When this cause came on for hearing before Bundy, J., upon the defendant's plea in bar to the plaintiff's alleged cause of action, the record discloses that the parties waived a jury trial as to the issue of the defendant's plea in bar and stipulated that the court could find facts and enter judgment thereon. The court, after considering the pleadings and stipulations of the parties as to the facts and after hearing argument of counsel, made the following findings of fact and conclusions of law:

"1. This is a civil action arising out of an automobile collision between vehicles driven by plaintiff and defendant on December 21, 1967 at about 7:40 p.m. on North Carolina Highway 45, at a point about four miles south of Colerain, North Carolina.

"2. Plaintiff's complaint alleges causes of action for his personal injuries and property damages arising out of the subject collision. Defendant's original answer, *inter alia,* alleged a counterclaim for defendant's personal injuries and property damages in the total sum of $1,300 and offered to credit the sum of $100 'already paid to the defendant for and on behalf of the plaintiff.' On August 30, 1968, plaintiff, through his personal attorneys, filed a reply to said counterclaim, alleging a general denial of the pertinent facts alleged in defendant's answer and renewing plaintiff's prayer for relief set forth in his complaint.

"3. On September 19, 1968, plaintiff's attorneys caused to be filed in the office of the clerk of Superior Court of Bertie County a further reply, which is on file in the original court folio in this action. Said further reply was admitted into evidence by stipulation of the parties, and is hereby incorporated by reference as a part of these findings of fact as if fully set out herein.

"4. Said further reply was prepared by Pritchett, Cooke & Burch, Attorneys for plaintiff's liability insurer only and mailed to the office of plaintiff's personal attorneys, Jones, Jones & Jones, in Ahoskie, North Carolina, where said further reply was signed by Carter W. Jones of said Jones firm and duly verified by plaintiff before notary public in the Jones' law offices on September 17, 1968.

"5. Plaintiff's attorneys were not aware that the pleading of the release, (secured by plaintiff's liability insurance carrier from the defendant), as set forth in said further reply, would

constitute a bar to plaintiff's action herein, it being the understanding of plaintiff's counsel that said pleading would bar defendant's counterclaim, but not bar plaintiff's right of action herein.

"6. Plaintiff was permitted to withdraw said further reply by order of the Honorable Howard H. Hubbard, Judge Presiding at the November 1968 Session of Superior Court of Bertie County, which is dated November 25, 1968 and appears of record in this cause.

"7. Thereafter, in apt time as permitted by said order, defendant filed an amended answer, which alleges, *inter alia,* that said further reply constituted a ratification of the release and settlement between defendant and plaintiff's insurance carrier and a bar to plaintiff's action herein, which amended answer appears of record in this cause.

"8. By said further reply, plaintiff sought to bar defendant's counterclaim by pleading of the release and settlement obtained by his insurance carrier. Thereby, plaintiff has sought to use said settlement to his advantage, accepted its benefits and ratified the same.

"UPON SAID FINDINGS OF FACT, the court makes the following CONCLUSIONS OF LAW:

"By said further reply, plaintiff has ratified his liability insurance carrier's settlement with the defendant, thereby barring his causes of action herein alleged as well as defendant's counterclaim herein."

To the entry of a judgment dismissing plaintiff's cause of action, and the defendant's counterclaim, the plaintiff excepted and appealed to the North Carolina Court of Appeals.

Leroy, Wells, Shaw & Hornthal, by L. P. Hornthal, Jr., for defendant appellee.

Jones, Jones & Jones, by A. B. Harrington, Jr., for plaintiff appellant.

HEDRICK, J.

[1] The exception to the signing and entry of the judgment presents for review the face of the record proper which includes whether the facts found or admitted support the judgment. *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968).

[2] Appellant in his brief states "Plaintiff does not question the

proposition that pleading a release through a further reply can constitute a ratification of a settlement and bar a plaintiffs cause of action." We hold that the pleading of the release by the plaintiff in the "further reply" constituted a ratification by the plaintiff of the settlement made by his insurance carrier with the defendant. *Keith v. Glenn,* 262 N.C. 284, 136 S.E. 2d 665 (1964).

[2, 3] This leaves us with the proposition of whether the withdrawal by the plaintiff of the "further reply" constituted a revocation of the ratification. The answer is no. In *Norwood v. Lassiter,* 132 N.C. 52, 43 S.E. 509, it is said: "When a party has the right to ratify or reject, he is put thereby to his election, and he must decide, once and for all, what he will do, and when his election is once made it immediately becomes irrevocable. This is an elementary principle. *Austin v. Stewart,* 126 N.C. 525." See also Breckenridge, "Ratification in North Carolina", 18 N.C. L. Rev. 308. Although the "further reply" had been withdrawn as a pleading, it was proper for Judge Bundy to consider it in making his findings of fact and conclusions of law. *Davis v. Morgan,* 228 N.C. 78, 44 S.E. 2d 593 (1947).

Appellant relies on *Bongardt v. Frink,* 265 N.C. 130, 143 S.E. 2d 286 (1965), which is readily distinguishable. In that case, after the court permitted the plaintiff to withdraw the reply pleading the release, the defendant did not amend its answer to allege the filing of the reply as a plea in bar.

Appellant contends that the judgment entered by Bundy, J., overruled the order of Hubbard, J., dated 25 November 1968. We do not agree.

The "further reply" was withdrawn when Judge Hubbard overruled defendant's original demurrer; therefore, there was not, and could not have been, any final ruling upon the merits of the demurrer. Obviously, Judge Hubbard's order contemplated the filing by the defendant of an amended answer setting up the ratification of the release by the plaintiff as a plea in bar to the plaintiff's cause of action.

[4] The sustaining or overruling by a superior court judge of a demurrer with leave to amend the pleading does not preclude another superior court judge from thereafter ruling on a demurrer to the amended pleadings. 2 Strong, N.C. Index 2d, Courts, Sec. 9, p. 447; *Simpson v. Plyler,* 258 N.C. 390, 128 S.E. 2d 843 (1963).

The findings of fact support the judgment entered.

Affirmed.

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

SUBURBAN RULANE GAS COMPANY OF N. C., INCORPORATED v. CHARLES H. WEEKS

No. 697DC394

(Filed 17 December 1969)

Sales § 10; Gas § 3— seller's action for gas sold and delivered — nonsuit

In an action by a gas company to recover $1,260.44 plus interest for the sale and delivery of tobacco curing gas to defendant, testimony by plaintiff's office manager, which was not objected to, that plaintiff's books and records showed that 7,535 gallons of curing gas were sold and delivered to defendant at 17 cents per gallon for a total price of $1,280.95, and that a gas refund credit was due defendant in the amount of $20.51, *held* sufficient to make out a *prima facie* case.

APPEAL by defendant from *Harrell, District Judge,* at the 2 April 1969 Civil Session of WILSON District Court.

This is a civil action in which plaintiff seeks to recover $1,260.44 plus interest allegedly owed plaintiff for tobacco curing gas sold and delivered by plaintiff to defendant in July and August 1966. In his answer defendant denied the indebtedness. The parties waived jury trial and after hearing evidence introduced by plaintiff, no evidence being presented by defendant, the trial court found facts, made conclusions of law, and entered judgment in favor of plaintiff for the amount claimed by plaintiff. Defendant appealed.

Lucas, Rand, Rose, Meyer & Jones by William R. Rand for plaintiff appellee.

Farris & Thomas by Robert A. Farris for defendant appellant.

BRITT, J.

Defendant first assigns as error the failure of the trial court to grant his motion for nonsuit interposed at the conclusion of plaintiff's evidence and renewed at the close of all the evidence.

Plaintiff's only witness was Mrs. Etheridge whose testimony is summarized as follows: She had been employed by plaintiff for 15 years and for the past 4 years had served as office manager, whose duties included supervision of all accounts "within five counties surrounding Wilson County, including Wayne County (in which defendant resides)." All bookkeeping entries for plaintiff's accounts in the five counties were made under her supervision and she was familiar with plaintiff's books as they related to defendant's account. Plaintiff's books and records reveal that between 14 July 1966 and

26 August 1966 7,535 gallons of curing gas were sold and delivered to defendant in Wayne County; "that this gas was sold to Mr. Weeks at 17¢ per gallon for a total price of $1,280.95." The records further reveal a credit of $20.51 allowed for curing gas returned but no other credit. Numerous letters bearing her signature were sent to defendant demanding payment of the account.

On cross-examination Mrs. Etheridge testified that she was not present when any purported agreement was entered into, that she had never seen nor spoken to defendant, that she did not know of her own knowledge if any gas was actually delivered to defendant, that the route man who delivered the gas was not in court, and that she did not actually make the book entries or records referred to in her testimony.

It is well settled in this jurisdiction that on motion to nonsuit the evidence must be taken as true and considered in its light most favorable to plaintiff who is entitled to the benefit of every reasonable inference which may be drawn therefrom. *Insurance Co. v. Storage Co.*, 267 N.C. 679, 149 S.E. 2d 27. We hold that the evidence introduced by plaintiff, no part of which was objected to by defendant, was sufficient to make out a *prima facie* case for plaintiff and survive defendant's motion for nonsuit.

In his other assignments of error, defendant contends (1) that the trial court's findings of fact that plaintiff delivered gas to defendant for a total price of $1,280.95 and that plaintiff had made demand for payment were not supported by the evidence, (2) that the court erred in concluding as a matter of law that defendant was indebted to plaintiff in the sum of $1,260.44, and (3) that the court erred in signing the judgment in favor of plaintiff. These assignments of error are without merit. The findings of fact were fully supported by the evidence and were sufficient to support the conclusions of law and decision of the court. G.S. 1-185.

The judgment of the district court is

Affirmed.

BROCK and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. THELMA EALY

No. 6926SC553

(Filed 17 December 1969)

1. Homicide § 28— instructions on self-defense — assumption that defendant stabbed deceased

In this homicide prosecution wherein it was stipulated that deceased died as the result of a stab wound, an instruction on self-defense which is subject to the interpretation that the trial judge held the opinion that the stabbing of deceased by defendant was an established fact *is held* erroneous as an expression of opinion in violation of G.S. 1-180.

2. Homicide § 28— instruction on self-defense — apparent necessity

An instruction on self-defense that defendant could use no more force than was reasonably necessary to repel an assault is erroneous, the correct rule being that defendant could use such force as was reasonably or apparently necessary.

APPEAL by defendant from *Falls, J.*, at the 4 August 1969 Schedule "C" Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was tried upon a bill of indictment charging her with murder in the second degree. The jury returned a verdict of guilty of murder in the second degree as charged in the bill of indictment. From judgment of imprisonment for not less than twelve years nor more than fifteen years, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan and Staff Attorney Roy A. Giles, Jr., for the State.

W. Herbert Brown, Jr., for the defendant appellant.

MALLARD, C.J.

Since there is to be a new trial, we do not deem it necessary or proper to state the evidence in detail. However, the evidence, when taken in the light most favorable to the State, tends to show that on 24 May 1969 the defendant stabbed and killed her boyfriend, Jesse Osborne, with a butcher knife. The trial judge correctly overruled the defendant's motion for judgment as of nonsuit.

Defendant contends, and we agree, that the trial judge committed error in charging the jury as follows:

> "(A)nd when you come to consider her plea of self-defense, you should ask yourselves these questions:

1. At the time of the stabbing that killed the deceased, Jesse Osborne, was the defendant at a place where she had the right to be?

2. Was she, herself, without fault in bringing on or entering into the encounter or difficulty with the deceased?

3. Was she unlawfully or feloniously assaulted by the deceased?

4. Did she believe and have reasonable ground to believe that she was about to suffer death or great bodily harm at the hands of the deceased?

5. Did she act with ordinary firmness and prudence under the circumstances as they reasonably appeared to her and under the belief that it was necessary to kill the deceased in order to save her own life or to protect her person from enormous bodily harm?

6. Did she use no more force than was reasonably necessary to repel the assault which she contends the deceased, Jesse Osborne, was making upon her at the time of the fatal stabbing? If you are satisfied from the evidence by the defendant or from the evidence against her from all of the evidence and circumstances in the case that the truth requires an affirmative answer to all of these questions, that is that they should be answered YES, then it would be your duty to acquit the defendant."

[1] There was sufficient evidence of self-defense to require the judge to instruct the jury as to the law of self-defense. The defendant stipulated that "Jesse Osborne died on May 24, 1969, as a result of a stab wound inflicted on this date," but denied that she stabbed him. The instruction contained in paragraph numbered one above is erroneous in that it is subject to the interpretation that the judge held the opinion that the stabbing of the deceased, Jesse Osborne, by the defendant was an established fact. See *State v. Hardee,* 3 N.C. App. 426, 165 S.E. 2d 43 (1969). An expression of opinion by the trial judge is prohibited by G.S. 1-180.

[2] The instruction contained in paragraph numbered six above is erroneous in that the judge failed to instruct the jury correctly as to the amount of force which could be used by the defendant in self-defense. The jury was told that the defendant, in self-defense, could use no more force than was *reasonably necessary* to repel an assault. The correct rule of law is that the defendant could use such force as was reasonably necessary or *apparently necessary. State v. Hardee, supra.* "The plea of self-defense rests upon necessity, real or apparent." *State v. Goode,* 249 N.C. 632, 107 S.E. 2d 70 (1959). A person may

fight in self-defense and is not limited to the use of such force as may be *actually* necessary to save himself from death or great bodily harm, but he may use more force than is actually necessary for such purpose, if he believes it to be necessary and has reasonable ground for the belief. The jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which he acted; however, this determination must be made in the light of the facts and circumstances as they appeared to the party charged at the time of the killing. *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24 (1968); *State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756 (1960). It is error to omit the element of apparent necessity from an instruction on self-defense.

We do not deem it necessary to discuss defendant's other assignments of error.

New trial.

MORRIS and HEDRICK, JJ., concur.

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

No. 691SC404

(Filed 17 December 1969)

1. Appeal and Error § 16— lower court — jurisdiction pending appeal — interlocutory order

An appeal from an appealable interlocutory order carries the interlocutory order and all questions incident to and necessarily involved therein to the appellate division, and the appeal stays all further proceedings in the trial court upon the order appealed from, or upon the matters embraced therein.

2. Appeal and Error § 16— appeal from interlocutory order — jurisdiction of lower court pending appeal

Where there was an appeal to the Court of Appeals from an order of the superior court of one county removing the case to the superior court of another county, the superior court of the latter county was *functus officio* to try the case pending appeal, and consequently the trial, the verdict, and the judgment of the latter court were nullities.

APPEAL by defendant from *Parker (Joseph W.), J.,* 12 May 1969 Session, PASQUOTANK Superior Court.

This action was instituted on 7 April 1967 in Currituck County.

On 28 February 1969 plaintiffs filed a motion for a change of venue. The motion for change of venue was heard by Judge Parker on 20 March 1969, at which time he entered an order removing the case from Currituck County to Pasquotank County for trial. Additionally, the order of removal directed that the case be calendared for trial at the May 1969 Session of Pasquotank Superior Court. Defendant excepted to the order removing the case to Pasquotank County, and gave notice of appeal therefrom.

The appeal was properly perfected and by opinion of this Court filed on 27 August 1969 (*Patrick v. Hurdle,* 6 N.C. App. 51, 169 S.E. 2d 239), for the reasons stated therein, the order of removal was reversed. However, in the interim, the case was called for trial at the May 1969 Session of Pasquotank Superior Court. Defendant filed a plea in abatement upon the grounds of lack of jurisdiction in the Superior Court because the case was pending on appeal in the Court of Appeals. Judge Parker denied the plea in abatement and proceeded to trial of the case, judgment being entered therein on 13 May 1969. Defendant did not participate in the trial, relying upon his exception to the denial of his plea in abatement.

Verdict and judgment were rendered for plaintiffs.

Defendant appealed.

Leroy, Wells, Shaw and Hornthal, by Dewey W. Wells, for plaintiffs.

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

BROCK, J.

By motion filed in this cause on 4 September 1969, plaintiffs concede error as follows: "The question presented in this appeal has been rendered moot by the opinion filed on 27 August 1969: If the order changing venue was improperly entered, of necessity the Pasquotank County Superior Court had no jurisdiction to try the case. The plaintiffs concede error on this appeal and will file no brief in opposition to a reversal of the judgment below."

[1, 2] An appeal from an appealable interlocutory order carries the interlocutory order and all questions incident to and necessarily involved therein to the appellate division. *Keith v. Silvia,* 236 N.C. 293, 72 S.E. 2d 686; *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559; *Sinclair v. R. R.,* 228 N.C. 389, 45 S.E. 2d 555; Strong, N.C. Index 2d, Appeal and Error, § 16. And the appeal stays all further

proceedings in the trial court upon the order appealed from, or upon the matters embraced therein. *Bohannon v. Trust Company,* 198 N.C. 702, 153 S.E. 263. The very question sought to be determined by the former appeal was the right of the Superior Court of Currituck County to transfer this case to the Superior Court of Pasquotank County for trial; therefore, the Superior Court of Pasquotank County was without jurisdiction to try the case pending the appeal.

Since the Superior Court of Pasquotank County was *functus officio* to try the case, it follows that the trial, the verdict and the judgment are nullities. The verdict rendered by the jury at the May 1969 Session of Pasquotank Superior Court is set aside and the judgment entered thereon is vacated.

Judgment vacated.

BRITT and VAUGHN, JJ., concur.

HARVEY DANIEL HALES v. WILLIE L. FLOWERS

No. 695DC495

(Filed 17 December 1969)

1. Negligence § 35— nonsuit for contributory negligence

A motion for nonsuit may not be allowed on the ground of contributory negligence unless the plaintiff's own evidence establishes such negligence so clearly that no other conclusion can be reasonably drawn therefrom.

2. Automobiles § 80— left turn — collision — contributory negligence

Plaintiff's evidence *held* not to disclose contributory negligence as a matter of law by his wife in making a left turn into a driveway and colliding with defendant's overtaking automobile. G.S. 20-154.

APPEAL by plaintiff from *Burnett, District Judge,* at the 7 July 1969 Session of NEW HANOVER District Court.

This is a civil action in which plaintiff seeks to recover for damage to his 1959 Ford sustained in a collision with defendant's 1958 Ford. Defendant filed answer denying negligence on his part and pleading contributory negligence on the part of plaintiff's wife (Mrs. Hales) who was operating plaintiff's car at the time of the collision.

Plaintiff's evidence tended to show: On 9 May 1968, around 4:25 p.m., Mrs. Hales entered U.S. Highway 421 from the west approximately one mile north of Wilmington and proceeded north on

said highway. Her destination was her aunt's home, situate on the west side of U.S. 421 approximately one mile north of the point where Mrs. Hales entered the highway. The weather was clear and the highway was straight, level and dry. When Mrs. Hales was approximately 200 or 300 feet south of her aunt's driveway, she turned on her left turn signals. When she arrived at her aunt's home, she proceeded to turn left into the private driveway but was struck in the west or left lane by defendant's car which was also proceeding north on Highway 421 and was in the act of passing Mrs. Hales when the collision occurred. Certain other pertinent facts are set forth in the opinion.

At the conclusion of plaintiff's evidence, defendant's motion for nonsuit was allowed and from judgment predicated thereon, plaintiff appealed.

W. G. Smith and Jerry L. Spivey for plaintiff appellant.

John F. Crossley for defendant appellee.

BRITT, J.

The sole question presented by this appeal is: Did the trial court err in allowing defendant's motion for judgment of nonsuit on the ground that the operator of plaintiff's automobile was contributorily negligent as a matter of law? We answer in the affirmative.

[1] It is well established in this jurisdiction that a motion for nonsuit may not be allowed on the ground of contributory negligence unless the plaintiff's own evidence establishes such negligence so clearly that no other conclusion can reasonably be drawn therefrom. *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536, and cases therein cited.

[2] Mrs. Hales testified that she was traveling 40 to 45 mph when she approached the driveway to her aunt's home, that she turned on her left turn signal when she was some 200 or 300 feet from the driveway, that she was some 400 or 500 feet from the driveway when she saw a car (presumably defendant's) in her rear-view mirror approximately 500 or 600 feet behind her, that she looked in her rear-view mirror again as she reached the driveway and seeing no car approaching in either direction she proceeded to turn left into her aunt's driveway.

Defendant contends that Mrs. Hales' own testimony established as a matter of law that she failed to keep a proper lookout and that she violated G.S. 20-154 by "turning from a direct line without seeing that such movement could be made in safety."

In *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115, in an opinion by Ervin, J., it is said:

> "The statutory provision that 'the driver of any vehicle upon a highway before . . . turning from a direct line shall first see that such movement can be made in safety' does not mean that a motorist may not make a left turn on a highway unless the circumstances render such turning absolutely free from danger. It is simply designed to impose upon the driver of a motor vehicle, who is about to make a left turn upon a highway, the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others before he actually undertakes it. [Numerous citations]"

In *Cowan v. Transfer Co. and Carr v. Transfer Co.,* 262 N.C. 550, 138 S.E. 2d 228, it is said:

> "Nonsuit may not be granted on the ground of contributory negligence unless plaintiff's own evidence establishes this defense as the sole reasonable conclusion. In our opinion it is debatable whether Carr's failure to look again constitutes a violation of G.S. 20-154(a) as a matter of law on this record. He testified in effect that he looked when he was ready to begin his turning movement and observed that the tractor-trailer was then at least 300 feet to the rear. Whether, under such circumstances, he could reasonably assume that he could make the movement in safety is a question for the jury. A motorist is not required to ascertain that a turning motion is absolutely free from danger. *Lemons v. Vaughn,* 255 N.C. 186, 120 S.E. 2d 527; *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1. The motion for nonsuit was properly overruled."

In the case before us, we think that it was for the jury to determine if under the circumstances related by Mrs. Hales she could reasonably assume that she could make the left turn movement in safety.

The judgment of the district court is

Reversed.

BROCK and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. LEROY MITCHELL

No. 695SC539

(Filed 17 December 1969)

Criminal Law § 113— instruction on corroborating evidence — sufficiency

Instruction in common law robbery prosecution that the testimony of police officers was to be considered by the jury only as corroborating evidence, *held* sufficient, even though the court did not define the word "corroborate."

APPEAL by defendant from *Copeland, S.J.*, 19 May 1969 Criminal Session, NEW HANOVER County Superior Court.

Defendant was tried on a valid bill of indictment charging him with the felony of common law robbery. He entered a plea of not guilty. The jury found him guilty, and from a sentence of not less than six nor more than 10 years in the State Prison system, the defendant appealed.

The evidence on behalf of the State tended to show that about 2:00 A.M. on 16 March 1969 Robert G. Bradley approached the house at 516 McRae Street in Wilmington where he had a room. At this time he observed some five people, including the defendant, inside the fence. As Bradley entered the gate, he was seized by the defendant and thrown to the ground where he was beaten and kicked; his wallet was extracted from his pocket, and his wedding band was taken. The defendant was the only one in the group recognized and known by Bradley. The next day he observed the defendant on the street wearing the wedding band. Bradley went up to the defendant and requested the return of his wedding band, and the defendant refused to return it. Bradley had some $13.00 in his wallet which was taken and never recovered. When the defendant refused to return the wedding band, Bradley reported the occurrence to the police, and a warrant was taken out for the defendant's arrest.

The defendant did not testify but offered the testimony of Margaret Logan to the effect that the defendant came to her home about midnight on the day in question and remained in her home until 10:00 a.m. the next day.

Attorney General Robert Morgan and Staff Attorney Roy A. Giles, Jr., for the State.

Murchison, Fox and Newton by James C. Fox, for defendant appellant.

CAMPBELL, J.

The defendant assigns as error the failure of the trial court to define or explain the meaning of the term "corroborate". Two police officers testified on behalf of the State. They testified as to what the prosecuting witness Bradley told them. In each instance when the witness started to tell what the prosecuting witness Bradley had told him, the defendant objected. The court thereupon instructed the jury:

> "Objection having been made, the Court instructs you that the objection having been made the objection is overruled, but this is being offered for the purpose of corroborating the witness if in fact you find it does corroborate the witness and for no other purpose. . . ."

The defendant asserts that this instruction was not sufficient as it did not explain adequately the meaning of the term corroboration. The defendant relies upon the case of *Sprague v. Bond,* 113 N.C. 551, 18 S.E. 701 (1893). This case does not support the position of the defendant. *Sprague v. Bond* merely holds that where corroborating evidence is introduced and the trial judge is requested to instruct the jury that it is to be considered only as corroborating evidence, and not substantive evidence, then it is incumbent upon the judge to do so. In the instant case the judge did instruct the jury that the testimony in this regard of the police officers was to be considered only as corroborating evidence. For the correct rule with regard to the distinction between corroborating evidence and substantive evidence and the requirement of the trial judge in regard thereto, see Stansbury, N.C. Evidence 2d, Witnesses, § 52.

In the instant case the trial judge properly instructed the jury, and there is no merit in this assignment of error.

The defendant also assigns as error that the court expressed an opinion concerning the facts to be proven and gave unequal stress to the contentions of the State and the defendant. We have reviewed the charge and are of the opinion that based upon the evidence introduced in the case, the charge was fair and adequate and in no way prejudicial to the defendant. The objection to the charge is broadside.

A review of the record and of the charge reveals that the defendant had a fair and adequate trial free from prejudicial error in law, and we find

No error.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. ALFRED WILLIAMS

No. 695SC549

(Filed 17 December 1969)

1. Criminal Law § 128— motion for mistrial — discretion of court

A motion for a mistrial is addressed to the discretion of the trial judge, and his ruling thereon is not reviewable on appeal in the absence of a showing of an abuse of discretion.

2. Criminal Law § 128— motion for mistrial — gun and coat brought into courtroom before jury selection

In this prosecution for armed robbery, the trial court did not err in the denial of defendant's motion for mistrial made before selection of the jury when a deputy sheriff brought a rifle and coat into the courtroom in the presence of the prospective jurors, any conceivable prejudice being removed when the rifle and coat were properly identified and admitted into evidence during the trial.

3. Criminal Law § 163— broadside exception to charge

Assignment of error based on an exception to the entire charge of the court is broadside and ineffectual.

APPEAL by defendants from *Mintz, J.*, 21 July 1969 Session NEW HANOVER Superior Court.

The defendant was tried upon a valid bill of indictment charging him with armed robbery, and was found by the jury guilty as charged. From a judgment of imprisonment of not less than twelve nor more than fifteen years, the defendant appealed to the North Carolina Court of Appeals assigning error.

Robert Morgan, Attorney General, Jean A. Benoy, Deputy Attorney General, and Bernard A. Harrell, Assistant Attorney General, for the State.

James L. Nelson and O. K. Pridgen, II, for the defendant appellant.

HEDRICK, J.

[1, 2] Defendant assigns as error the court's denial of his motion for a mistrial. The record discloses that when this case was called for trial a deputy sheriff brought a rifle and a coat into the courtroom in the presence of the prospective jurors. Before the selection of the jury, the defendant moved that the court declare a mistrial. The motion was denied and the court ordered that the gun and coat be removed from the courtroom. During the trial, Danny Burton

Wilkins, victim of the robbery, identified the rifle as the one used by the person that robbed him of approximately $140.00 at about 2:00 a.m. on 2 February 1969 while he was working at the Savings Oil Company service station in Wilmington, North Carolina. Wilkins also identified the coat as the one worn by another person taking part in the robbery. Deputy Sheriff James Brown testified that while he was investigating the robbery later that same night, he found the rifle wrapped in the coat under an abandoned automobile on Highway 132 near the City of Wilmington. Officer Wolfe testified that the defendant admitted that the rifle belonged to him and that he was guilty of the charge against him. The rifle and the coat were admitted into evidence as exhibits for the State. As a general rule, a motion for a mistrial is addressed to the discretion of the trial judge, and the ruling thereon is not reviewable on appeal in the absence of a showing of an abuse of discretion. *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599 (1966); *State v. Pfeifer,* 266 N.C. 790, 147 S.E. 2d 190 (1966); *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264 (1954).

In the instant case, the appellant has failed to show any abuse of discretion upon the part of the trial judge; moreover, he has failed to show that he was in any way prejudiced by the ruling, or by the act complained of. Any conceivable prejudice was removed when the rifle and the coat were properly identified and introduced into evidence. The assignment of error is overruled.

[3] The appellant's second assignment of error is based on an exception to the entire charge of the court. This is a broadside exception for that it fails to point out specifically that portion of the charge the defendant contends to be erroneous. *State v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411 (1961); *State v. McCaskill,* 270 N.C. 788, 154 S.E. 2d 907 (1967); *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729 (1966). Nevertheless, we have carefully examined the entire record on appeal, including the charge, and find it to be free of prejudicial error. We hold that the defendant had a fair and impartial trial.

No error.

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

STATE OF NORTH CAROLINA v. CLIFFORD JOHNSON

No. 6918SC547

(Filed 17 December 1969)

1. Criminal Law § 23— guilty plea — appellate review

Defendant's plea of guilty will not be disturbed on appeal when the record shows that said plea was entered freely, understandingly and voluntarily.

2. Criminal Law § 23— guilty plea — voluntariness — necessity for findings of fact

Failure of the trial court to find as a fact and adjudicate that defendant's plea of guilty was made freely, understandingly and voluntarily is not prejudicial error where the court's questioning of defendant under oath and an affidavit executed by defendant show the plea was so entered, although the better practice would be for the trial court to make such an adjudication.

3. Constitutional Law § 36— cruel and unusual punishment

Punishment which does not exceed the statutory limits cannot be considered cruel and unusual punishment in the constitutional sense.

ON certiorari from *May, S.J.*, 10 March 1969 Session of GUILFORD Superior Court.

The defendant was tried on 10 March 1969 on separate bills of indictment charging him with auto larceny, safecracking, breaking and entering and larceny. The defendant, through his court-appointed attorney, in open court entered a plea of guilty to all charges.

The court, after hearing evidence, entered judgment that the defendant be imprisoned for a term of ten years for auto larceny, twenty-five years for safecracking and ten years for breaking and entering and larceny to run concurrently.

To this judgment the defendant excepted and gave notice of appeal.

Robert Morgan, Attorney General, and Claude W. Harris, Trial Attorney, for the State.

Bencini, Wyatt, Early & Harris, by A. Doyle Early, Jr., for the defendant appellant.

HEDRICK, J.

In his brief appellant discusses two assignments of error: (1) That the defendant's plea of guilty to the charges in the bills of indictment was not entered freely, understandingly and voluntarily, and (2) that the sentences imposed were cruel, unjust and excessive. Defendant's counsel concedes that these assignments of error are without merit.

[1, 2] The record contains an affidavit executed by the defendant setting out, among other things, that he understood the charges against him, that he did in fact plead guilty to the charges, that he understood he had a right to plead not guilty and be tried by a jury, that he understood that upon his plea of guilty he could be imprisoned for as much as life, that he was satisfied with the services of his attorney, and that he freely, understandingly and voluntarily authorized and instructed his lawyer to enter on his behalf a plea of guilty. The record further shows that the trial judge, while the defendant was under oath, asked the defendant essentially the same questions as were contained in the affidavit, and that the defendant's answers are in the record to the effect that he understood the charges against him, that he understood he had a right to plead not guilty and be tried by a jury, that he did in fact plead guilty, that he understood that upon his plea of guilty he could be imprisoned for as much as life, that no one had offered any promise to him to induce him to plead guilty, and that he freely, understandingly and voluntarily authorized and instructed his lawyer to enter a plea of guilty on his behalf. The defendant's plea of guilty will not be disturbed on appeal when the record shows that said plea was entered freely, understandingly and voluntarily. *State v. Reed,* 4 N.C. App. 109, 165 S.E. 2d 674 (1969). We note that the trial judge failed to find as a fact and adjudicate that the defendant's plea of guilty was made freely, understandingly and voluntarily. The better practice would be for the trial judge to make such an adjudication; however, the failure to do so in the instant case was not prejudicial error.

[3] The maximum punishment for the felony of breaking and entering is ten years imprisonment. G.S. 14-54. The maximum punishment for the felony of safecracking is life imprisonment. G.S. 14-89.1. The maximum punishment for the felony of larceny is ten years. G.S. 14-70. Punishment which does not exceed the statutory limits cannot be considered cruel and unusual punishment in a constitutional sense. *State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570 (1966); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966); *State v. Reed, supra.*

We hold that the defendant was properly sentenced and that the sentences imposed were within the statutory limits and violated no provision of the Federal or State Constitutions.

We have carefully examined the entire record on appeal and find

No error.

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

STATE OF NORTH CAROLINA v. BERNARD FOX

No. 6918SC500

(Filed 17 December 1969)

Criminal Law § 146— conviction upon plea of guilty — sufficiency of record

In an appeal from a sentence imposed upon defendant's plea of guilty to the felony of receiving stolen property, no error appears on the face of the record, where a review of the record shows that (1) defendant's plea of guilty was freely, understandingly, and voluntarily made, (2) the indictment is in proper form, (3) the judgment is in proper form and is supported by the indictment and the plea, and (4) the sentence imposed is within the limits prescribed by statute.

APPEAL by defendant from *Collier, J.*, at the 7 July 1969 Session of GUILFORD Superior Court.

Defendant was charged in a bill of indictment, proper in form, with (1) breaking and entering a building occupied by Edmonds Plaza Drugs, Inc., (2) larceny of property valued at $205.00 and (3) receiving stolen property valued at $205.00 knowing the same to have been feloniously stolen.

When the case was called for trial, defendant, personally and through his court-appointed attorney, tendered a plea of guilty to the felony charge of receiving stolen property alleged in the bill of indictment. Thereupon, the trial judge interrogated the defendant as to the voluntariness of his plea and defendant executed an affidavit in the form of eleven questions and answers to the effect that he fully understood the charges against him, that he was guilty of the charge to which he tendered a plea of guilty, that he understood that upon a plea of guilty to such charge he could be imprisoned for as much as ten years, that he was satisfied with the services of his attorney and that he freely, understandingly and voluntarily authorized and instructed his attorney to enter a plea of guilty to the felony charge of receiving stolen property. After adjudicating that the defendant's plea of guilty as aforesaid was freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency, the trial judge entered judgment that defendant be imprisoned for the term of not less than six nor more than ten years in the State's prison.

Within ten days after the foregoing judgment was entered, defendant gave notice of appeal to this Court and an attorney was appointed to perfect his appeal and represent him in this Court.

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

Charles W. Harden for defendant appellant.

BRITT, J.

In his brief defendant's counsel presents no assignment of error but concedes that the only question before the court is: "Does error appear on the face of the record?"

In *State v. Hopkins,* 5 N.C. App. 282, 168 S.E. 2d 64, this Court said:

> "It is well settled in this jurisdiction that an appeal from a sentence imposed upon defendant's plea of guilty, voluntarily and understandingly made, presents only the face of the record proper for review, and the judgment must be affirmed when the sentence is within the limits prescribed by statute and no fatal defect appears upon the face of the record proper. 3 Strong, N.C. Index 2d, Criminal Law, § 146, p. 88."

We have carefully reviewed the record before us and find that defendant's plea of guilty was freely, understandingly and voluntarily made; the indictment is in proper form; the judgment is in proper form and is supported by the indictment and the plea; and the sentence imposed is within the limits prescribed by statute. No prejudicial error appears on the record. *State v. Alston,* 6 N.C. App. 200, 169 S.E. 2d 520.

The judgment of the superior court is

Affirmed.

BROCK and VAUGHN, JJ., concur.

AUSTIN CHERRY v. JESSIE SMALLWOOD

No. 696SC411

(Filed 17 December 1969)

Automobiles §§ 44, 50— vehicle leaving road without apparent reason — driver negligence — res ipsa loquitur

In this action for personal injuries sustained by plaintiff while riding as a guest passenger in an automobile driven by defendant, plaintiff's evi-

dence tending to show that the automobile left the highway for no apparent reason and wrecked *is held* sufficient to make out a *prima facie* case for the jury on the issue of the driver's negligence, notwithstanding there was no evidence as to what road was involved, or whether the road was wet or dry, paved or unpaved, and there was no evidence relating to defects in the road, mechanical defects in the vehicle, speed of the vehicle or illness of the driver.

APPEAL by plaintiff from *Bundy, J.*, at the May 1969 Session of Superior Court held in BERTIE County.

This is an action to recover for personal injuries alleged to have been sustained by plaintiff, Austin Cherry, on 3 September 1967 while riding as a guest passenger in an automobile owned and operated by the defendant, Jessie Smallwood. Plaintiff alleges that defendant was actionably negligent in the operation of the automobile proximately resulting in injury to plaintiff.

At the close of plaintiff's evidence, defendant's motion for nonsuit was granted. From judgment dismissing the action, plaintiff appeals.

Jones, Jones & Jones by A. B. Harrington, Jr., for plaintiff appellant.

Cherry & Cherry by Thomas L. Cherry for defendant appellee.

MALLARD, C.J.

Plaintiff's evidence tended to show these facts: On the night of 3 September 1967 plaintiff, while riding in the front seat of an automobile owned and operated by the defendant who was his brother-in-law, was injured. There were two other persons in the back seat of the automobile. Defendant, as an adverse witness for plaintiff, testified:

"I was on the way taking my brother-in-law home and the other two fellows and I was driving along and the first thing I knew the car pulled over in the ditch, and I stepped on the gas to try to pull it back over in the road and I went over.

I don't know whether there was anything mechanically wrong with my automobile, but I feel like it was. I have not found anything mechanically wrong with the automobile since the wreck because I haven't checked it. At the time of this incident, my car had three tires in good shape and one was just a little faulty, but it won't bald. It had a little tread on it.

I was not talking to the passengers in my automobile just before I ran off the road. . . .

I was familiar with this road, the shape of the road, and where the curves were located. Where I ran off the road I was in a sharp curve. I do not know whether the road curved to my left or my right. I don't remember whether I ran off the road on my right side or on my left-hand side."

On cross-examination the defendant, in replying to the question of what caused him to run off the road, said:

"Well, there was some sand down there, you know, where people had been going toward the road pulling the sand over. That is what I figured that it was, the sand."

The plaintiff testified:

"Jessie Smallwood was talking to Chestnut Bonds and Jessie told him, 'You ought to be a lawyer, you talk so much.' About that time, the car went like that and it ran off the road and turned over on me. I don't know whether Jessie looked back when he was talking to Chestnut Bonds or not."

There was no evidence as to what road was involved or whether the road was wet or dry, paved or unpaved. Neither was there any evidence of defects in the road, mechanical defects in the vehicle, speed of the vehicle, or illness of the driver.

In the case of *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521 (1968), Justice Sharp said:

"When a motor vehicle leaves the highway for no apparent cause, it is not for the court to imagine possible explanations. *Prima facie,* it may accept the normal and probable one of driver-negligence and leave it to the jury to determine the true cause after considering all the evidence — that of defendant as well as plaintiff."

Applying the above rule, we are of the opinion and so hold that the trial judge committed error in allowing the defendant's motion for judgment as of nonsuit.

Reversed.

MORRIS and HEDRICK, JJ., concur.

IN THE MATTER OF THE CUSTODY OF LAURA PATTERSON MAXWELL AND HAROLD MAXWELL, III

No. 693DC533

(Filed 17 December 1969)

1. Appeal and Error § 39— failure to docket record on appeal in apt time

Appeal is dismissed for failure to docket the record on appeal until more than a month after the time for docketing had expired.

2. Appeal and Error § 44— failure to file brief

Appellant's exceptions and assignments of error are deemed abandoned where appellant fails to file a brief as required by Court of Appeals Rule No. 28.

APPEAL from *Phillips, District Judge,* at the 24 April 1969 Session of CRAVEN County District Court.

The respondent father appealed from an order entered in this cause ordering that he pay to the petitioner, his former wife, the sum of $300.00 to be used to make payments on the trailer-home in which she and the minor children live. The court found that the petitioning mother was without any money with which to make these payments and that the trailer-home was in imminent threat of being repossessed by the mortgagee unless past due payments were made. The court refused to otherwise increase provisions for support set forth in the original order entered on 22 August 1964.

LeRoy Scott for movant appellee.

GRAHAM, J.

[1] The order appealed from was entered 30 May 1969. No order extending the time for docketing the case on appeal in this court appears in the record before us and therefore the respondent had ninety days from 30 May 1969 in which to docket the record on appeal. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. The record on appeal was not docketed in this court until 1 October 1969 which was more than a month after the time for docketing had expired. This appeal is therefore subject to dismissal. *Osborne v. Hendrix,* 4 N.C. App. 114, 165 S.E. 2d 674; *City of Randleman v. Stevenson,* 4 N.C. App. 113, 165 S.E. 2d 693; *State v. Cline,* 4 N.C. App. 112, 165 S.E. 2d 691.

[2] The respondent has also failed to file a brief as required by

Rule 28 of this court. His exceptions and assignments of error are therefore abandoned.

For failure to docket the record on appeal within the time required, the petitioner's motion to dismiss the appeal is allowed.

Appeal dismissed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ROOSEVELT ALPHIN

NOS. 694SC465 AND 694SC466

(Filed 17 December 1969)

1. Criminal Law §§ 159, 166— consolidated prosecution — records and briefs on appeal

Where prosecution on separate bills of indictment charging felonious larceny was consolidated for judgment and only one judgment was entered, it was improper to file separate records and briefs in the Court of Appeals.

2. Criminal Law § 155.5— record on appeal — failure to docket on time

Defendant's appeal is subject to dismissal where the record on appeal was not docketed within 90 days after the date of the judgment, nor was any order entered within that time by the trial tribunal, for good cause, extending the time to docket the record on appeal in the Court of Appeals. Rule of Practice in the Court of Appeals No. 5.

3. Criminal Law § 155.5— record on appeal — expiration of time for docketing — power of trial court

Where more than eight months had elapsed from the date of the judgment appealed from, the judge of the superior court had no power to enter an order purporting to extend the time for docketing the record on appeal in the Court of Appeals.

4. Criminal Law § 156— petition for certiorari

Where time for docketing record on appeal in the Court of Appeals has expired, defendant's proper remedy is to file a petition for *certiorari.*

APPEAL by defendant from *Peel, J.,* 26 August 1968 Criminal Session of DUPLIN Superior Court.

At the August 1968 Session of Duplin Superior Court the defendant was brought to trial on two separate bills of indictment charging him with felonious larceny. Defendant was found to be an indigent and counsel was appointed by the court to represent him at

his trial. He pleaded guilty, the cases were consolidated for judgment, and defendant was sentenced to imprisonment for a term of not less than four nor more than six years. In open court he gave notice of appeal. However, no counsel was appointed to represent defendant on his appeal, and the appeal was not perfected in apt time. On 12 May 1969, after the time for docketing the record on appeal had expired, this matter came to the attention of the judge of superior court assigned to hold the courts of the Fourth Judicial District, who on that date entered an order appointing defendant's trial counsel to represent him and directing said counsel to perfect the appeal in this matter for the defendant. This order allowed defendant 40 days in which to serve case on appeal and the State 20 days thereafter to serve exceptions or countercase. On 30 June 1969 the judge of superior court entered an order further extending the time for defendant to serve case on appeal until 1 August 1969 and allowing the State 20 days thereafter to file exceptions or countercase. This latter order also purported to extend the time to docket the case on appeal in the Court of Appeals to and including 5 September 1969. Defendant's counsel prepared a record on appeal in each case and after service was accepted by the State docketed both records in this Court on 8 August 1969.

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

Grady Mercer, Sr., for defendant appellant.

PARKER, J.

[1] Both records filed herein are identical except that they contain the separate bills of indictment. Separate but identical briefs were filed. This was improper. The cases were consolidated for judgment and only one judgment has been entered. We have therefore consolidated the cases and consider them as constituting a single appeal.

[2] Judgment in this case was entered at the August 1968 Criminal Session of Duplin Superior Court. The record on appeal was not docketed within 90 days after the date of the judgment, nor was any order entered within that time by the trial tribunal, for good cause, extending the time to docket the record on appeal in this Court. This appeal is, therefore, subject to dismissal for defendant's failure to comply with the rules of this Court. Rule 5 of the Rules of Practice of the Court of Appeals.

[3, 4] When the judge of superior court holding the courts of the

Fourth Judicial District entered his order dated 12 May 1969 directing defendant's trial counsel to represent him in perfecting the appeal, more than eight months had elapsed from the date of the judgment appealed from. When he entered the order dated 30 June 1969 purporting to extend the time for docketing the record on appeal in this Court, approximately ten months had elapsed from the date of the judgment appealed from. The judge of superior court, while exhibiting commendable concern to protect the rights of the defendant, had no power to vary or modify the rules of the Court of Appeals. Defendant's proper remedy would have been to file a petition for certiorari.

Treating defendant's appeal as a petition for certiorari, we have carefully reviewed the record and can find no error. Defendant, represented by counsel, entered pleas of guilty to two charges of felonious larceny. He does not contend, and nothing in the record would indicate, that his pleas were other than freely, intelligently, and voluntarily entered. The sentence imposed was within statutory limits.

No error.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. BERNARD BENJAMIN GODWIN, JR.

No. 6918SC482

(Filed 17 December 1969)

Criminal Law § 23— voluntariness of guilty plea — admission of defendant's prior record

There is no merit to defendant's contention that his plea of guilty was coerced in that, during the course of his examination in the absence of the jury upon the admissibility of his statements to the arresting officer, he had testified that he had been previously arrested and sent to training school, which testimony led defendant to believe that his prior record would be placed before the jury if the trial continued, since defendant was represented by competent counsel who could have advised him that his record could not be inquired into in the presence of the jury.

APPEAL by defendant from *Fountain, J.*, 2 June 1969 Session, GUILFORD Superior Court.

Defendant was charged in a bill of indictment, proper in form, with felonious breaking and entering, and with felonious larceny.

He entered a plea of not guilty to the charges and the State offered its evidence. After a *voir dire* examination of the investigating officer and the defendant to determine the voluntariness of statements made by defendant to the officer, the trial judge made appropriate findings and ruled that the statements would be received in evidence.

Immediately after the trial judge entered his findings and ruling upon the admissibility of defendant's statements, defendant's counsel made the following statement to the judge: "Your Honor, the defendant has informed me that he feels — he says that he knows he is guilty and he desires to enter a plea of guilty. However, I would like the record to show he has indicated this to me on several previous occasions and then changed his mind; therefore, I would like to move the court and ask the court to inquire as to whether he voluntarily wants to enter the plea of guilty to the charge." Counsel also stated to the court that he advised defendant to plead guilty.

The trial judge then interrogated defendant as to whether he understood the effects of a plea of guilty and whether he was voluntarily entering a plea of guilty. The judge then adjudicated that the plea of guilty to the two felony charges was freely, voluntarily and understandingly made, and ordered that the plea of guilty to the two felony charges be entered in the record. An active sentence of twelve months was imposed and commitment was issued.

Seven days after trial, defendant wrote a letter to the Clerk of Superior Court advising that he wished to appeal. This letter was received on the tenth day after trial and the appeal was duly noted. Mr. Wallace C. Harrelson was appointed to represent defendant on his trial, and did so represent him. However, for reasons not disclosed by the record, Judge Gambill appointed Mr. William E. Comer to represent defendant upon his appeal.

Robert Morgan, Attorney General, by R. S. Weathers, Staff Attorney, for the State.

William E. Comer for the defendant.

BROCK, J.

Defendant assigns as error that the trial judge admitted evidence concerning defendant's juvenile record.

During the course of the examination of the defendant, in the absence of the jury, upon the question of the admissibility of statements made by defendant to the arresting officer, defendant indicated

that he had been arrested before this occasion. In response to the judge's question as to what the other arrests were for, defendant replied: "I have been in Training School before. I had stolen a motor bike of some sort — it was a pedal bike or bicycle — before that."

Defendant contends that this answer having been elicited from him entitles him to a new trial because it coerced him into pleading guilty. Although the answer was given in the absence of the jury defendant argues that the inquiry led him to believe that his juvenile record would be placed before the jury if his trial continued. We do not agree with this argument. Defendant had competent counsel representing him upon his trial who could have advised him that his juvenile record could not have been inquired into before the jury. Also, defendant's counsel had already advised him to plead guilty.

The trial judge was acting within his province when he asked defendant to clarify what defendant had indicated about previous arrests. Nothing improper in the inquiry by the judge nor the answer by defendant has been shown. Certainly defendant was aware of his juvenile record before he was placed upon trial for the present charges, and there is no reason to believe he was coerced into pleading guilty merely because he answered the judge's question. If defendant, in fact, thought his juvenile record would be placed before the jury, it was his knowledge of his record, not the judge's question, that made him so think.

Also, it clearly appears that defendant's cooperation and plea of guilty were much to his benefit, as he obviously had wished, because out of a possible maximum of twenty years imprisonment, he only received one year.

No error.

BRITT and VAUGHN, JJ., concur.

WILLIAM E. ROBERTS, T/D/B/A TRANS-MATIC TRANSMISSION SERVICE v. H. G. HERRING, T/D/B/A HERRING PLUMBING COMPANY

No. 695DC558

(Filed 17 December 1969)

1. Contracts § 28— instructions — amount of damages — express contract — quantum meruit

In this action to recover the contract price for the installation of a transmission in defendant's automobile, the trial court erred in instructing the jury that it could return a verdict for the contract price, nothing or any amount in between, without submitting separate issues based upon express contract and *quantum meruit* and giving appropriate instructions thereon.

2. Trial § 33— instructions — application of law to evidence

It is the duty of the judge to declare and explain the law and apply it to the evidence bearing on the issue involved.

APPEAL by defendant from *Burnett, District Judge,* 28 July 1969 Session of NEW HANOVER County District Court.

This is a civil action brought by plaintiff to recover $206.00. The matter was heard by a magistrate and from adverse judgment the defendant appealed to the district court.

The evidence tends to show that plaintiff agreed to install a used transmission in defendant's automobile for $206.00 and that defendant authorized the installation and agreed to pay the plaintiff $206.00. The next day, upon being advised that his car was ready, defendant gave plaintiff his check for $206.00 and took possession of his automobile. Defendant went directly to the bank and caused payment to be stopped on the check.

From judgment on a jury verdict of $140.00 defendant appeals.

No counsel for plaintiff appellee.

Marshall & Williams by Lonnie B. Williams for defendant appellant.

VAUGHN, J.

It is difficult to rationalize the theory upon which this case was tried and submitted to the jury. Undoubtedly the court was hindered by the absence of pleadings and by the failure of the defendant to tender issues which embraced his defenses.

[1] In the part thereof which is pertinent to this appeal the court instructed the jury as follows:

> "There was a contract here for work on a transmission — replacement of transmission. And, assuming that if the plaintiff has satisfied you from the evidence and by its greater weight that the contract was fulfilled and he did do the work in a workmanlike manner, then it would be your duty to answer this issue in such an amount as would be a fair and equitable amount due him for such work, said amount not to exceed $206.00. The plaintiff contends you should answer this in the amount of $206.00. The defendant contends you should answer it nothing. You may answer it nothing, $206.00, or any amount in between."

The error in this instruction is manifest. If the jury found that there was a contract for the replacement of the transmission and if they found from the greater weight of the evidence that plaintiff fulfilled his part of the contract, it would have been their duty to answer the issue in the amount of the contract price — $206.00. If the court was of the opinion that the evidence was sufficient to support recovery on either an express contract or *quantum meruit,* it should have submitted separate issues and given appropriate instructions thereon. We have read the entire charge and find that at no place therein did the court give the jury any instruction as to what they should find in order to select from the alternative answers the above quoted instruction permitted them to give.

[2] It is the duty of the judge to declare and explain the law and apply it to the evidence bearing on the issue involved. When he fails to do this, the jurors, unfamiliar with legal standards, are left without benefit of such legal standards necessary to guide them to a right decision on the issue. *Saunders v. Warren,* 267 N.C. 735, 149 S.E. 2d 19.

New trial.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. ELBERT LEE COLLINS

No. 694SC430

(Filed 17 December 1969)

1. Intoxicating Liquor § 19— possession and sale of non-taxpaid whiskey — instructions

In this trial upon two warrants charging the possession and sale of non-taxpaid whiskey on two specified dates, the trial court erred in instructing the jury that defendant should be found guilty of each count under both warrants if defendant had non-taxpaid whiskey in his possession at any time, or at least on either of the two specified dates.

2. Criminal Law § 168— instructions — correct at one point, incorrect at another

Where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part.

3. Intoxicating Liquor § 20— illegal sale — verdict of illegal possession for sale

Where defendant was charged with illegal sale of non-taxpaid whiskey, verdict of guilty of illegal possession for sale was improper.

APPEAL by defendant from *Burgwyn, E.J.*, 28 April 1969 Session, SAMPSON Superior Court.

Defendant was charged in two warrants. Each warrant contained two counts. The first warrant charged defendant with possession of a quantity of non-taxpaid whiskey and with selling a portion of such non-taxpaid whiskey on 3 January 1969. The second warrant charged defendant with possession of a quantity of non-taxpaid whiskey and with selling a portion of such non-taxpaid whiskey on 12 July 1968. The two warrants were consolidated for trial.

From verdicts of guilty and judgment pronounced thereon, defendant appealed, assigning as error portions of the judge's charge to the jury.

Robert Morgan, Attorney General, by Jean A. Benoy, Deputy Attorney General, and Thomas J. Bolch, Special Assistant, for the State.

David J. Turlington, Jr., for defendant.

BROCK, J.

[1] Defendant assigns as error the following portion of the judge's charge to the jury:

"If you find that he had in his possession at any time any amount of non-taxpaid whiskey either in his house or nearby in the country, you will find him guilty in each count."

This part of the charge is material error and prejudicial to the defendant because it instructed the jury that if the defendant had non-taxpaid whiskey in his possession at any time, or at least on *either* 2 January 1969 *or* 12 July 1968, it would be their duty to find defendant guilty of each count under both warrants.

[2] Even though the law may have been correctly stated in other portions of the charge "[i]t has been uniformly held that where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part." *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230.

[3] Additionally, we note the verdict was improper in part in that one of the counts in each warrant charged the defendant with illegal sale of non-taxpaid whiskey, yet the verdict as entered on this count in each warrant found the defendant guilty of illegal possession for sale.

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 material error in the charge a new trial is ordered.

New trial.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. HOWARD RAY FULK AND ASHBORNE EUGENE JOHNSON

No. 6920SC491

(Filed 17 December 1969)

Criminal Law § 155.5— failure to docket record on appeal in apt time

Appeal is dismissed by the Court of Appeals *ex mero motu* where the record on appeal was docketed more than 90 days after the date of judgment appealed from and the record contains no order extending the time for docketing the record on appeal, an order allowing defendant additional time within which to prepare and serve the case on appeal being insufficient to extend the time for docketing the record on appeal. Rules of the Court of Appeals Nos. 5 and 48.

STATE *v.* FULK

APPEAL by defendants from *Beal, S.J.*, at the 5 May 1969 Session of UNION Superior Court.

By indictment proper in form, defendant Fulk was charged with breaking and entering, larceny and receiving. He pled not guilty and the case was submitted to the jury on charges of breaking and entering and larceny. The jury found him guilty of the charges submitted and from active prison sentences imposed, he appealed.

Defendant Johnson was charged with possession of burglary tools in violation of G.S. 14-55. The jury found him guilty as charged and from active prison sentence imposed, he appealed.

Attorney General Robert Morgan and Trial Attorney Charles M. Hensey for the State.

Bobby H. Griffin for defendant appellants.

BRITT, J.

Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina requires that the record on appeal be docketed in this Court within ninety days after the date of the judgment, order, decree, or determination appealed from; provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days, for docketing the record on appeal. Rule 48 provides that if the rules of this Court are not complied with, the appeal may be dismissed. *Coffey v. Vanderbloemen,* 4 N.C. App. 504, 167 S.E. 2d 36.

Judgments were entered in these cases on 8 May 1969 and the record on appeal was docketed in this Court on 26 August 1969, 109 days after the entry of judgments. The record contains no order extending the time for docketing the record on appeal. Although orders were entered on 20 June 1969 allowing the defendants additional time within which to prepare and serve their cases on appeal, no order provides for additional time within which to docket the case on appeal.

In *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547, this Court, speaking through Brock, J., said:

> "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."

For failure of the defendants to comply with the rules, this Court, *ex mero motu,* dismisses the appeals of both defendants. *Coffey v. Vanderbloemen, supra; Kelly v. Washington,* 3 N.C. App. 362, 164 S.E. 2d 634. Nevertheless, we have carefully reviewed the record, with particular reference to the assignments of error brought forward and discussed in defendants' brief, but find no prejudicial error. The defendants were afforded a fair trial and the sentences imposed are within the limits allowed by the statutes.

Appeal dismissed.

BROCK and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE GATTISON

No. 695SC543

(Filed 17 December 1969)

Criminal Law § 97— recall of witness — discretion of trial court

Trial court did not abuse its discretion in allowing the State to recall a witness for the purpose of offering additional evidence after the State had rested its case and after the defendant's motion for nonsuit had been denied.

APPEAL by defendant from *Cohoon, J.,* 12 August 1969 Session of Superior Court held in NEW HANOVER County.

Defendant was tried upon a bill of indictment charging him with the felony of breaking and entering on 6 February 1969 a building occupied by Schwartz Furniture Company, a corporation, with the

intent to steal property therefrom. Trial was by jury and the verdict was guilty of the felonious breaking and entering.

From judgment of imprisonment of not less than six years nor more than eight years, the defendant, an indigent, appealed to the Court of Appeals.

Attorney General Robert Morgan and Staff Attorney L. Phillip Covington for the State.

Yow & Yow by Lionel L. Yow for defendant appellant.

MALLARD, C.J.

This appeal presents the question of whether the trial judge can allow the State to recall a witness for the purpose of offering additional evidence after the State has rested its case and after the defendant's motion for judgment of nonsuit has been denied. The answer is yes.

The judge in the instant case, after overruling the defendant's motion for judgment of nonsuit, permitted the State to offer additional evidence of an explanatory nature. Defendant contends that this was error and argues that the power of the court under such circumstances is limited to permitting the introduction of newly discovered evidence. This contention is without merit.

It is elementary that the trial judge possesses discretionary power to permit the reopening of a criminal case for the introduction of further evidence after the parties have rested. *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736 (1961); *State v. Neely,* 4 N.C. App. 472, 166 S.E. 2d 856 (1969); *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508 (1968); 53 Am. Jur., Trial, § 128. This may be done even after the parties have argued the case to the jury. *State v. Jackson,* 265 N.C. 558, 144 S.E. 2d 584 (1965). No abuse of discretion appears on this record. The defendant has had a fair and impartial trial, free from prejudicial error.

No error.

MORRIS and HEDRICK, JJ., concur.

W. M. "JIMMIE" UMPHLETT, T/A JIMMIE'S COASTAL SERVICE v. WILLIAM M. BUSH, ET UX, MARY H. BUSH

No. 691DC514

(Filed 17 December 1969)

Appeal and Error § 39— failure to docket record on appeal in apt time

Appeal is dismissed for failure to docket the record on appeal within the time prescribed by Court of Appeals Rule 5. Court of Appeals Rule 48.

APPEAL by defendants from *Privott, District Judge,* May 1969 Session of DARE District Court.

Plaintiff, a building contractor, instituted this action to recover a balance alleged to be due upon an oral contract for repairs and additions to certain buildings owned by defendants near Kitty Hawk, N. C. Defendants answered and denied the amount of the contract and the amount of credits thereon as alleged in the complaint, and counterclaimed for loss of certain tools and materials which defendants alleged had been converted by plaintiff to his own use and for damages resulting from plaintiff's alleged failure to perform the contract in a workmanlike manner. The parties waived jury trial. After hearing evidence, the district judge answered issues finding defendants indebted to plaintiff for labor and materials furnished as alleged in the complaint in the amount of $2,811.68, plaintiff indebted to defendants as alleged in the counterclaim in the amount of $182.60, and rendered judgment in favor of plaintiff in the amount of the difference of $2,629.08. Defendants appealed.

Forrest V. Dunstan for plaintiff appellee.

McCown & McCown, by Wallace H. McCown, for defendant appellants.

PARKER, J.

The judgment here appealed from was dated 12 May 1969. The record on appeal was docketed in this Court on 15 September 1969, 126 days after the date of the judgment appealed from. Rule 5 of the Rules of Practice in the Court of Appeals provides that the case may be dismissed if the record on appeal is not docketed within 90 days after the date of the judgment appealed from; provided the trial tribunal may, for good cause, extend the time for docketing the record on appeal not exceeding 60 days. No order extending the time for docketing appears in the record before us. For failure to docket within the time prescribed by our rules, the appeal is dismissed. Rules 5 and 48, Rules of Practice in the Court of Appeals

of North Carolina; *Osborne v. Hendrix,* 4 N.C. App. 114, 165 S.E. 2d 674; *City of Randleman v. Stevenson,* 4 N.C. App. 113, 165 S.E. 2d 693; *Ellis v. Guilford County,* 4 N.C. App. 111, 165 S.E. 2d 688; *Evangelistic Assoc. v. Bd. of Tax Supervision,* 3 N.C. App. 479, 165 S.E. 2d 67; *Williams v. Williams,* 1 N.C. App. 446, 161 S.E. 2d 757.

Appeal dismissed.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES MARION STOVALL

No. 6930SC494

(Filed 17 December 1969)

Criminal Law § 155.5— failure to docket record on appeal in apt time

Appeal is dismissed by the Court of Appeals *ex mero motu* for failure to docket the record on appeal until two months beyond the time allowed by Court of Appeals Rule 5.

APPEAL by defendant from *Martin, J.,* 31 March 1969 Session, CHEROKEE Superior Court.

Defendant was tried and convicted in District Court, and upon his appeal and trial *de novo* in the Superior Court was again convicted by a jury, upon a warrant charging his willful neglect and refusal to provide adequate support for his wife and children, while living with his said wife.

From the verdict and active sentence imposed, defendant gave notice of appeal.

Robert Morgan, Attorney General, by R. S. Weathers, Staff Attorney, for the State.

C. E. Hyde for the defendant.

BROCK, J.

The judgment appealed from was entered 31 March 1969. The record does not contain an order of the trial tribunal extending time for docketing the record on appeal in this Court. Therefore, in accordance with the rules of practice, the record on appeal should

have been docketed in this Court no later than 29 June 1969. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. The record on appeal in this case was docketed in this Court on 27 August 1969, almost two months beyond the time allowed by Rule 5. For failure of defendant to comply with the rules, the appeal is subject to dismissal by this Court *ex mero motu. State v. Wilson,* 3 N.C. App. 225, 164 S.E. 2d 546.

Nevertheless we have reviewed the record on appeal with particular reference to defendant's assignments of error. In our opinion, defendant was given a fair trial, free from prejudicial error.

Appeal dismissed.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. DONNELL L. CARTER

No. 693SC399

(Filed 17 December 1969)

Criminal Law § 161— appeal as exception to judgment

An appeal itself is an exception to the judgment and, even in the absence of exceptions in the record, presents the face of the record proper for review.

APPEAL by defendant from *Bundy, J.,* 18 March 1969 Session of PITT Superior Court.

Defendant was charged, under valid bills of indictment, with assault with a deadly weapon with intent to kill and armed robbery. Upon a finding of defendant's indigency, counsel was appointed on 27 January 1969. To each charge defendant entered a plea of not guilty. The jury found him guilty as charged as to each offense. From judgments entered defendant appealed. The same counsel appointed for trial was appointed to perfect defendant's appeal.

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

A. Louis Singleton for defendant appellant.

MORRIS, J.

The record on appeal contains no exceptions nor assignments of error. Counsel for defendant candidly states in his brief that he has

carefully studied the record and finds no error but asks this Court, in fairness to the defendant, to review the record. Counsel for defendant, as he felt it was his duty to do, has filed a complete record on appeal, including the evidence and the charge of the court.

The Supreme Court of North Carolina has held repeatedly that an appeal itself is an exception to the judgment and, even in the absence of exceptions in the record, presents the face of the record proper for review. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967), and cases there cited.

We have reviewed the record before us and find no prejudicial error.

This is another conspicuous illustration of the abuse of the unlimited right of appeal by an indigent defendant at the cost of the taxpayers.

Affirmed.

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

STATE OF NORTH CAROLINA v. WILLIE (PHILL LEON) WILSON

No. 694SC426

(Filed 17 December 1969)

Escape § 1— second offense of escape — punishment

In a prosecution for a second escape, a sentence of nine months' imprisonment is within the statutory maximum. G.S. 148-45(a).

APPEAL by defendant from *Cohoon, J.,* 12 May 1969 Criminal Session, DUPLIN County Superior Court.

The defendant was charged in a proper bill of indictment with a felonious escape from the North Carolina Department of Corrections, same being a second offense of escape.

To the charge made against him the defendant, in open court, in person, and by and through an attorney, entered a plea of *nolo contendere* to the charge of an escape, second offense, a felony. The trial court, upon ample evidence, ascertained and determined that the plea was freely, understandingly and voluntarily made without

any undue influence, compulsion, duress or promise of leniency, and said plea was accepted by the Court.

From a sentence of nine months the defendant appealed.

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

Russell J. Lanier, Jr., for defendant appellant.

CAMPBELL, J.

With complete candor and frankness the attorney for the defendant states that in his opinion "there was no error committed in this trial."

We have examined the record and find no error therein.

The sentence imposed was well within the limits prescribed by the statute, G.S. 148-45(a) which prescribes a sentence of not less than six months nor more than three years.

No error.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE (PHILL LEON) WILSON

No. 6915SC540

(Filed 17 December 1969)

APPEAL by defendant from *Thornburg, S.J.*, 4 August 1969 Session, ORANGE County Superior Court.

The defendant was charged in a proper bill of indictment with the felony of breaking and entering a dwelling house and in a second count with the felony of larceny of various items of personal property after having feloniously broken into a dwelling house.

The defendant in open court, in person, and through his attorney entered a plea of guilty to the felony of breaking and entering. From the imposition of a sentence of three years in the State Prison, the defendant entered an appeal to this Court.

Attorney General Robert Morgan and Staff Attorney Jacob L. Safron, for the State.

Roy Cole, for defendant appellant.

CAMPBELL, J.

The attorney for the defendant quite frankly states that he "is unable to find error that would compel reversing this and sending it back to Superior Court."

We have reviewed the record, and the record supports the entry of the order by the trial judge to the effect that the defendant freely, understandingly and voluntarily entered his plea of guilty, and there is no error appearing on the face of the record.

Affirmed.

PARKER and GRAHAM, JJ., concur.

HILLCREST BUILDING COMPANY OF GOLDSBORO, N. C., INC v. C. W. PEACOCK

No. 698SC530

(Filed 31 December 1969)

1. Deeds § 20— subdivisions — uniform scheme or plan of development

Determination of whether subdivision property was being developed and sold under a uniform scheme or plan of development must be made from an evaluation of the intent of the parties.

2. Deeds § 20— subdivisions — restrictive covenants — enforcement by owners

When it appears that subdivision property was originally developed pursuant to a uniform scheme or plan, restrictive covenants are enforceable *inter se* by the owners of the lots in the subdivision, there being mutuality of covenants and consideration.

3. Deeds § 20; Parties § 1— enforcement of subdivision restrictive covenants — necessary parties

Where there is a uniform scheme or plan, the owners of lots in the subdivision are necessarily interested parties in any action against or by another lot owner where a mutual covenant or obligation, such as a re-

strictive covenant for residential use, is in dispute, and all persons who have a right to enforce the covenants *inter se* or otherwise should be made parties.

4. Deeds § 19— restrictive covenants — construction — enforcement

While restrictive covenants are not favored and are to be strictly construed, they are enforceable if found not to be inequitable.

5. Deeds § 19— restrictive covenants — servitude imposed

The servitude imposed by a restrictive covenant is a species of incorporeal right which restrains the owner of the servient estate from making certain use of his property.

6. Deeds § 19— restrictive covenants — negative easements

Restrictive covenants create negative easements which are interests in the lands of others and are vested property rights.

7. Deeds § 20— restrictive covenants — effect of zoning ordinance

A valid restrictive covenant is neither nullified nor superseded by the adoption or enactment of a zoning ordinance, nor is the validity of the covenant thereby affected.

8. Deeds § 20; Parties § 1; Vendor and Purchaser § 10— action involving subdivision restrictive covenants — necessary parties — other lot owners

In this action for the specific performance of a contract to purchase land lying partially within a subdivision, plaintiff having agreed to convey the land free of restrictions on use, the trial court erred in determining that recorded restrictions limiting land within the subdivision to residential use could not be enforced against the portion of the land within the subdivision on the ground that fundamental changes within and without the subdivision had rendered such land unsuitable for residential purposes, where the subdivision was developed and sold under a uniform scheme or plan of development and the owners of other lots within the subdivision were not made parties to the action, since such other owners have the right to assert that enforcement of the restrictive covenant for residential uses has not become inequitable and that violations of the restrictions within the development do not amount to such a radical or fundamental change as to destroy the essential objects and purposes of the residential restrictions.

9. Deeds § 20— subdivision restrictive covenants — residential use — limited non-residential use

Limited uses for non-residential purposes within a subdivision do not estop owners of other lots within the subdivision from asserting their right against subsequent substantial violations of restrictive covenants limiting use of land within the subdivision to residential purposes.

APPEAL by defendant from *Hubbard, J.*, 1 September 1969 Civil Term, WAYNE Superior Court.

This is a civil action seeking specific performance of a contract

whereby the plaintiff agreed to sell and the defendant to purchase a certain tract of land in two parcels a part of which is located in the Hillcrest Farm Subdivision of Goldsboro, North Carolina, and a part of which is located outside of the subdivision and is referred to as the unsubdivided portion. The contract was conditioned upon the plaintiff being able to convey title with the land having unrestricted use and being zoned for business. The answer of the defendant alleged that these conditions had not been met.

The parties waived trial by jury and agreed that the presiding judge could find the facts upon an agreed statement of facts and exhibits. The stipulations and findings of fact are, in pertinent part, as follows. The tract of land to be conveyed is a portion of a farm originally owned by W. C. Spence on which he operated a dairy business from the year 1916 to the year 1942. The particular site fronts on Ash Street, formerly North Carolina Highway No. 10, now U.S. Highway 70 East. On the unsubdivided portion of the site to be conveyed, W. C. Spence, in 1928, erected a building for the treatment of raw milk and for the retail sale of milk, dairy products, ice cream, and other products. At that time the W. C. Spence home place was situated on the lot to be conveyed somewhat west of the dairy building. In 1951 W. C. Spence and his wife subdivided into lots a portion of Hillcrest Farm and designated upon said map Lots 1 through 7, Lots 28 through 35, and Lots 36 through 60, a copy of said map being duly recorded in the office of the Register of Deeds of Wayne County.

In 1951 W. C. Spence and wife executed an instrument containing restrictive covenants for Hillcrest Farm Subdivision which was recorded in the office of the Register of Deeds. A portion of said restrictive covenants is as follows:

> "KNOW ALL MEN BY THESE PRESENTS: That W. C. SPENCE and wife, MARY J. SPENCE, do hereby covenant, stipulate and agree on behalf of themselves and to and with all persons, firms, and corporations who or which may hereafter acquire any lot or lots in the area embraced in the development known as 'Hillcrest Farm, W. C. Spence, Adamsville, N. C.,' said area including all the lands owned by W. C. Spence and embraced within the property lines shown on map thereof recorded in the Office of the Register of Deeds of Wayne County, North Carolina, in Map Book 3 at page 67. . . ."
>
> "3. That no stores nor manufacturing establishments of any kind shall be erected on any lot, and no buildings, except for schools, churches and residential purposes and detached houses

for servants and the usual or necessary outhouses for the enjoyment of the said lot for residential purposes shall be erected."

Since the map and restrictive covenants were recorded in 1951, W. C. Spence and wife have conveyed a number of the subdivided lots within the property lines of Hillcrest Farm in which deeds they referred specifically to the restrictive covenants. They have conveyed a number of lots in Hillcrest Farm, in which deeds they referred to "valid restrictions of record," and they have conveyed a number of lots in Hillcrest Farm in which deeds they made no reference to any restrictive covenants.

In 1964 Mary B. Spence, widow of W. C. Spence, conveyed to W. C. Spence, Jr., and others the site proposed to be conveyed by two deeds in which there is no reference to any restrictive covenants or to any subdivision map in said deeds. In 1965 W. C. Spence, Jr., and others conveyed the site to Hillcrest Building Company of Goldsboro, N. C., Inc., with no references to restrictive covenants or subdivided map. On 20 January 1969, Hillcrest Building Company of Goldsboro, N. C., Inc., contracted to convey the site to C. W. Peacock, Agent.

In 1955 W. C. Spence and wife erected on Lots 1 and 2 of Hillcrest Farm Subdivision a commercial building for a retail florist with greenhouse attached. Plaintiff's Exhibit 5 shows Lots 1 and 2 to be located in the southwest corner of the intersection of Spence Avenue and Ash Street. Each of these lots are only 64 feet in depth. Every other lot in the subdivision has a depth of over 100 feet. By deed dated 10 November 1958, said Lots 1 and 2 were conveyed to Walton R. Thompson, the operator of the florist business. In 1958 Walton R. Thompson constructed an additional commercial building on Lot 2 and the buildings are now situated on the land and are in commercial use for a retail florist business and a sewing shop. It appears that this is the only non-residential use existing within the subdivision.

In 1955 W. C. Spence and wife constructed on the unsubdivided portion of the first parcel additional commercial buildings, to-wit: an office building on the west side of the retail dairy building and two office buildings on the south side of the dairy building. The former home place was converted to a commercial use for a convalescent and nursing home. At the time of the conveyance of the property to Hillcrest Building Company of Goldsboro, N. C., Inc., there was situated on the unsubdivided portion of the first parcel a building used for an interior decorator's store, a real estate office building, a building containing two beauty shops and the former

residence used for a convalescent nursing home and subsequently used for a church.

In 1956 Seymour Johnson Air Force Base was reactivated, the main access to the Base from Goldsboro being Ash Street on which this property faces. The main entrance to the Base is approximately 400 yards south of the intersection of Berkeley Boulevard and Ash Street, which intersection is approximately 400 yards east of the site proposed to be conveyed. The Base has a military population of 8,400 living on base and many military and civilian personnel living off base. It has been in continual operation since its reactivation in 1956.

In 1960 the City of Goldsboro zoned a portion of said first parcel, said portion having a frontage of 150 feet on Ash Street and a depth of 300 feet along Spence Avenue, as business property.

There has been considerable commercial development adjacent to the subdivision during the years since the Hillcrest Farm was subdivided in 1951, and particularly since the reactivation of Seymour Johnson Air Force Base in 1956.

The City of Goldsboro and the North Carolina Highway Commission are in the process of widening Ash Street to provide for five lanes of traffic, two lanes in each direction with a center turning lane. The State will acquire approximately 20 feet along the northern line of the site proposed to be conveyed for additional right of way.

In 1951 when W. C. Spence subdivided Hillcrest Farm the city limits of the City of Goldsboro were situated between Audubon Avenue and Oleander Avenue on Ash Street, approximately one mile west of the site proposed to be conveyed. The city limits, as extended on 7 March 1960, are now approximately 300 yards east of the intersection of Ash Street and Berkeley Boulevard.

From the stipulation of facts and findings of fact, the court made conclusions of law determining that the recorded restrictive covenants do not affect the unsubdivided portion of the site proposed to be conveyed and the portion of the subdivided area included in the parcel is not suitable or desirable for residential purposes because of the fundamental changes having taken place within and without the subdivision, such changes being of the magnitude which "would preclude a court of equity from enforcing any residential restrictive covenants . . ." It was further concluded that the second parcel is affected by the restrictive covenants but that the restrictions do not prohibit use of the parcel for a parking lot, the use as a parking

lot being such as would not invalidate the residential restrictions for the remainder of the subdivision.

The court determined that the plaintiff had fully complied with the contract and ordered the plaintiff to convey and the defendant to purchase the tract in controversy, the use of the tract being in compliance with the contract. The judgment was limited to the specific parcels to be conveyed and "shall not affect in any manner the restrictive covenants for any other portion of subdivided lots of Hillcrest Farm Subdivision or any other portion of Hillcrest Farm" shown on the recorded plat.

The defendant excepted to the foregoing findings of fact and conclusions of law and appealed.

Bland and Wood by W. Powell Bland and J. Darby Wood for plaintiff appellee.

Smith and Everett by James N. Smith for defendant appellant.

VAUGHN, J.

[1, 2] The judgment from which the defendant appeals was specifically limited to the lots in controversy and was expressly not applicable to the restrictive covenants of other subdivided lots. It appears that the obvious intent of W. C. Spence, and wife, was that the subdivision should be developed and sold under a uniform scheme or plan of development. Such a determination must be made from an evaluation of the intent of the parties. *Long v. Branham,* 271 N.C. 264, 156 S.E. 2d 235. W. C. Spence, and wife, caused to be recorded an instrument setting forth the restrictive covenants applicable to Hillcrest Farm Subdivision. They provided for uniform restrictions in accord with a general scheme for the benefit of all lots in the subdivision allowing grantees of the owner of the original tract to enforce the restrictions. When it appears that the property was originally developed pursuant to a uniform scheme or plan, the covenants are enforceable *inter se* by the owners of the lots in the subdivision. *Lamica v. Gerdes,* 270 N.C. 85, 153 S.E. 2d 814; *Muilenburg v. Blevins,* 242 N.C. 271, 87 S.E. 2d 493. There is mutuality of covenants and consideration.

[3] When there is a uniform scheme or plan, the owners of lots in the subdivision are necessarily interested parties in any action against or by another lot owner where a mutual covenant or obligation, such as a restrictive covenant for residential uses, is in dispute. All persons who have a right to enforce the covenants *inter*

se or otherwise should be made parties. *Muilenburg v. Blevins, supra.* We are of the opinion that *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344, is directly in point. There the action was also for specific performance of a contract of purchase and sale of real estate, the plaintiff being the owner of the lot to be conveyed and the purchaser defendant relying as a defense on the presence of restrictive covenants which caused non-compliance with the contract. The trial court ordered specific performance of the contract, finding the restrictive covenants to be null and void. Error was found and the case remanded as the judgment was not conclusive as to anyone other than the plaintiff and defendant, the plaintiff's predecessor in title and other grantees not being estopped from thereafter asserting their rights. The Court stated that, "[u]nder such circumstances equity will not require defendant to comply with his contract in direct violation of the stipulation that the property is to be conveyed free of restrictive covenants. If plaintiff desires to have this covenant invalidated and stricken from the deed of the original grantee, he must bring in the interested parties and give them a day in court."

[4-9] Restrictive covenants are not favored and are to be strictly construed against limitation on use. *Hullett v. Grayson,* 265 N.C. 453, 144 S.E. 2d 206. But a restrictive covenant, if not found inequitable, is enforceable. *Hale v. Moore,* 4 N.C. App. 374, 167 S.E. 2d 12. The servitude imposed by restrictive covenants is a species of incorporeal right. It restrains the owner of the servient estate from making certain use of his property. *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. Restrictive covenants create negative easements which are an interest in the land of another, they are vested property rights. *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396. A valid restriction on the use of real property is neither nullified nor superseded by the adoption or enactment of a zoning ordinance, nor is the validity of the covenant thereby affected. 26 C.J.S., Deeds, § 171c(2), p. 1181. The other owners of lots in Hillcrest Farm Subdivision have the right to assert that enforcement of the restrictive covenant for residential uses has not become inequitable and that violations of the restrictions within the development do not amount to such a radical or fundamental change as to destroy the essential objects and purposes of the residential restrictions. The very limited uses of Lots 1 and 2 for non-residential purposes will not be held to have estopped them from asserting their right against subsequent substantial violations within the subdivision. *Tull v. Doctors Building, Inc.,* 255 N.C. 23, 120 S.E. 2d 817.

Since we are of the opinion that this case must be remanded for

new parties and for a further hearing, we shall refrain from a further discussion of the evidence or of the law of the case.

Error and remanded.

BROCK and BRITT, JJ., concur.

R. A. PLUMMER, JR., ADMINISTRATOR OF THE ESTATE OF ROBERT MICHAEL PLUMMER, DECEASED v. WILLIAM ALLEN HENRY, BY HIS GUARDIAN AL LITEM, JAMES E. ROBERTS, AND WHIT CLIFFORD HENRY

No. 6919SC113

(Filed 31 December 1969)

1. Automobiles § 108— family purpose doctrine

The family purpose doctrine is an extension of the principle of *respondeat superior* by which the negligence of the driver is imputed to the family member who furnishes and controls the use of the vehicle.

2. Automobiles § 98— negligent entrustment of automobile

Under the theory of negligent entrustment the owner is held liable, not for any imputed negligence, but by reason of his own independent and wrongful breach of duty in entrusting his automobile to one he knows or should know is likely to cause injury; proof of negligence of the driver merely furnishes the causal connection between the primary negligence of the owner and the injury or damage.

3. Automobiles § 98— accident case — allegation of negligent entrustment of automobile — punitive damages — family purpose doctrine

Where the plaintiff in an automobile accident case alleged (1) that the defendant-owner was liable for the negligence of his son, the defendant-driver, under the family purpose doctrine and (2) that the defendant was also liable for compensatory and punitive damages, on the theory of negligent entrustment, in wilfully and wantonly permitting his son to operate an automobile with a souped-up engine in the vicinity of a public school, a stipulation by defendants father and son admitting agency under the family purpose doctrine does not constitute an admission by them of wilful and wanton conduct on the part of defendant-owner in entrusting the vehicle to his minor son, and the trial court was not warranted in striking as irrelevant and prejudicial plaintiff's allegations and prayer for recovery of punitive damages on the theory of negligent entrustment, since such allegations, if proved, would entitle plaintiff to the recovery of punitive damages for the owner's own negligence.

4. Damages § 11— punitive damages — wanton conduct

Punitive damages are recoverable for wanton conduct, which is in conscious and intentional disregard of and indifference to the rights and safety of others.

5. Arrest and Bail § 13; Automobiles § 43— accident case — pleadings — grounds for arrest

Although it is appropriate for a plaintiff to allege in his complaint facts upon which the remedy of arrest may be sustained, an allegation by a plaintiff in an automobile accident case that the wilful and wanton conduct of the defendants prior to the accident "constitutes one of the causes of action whereby a defendant may be arrested" is merely a conclusion of law and should not be included in the complaint.

6. Pleadings § 1— rewriting of pleadings — trial court

It is error for the trial court to rewrite any part of plaintiff's complaint for him.

ON Writ of *Certiorari* to review an order of *Collier, J.*, August 1968 Session of CABARRUS Superior Court.

This is a civil action in which plaintiff seeks to recover compensatory and punitive damages for personal injuries and pain suffered by his intestate prior to death allegedly caused by the willful and wanton acts of negligence on the part of the defendants. In his complaint plaintiff alleged: That at 8:20 a.m. on 12 September 1966 his intestate, age 10, was struck and injured as he was crossing Swink Street in front of Hartsell School in Cabarrus County, N. C., by an automobile owned by the defendant Whit Clifford Henry, and being operated by the owner's 20 year old son, the defendant William Allen Henry; that the automobile was being operated with the consent and approval of the owner-defendant and as a family purpose automobile; and that the injuries to plaintiff's intestate were proximately caused by particularly described willful and wanton acts of negligence on the part of the driver-defendant.

In addition, plaintiff alleged in paragraphs 8, 10 and 13 of the complaint as follows:

> "8. That the plaintiff is informed and believes and, upon such information and belief, alleges that the defendant Whit Clifford Henry knew or ought to have known that his son William Allen Henry was driving said Ford automobile in the area in front of Hartsell School on Swink Street in a careless, reckless, negligent and unlawful manner and in a way and manner likely to endanger the safety of children in and about said school; that his son had regularly and habitually operated the automobile belonging to the defendant Whit Clifford Henry, in and around said school grounds, especially while the children were going to and from school, but that, in spite of said knowledge, defendant Whit Clifford Henry knowingly, willfully, and wantonly, continued to permit his son William Allen Henry to

operate said Ford automobile upon the public streets in and around said school without restriction, and said willful and wanton acts and conduct of the defendant Whit Clifford Henry concurred with the aforesaid acts and conduct of the defendant William Allen Henry, causing the injuries to the plaintiff's intestate as set forth hereinafter."

"10. That the injuries to the plaintiff's intestate were due, caused and occasioned by, and followed as a direct and proximate result of the willful, wanton and reckless acts and conduct of the defendant Whit Clifford Henry in that he did continue to permit his motor vehicle to be operated upon the public highways of this State by his son when he knew or ought to have known that his son was operating said automobile in school zones in a careless and reckless manner and that his son was endangering the safety and lives of small school children, and did fail to advise or warn his son that he was not to drive said defendant's automobile in and around school zones in such a way and manner as to endanger the lives of said school children and that said defendant did, with full knowledge of his son's driving habits, alter the engine of said automobile so as to increase the speed of said automobile and did willfully and knowingly entrust the 'souped-up' vehicle to his son."

"13. That the aforesaid specific acts and negligence, as set forth in paragraphs 9 and 10 above, were willfully, wantonly, maliciously and intentionally conceived, planned and executed by the defendants, contrary to the laws and dignity of this State and that the injuries to the plaintiff's intestate and the damage sustained by the plaintiff were willfully, wantonly and maliciously inflicted upon the plaintiff's intestate by the defendants; and said willful, wanton and malicious acts and conduct on the part of the defendants, and each of them, constitutes one of the causes of action whereby a defendant may be arrested as provided by Chapter 1, Article 34, of the General Statutes of North Carolina."

The prayer for relief in plaintiff's complaint was as follows:

"WHEREFORE, the plaintiff prays that he have and recover of and from the defendants, jointly and severally, the sum of Two Thousand ($2,000.00) Dollars for the personal injuries to the plaintiff's intestate; the sum of Five Thousand ($5,000.00) Dollars punitive damages; the costs of this action to be taxed by the Clerk; and such other and further relief as may be just and proper."

The defendants filed motion to strike portions of the complaint, including all of paragraphs 8, 10 and 13, stipulating in their motion that any negligence on the part of the driver-defendant is imputable as a matter of law to the owner-defendant under the family purpose doctrine and under the doctrine of *respondeat superior.* Prior to hearing on their motion to strike the defendants filed answer, subject to such motion, in which they admitted the automobile was owned and operated as a family purpose automobile.

After hearing, the superior court judge entered an order striking from the complaint all of paragraphs 8 and 10 and the words "joint and concurring" in paragraph 11. The order also amended paragraph 13 and the prayer for relief to read as follows:

> " '13. That the aforesaid specific acts and negligence as set forth in paragraph 9 above were willfully, wantonly, maliciously and intentionally conceived, planned, and executed by the defendant William Allen Henry, contrary to the laws and dignity of this State and that the injuries to the plaintiff's intestate and the damage sustained by the plaintiff were willfully, wantonly and maliciously inflicted upon the plaintiff's intestate by the defendant William Allen Henry.' "
>
> " 'WHEREFORE, the plaintiff prays that he have and recover of and from the defendants, jointly and severally, the sum of Two Thousand ($2,000.00) Dollars for the personal injuries to the plaintiff's intestate; the sum of Five Thousand ($5,000.00) Dollars punitive damages of and from the defendant William Allen Henry; the costs of this action to be taxed by the Clerk, and such other and further relief as may be just and proper.' "

Plaintiff excepted and petitioned the Court of Appeals for certiorari to review the trial court's order, which was allowed.

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

Carpenter, Webb & Golding, by Michael K. Gordon for defendant appellees.

PARKER, J.

[1, 2] Plaintiff alleged facts sufficient, if proved, to support a verdict against the owner-defendant, who in this case was father of the driver-defendant, on two theories: First, under the "family purpose doctrine," and second, on the theory of negligent entrustment.

North Carolina recognizes both. *Grindstaff v. Watts,* 254 N.C. 568, 119 S.E. 2d 784 (family purpose); *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373 (negligent entrustment). The family purpose doctrine is an extension of the principle of *respondeat superior* by which the negligence of the driver is imputed to the family member who furnishes and controls the use of the vehicle. Under the negligent entrustment theory the owner is held liable, not for any imputed negligence, but by reason of his own independent and wrongful breach of duty in entrusting his automobile to one he knows or should know is likely to cause injury; proof of negligence of the driver merely furnishes the causal connection between the primary negligence of the owner and the injury or damage. *Roberts v. Hill, supra.*

[3] In the present case, the order appealed from strikes from plaintiff's complaint all allegations on which plaintiff seeks recovery of compensatory and punitive damages from the owner-defendant under the negligent entrustment theory. The defendants-appellees, seeking to sustain the order, contend that their stipulation that any negligence of the driver-defendant is imputable as a matter of law to the owner-defendant under the family purpose doctrine has rendered all allegations in the complaint as to negligent entrustment irrelevant and prejudicial, citing *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104. In that case the plaintiff sued both the driver and the owners of the vehicle which caused his injuries, alleging the driver was acting as agent and employee of the owners. In addition, in subparagraph (d) of paragraph XII of the complaint, plaintiff alleged that the owners were themselves negligent in retaining the driver in their employ and in entrusting to him the operation of their vehicle, a wrecker, "knowing of his reckless habits and disposition in the operation of motor vehicles generally and of their wrecker in particular." The trial court refused to strike these allegations relative to negligent entrustment, but did strike from the complaint an allegation that the driver, due to his reckless propensities known to his employers, had acquired the nickname "Wild Bill." On appeal the Supreme Court, in an opinion written by Bobbitt, J. (now C.J.), affirmed these rulings. The opinion recognizes the negligent entrustment theory as applicable in the State of North Carolina, and then goes on to state:

> ". . . This principle is applicable only when the plaintiff undertakes to cast *liability* on an owner not otherwise responsible for the conduct of the driver of the vehicle. But evidence of reputation for negligence or of acts of negligence on prior unrelated occasions is not competent to show that the driver was negligent on the occasion of plaintiff's injury. . . ."

The opinion approved the ruling striking out the allegations relative to the driver's nickname, but also expressly approved the retention in the complaint of subparagraph (d) of paragraph XII, which contained the allegations relative to negligent entrustment. Charting the further course of the litigation, the opinion then contains the following:

> "The allegations of the complaint are explicit to the effect that Atkins on the occasion of plaintiff's injury was acting within the scope of his employment by his codefendants and in furtherance of their business. Of course, we cannot assume that such allegations of agency will be admitted when answers are filed. If admitted, the *liability* of the defendant employers would rest upon *respondeat superior;* and subparagraph (d) of paragraph XII would become irrelevant and prejudicial and should be stricken upon motion then made. On the other hand, if the allegations invoking *respondeat superior* are denied, the plaintiff should be allowed to amend his complaint so as to allege additional ultimate facts, such as indicated above, in conformity with the theory of liability set forth in subparagraph (d) of paragraph XII."

Thus, the opinion expressly approves the retention in the complaint of allegations which would impose liability on an owner-defendant on both the theory of *respondeat superior* and on the negligent entrustment theory at the same time. The opinion indicates that if in the further course of that particular litigation the allegations of agency should be admitted by the defendants, then the allegations as to negligent entrustment would become irrelevant and prejudicial *in that case* and should be stricken upon motion then made. We understand the reasoning of the opinion to be that if responsibility of the owner-defendants for any negligence of their driver should be judicially established by an admission of agency, it would then be unnecessary for plaintiff to prove the owners also liable under the negligent entrustment theory. Therefore, allegations as to negligent entrustment would be rendered irrelevant by the admission of agency. At the same time these allegations would be prejudicial to defendants, since, while evidence of the driver's reputation for negligence or of his acts of negligence on prior unrelated occasions would not be competent to prove his negligence on the occasion of the plaintiff's injury, such evidence would be competent if the negligent entrustment theory was allowed to remain in the case, to show that the owners knew, or in the exercise of due care should have known, of the driver's reckless propensities. Implicit in the reasoning of the

opinion in the *Heath* case is the thought that if the defendants' admissions of agency rendered the allegation in the complaint as to negligent entrustment no longer necessary to serve some proper purpose of the plaintiff, then such allegations should be stricken in order to avoid possible prejudice to the defendants.

In the case presently before us, however, the allegations as to negligent entrustment have not been rendered immaterial by reason of the defendants' stipulation judicially establishing the owner-defendant's responsibility under the family purpose doctrine. In the present case the plaintiff has alleged that the owner-defendant knew or ought to have known that his son was driving his automobile in the area of the school in a careless, reckless, negligent and unlawful manner and in a manner likely to endanger the safety of children in and about said school, and that in spite of said knowledge the owner-defendant "knowingly, willfully, and wantonly," continued to permit his son to operate his automobile upon the public streets in and around said school without restriction and even altered the engine so as to increase the speed of the automobile. Thus, the plaintiff has not only alleged liability of the owner-defendant for compensatory damages on the negligent entrustment theory, but has further alleged facts which, if proved, would justify an award of punitive damages against the owner for his own wanton negligence. By admitting applicability of the family purpose doctrine, defendants have certainly not admitted any willfulness or wantonness on the part of the owner-defendant in continuing to entrust the vehicle to his minor son. Therefore, the defendants' stipulation did not render immaterial the plaintiff's allegations as to negligent entrustment. In *Heath v. Kirkman, supra,* while plaintiff had prayed for punitive as well as compensatory damages, the opinion expressly stated that "[t]he appeal does not present the question as to the sufficiency of the allegations to warrant submission of an issue of punitive damages," and that question was, therefore, not before the court in that case.

[4] Two years after the decision in *Heath v. Kirkman, supra,* the North Carolina Supreme Court for the first time dealt directly with the question whether the doctrine of punitive damages applied to an automobile collision case. In *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393, in an opinion also written by Bobbitt, J. (now C.J.), the Court pointed out that in general punitive damages may not be recovered in the absence of some intentional, malicious or willful act, but held that if the *facts* alleged justify the allegation (by way of conclusion) that the conduct was wanton, a proper basis was

furnished for submission of an issue as to punitive damages. The Court stated that "[c]onduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others."

[3] *Hinson v. Dawson, supra,* as does the case before us, presented a case in which plaintiff sued to recover for injuries to his intestate allegedly caused by the negligence of the driver-defendant, who was the son of the owner-defendant. Examination of the record on appeal reveals that in the complaint as originally filed plaintiff had alleged liability of the owner-defendant under the family purpose doctrine and sought to recover only compensatory damages. The defendants filed answer, admitting plaintiff's allegations under the family purpose doctrine. After a first trial and appeal to the Supreme Court, a partial new trial was ordered. Plaintiff then obtained permission to file an amended complaint. In his amended complaint the plaintiff repeated his allegations under the family purpose doctrine, and for the first time added allegations as to negligence of the owner-defendant in entrusting the automobile to his son and for the first time prayed recovery of punitive, as well as compensatory, damages. The trial court refused to allow the defendants' motion to strike the allegations and prayer relative to punitive damages as contained in the amended complaint. On appeal, the Supreme Court affirmed this ruling, pointing particularly to the allegations as to negligent entrustment. The result was that allegations as to negligent entrustment and punitive damages remained in the complaint even though defendants' admission of family purpose had judicially established liability of the owner-defendant for any negligence of the driver-defendant. We consider *Hinson v. Dawson, supra,* controlling in the case now before us, and hold that the trial court committed error in striking paragraphs 8 and 10, in striking the words "joint and concurring" from paragraph 11, and in rewriting paragraph 13 and the prayer for relief.

[5, 6] The trial court's order amending and rewriting paragraph 13 and the prayer for relief had the effect of eliminating allegations and prayer for recovery of punitive damages against the owner-defendant and also of striking out the allegations to the effect that conduct of both defendants constitutes one of the causes of action whereby a defendant may be arrested under the statutes of North Carolina. While it is appropriate for a plaintiff to allege in his complaint facts upon which the remedy of arrest may be sustained, *Long v. Love,* 230 N.C. 535, 53 S.E. 2d 661, an allegation that such facts "constitute one of the causes of action whereby a

defendant may be arrested" is merely a conclusion of law drawn by the pleader and ordinarily should not be included in the complaint. However, we point out that while the trial judge "can direct the plaintiff generally how he shall plead, he cannot plead for him," *Hensley v. Furniture Co.*, 164 N.C. 148, 80 S.E. 154, and it was error for the court to rewrite any part of plaintiff's complaint for him.

The order appealed from is

Reversed.

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

STATE OF NORTH CAROLINA v. RAYMOND EUGENE HUFFMAN

No. 6918SC492

(Filed 31 December 1969)

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

In this prosecution for assault with intent to commit rape, the trial court did not express an opinion on the evidence by asking the prosecutrix to repeat, explain or clarify portions of her testimony.

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

While G.S. 1-180 prohibits the court from asking questions 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, it is not improper for the court to ask questions for the purpose of obtaining a proper understanding and clarification of a witness' testimony as long as the court does not engage in frequent interruptions and prolonged questioning.

3. Criminal Law § 66— illegal out-of-court identification — in-court identification — independent origin — voir dire hearing

Where it appears during the course of a criminal trial that the accused's right to be represented by counsel was violated at an out-of-court lineup identification, the admission in evidence of an in-court identification of the accused is erroneous unless the trial court determines on *voir dire* that the in-court identification had a sufficiently independent origin and was not the result of the illegal out-of-court confrontation.

4. Criminal Law § 66— illegal out-of-court confrontation — in-court identification of defendant — independent origin

In this prosecution for assault with intent to commit rape, testimony by the prosecutrix on *voir dire is held* sufficient to support the trial court's

finding that the prosecutrix' in-court identification of defendant as her assailant was based upon her observation of defendant at the scene of the crime and was not the result of viewing a single photograph of defendant shown her by the police or of viewing defendant in an elevator at the police station without his knowledge and while he was unrepresented by counsel.

5. Criminal Law § 162— exception to exclusion of evidence — record fails to show what answer of witness would have been

An exception will not be considered on appeal where an objection has been sustained, unless the record discloses what the witness would have said if he had been permitted to answer.

6. Criminal Law § 102— control of argument by counsel to jury

Defendant was not prejudiced by trial court's instruction to counsel with reference to his argument to the jury, the control of argument of counsel being left largely to the discretion of the trial court.

7. Criminal Law § 89— corroborative testimony — slight variances — admissibility

In this prosecution for assault with intent to commit rape, the trial court did not err in admitting for corroborative purposes testimony by a police officer as to statements made to him by the prosecutrix, notwithstanding defendant's contention that a portion of the officer's testimony was not corroborative of any testimony given by the prosecutrix, since slight variances in corroborating testimony do not render such testimony inadmissible, it being for the jury to determine whether or not the testimony of one witness does in fact corroborate that of another.

APPEAL by defendant from *Bowman, S.J.*, 14 April 1969, Regular Session of GUILFORD Superior Court.

Evidence on behalf of the State tended to show the following. At about 1:00 or 1:30 a.m. on 8 February 1969 the prosecutrix was walking along Walker Avenue in Greensboro, North Carolina. The defendant observed her from a Pontiac automobile which he then parked nearby. The defendant got out of the automobile and stalked prosecutrix on foot for some distance. At one point prosecutrix stopped under a street light and defendant passed within two feet of her. She had an opportunity to observe his face and clothing. Later prosecutrix stopped at a well-lighted area near a sign store and observed the defendant as he approached her from the opposite side of the street and inquired as to the location of a particular street. After telling him that she did not know, prosecutrix walked ahead of the defendant and started to cross the street. The defendant came up from behind, grabbed her by the neck and arm and carried her over some bushes and threw her to the ground. Prosecutrix got up but defendant again threw her to the ground and got on top of her. Prosecutrix screamed and fought defendant, scratching his face.

The area behind the bushes was well lighted by a street light and prosecutrix was again able to see defendant's face. Defendant put his hand up her dress and was trying to remove her underclothing. The defendant jumped up and fled when the lights of two automobiles which had stopped at the stoplight shone on him.

Approximately one hour later prosecutrix talked with H. D. Tolbert, Greensboro police officer. She related the details of the attack and gave Tolbert a description of the automobile, the defendant's general appearance and his clothing. Shortly after 5 a.m. on the same day, Tolbert arrested the defendant at his home at 1421 Vine Street. Clothing similar to that previously described to the officer was found in defendant's room and bathroom. A 1963 Pontiac was parked at the rear of the house. The defendant had scratch marks on his right cheek. The prosecutrix identified the defendant as being the same man who had followed and attacked her.

The defendant offered no evidence.

From a verdict of guilty as charged and the judgment entered thereon, the defendant appeals.

Attorney General Robert Morgan by Staff Attorney Carlos W. Murray, Jr., for the State.

Cahoon and Swisher by Robert S. Cahoon for defendant appellant.

VAUGHN, J.

[1, 2] The defendant has brought forward various assignments of error upon this appeal, one of which is that the court intervened in the direct examination of the prosecuting witness so as to emphasize portions of her testimony which were damaging to the defendant in that it conveyed to the jury the impression that the court was especially impressed by certain testimony and that "the court was with the prosecution." We find no merit to this contention. Generally the court asked the witness to repeat, explain, or clarify portions of her testimony in several instances. The statutory proscription against the trial judge expressing an opinion, G.S. 1-180, prohibits the court from asking questions at any time during the trial which amount to an expression of opinion to what has or has not been shown by the testimony of a witness. *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861. It is not, however, improper for the court to ask questions for the purpose of obtaining a proper understanding and clarification of a witness' testimony as long as the

trial judge does not engage in frequent interruptions and prolonged questioning. *State v. McRae,* 240 N.C. 334, 82 S.E. 2d 67. A trial judge is justified in propounding competent questions in order to develop some relevant fact. *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858.

The questions asked by the trial judge in the present case were not such that would convey to the jury an opinion of the court. The questions generally called for the witness to repeat and clarify a prior statement. "The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774. A review of the record and the questions presented by the court, in the light of all the attendant facts and circumstances, calls for the conclusion that the judge's purpose here was one of clarification and the questions were not propounded as expressions of opinion.

[3, 4] The defendant contends that the court committed error in admitting in evidence, over the defendant's objection, the prosecuting witness' in-court identification of the defendant as her assailant. He contends that the identification was procured by and based upon her having been furnished one photograph of the defendant by the police and from her having viewed the defendant in an elevator at the police station without his knowledge and without counsel. Upon the prosecuting witness being asked to identify her assailant at trial, she was examined on *voir dire* at which time she stated that she looked at the defendant before and during the assault upon her and from these viewings she is now able to identify the defendant as her assailant. She further testified that she had described her assailant to the police before viewing a picture of the defendant at the police station and that she had signed a warrant for the defendant before viewing him at the police station. The witness testified that her in-court identification was based upon the times she had seen the defendant previous to and during the assault. The defendant's assignment of error to the admission of the identification is overruled. Where it appears during the course of a criminal trial that the accused's right to be represented by counsel was violated at an out-of-court lineup identification, the admission in evidence of an in-court identification of the accused is erroneous unless the trial court determines on *voir dire* that such in-court identification had a sufficiently independent origin and was not the result of the illegal out-of-court confrontation. *State v. Stamey,* 3 N.C. App. 200, 164 S.E.

2d 547. There was an abundance of evidence to sustain the trial court's finding of fact that the in-court identification was based upon observation of the suspect at the scene of the crime and not upon an illegal confrontation. *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593.

[5, 6] Counsel for defendant, in his cross-examination of the prosecutrix, asked her if she did not intend to spend the night at her boyfriend's apartment. The State's objection was sustained. The defendant duly excepted to the court's ruling and assigns it as error. The record does not disclose what the reply would have been if the witness had been permitted to answer. An exception will not be considered on appeal where an objection has been sustained, unless the record discloses what the witness would have said if he had been permitted to answer. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342. The defendant's assignment of error based on the court's instruction to counsel with reference to his argument to jury is also overruled. Although wide latitude is allowed in the argument to the jury, the control of the argument of counsel is left largely to the discretion of the trial court. 2 Strong, N.C. Index 2d, Criminal Law, § 102, p. 641. We hold that no error, prejudicial to the defendant, was committed by the trial judge in the exercise of his discretion in this instance.

[7] The defendant objected to and assigns as error the admission of Officer Tolbert's testimony as to the statements the prosecutrix had made to him. On at least three occasions the trial judge instructed the jury that such testimony was not received as substantive evidence, but was offered and admitted solely for the purpose of corroborating the prosecutrix if, in fact, the jury should find that it did corroborate her testimony. The testimony was clearly competent for that purpose. The defendant complains that the officer testified that prosecutrix told him that after the attack she ran toward the lights of an automobile when, in fact, there was no such testimony from the prosecutrix. Slight variances in corroborating testimony do not render such testimony inadmissible. It is for the jury to determine whether the testimony of one witness does corroborate the testimony of another witness. *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429. This assignment of error is overruled.

We have carefully considered the remaining assignments of error brought forward by the defendant, and in our opinion they present no prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. HENRY BRADSHAW

No. 6910SC536

(Filed 31 December 1969)

1. Criminal Law § 118; Rape § 6— misstatement of State's contentions — assumption of evidence not in record — prejudice to defendant

In this prosecution for the rape of a ten-year-old child, the trial court committed prejudicial error in charging the jury that "the State contends that you should find from the evidence that there is no other male person that was in their presence except him, and no other male person that could have committed this offense, if it were committed," where the evidence shows that on the day of the alleged crime defendant was in the company of the prosecutrix from sometime in the morning until 3:00 o'clock in the afternoon, but there is no evidence accounting for the activities of the prosecutrix from 3:00 o'clock in the afternoon until some hours later when she told her mother what allegedly happened, since the court in effect told the jury that whatever had in fact happened to the prosecutrix could only have been done by defendant, and there was no evidence to support such a conclusion.

2. Criminal Law § 118— instructions — contentions of the parties — misstatement upon material point — failure to object

While ordinarily error in stating the contentions of the parties must be brought to the trial court's attention in time to afford an opportunity for correction, where the misstatement of a contention upon a material point includes an assumption of evidence unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection.

APPEAL by defendant from *Carr, J.*, 4 August 1969 Session of WAKE Superior Court.

Defendant was charged in a bill of indictment with the capital felony of rape of a female child under the age of 12 years. He pleaded not guilty. The jury returned a verdict of guilty of assault on a female with intent to commit rape. From judgment imposing prison sentence on the verdict, defendant appealed.

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

Peyton B. Abbott for defendant appellant.

PARKER, J.

The offense for which defendant was charged was alleged to have been committed on 7 December 1968. On that date the prosecuting witness, a child 10 years old, lived with her mother in Raleigh,

North Carolina. The defendant was a widower 45 years old, and was father of 8 children. He had formerly rented a room in the same home occupied by the prosecuting witness and her family. On the morning of 7 December 1968 he took the prosecuting witness and her 3 younger sisters in his car and drove to his sister-in-law's home near Zebulon, N. C. There the children played with other children. While driving back to Raleigh, he stopped the car briefly for the purpose of hunting for a Christmas tree, but did not find one. He returned with the children to Raleigh about 2:30 or 3:00 o'clock in the afternoon. Not finding the children's mother at home, he took them to the home of an aunt, who lived nearby, where they found the mother visiting.

The State's case rests entirely on the testimony of the prosecuting witness, who testified that at the time defendant had stopped his car to look for the Christmas tree, he had left the 3 younger children in the car and had taken her into the woods with him, where he had sexually assaulted her. Defendant took the stand and testified to taking the children with him in his car, but denied he had taken the prosecuting witness with him when he stopped to look for the tree. He testified that on the contrary he had instructed all of the children to remain in the car, and that he had himself left the car only briefly in an unsuccessful search for a suitable tree.

The child's mother testified that after the defendant had brought the children to her sister's home about 3:00 o'clock in the afternoon, they had remained at her sister's for a while and then had returned home; that she had later asked the children if they had looked for a Christmas tree, and the prosecuting witness then told her that she and defendant had gone to get a tree; that she had asked the prosecuting witness "did anything happen;" and that the prosecuting witness had first told her "no," but that when she had told the child that if she didn't tell the truth she was going to whip her, the child had then told her of the assault.

A doctor who examined the child about 7:00 p.m. on 7 December 1968, testified that he found no serious injury, that examination for sperm was negative, but that he did find slight abrasions within the child's vulva; that he examined her hyman ring and it was intact.

[1] In its charge, the Court stated "And the State contends that you should find from the evidence that there is no other male person that was in their presence except him, and no other male person that could have committed this offense, if it were committed." Examination of the record before us fails to disclose any evidence accounting for the activities of the prosecuting witness from approx-

imately 3:00 o'clock in the afternoon until some hours later, when her mother questioned her. There was testimony from the defendant that when he returned to the home of the prosecuting witness, approximately 2:30 in the afternoon, the yard and its vicinity contained a number of boys at play. By the quoted statement from the charge, the Court in effect told the jury that whatever had in fact happened to the prosecuting witness could only have been done by the defendant. In this there was error.

[2] While ordinarily error in stating contentions of the parties must be brought to the trial court's attention in time to afford opportunity for correction, where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. *In Re Will of Atkinson,* 225 N.C. 526, 35 S.E. 2d 638; *State v. Wyont,* 218 N.C. 505, 11 S.E. 2d 473; 7 Strong, N.C. Index 2d, Trial § 34, p. 338.

[1] While the record reveals that the learned and the experienced trial judge exercised great care in conducting the trial of this case, we cannot say that the error noted above was not prejudicial to the defendant. The State's entire case rested upon the testimony of a young child. The defendant was in the company of this child under circumstances entirely compatible with his innocence. He stoutly protested that he was innocent. A previous trial had ended in mistrial when the jury was unable to agree upon a verdict. The portion of the charge above quoted could well have left with the jury the impression that the evidence indicated that whatever happened to the child could only have happened by some act of the defendant and that no other person could have been involved. There was no evidence to support such a conclusion.

For the error noted there must be a

New trial.

CAMPBELL and GRAHAM, JJ., concur.

JIMMY RAY SUTTON v. MARVIN DUKE, KINSTON FERTILIZER COMPANY, AND SEABOARD COAST LINE RAILROAD COMPANY

No. 698SC560

(Filed 31 December 1969)

1. Animals § 3— fencing in of livestock — Lenoir County

Lenoir County is subject to G.S. Ch. 68, Art. 3, which requires livestock to be kept fenced in and contained by the owner, G.S. 68-39; the keeper of a pony, mule or other animal is liable for negligently permitting such animal to escape and go upon the public highways, in the event the animal does damage to travelers or others lawfully thereon.

2. Animals § 3— restraint of animals — legal duty of owner

The person having charge of an animal is under the legal duty to exercise the ordinary care and foresight of a reasonably prudent person in keeping the animal in restraint.

3. Pleadings § 19— demurrer

A demurrer to the pleadings challenges the sufficiency thereof.

4. Pleadings § 19— demurrer — construction of pleadings

Upon a demurrer to a complaint on the ground that there is a failure to state facts sufficient to constitute a cause of action, the allegations are to be liberally construed so as to give plaintiff the benefit of every reasonable intendment in his favor. G.S. 1-151.

5. Pleadings § 19— demurrer — admission of facts

A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and relevant inferences of fact reasonably deducible therefrom.

6. Pleadings § 19— demurrer — issues of fact

A demurrer raises no issue of fact, since it admits the truth of all material facts which are properly pleaded.

7. Animals § 3— pony roaming at large — mules — injury to motorist — demurrer

Allegations that the defendants negligently left open the gate to an enclosure in which a pony was kept, that the pony escaped and went onto a lot in which some mules were enclosed, that the pony became excited and agitated in such a way that the mules broke out of their enclosure, that one of the mules wandered onto a highway and was struck by plaintiff's car, and that plaintiff was injured in the collision, *held* sufficient to withstand demurrer.

8. Negligence § 8— negligent act — proximate cause

A negligent act, standing alone, does not create liability; but when such negligent act is a proximate cause of an injury to another person, nothing else appearing, liability does occur.

9. Animals § 3; Negligence § 9— negligent release of pony — injury to motorist — foreseeability

It can be reasonably foreseen that a pony, after being negligently re-

leased from its enclosure, would wander onto a highway and be struck by a motorist and that the motorist would be injured.

10. Animals § 3; Negligence § 9— pony at large — exciting other animals — foreseeability

It is reasonably foreseeable that a pony running at large would go to a place where other animals were, and that some injury would result to the person or property of another if the animal at large agitated and excited other animals.

11. Negligence § 22— pleadings — demurrer

On demurrer the court is not concerned with whether the plaintiff can prove his factual allegation or establish proximate cause, including foreseeability, at the trial; but the court is concerned only with whether the complaint alleges a cause of actionable negligence against the defendant.

APPEAL by plaintiff from *Hubbard, J.*, at the 6 October 1969 Session of Superior Court held in GREENE County.

In this action plaintiff seeks to recover damages for injuries sustained by him when his automobile collided with a mule on a highway in Lenoir County at about 9:20 p.m. on 22 April 1967.

The material allegations of the complaint are:

"13. On or about April 22, 1967, the said Railroad did deliver a carload of merchandise or supplies to the premises of the said Kinston Fertilizer Company. The defendants jointly and severally through their respective servants and agents and the said Marvin Duke individually, said agents and servants then and there acting within the scope of and pursuant to their employment, did negligently, carelessly and unlawfully leave the gate to the enclosure wherein said pony was customarily retained, open, enabling said pony to escape and run at large.

14. The defendants, jointly and severally, and their respective servants and agents therein and acting within the scope of their employment did negligently permit said pony to run at large by (a) leaving the gate to said enclosure open thus permitting said pony to escape and run at large and (b) by failing to exercise proper supervision and care to containing said pony in said enclosure. It being known to all defendants, their agents and servants as aforesaid, that said pony was contained in said enclosure and would likely run at large if not kept enclosed or if the pony was not otherwise supervised and controlled.

15. At a distance of approximately 500 yards from the aforesaid enclosure and on the opposite side of the rural paved road #1745, Mr. W. I. Herring, then and there, had contained in a

lot or enclosure situate upon lands owned by him and under his control and supervision four mules.

16. During the early evening hours and just prior to eight p.m. the said white pony, after being negligently permitted to run at large as aforesaid, came to the vicinity of the enclosure wherein said mules were then and there being retained and did agitate, excite, and attract said mules, and said pony did become agitated, excited, and attracted by the presence of such mules, in such a way that the said mules were caused to break down and break out of the Herring enclosure.

17. Thereafter three of said mules did run at large and one of same was involved in the collision hereinafter described.

* * *

25. The negligence of the defendants, their agents and servants, as aforesaid, and the defendants, Marvin Duke individually, in leaving the gap or gate for said enclosure open and in failing to supervise and contain said pony as aforesaid, thereby permitting said mule to escape, was the sole and proximate cause of the injuries sustained by this plaintiff in the collision aforesaid."

The defendant Seaboard Coast Line Railroad Company (Railroad) entered a special appearance and moved to dismiss on the grounds that it had not properly been subjected to the jurisdiction of the court; at the same time Railroad, in the alternative, filed a demurrer to the complaint asserting that plaintiff had failed to state a cause of action against it. The other defendants demurred *ore tenus* to the complaint on the grounds that plaintiff's complaint does not state facts sufficient to constitute a cause of action against them.

The record does not reveal what disposition was made of Railroad's motion to dismiss on the grounds that it had not properly been subjected to the jurisdiction of the court.

From a judgment sustaining the demurrer of each of the defendants and dismissing the action, the plaintiff appealed to the Court of Appeals.

Lewis & Rouse by Robert D. Rouse, Jr., for plaintiff appellant.

Aycock, LaRoque, Allen, Cheek & Hines by C. B. Aycock for defendant appellee Marvin Duke.

Barden, Stith, McCotter & Sugg by L. A. Stith for defendant appellee Kinston Fertilizer Company.

Spruill, Trotter & Lane by John R. Jolly, Jr., for defendant appellee Seaboard Coast Line Railroad Company.

MALLARD, C.J.

[1, 2] In Lenoir County the keeper of a pony, mule or other animal is liable under our statutes for negligently permitting such animal to escape and go upon public highways in the event they do damage to travelers or others lawfully thereon. The liability of the keeper rests upon the question of whether the keeper is guilty of negligence in permitting such animal to escape. The same rules as to what is or is not negligence in ordinary situations apply. The person having charge of an animal is under the legal duty to exercise the ordinary care and foresight of a reasonably prudent person in keeping the animal in restraint. *Herndon v. Allen,* 253 N.C. 271, 116 S.E. 2d 728 (1960); *Shaw v. Joyce,* 249 N.C. 415, 106 S.E. 2d 459 (1959); *Kelly v. Willis,* 238 N.C. 637, 78 S.E. 2d 711 (1953); *Gardner v. Black,* 217 N.C. 573, 9 S.E. 2d 10 (1940). In this case the collision of the plaintiff with the mule is alleged to have occurred in Lenoir County. Lenoir County, by the provisions of G.S. 68-39, is subject to the provisions of Article 3, Chapter 68, of the General Statutes of North Carolina which requires livestock to be kept fenced in and contained by the owner.

[3, 4] A demurrer to the pleadings challenges the sufficiency thereof. *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345 (1950). Upon a demurrer to a complaint on the grounds that there is a failure to state facts sufficient to constitute a cause of action, the allegations are to be liberally construed so as to give plaintiff the benefit of every reasonable intendment in his favor. *Clemmons v. Insurance Co.,* 274 N.C. 416, 163 S.E. 2d 761 (1968); *Grimes v. Gibert,* 6 N.C. App. 304, 170 S.E. 2d 65 (1969). G.S. 1-151.

[5, 6] "A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated, and relevant inferences of fact reasonably deducible therefrom." 6 Strong, N.C. Index 2d, Pleadings, § 19. "A demurrer raises no issue of fact, since it admits the truth of all material facts which are properly pleaded." 1 McIntosh, N.C. Practice 2d, § 1191.

The demurrers in this case admit, for the purpose of testing the sufficiency of the pleadings, the allegation that the defendants were negligent in leaving the gate open and allowing the pony to escape. Defendants contend that the complaint does not properly allege that the negligence of the defendants was one of the proximate causes of plaintiff's injuries, in that, such injuries were not foreseeable in the exercise of due care. Defendants further contend that they could not reasonably foresee that such a chain of events would occur from the negligent act of leaving the gate open. On the other hand, the plain-

tiff contends that the negligence of the defendants gave the pony its freedom; that because of the freedom of the pony, forces were set in motion which directly caused plaintiff's injury; and that defendants were charged with the duty of foreseeing that such negligence was likely to result in consequences of a generally injurious nature.

[7] The plaintiff did not make the owner of the mule a party defendant. There is no allegation in the complaint that the owner of the mule failed to exercise due care to retain the mule. There is no allegation that the mule which plaintiff struck was improperly retained prior to the arrival of the pony. The allegations of the complaint are briefly summarized as follows: The defendants negligently permitted the pony to escape on 22 April 1967. After escaping at approximately 8:00 p.m., the pony went about five hundred yards to the lot where some mules were enclosed and there agitated, excited and attracted the mules in such way that the mules were caused to break out of their enclosure. After their escape, one of the mules traveled approximately three-fourths of a mile and wandered onto the highway in plaintiff's lane of travel where it was struck by plaintiff's automobile at about 9:20 p.m. Plaintiff was injured in the collision with the mule.

In the case of *Williams v. Boulerice,* 268 N.C. 62, 149 S.E. 2d 590 (1966), it is said:

> "Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767. Foreseeability is an essential element of proximate cause. *Pinyan v. Settle,* 263 N.C. 578, 139 S.E. 2d 863; *Pittman v. Swanson,* 255 N.C. 681, 122 S.E. 2d 814. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but 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. *Slaughter v. Slaughter,* 264 N.C. 732, 142 S.E. 2d 683; *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292."

[8] It is elementary that there is a distinction between the commission of a wrong and liability to another for commission of such wrong. Standing alone, a negligent act does not create liability. However, when such negligent act is a proximate cause of an injury to another person, nothing else appearing, liability does occur.

In the case before us the plaintiff did not strike the pony that was allowed to run at large but a mule that the pony caused to break out of its enclosure. However, the reasonable inference from the wording of the complaint is that the pony was the sole cause of the mule breaking out and being at large.

[9] It could be reasonably foreseen that the pony, after being negligently released, would wander upon a highway and be struck by a motorist thereon. Plaintiff's injury was a type which the defendants could have reasonably anticipated from their negligent release of the pony.

[10] It was reasonably foreseeable that the pony, running at large, would go to where other animals were. One might also reasonably foresee that some injury would result either to the person or property of another if said animal at large agitated and excited other animals.

It is clear, when only the factual allegations of the complaint are considered, that the harm to plaintiff would not have occurred "but for" the defendants' conduct in negligently permitting the pony to run at large and that such was not a remote cause but was one from which consequences of an injurious nature were reasonably foreseeable. *Ratliff v. Power Co.*, 268 N.C. 605, 151 S.E. 2d 641 (1966).

Although the rule is that the liability of the defendants is limited to the legally foreseeable consequence of their conduct, it is not necessary, in order for them to be liable, that they could have foreseen that the mules would have been agitated, excited and attracted by the pony when they negligently permitted the pony to run at large. It is only necessary that the defendants should have been able to foresee that some injury to some person might result from their negligent act in leaving the gate open so the pony could escape. *Hall v. Coble Dairies*, 234 N.C. 206, 67 S.E. 2d 63 (1951).

In 38 Am. Jur., Negligence, § 58, the following language appears:

> "It appears that the modern trend of judicial opinion is in favor of eliminating foreseeable consequences as a test of proximate cause, except where an independent, responsible, intervening cause is involved. The view is that once it is determined that a defendant was negligent, he is to be held responsible for injurious consequences of his negligent act or omission which occur naturally and directly, without reference to whether he anticipated, or reasonably might have foreseen such consequences."

In the case before us the complaint does not reveal that there was any independent, responsible or intervening cause involved in the plaintiff's injuries. The question does not arise at this time as to whether the causal connection between defendants' negligence and the injury was broken by the intervention of a new, independent and intervening cause so that the actionable negligence of the defendants would not be a proximate cause of plaintiff's injuries. Nor is there a question as to whether the foregoing is subject to the qualification that if the intervening cause was foreseen or could have been reasonably foreseen by the defendants in the exercise of due care, the negligence of the defendants could be considered a proximate cause, notwithstanding the intervening cause.

This case, according to the allegations in the complaint, bears some analogy to the frightened animal cases. The general rule in those cases seems to be that if one by his negligent act frightens an animal and that animal, in its frightened condition, causes injury to an individual, the negligent party shall be held liable. *Woodie v. North Wilkesboro,* 159 N.C. 353, 74 S.E. 924 (1912).

"A negligent act which frightens an animal is generally considered to be the proximate cause of injuries subsequently caused by the frightened animal." 65 C.J.S., Negligence, § 114.

In *Woodie v. North Wilkesboro, supra,* the defendant, by its negligence, allowed a standpipe to overflow which frightened a horse. The frightened horse ran away, causing injury to the plaintiff. In the case before us the defendants by their negligence allowed a pony to agitate, excite and attract the mule which wandered away and caused injury to the plaintiff. We think the two situations are analogous.

[11] We are not concerned with whether plaintiff can prove his factual allegations; neither are we concerned with whether plaintiff can establish proximate cause, including foreseeability, at the trial. We are concerned only with whether the complaint alleges a cause of actionable negligence against the defendants.

[7] We hold that the factual allegations in the complaint, when liberally construed, are sufficient to show proximate cause between the alleged negligent acts and omissions of the defendants and the injuries complained of, and that the demurrers should have been overruled.

The judgment sustaining the demurrers is

Reversed.

MORRIS and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. MARVIN RAY SPARROW, KATHERINE TAFT SPARROW AND BRITTON OXIDINE, JR.

No. 6926SC504

(Filed 31 December 1969)

1. Criminal Law § 138— appeal from district court to superior court — increased sentence

In cases involving petty misdemeanors which are appealed from the district court to the superior court, where trial *de novo* is had, imposition of a more severe sentence by the superior court judge than that imposed by the district court judge does not violate defendant's right to due process or rights secured by the Sixth Amendment to the U. S. Constitution.

2. Courts § 15; Infants §§ 7, 10— jurisdiction of juvenile courts — contributing to delinquency of minor — constitutionality of statutes

Provisions of [former] G.S. 110-21 defining the jurisdiction of juvenile courts and provisions of [former] G.S. 110-39, now G.S. 14-316.1, making it a misdemeanor to contribute to the delinquency of a minor *are held* not unconstitutional for vagueness.

3. Infants § 7— contributing to delinquency of minor — sufficiency of warrant

Warrants are sufficient to charge defendants with contributing to the delinquency of a minor in violation of [former] G.S. 110-39, now G.S. 14-316.1, where they allege that defendants harbored and provided lodging for a fourteen year old female and wilfully concealed her from officers knowing they had petitions for her arrest for delinquency, runaway and truancy.

4. Criminal Law § 98— sequestration of witnesses — discretion of court

The sequestration of witnesses during a trial rests solely in the discretion of the trial judge, and the exercise of his discretion is not reviewable on appeal except where there has been an abuse of discretion.

5. Criminal Law § 98— failure to allow motion to sequester witnesses

In this prosecution of defendants for contributing to the delinquency of a minor and for interfering with an officer, the trial court did not abuse its discretion in denying defendants' motion to sequester the State's witnesses, defendants having exercised their right thoroughly to cross-examine the State's witnesses.

6. Criminal Law § 84— legality of officers' entry into house occupied by defendants — invitation — juvenile summons

In this prosecution for interfering with an officer in the performance of his duties, the entry by law officers into the house occupied by defendants was lawful and evidence obtained as a result of the entry was properly admitted, where law officers knocked on the front door and were told to "come in" by an occupant of the house, and the officers had in their possession a "juvenile summons" issued by the district court to be served on a minor who was in the house.

7. Criminal Law § 169— exclusion of evidence — record fails to show what evidence would have been

Action of the trial court in sustaining the State's objections to questions asked by defense counsel in his cross-examination of several State's witnesses will not be held prejudicial error where the record does not disclose what the replies of the witnesses would have been had they been permitted to answer.

8. Criminal Law §§ 33, 162— striking unresponsive and irrelevant testimony — police harassment

In this prosecution for contributing to the delinquency of a minor and for interfering with an officer, the trial court did not err in striking testimony by one defendant, in response to a question by defense counsel as to what occurred immediately prior to the arrival of police officers, that "we were talking about the police harassment we had been having," such testimony not being responsive to the question or relevant to the issues.

9. Criminal Law §§ 99, 165, 170— admonishment of defendant by court — G.S. 1-180

In this prosecution for contributing to the delinquency of a minor and for interfering with an officer, the trial court did not comment on the weight of the evidence in violation of G.S. 1-180 when, after one defendant had stated on cross-examination that a police officer had lied in his testimony, the court directed defendant to refrain from such characterization, and upon defendant's reply of "I'm sorry, he asked me," the court further stated, "You heard me, too, didn't you?"

10. Infants § 7— contributing to delinquency of minor — concealing minor from police — sufficiency of evidence

In this prosecution of three defendants for contributing to the delinquency of a minor female by wilfully concealing her from officers with knowledge that the officers had a petition for her arrest as a runaway and a truant, the State's evidence against two of the defendants was insufficient to be submitted to the jury where it tended to show that the two defendants rented a house which they ran in a "communal" fashion, and that the minor spent several days and one night in the house, but there was no evidence that the two defendants knew the minor was staying the house or that the police had a petition for her arrest; the State's evidence against the third defendant was sufficient to be submitted to the jury where it tended to show that he knew the police had a petition to take the minor into custody as a runaway and a truant, that he knew she was, in fact, truant from home and school and that she was under sixteen years of age, and that when officers went to the "communal" house where defendant was staying to look for the minor, defendant took her from the house in a deliberate attempt to keep the officers from serving the petition on her.

11. Arrest and Bail § 6— interfering with police officer — sufficiency of evidence

In this prosecution of defendants, husband and wife, for interfering with an officer, the State's evidence *is held* sufficient for the jury where it tends to show that when an officer attempted to take a minor into custody

under a juvenile summons issued by the district court, defendant husband pushed the officer and tried to prevent him from getting to the minor, and that when the husband was arrested for interfering with an officer, his wife tried to pull him away from the officer, and when this failed she resorted to kicking the officer as he went out the door.

12. Criminal Law §§ 102, 165— motion to record solicitor's argument to jury

The trial court did not err in the denial of defendants' motion, made after defense counsel had argued to the jury, to have the court reporter record the solicitor's closing argument to the jury, since no statute or rule requires that argument of counsel be recorded, and defendant could have called any allegedly improper argument to the attention of the trial court during the trial or could have included any such remarks in the record on appeal.

13. Criminal Law § 154— record on appeal — arguments of counsel

It is not required that the arguments of counsel be included in the record on appeal. Court of Appeals Rule 19(a).

14. Criminal Law §§ 102, 165, 170— improper argument by counsel — duty of court

When an attorney makes improper argument to the jury, it is the duty of the presiding judge to correct the transgression upon objection by the opposing party or ex mero motu, and where there were no objections by the opposing party and the trial court found no impropriety, it will be assumed there was no improper argument.

APPEAL by defendants from *Mintz, J.*, at the 3rd week of the May 12, 1969, Schedule "A" Regular Criminal Session of MECKLENBURG Superior Court.

The evidence at the trial in the Superior Court of Mecklenburg County tended to establish the following facts: The defendants, Marvin and Kathy Sparrow, rented a house at 1200 Central Avenue in the City of Charlotte and ran the house in a "communal" fashion — in a family situation — allowing various persons to reside there either on a permanent basis or as temporary guests. All persons staying in the house as permanent residents contributed to the payment of the rent and the purchase of food to be shared by all. In order to stay in the house overnight it was necessary for a person to get the permission of five residents of the house, the only restriction being that the person had to be over sixteen years of age; however, there was evidence that persons under sixteen had been allowed to stay overnight. Persons desirous of staying overnight were asked to produce identification to prove their age but the Sparrows did not insist that such identification be produced. The Sparrows testified that they policed the house and kept it clean, but the tes-

timony of the police officers who arrested the Sparrows and Oxidine was that the house was filthy and that the mattresses, which were the principal articles of furniture in the house, were dirty and looked as if someone had urinated on them.

On Thursday, 1 May 1969, Karen Torpey, a fifteen-year-old girl, did not return to her home from school at her regular time. After several unsuccessful attempts to locate her, Mrs. Torpey went to the Charlotte Police Department and reported that Karen was missing. On Friday, 2 May 1969, Mrs. Torpey went to the house at 1200 Central Avenue, where she talked to the Sparrows and Oxidine, telling them that she believed Karen to be with them and that Karen was only fifteen years of age. Oxidine told Mrs. Torpey that Karen had been there but that when she saw her mother coming she ran out the back door. On Monday, 5 May 1969, Mrs. Torpey went to the Mecklenburg County Juvenile Court and filed a petition stating that her daughter was uncontrollable, that she was away from home without her permission and requested that they take her into their custody.

Karen Torpey testified that she had been truant from school for several days prior to 1 May 1969 and that on the occasions when she had been truant she had spent most of her time at the house at 1200 Central Avenue. Each day prior to 1 May 1969, she returned to her home at her usual time; however, on this day she did not return home but instead stayed in the Sparrow house. Karen testified that she obtained permission from five people to stay in the house on Thursday night, but she did not see the Sparrows between Thursday afternoon and Monday afternoon nor did she ask them for permission to spend the night in their house. On Friday, 2 May 1969, she and Oxidine, along with several other persons from the house, went to Chapel Hill where they spent the night in the social room of a dormitory. The Sparrows did not accompany them to Chapel Hill but went instead to Folly's Beach in South Carolina. On Saturday, this group returned to Charlotte and Karen and Oxidine went to the house belonging to one of his relatives where they spent the night. Karen testified that she slept in the bedroom of this house and that Oxidine slept in the same room. They returned to 1200 Central Avenue on Sunday, but late Sunday night they returned to the house where they had spent the previous night. Karen said that she was in the Sparrow's house at 1200 Central Avenue on Friday afternoon when her mother came to look for her but that she hid in a closet in one of the bedrooms upstairs to avoid meeting her mother.

On Monday, 5 May 1969, Officer D. M. Maness, of the Charlotte

Police Department, Youth Bureau Aid Division, went to the house at 1200 Central Avenue to serve the petition on Karen Torpey. When he got to the house he was unable to locate the girl so he went back to his office. After he got to his office, he received a call from Clyde White telling him that the girl was at the Sparrow house. White testified that he had seen Karen Torpey at this house on Sunday evening and that she had been drinking beer from a mayonnaise jar and had offered him a drink. On Monday, 5 May 1969, he met Karen and Oxidine as they were leaving the Sparrow house and walked to a local store with them. As they were leaving he noticed the presence of police officers and when they got to the store, Oxidine asked him to go back to the house and let them know when the officers left. It was after this that he decided to call the police. White accompanied the officers to the house when they went to serve the petition on Karen.

Officer Maness testified that when they went back to the house to serve the petition on Karen they had in their possession, as they did the first time, the petition signed by Mrs. Torpey and a juvenile summons signed by the Deputy Clerk of Superior Court and District Court Judge P. B. Beacham. With his identification in hand, Officer Maness knocked on the door of the Sparrow house and entered when he was told to by Marvin Sparrow. He told Marvin he had a petition for Karen Torpey and Marvin asked him to read it. He told Marvin that he did not have to read it to him since it was for Karen but that he would; however, he was prohibited from reading the petition by the noise coming from the living room. He testified that he told Karen he had a petition for her, that she started toward him and then broke to run just as she reached him. He attempted to stop her and she grabbed his arm and bit him. Clyde White testified that as the officer grabbed Karen, Marvin shoved the officer in an attempt to prevent him from holding Karen. As Marvin shoved Officer Maness, Lt. J. R. Hall took Marvin and pulled him off of Officer Maness and placed him under arrest for interfering with an officer. As he started out of the door with Marvin, Kathy Sparrow began to pull at her husband in an attempt at freeing him and as they reached the door she kicked Lt. Hall. When this occurred, she was also arrested for interfering with an officer. Marvin testified on direct examination that he did not shove or push the officer but that he fell or was pushed into him. On cross-examination, the following exchange took place between Marvin and the Court:

"Q. You heard Officer Hall testify you were the one that grabbed him?

"A. Yes, I believe I heard that.

"Q. They are just mistaken about that, aren't they?

"A. They are lying.

"COURT: Beg pardon?

"A. They are lying. They are not telling the truth.

"COURT: Now let's refrain from that sort of characterization.

"A. I'm sorry, he asked me.

"COURT: You heard me too, didn't you?"

All defendants were convicted by a jury of contributing to the delinquency of a minor and the Sparrows were also convicted of interfering with an officer. From this conviction and sentences imposed thereon, the defendants gave notice of appeal to this Court.

Robert Morgan, Attorney General, and Burley B. Mitchell, Jr., Staff Attorney, for the State.

George S. Daly, Jr., Adam Stein, and Thomas Allman, for the defendants appellants.

HEDRICK, J.

[1] The appellants' first assignment of error is based on their exceptions to the fact that the judgment imposed in each case by the Judge in the Superior Court was more severe than that imposed in the District Court. The appellants contend that the imposition of greater sentences denied them due process of law and violated rights secured them by the Sixth Amendment to the U. S. Constitution. We do not agree. Article I, Sec. 13, of the North Carolina Constitution provides:

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

In *State v. Sherron*, 4 N.C. App. 386, 166 S.E. 2d 836 (1969), where the identical question was raised, Parker, J., speaking for the Court, said:

> "By G.S. 7A-272 the district court has exclusive, original jurisdiction for the trial of criminal actions below the grade of felony, and the same are declared to be petty misdemeanors. G.S. 7A-196 provides: 'In criminal cases there shall be no jury trials in the district court. Upon appeal to superior court trial

shall be de novo, with jury trial as provided by law.' This provision does not transgress the requirements of Art. I, § 13 of our State Constitution. *State v. Norman,* 237 N.C. 205, 74 S.E. 2d. 602; *State v. Pulliam,* 184 N.C. 681, 114 S.E. 394."

On appeal from district court to superior court trial is de novo. *State v. Overby,* 4 N.C. App. 280, 166 S.E. 2d 461 (1969); *State v. Meadows,* 234 N.C. 657, 68 S.E. 2d 406 (1951). We do not agree with the appellants' contention that *North Carolina v. Pearce,* 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), is authority for holding that in cases involving petty misdemeanors which are appealed from the district court to the superior court where trial de novo is had, the superior court judge cannot impose a more severe sentence than did the district court judge. See *Michigan v. O'Lary,* 382 Mich. 559, 170 N.W. 2d 842 (1969).

[2] The appellants by assignment of error No. 2 contend that the statutes, G.S. 110-21 and G.S. 110-39, under which they were charged, are unconstitutional for vagueness. The North Carolina Supreme Court was faced with an issue identical to the one raised in the instant case in *In Re Burrus,* 275 N.C. 517, 169 S.E. 2d 879 (1969). In answer to the question raised, the Court, speaking through Huskins, J., said, at page 531:

"Appellants argue that the statute fails to define any of the operative terms such as 'delinquent', 'unruly', 'wayward', 'misdirected' and 'disobedient' and contend that the statute is therefore void for vagueness and uncertainty.

"It is settled law that a statute may be void for vagueness and uncertainty. 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' 16 Am. Jur. 2d, Constitutional Law § 552; *Cramp v. Board of Public Instruction,* 368 U.S. 278, 7 L. ed 2d 285; 82 S. Ct. 275; *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768. Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. *United States v. Petrillo,* 332 U.S. 1, 91 L. ed 1877, 67 S. Ct. 1538."

Our courts have construed these juvenile statutes and have consistently upheld their constitutionality. *State v. Burnett,* 179 N.C. 735, 102 S.E. 711 (1920); *State v. Coble,* 181 N.C. 554, 107 S.E.

132 (1921); *In Re Hamilton,* 182 N.C. 44, 108 S.E. 385 (1921); *In Re Coston,* 187 N.C. 509, 122 S.E. 183 (1924); *Winner v. Brice,* 212 N.C. 294, 193 S.E. 400 (1937); *In Re Burrus,* 4 N.C. App. 523, 167 S.E. 2d 454; modified and affirmed, *supra.* Statutes similar to the N. C. Juvenile Courts Act have been held constitutional in over forty states against numerous attacks. *In Re Gault,* 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967); See Paulson, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 Supreme Court Review 167, 174.

[3] By assignment of error No. 3, the defendants challenge the sufficiency of the warrants which charge each of the defendants with contributing to the delinquency of a minor. The assignment of error is based on the defendants' exception to the court's refusal to grant their motion for a bill of particulars. This exception does not support the assignment of error; nevertheless, we must consider the sufficiency of the warrant to support the judgment entered on the verdict as to the defendant Britton Oxidine. We believe that the warrant is sufficient to charge the defendants with a violation of G.S. 110-39. The warrant is couched in the language of the statute and the statute is cited. It is true that the words "harboring and providing lodging" standing alone would be insufficient, but the warrant must be read in its entirety. We believe the allegation that the defendants "did unlawfully, wilfully, contribute to the delinquency of Karen Torpey, white female, age 14, in violation of G.S. 110-39 of North Carolina by harboring and providing lodging for Karen Torpey and wilfully concealing said minor from officers knowing they had petitions for said Karen Torpey for delinquency, runaway and truancy" was sufficient to charge the offense. To wilfully conceal a minor from officers knowing that they had a petition for her arrest for runaway and truancy is an act calculated to contribute to the minor's delinquency. The allegation is sufficient to identify the offense with which the defendant is charged, to protect the defendant from being put in jeopardy twice for the same offense, to enable the accused to prepare for trial, and to allow the court, on conviction, plea of nolo contendere or guilty, to pronounce sentence. *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917 (1953).

This assignment of error is overruled.

[4, 5] The appellants' fourth assignment of error was that the trial court erred in denying their motion to sequester the State's witnesses. In North Carolina, the sequestration of witnesses during a trial rests solely in the discretion of the trial judge, and the exercise of his discretion is not reviewable on appeal except where there

has been an abuse of discretion. *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557 (1968); *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670 (1954); *State v. Lovedahl,* 2 N.C. App. 513, 163 S.E. 2d 413 (1968). A thorough examination of the record on appeal discloses that defendants were given ample opportunity to cross-examine the witnesses for the State and that they did, in fact, exercise their right to cross-examine. We find no abuse by the trial judge in the exercise of his discretion.

[6] The appellants' fifth assignment of error is as follows: "The evidence in this case was obtained as the result of an illegal entry of a private dwelling and should have been excluded." By this assignment of error the appellants apparently attempt to raise the question of the legality of the entry by the officers into the Sparrow house; however, of the fifteen exceptions upon which the assignment of error is based, only three seem to relate to evidence obtained as a result of the entry. The fifteen exceptions grouped under this assignment of error raise questions of law not embraced in the assignment; nevertheless, since the entry into the Sparrow house by the officers for the purpose of serving the petition upon the juvenile, Karen Torpey, resulted in the charges of interfering with an officer against Marvin and Kathy Sparrow, we have considered the question of whether the entry into the Sparrow house by the officers was lawful, and whether any evidence obtained as a result of the entry was admissible.

The evidence for the State tends to show that when the officers went to the Sparrow house to serve the petition on Karen Torpey they knocked on the front door and were invited into the house. Clearly, an entry made by police officers after being told to "come in" by the occupant of a house is not an illegal entry. *State v. Smith,* 242 N.C. 297, 87 S.E. 2d 593 (1955). Even so, the officers had in their possession a "juvenile summons" issued by the district court of Mecklenburg County to be served on Karen Torpey. In *State v. Wright,* 1 N.C. App. 479, 162 S.E. 2d 56, affirmed on other grounds, 274 N.C. 380, 163 S.E. 2d 897 (1968), it is stated that an officer may not be interfered with when he is acting pursuant to a "writ . . . sufficient on its face to show its purpose, even though it may be irregular or defective in some respects." It is not for the officer to scrutinize each warrant or process he is to serve to determine its legal sufficiency. Even though a writ may be defective or irregular in some manner, if it is sufficient on its face to show its purpose, the officer is protected. *State v. Wright, supra.*

The fifth assignment of error is overruled.

[7] The sixth assignment of error relates to the action of the court in sustaining the objections to questions asked by defendants' counsel in his cross-examination of several of the State's witnesses. The defendants contend that the action of the judge in sustaining these objections was an arbitrary restriction of their right to cross-examine the State's witnesses and an infringement of their Sixth Amendment right of confrontation. Of the seven exceptions grouped within this assignment, four of them were to the sustaining of objections made by the State. Of these four exceptions, the record does not disclose what the reply of the witnesses would have been had they been permitted to answer; therefore, it is impossible for us to know whether the ruling was prejudicial to the defendants. The record does not disclose that there was any effort made by counsel for the defendants to get the answers to the questions put in the record. It is incumbent upon the appellant not only to state that this was error but to show that such error was prejudicial to him. *State v. Brown,* 271 N.C. 250, 156 S.E. 2d 272 (1967); *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342 (1955).

The other three exceptions embraced within this assignment of error relate to the admissibility of evidence offered by the State and have nothing to do with the defendants' sixth assignment of error. This assignment of error is without merit.

[8] The defendants' seventh assignment of error is that the trial court was biased and made comments on the evidence throughout the trial. On direct examination Marvin Sparrow was asked by his attorney to tell the court what occurred immediately prior to the arrival of the officers. Marvin replied: "Well, we had, all the people in the house had come into the living room for a meeting. We were talking about the police harassment we had been having for the last . . ." Upon objection of the solicitor and motion to strike, this testimony was stricken from the record. There was no error in the court's ruling since the answer was not responsive to the question. By this testimony the witness was obviously undertaking to express his contempt for the law enforcement officers. What the residents of the Sparrow house were discussing immediately before the officers arrived was not in any way relevant to the instant cases.

[9] The defendants contend that the exchange that took place between Marvin Sparrow, the solicitor and the court, when the defendant was told to refrain from calling the police liars, was a comment by the judge which produced prejudicial error under G.S. 1-180. We do not agree. In this situation, the judge was very careful to do all within his power to prevent the defendant from prejudicing the jury

against himself. The conduct of the defendant Sparrow was uncalled for and was clearly an attempt on his part to assert, completely out of order, his opinion on the conduct of the police officers. The defendant, in his brief, states that "For the Court to then direct the witness, because of his use of this word (liar), 'Now, let's refrain from that sort of characterization', and upon the witness' ingenuous reply of 'I'm sorry, he asked me,' to further admonish him with, 'You heard me, too, didn't you?' is a shocking violation of G.S. 1-180, and a clear comment by the judge on the weight of the evidence. This exchange sounds like an overly authoritarian father lecturing a child, and has no place in a court of law." It is apparent from the foregoing that it is being asserted that witnesses should be allowed an unfettered right to take the witness stand and conduct the trial as they see fit without regard to rights of others involved in the trial. As was said in *State v. Kirkman,* 234 N.C. 670, 68 S.E. 2d 315 (1951):

> "The conduct of a trial in the Superior Court, the preservation of order and the prevention of unfair tactics and behaviour *on the part of witnesses and others* must be left in large measure to the control and wise discretion of the presiding judge."

We believe that the judge was acting properly in this case to prevent the defendant from causing any prejudicial effect by his words or actions. Any other course on the part of the trial judge would have allowed the defendant to prejudice the jury against himself.

Exceptions 18, 24, 35, 36 and 39 relate only to the admissibility of certain evidence offered by the State and in no way support the assignment of error.

The appellants' eighth assignment or error is based on the defendants' exceptions to the court's denial of their motions for judgment as of nonsuit. In considering a motion for judgment as of nonsuit it is necessary to consider the evidence in the light most favorable to the State.

Contributing to the delinquency of a minor:

[10] We have examined the record in regard to this charge and have been unable to find any evidence which would tend to show that Marvin and Kathy Sparrow wilfully concealed Karen Torpey from the police knowing that they had a petition for her arrest. Karen Torpey testified that she spoke to the Sparrows briefly on three occasions. She did not ask them for permission to stay overnight in their house and there was no evidence which would impute

to them any knowledge of her presence. In fact, the evidence shows that they were not even at home on two of the nights but were in South Carolina. As to the defendants, Marvin and Kathy Sparrow, upon the charge of contributing to the delinquency of a minor, we hold that their motion for judgment as of nonsuit ought to have been allowed.

Britton Oxidine
Contributing to the delinquency of a minor:

[10] An examination of the record discloses that the evidence was sufficient to raise the inference that Britton Oxidine knew that the police had a petition to take Karen Torpey into custody for runaway and truancy and that she was, in fact, truant from home and school and that she was less than sixteen years of age. The evidence tends to show that Oxidine talked to Mrs. Torpey when she first went to the Sparrow house on Friday afternoon looking for her daughter, and that Mrs. Torpey told him that Karen was only fifteen years of age and that she was away from home without her permission; nevertheless, Oxidine later that week went with Karen and others on a trip to Chapel Hill, North Carolina, where they collectively spent the night in a dormitory. The evidence further tends to show that on the day the officers came to the Sparrow house to look for Karen, Oxidine took her from the house in a deliberate attempt to keep the officers from serving the petition on her. We hold, therefore, that the trial court correctly overruled the defendant Oxidine's motion for judgment as of nonsuit upon the charge of contributing to the delinquency of Karen Torpey.

This evidence was sufficient to allow the jury, but not compel it, to conclude that Britton Oxidine did, in fact, contribute to the truancy, waywardness and uncontrollable conduct of Karen Torpey.

Interfering with an officer:

[11] The evidence shows that when the officer attempted to hold Karen Torpey as she ran from the house, the defendant Marvin Sparrow pushed the officer and tried to prevent him from getting to Karen. When Marvin was arrested, his wife, Kathy, tried to pull him away from the officers and when this failed she resorted to kicking the officer as he went out the door. The appellants argue that these acts were not interfering with an officer in the performance of his duty since at the time they occurred the petition had already been served on Karen Torpey. This argument has a hollow ring since the act of serving the process did not terminate, in and of itself, the duty of the officers. They were under a duty to take Karen

from the house and into their custody. She was attempting to evade the officers when the defendants intervened. Clearly, this evidence was sufficient to raise an inference that the defendants, Kathy and Marvin Sparrow were attempting to obstruct the officers in the performance of their duty. The trial court was correct in overruling their motion for judgment as of nonsuit as to this charge.

[12] As their final assignment of error the defendants allege that the trial court committed error in denying their motion to have the court reporter record the State's closing argument to the jury, thereby impairing their statutory and constitutional rights to judicial review. The motion was made after defendants' counsel had argued the case to the jury. The court, in the exercise of its discretion, denied the motion. The defendants did not object to any portion of the solicitor's argument during the trial, nor does the record on appeal point out any portion of the argument which they contend to have been prejudicial.

[13, 14] It may be appropriate to point out that there are rigid rules governing the requirements for the record on appeal. It is not a requirement of these rules that the arguments of counsel be included in the record on appeal. Rule 19(a), Rules of Practice in the Court of Appeals of North Carolina. Compliance with these rules affords all parties adequate appellate review. When an attorney makes improper argument to the jury, it is the duty of the presiding judge to correct the transgression upon objection by the opposing attorney or *ex mero motu*. *Cuthrell v. Greene*, 229 N.C. 475, 50 S.E. 2d 525 (1948). Where, as here, there are no objections by the opposing attorney, and the trial judge has found no impropriety, we can but assume there was no improper argument.

[12] The burden is on the appellant to show that he was prejudiced by the argument; moreover, the burden is on the appellant to make up the record on appeal. If he contended that the solicitor made improper argument he could have called it to the attention of the trial judge during the trial, or he could have included the remarks of the solicitor in the record on appeal himself. We know of no statute or rule requiring that the argument of counsel be recorded. This assignment of error is without merit.

The result is: As to the defendant Marvin Sparrow, on the charge of contributing to the delinquency of a minor — Reversed. As to the defendant Katherine Sparrow on the charge of contributing to the delinquency of a minor — Reversed. As to the defendant Marvin Sparrow on the charge of interfering with an officer — No error. As

to the defendant Katherine Sparrow on the charge of interfering with an officer — No error. As to the defendant Britton Oxidine on the charge of contributing to the delinquency of a minor — No error.

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

LENORE HELLER v. ALFRED HELLER AND THEODORA HELLER GERTNER

No. 693SC550

(Filed 31 December 1969)

1. Descent and Distribution § 1— intestate share of surviving spouse

Where plaintiff's husband died intestate survived by two children, plaintiff, as surviving spouse, became entitled to one-third of the personal property and a one-third undivided interest in the real property in her husband's estate. G.S. 29-14(2).

2. Husband and Wife § 1— property of married persons — nature and rights

The real and personal property of any married person in this State, acquired before or after marriage, remains the sole and separate property of such married person and may be devised, bequeathed and conveyed by the married person subject to regulations and limitations prescribed by the General Assembly. G.S. 52-1.

3. Descent and Distribution § 1— intestate succession — right of spouse — conveyance of separate property — limitations

Insofar as concerns any rights which the spouse of a married person might acquire by virtue of G.S. 29-14, the General Assembly has prescribed no regulation or limitations relating to the conveyance during lifetime by such married person of his or her separate real or personal property.

4. Descent and Distribution § 1— intestate succession — right of surviving spouse — conveyance of separate real property during lifetime of deceased spouse

Deed by plaintiff's husband, which was executed while he and plaintiff were living together and which conveyed his separate real property to his children by a prior marriage, was effective to convey title to the children free from any claims of plaintiff under statute defining intestate share of surviving spouse. G.S. 29-14.

5. Dower and Curtesy §§ 1, 9— abolition — limitations on present-day conveyances by spouses

Although dower and curtesy, as such, have been abolished in this State, the General Assembly has prescribed regulations and limitations on

the right of a married person to convey his or her real property free from the elective life estate provided for his or her spouse by G.S. 29-30.

6. Descent and Distribution § 1— intestate succession — rights of widow — conveyance by husband of separate realty — fraud — election of life estate

In an action by plaintiff, a widow, to set aside a deed executed by plaintiff's husband, which conveyed his separate realty to his children of a prior marriage, plaintiff's allegations that the conveyance was without her knowledge or joinder and was an attempt by her husband and the defendants to defraud her of her elective life estate in the realty, *held* ineffectual to state a cause of action, where (1) plaintiff would have been entitled to her elective life estate, regardless of fraud, if she had made an election in the time and manner prescribed by statute, and (2) plaintiff's failure to make an election within the required twelve months after the death of her husband effectively terminated any interest she might have had in the realty. G.S. 29-30(c)(2).

7. Descent and Distribution § 1— election of life estate — widow's timely election — pending litigation

Where widow's right to make election of life estate in deceased husband's realty expired through her failure to make timely election within twelve months after his death, an action by the widow, commenced after time for election had expired, to declare void a deed executed by her husband which conveyed the husband's separate realty to his children of a prior marriage, *held* not to constitute "pending" litigation within the meaning of the statute providing that election of life estate may be made within a reasonable time by order of superior court clerk if litigation affecting the estate is pending. G.S. 29-30(c)(4).

8. Descent and Distribution § 1— intestate succession — rights of widow — action to set aside husband's conveyance — fraud

In an action by plaintiff, a widow, to set aside a deed conveying realty from plaintiff's husband to his children of a prior marriage, plaintiff's allegations (1) that her husband's conveyance of his separate realty to his children, the defendants, was made without consideration and without her knowledge or joinder, (2) that two months after the conveyance her husband abandoned her without just cause and went to live with the defendants, and (3) that the conveyance was an attempt by her husband and the defendants to defraud and deprive plaintiff of her marital rights in the realty, *held* insufficient to state a cause of action for fraud.

9. Fraud § 9— pleading

To characterize a transaction as fraudulent is of no avail unless the facts which make it so are particularly alleged.

APPEAL by plaintiff from *Fountain, J.*, 16 September 1969 Session of PITT Superior Court.

This is a civil action to have a deed declared void and to obtain an accounting for rents and profits. In her complaint filed 2 August 1966, plaintiff alleged:

On 1 December 1963 plaintiff was married to Samuel Heller and remained his wife until his death on 16 April 1965. On 10 August 1964 Heller, while living with plaintiff, conveyed by deed certain described real property in Pitt County, N. C., to defendants, who are his only living issue by a prior marriage. Plaintiff is informed and believes that this conveyance was without consideration and "was an attempt by the said Samuel Heller and the defendants to defraud and deprive plaintiff of her marital rights in said property. Said conveyance was without plaintiff's knowledge nor has plaintiff since ratified or otherwise joined in said conveyance." On 14 October 1964 Heller abandoned plaintiff without justification and went to live with the defendants. On 16 April 1965 Heller died intestate, a citizen of North Carolina. No legal representative has been appointed to administer his estate. Plaintiff has made repeated demands upon the defendant "for possession of her one-third undivided interest in said property," but defendants have refused to vacate. Plaintiff prayed for judgment declaring the deed void "insofar as it purports to encumber the plaintiff's one-third undivided interest in the land described therein," and for an accounting and one-third of the rents and profits on the premises from 16 April 1965.

Defendant demurred to the complaint for failure to state a cause of action in that: (1) it does not affirmatively appear from the allegations of the complaint that the plaintiff exercised her marital rights as provided in G.S. 29-30, and (2) the complaint fails to set up with particularity the facts of any alleged fraud.

The demurrer was sustained and plaintiff appealed.

Harrell & Mattox, by Fred T. Mattox for plaintiff appellant.

Lewis & Rouse, by Robert D. Rouse, Jr., for Alfred Heller, defendant appellee.

PARKER, J.

Upon the death of a married person intestate, the surviving spouse may acquire either of two alternative rights in the estate of the decedent: first, the surviving spouse may receive the share as specified in G.S. 29-14 (or in G.S. 29-21 if applicable); or second, in lieu of such share, if timely election is made in the manner specified in G.S. 29-30(c), the surviving spouse shall be entitled to take the life estate provided for in G.S. 29-30.

[1-4] In the present case under the facts alleged in the complaint, which on demurrer are to be taken as true, plaintiff's husband died

intestate survived by two children. G.S. 29-14(2) applied and plaintiff, as surviving spouse, became entitled upon the death of her husband to one-third of the personal property and a one-third undivided interest in the real property. For purposes of G.S. 29-14 her husband's estate would not include, however, property which he had conveyed away prior to his death, even though she had not joined in the conveyance. The real and personal property of any married person in this State, acquired before or after marriage, remains the sole and separate property of such married person, and "may be devised, bequeathed and conveyed by such married person subject to such regulations and limitations as the General Assembly may prescribe." G.S. 52-1. Subject to such regulations and limitations, "every married person is authorized to contract and deal so as to affect his or her real and personal property in the same manner and with the same effect as if he or she were unmarried." G.S. 52-2. Insofar as concerns any rights which the spouse of a married person might acquire by virtue of the provisions of G.S. 29-14, the General Assembly has prescribed no regulation or limitations relating to the conveyance during lifetime by such married person of his or her separate real or personal property. Therefore, the deed described in the complaint by which plaintiff's husband conveyed his separate real property to his two children was effective to convey title to them, free from any claim of plaintiff under G.S. 29-14, and her complaint alleges no cause of action based on any rights provided her under that statute.

[5] "Dower, as such, has been abolished in North Carolina, but G.S. 29-30 preserves to a surviving spouse the benefits of the former rights of dower and curtesy." *Smith v. Smith,* 265 N.C. 18, 30, 143 S.E. 2d 300, 308. To protect these rights, the General Assembly has prescribed regulations and limitations on the right of a married person to convey his or her real property free from the elective life estate provided for his or her spouse by G.S. 29-30. By express terms of that statute this estate is:

> "a life estate in one third in value of all the real estate of which the deceased spouse was seized and possessed of an estate of inheritance at any time during coverture, except that real estate as to which the surviving spouse:
>
> "(1) Has waived his or her rights by joining with the other spouse in a conveyance thereof, or
>
> "(2) Has released or quitclaimed his or her interest therein in accordance with G.S. 52-10, or

"(3) Was not required by law to join in conveyance thereof in order to bar the elective life estate, or

"(4) Is otherwise not legally entitled to the election provided in this section."

[6] When plaintiff's husband conveyed his land to his two children, in order for plaintiff to have waived her elective life estate as provided for in G.S. 29-30 it would have been necessary for plaintiff herself to execute the conveyance thereof, "and due proof or acknowledgment thereof must be made and certified as provided by law." G.S. 39-7(a). Plaintiff alleged that her husband's conveyance was "without plaintiff's knowledge nor has plaintiff since ratified or otherwise joined in said conveyance." Therefore, accepting as true her further allegation that her husband's separate conveyance "was an attempt by the said Samuel Heller and the defendants to defraud and deprive plaintiff of her marital rights in said property," under the other facts alleged in the complaint the attempt was wholly ineffectual. No matter what fraudulent intent her husband and the two defendants may have harbored, under the facts alleged it was simply impossible for them to have impaired plaintiff's elective rights provided her under G.S. 29-30. If, following her husband's death, she had elected in apt time and in the manner specified in the statute, she would have been entitled to receive all rights provided for her under G.S. 29-30 entirely unaffected by his separate deed to defendants which she now attacks. The ineffectual attempt to defraud which plaintiff here alleged gave rise to no cause of action. None was necessary to protect plaintiff's rights under G.S. 29-30.

Plaintiff alleged her husband died intestate on 16 April 1965 and that no legal representative has been appointed to administer his estate. Therefore, G.S. 29-30(c)(2) controls. This section provides that the election of the surviving spouse to take the elective life estate shall be made "within twelve months after the death of the deceased spouse if letters of administration are not issued within that period." Subsection (h) of that statute provides:

> "If no election is made in the manner and within the time provided for in subsection (c) the surviving spouse shall be conclusively deemed to have waived his or her right to elect to take under the provisions of this section, and any interest which the surviving spouse may have had in the real estate of the deceased spouse by virtue of this section shall terminate."

This action was commenced and the complaint filed on 2 August 1966, more than twelve months after the death of plaintiff's hus-

band. The complaint contains no allegation that plaintiff has ever elected to take the life estate provided for her by G.S. 29-30.

[7] Plaintiff's contention that she still has the right to make the election because of the language of G.S. 29-30(c)(4) is without merit. That subsection provides that if litigation that affects the share of the surviving spouse in the estate is pending, then the election may be made within such reasonable time as may be allowed by written order of the clerk of superior court. Plaintiff points to the case presently before us as the "pending" litigation affecting her share in her husband's estate. This ignores the fact that this case was not commenced and therefore was not pending at the time her right to make the election otherwise expired under G.S. 29-30(c)(2). By failing to take timely action her right to make the election expired. She could not thereafter revive it by the simple expedient of bringing an action purporting to affect her share in her husband's estate.

[8, 9] Finally, the complaint alleges no *facts* to support plaintiff's charge of fraud on the part of the defendants. Plaintiff's allegation that her husband's conveyance to the defendants, who were his children and therefore natural objects of his bounty, was made without consideration and at a time when her husband was living with her but without her knowledge or joinder, gives rise to no cause of action. Nor does the additional allegation that two months after the conveyance her husband abandoned her without just cause and went to live with the defendants, serve to state any cause of action against the defendants. The broadside allegation, made on information and belief, that the conveyance was "an attempt" by her husband and the defendants "to defraud and deprive the plaintiff of her marital rights in said property," added nothing of legal significance. As noted above, the attempt, if made, was legally ineffective; and to characterize a transaction as fraudulent is of no avail unless the facts which make it so are particularly alleged. "Whatever may be the facts beyond the complaint, the pleading will be of no avail unless it sets up with sufficient particularity facts from which legal fraud arises or, where proof of actual fraud is necessary to relief, specifically alleges the fraud — that is, the fraudulent intent — and particularizes the acts complained of as fraudulent so that the court may judge whether they are at least *prima facie* of that character." *Development Co. v. Bearden,* 227 N.C. 124, 127, 41 S.E. 2d 85, 87.

Plaintiff seeks to rely on *Everett v. Gainer,* 269 N.C. 528, 153 S.E. 2d 90, and other cases holding that a voluntary conveyance or one made for a grossly inadequate consideration by a grantor who fails to retain assets fully sufficient to pay his then existing debts

is fraudulent as to existing creditors of the grantor and may be set aside on suit of such a creditor without a showing of actual fraud on the part of the grantee. These cases are not here apposite. Plaintiff did not occupy the position of a creditor of her husband when the conveyance here attacked was made. *Oil Co. v. Richardson,* 271 N.C. 696, 157 S.E. 2d 369, is distinguishable. In that case the wife, who was in possession of her husband's land and was defendant in an ejectment action brought by his grantee, alleged that she had already obtained an order for alimony *pendente lite* against her husband when he executed the voluntary conveyance to the plaintiff, and that this was executed by the husband and received by the plaintiff for the purpose of defeating, delaying and defrauding the wife's rights under the alimony order. The court held these allegations sufficient to state a valid defense and counterclaim to plaintiff's ejectment suit against her. In the case presently before us there is no allegation that plaintiff ever obtained any award of alimony against her husband or that he was called upon and failed to furnish her support. Nor is there any allegation that he failed to retain other assets sufficient to discharge his obligations.

The judgment sustaining the demurrer to plaintiff's complaint is Affirmed.

CAMPBELL and GRAHAM, JJ., concur.

JOHN A. BARRINGER v. L. H. WEATHINGTON AND BILLIE WEATHINGTON

No. 6912SC25

(Filed 31 December 1969)

1. Judgments § 35—

The plea of *res judicata* must be founded upon an adjudication on the merits and may be maintained only where there is identity of parties, subject matter and issues.

2. Judgments §§ 37, 42— judgment of dismissal based on referee's report — insufficiency of plaintiff's evidence — res judicata

In this action to recover damages for the removal of timber from land allegedly owned by plaintiff, to remove the cloud of defendant's adverse claim from plaintiff's title, and to declare plaintiff owner of the land, the trial court did not err in the denial, prior to hearing plaintiff's evidence, of defendants' plea of *res judicata* based upon judgment entered by

the superior court dismissing an action brought by plaintiff which involved identical parties, subject matter and issues, where the court in dismissing the prior action adopted the report of a referee in a compulsory reference, entered after presentation of plaintiff's evidence, concluding that plaintiff had failed to prove title to the land, there having been no adjudication on the merits since the judgment dismissing the prior action was equivalent to a nonsuit for the insufficiency of plaintiff's evidence, and a plea of *res judicata* based on a prior judgment of compulsory nonsuit being sustainable only when the allegations *and* evidence in the two actions are substantially the same.

APPEAL by defendants from *Canaday, J.*, 26 August 1968 Civil Session of CUMBERLAND Superior Court.

This is a civil action commenced 21 June 1968 in which plaintiff seeks to recover damages for the unlawful cutting of timber on a described tract of land which plaintiff alleges is owned by him, to remove the cloud of defendants' adverse claim from plaintiff's title, and to obtain judgment declaring plaintiff the owner and entitled to possession of the land. Defendants denied plaintiff's ownership of the land, alleged ownership in themselves, and in a further answer alleged as a plea in bar that the matter of ownership had already been adjudicated adversely to plaintiff. In this regard defendants alleged: that on 16 February 1962 plaintiff had commenced a processioning proceeding to establish boundary between plaintiff and defendants and others; that in that proceeding defendants had answered, denying plaintiff's title and alleging title in themselves; that the court had ordered a compulsory reference; that the referee conducted hearings at which evidence for the plaintiff was presented; that the referee filed his report making findings of fact on the basis of which he concluded as a matter of law that plaintiff had failed to prove title to the land "under any of the methods as required by law"; that the referee recommended plaintiff's action be nonsuited; and that on 25 March 1968 judgment was entered by the superior court adopting the referee's findings of fact and conclusion of law and dismissing plaintiff's action. Copies of the pleadings, orders, record of the hearing before the referee, report of the referee, and judgment in the prior action were attached to defendants' answer in support of their plea in bar.

The plaintiff and defendants stipulated that the parties in the prior action were the same for the purposes presented in this case (except there was one additional defendant in the prior action) and that the land involved in the present action is part of the land described in the petition in the prior proceeding as being owned by the petitioner.

Upon hearing on the plea in bar, the court overruled defendants' motion to dismiss the present action as *res judicata,* and defendants appealed.

Williford, Person & Canady by N. H. Person for defendant appellants.

Chambliss & Paderick by Clifton W. Paderick for plaintiff appellee.

PARKER, J.

The sole question presented is whether the court erred in refusing to sustain defendants' plea of *res judicata.*

[1, 2] The plea of *res judicata* must be founded upon an adjudication on the merits and may be maintained only where there is identity of parties, subject matter, and issues. 5 Strong, N. C. Index 2d, Judgments, § 35, p. 63. Here, identity of parties and subject matter has been stipulated and the validity of plaintiff's title was at issue in the prior proceeding as it is in this one. The only question remaining is whether the prior adjudication was on the merits. In this connection the case on appeal contains a stipulation of the parties that the referee's report in the prior action was entered at the conclusion of plaintiff's evidence, that the evidence which had then been presented by the plaintiff was insufficient to prove title to the land in question, and that the referee's conclusion that the plaintiff had failed to prove title and his recommendation that the prior action should be dismissed were "supported by the insufficiency" of plaintiff's evidence. It is, therefore, clear that the judgment dismissing plaintiff's action in the prior case was equivalent to a nonsuit for insufficiency of plaintiff's evidence.

> "It is settled law in this jurisdiction that when a prior action is nonsuited on the ground of insufficiency of plaintiff's evidence, a plea of *res judicata* on the ground of a prior judgment of compulsory nonsuit can be sustained when, and only when, the allegations and evidence in the two actions are substantially the same. A plea of *res judicata* ordinarily cannot be determined on the pleadings in the two actions, the judgment of compulsory nonsuit entered in the prior action on the ground of insufficiency of the evidence, the record of evidence in the prior action on appeal, and the decision of the Supreme Court in respect to the prior action. A plea of *res judicata* can be determined only after the evidence in the second action is presented." *Powell v. Cross,* 268 N.C. 134, 150 S.E. 2d 59.

The trial court was, therefore, correct in denying defendants' plea in the present case prior to hearing plaintiff's evidence. Only after plaintiff's evidence is presented in this action will it be possible to determine if the evidence in the two actions is substantially identical.

Coburn v. Timber Corporation, 260 N.C. 173, 132 S.E. 2d 340, relied on by appellants, is distinquishable. In that case the Supreme Court noted that both parties had presented extensive evidence as to title in the prior proceeding before the referee, and the Court stated (p. 176) "[t]he report of the referee, approved by the judge, is equivalent to an express jury finding that plaintiffs were not the owners of the land in controversy. They are now estopped as to Timber Corporation to assert that they do own the land." In the case now before us the record clearly establishes that the report of the referee in the prior processioning proceeding was not equivalent to an express jury finding that plaintiff was not the owner of the land in controversy; all that the referee found was that plaintiff's evidence had been insufficient to establish his title.

Affirmed.

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

STATE OF NORTH CAROLINA v. SIDNEY WILLIAM RAY, JR.
No. 6914SC506

(Filed 31 December 1969)

1. Criminal Law § 23— plea of guilty — inquiry by trial court

The fact that the trial court accepted defendant's plea of guilty without first inquiring of the defendant if he knew the possible consequences of his plea, etc., does not constitute error.

2. Criminal Law § 146— appeal from plea of guilty — scope of review

Where defendant enters a plea of guilty, his appeal presents for review only whether error appears on the face of the record proper.

3. Criminal Law § 127— motion in arrest of judgment — defect on face of record

A judgment in a criminal prosecution may be arrested on motion duly made when, and only when, some fatal error or defect appears on the face of the record proper.

4. Criminal Law § 127— motion in arrest of judgment

Defects which appear only by aid of the evidence cannot be the subject of a motion in arrest of judgment.

5. Criminal Law §§ 18, 127— jurisdiction of superior court — appeal from district court — arrest of judgment

Defendant's motion in arrest of judgment in the superior court on the ground that more than 10 days had elapsed from the date of his trial in the district court until the time of his appeal to the superior court and that the superior court consequently had no jurisdiction of the case, *held* properly denied, where the date of the appeal entry in the district court is missing and the record does not otherwise show on its face that the notice of appeal was not given in apt time.

APPEAL by defendant from *Ragsdale, S.J.*, 9 May 1969 Session, DURHAM Superior Court.

On 19 June 1968 defendant was charged with operating a motor vehicle on the public highways of the State of North Carolina at a speed of 75 miles per hour in a 55 miles per hour zone.

The defendant was tried in district court on 12 September 1968, was found guilty and was fined $15.00 and costs. Upon his request, the defendant was given until the next day to comply with the judgment. The defendant not having complied with the judgment, on 20 September 1968 a capias was issued from the district court and bond set at $100.00. There was also an appeal bond of $100.00 for defendant's appearance in superior court, the bond being signed on 24 September 1969.

Upon his appeal to the superior court, the defendant in person and through his privately employed counsel tendered a plea of guilty of speeding 65 miles per hour in a 55 miles per hour zone, which plea was accepted by the State. He received a jail sentence of 15 days which was to be served on five successive weekends from 6:00 p.m. on Friday until 7:00 a.m. on Monday, and was ordered to pay the costs of the action. Thereafter the defendant made a motion in arrest of judgment contending that the case was one properly for the district court in that more than 10 days had elapsed from the date of his trial in district court until the time of his appeal to the superior court and that the superior court was therefore without jurisdiction.

The motion being denied, the defendant appealed.

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

Arthur Vann for defendant appellant.

VAUGHN, J.

[1] The defendant brings forward two assignments of error by this appeal, the first being that the superior court erred in accept-

ing the defendant's plea of guilty and in thereafter sentencing the defendant to an active jail sentence without first inquiring from the defendant if he knew the possible consequences of his plea and whether he had understandingly and knowingly entered the plea. The defendant did not make a motion to withdraw his plea of guilty in the superior court. Motions of such character are addressed to the sound discretion of the trial court. *State v. Morris,* 2 N.C. App. 611, 163 S.E. 2d 539. There is no contention that the plea was not voluntarily made, that the defendant did not understand what he was doing when the plea was entered, or that his attorney was not authorized to enter such a plea. It is to be noted that defendant is represented on the appeal by the same competent attorney whom he consulted after receiving the citation on 19 June 1968, and who represented him in the superior court. On the authority of *State v. Woody,* 271 N.C. 544, 157 S.E. 2d 108; *State v. Abernathy,* 1 N.C. App. 625, 162 S.E. 2d 114; and *State v. Miller,* 3 N.C. App. 227, 164 S.E. 2d 406, this assignment of error is overruled.

The defendant's remaining assignment of error is the denial of his motion in arrest of judgment, the defendant contending that notice of appeal from his trial in the district court on 12 September 1968 was not given until 24 September 1968.

[2-4] Where the defendant enters a plea of guilty his appeal presents for review only whether error appears on the face of the record proper. *State v. Dawson,* 268 N.C. 603, 151 S.E. 2d 203. A judgment in a criminal prosecution may be arrested on motion duly made when, and only when, some fatal error or defect appears on the face of the record proper. Defects which appear only by aid of the evidence cannot be the subject of a motion in arrest of judgment. 3 Strong, N.C. Index 2d, Criminal Law, § 127, p. 43.

[5] The record does not show on its face that notice of appeal from the district court was not given in apt time. The record does disclose the following. A warrant was duly issued and was returned before the District Court of Durham County. The warrant charged a criminal offense. The defendant was tried thereon, found guilty and judgment was duly pronounced. The defendant appealed and posted bond for his appearance in the Superior Court of Durham County, where the case was docketed for trial. This gave the superior court jurisdiction and the right to proceed to trial on the original warrant. *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738. In the present case only the date of the appeal entry is missing. In *State v. Hill,* 223 N.C. 753, 28 S.E. 2d 99, the record proper did not show any appeal entries in the municipal court. In that case, the Attorney General's

motion to dismiss the appeal for lack of jurisdiction was denied because it appeared from the record that the action originated in the municipal court and on appeal was tried in the superior court. A similar result was reached in *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548. The defendant's motion in arrest of judgment was properly denied.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. RICHARD DEWAYNE MCCLOUD

No. 6918SC520

(Filed 14 January 1970)

1. Criminal Law § 75— admissibility of confession — findings by court on voir dire

Testimony by police officers concerning an oral confession made by defendant was properly admitted where the trial court found upon competent evidence presented by the State on *voir dire* that prior to making any statement defendant was warned of his constitutional rights as required by *Miranda,* and that his statements to police officers were freely, understandingly and voluntarily made without duress, promise or hope of reward offered or threat made against him.

2. Criminal Law § 75— admissibility of confession — unlawful initial arrest

Defendant's contention that his confession was rendered inadmissible because his initial arrest was unlawful is without merit, defendant having been in lawful custody at the time he confessed since he had been served with warrants charging him with certain of the crimes for which he was tried, and every statement made by a person in custody as a result of an illegal arrest not being *ipso facto* involuntary and inadmissible.

3. Criminal Law § 76— admissibility of confession — delay of preliminary hearing — excessive bail

Defendant's contention that the trial court was required to find that his confession was coerced because he was being held under excessive bail and his preliminary hearing was delayed is without merit, where no evidence introduced on *voir dire* or at any other time during the trial would indicate that defendant's confession was the product of any requirement of excessive bail or of any delay in granting him a preliminary hearing.

4. Criminal Law § 76— admissibility of confession — voir dire hearing — necessity for findings of fact

Where there is no conflict in the evidence presented at a *voir dire* hearing to determine the admissibility of a confession, it is not essential, though it is desirable, that the judge make findings of fact.

5. Criminal Law § 76— admissibility of confession — uncontradicted voir dire evidence — sufficiency of court's findings

Where the trial court made detailed findings on *voir dire* as to the giving of *Miranda* warnings to defendant prior to his confession, it was not essential that the court make further detailed findings as to all of the other circumstances of the interrogation in the absence of any conflict in the *voir dire* evidence, the findings made by the court being sufficient, when considered with other facts established by the uncontradicted *voir dire* evidence, to support the ruling admitting testimony of the confession.

6. Criminal Law §§ 33, 42; Burglary and Unlawful Breakings § 10— articles found in car occupied by another — admissibility against defendant

In this prosecution for possession of burglary tools, safecracking, breaking and entering and larceny, defendant's connection with certain tools and other articles found in a car owned and operated by another person was sufficiently established to render them admissible against defendant, where defendant's confession placed him in the car and in joint possession of the articles with the car's owner during the time the crimes were committed.

7. Criminal Law § 84; Searches and Seizures § 1— search without a warrant — articles in plain view — search incident to lawful arrest

In this prosecution for possession of burglary tools, safecracking, breaking and entering and larceny, tools and other articles admitted in evidence were not gained by an illegal search and seizure without a warrant, where officers observed most of the tools on the floor of a car, the officers immediately placed the owner and sole occupant of the car under arrest for unlawful possession of burglary tools, and as an incident to such arrest the officers further searched the car and discovered stolen money and other articles in the glove compartment, no search warrant being required for articles in plain view or for a search incident to a lawful arrest.

8. Criminal Law §§ 34, 169— evidence indicating other offenses committed by defendant — harmless error

In this prosecution for possession of burglary tools, safecracking, breaking and entering and larceny, the trial court did not commit prejudicial error in refusing to strike testimony of a police officer, relating to interrogation of defendant, that one of the officers told defendant that "he wanted to talk to him with reference to some breakings and enterings we had been having in the city, and also about some money and coins that were found in the motel room where he was arrested," although the testimony should have been stricken as possibly indicating other offenses for which defendant was not being tried, since refusal to strike the testimony could not have affected the outcome of the trial.

9. Criminal Law § 86— prior offenses — cross-examination of defendant

For purposes of impeachment, defendant who takes the stand is subject to cross-examination as to convictions and indictments for prior criminal offenses.

10. Constitutional Law § 30— speedy trial — delay between arrest and trial

Defendant was not denied the right of a speedy trial by a delay of approximately three and one-half months between his arrest and trial.

11. Burglary and Unlawful Breakings § 9— unlawful possession of burglary tools — elements of offense

In a prosecution for unlawful possession of burglary tools in violation of G.S. 14-55, the burden is on the State to show (1) that the person charged was found having in his possession an implement or implements of housebreaking enumerated in or which come within the meaning of the statute, and (2) that such possession was without lawful excuse.

12. Burglary and Unlawful Breakings § 10— unlawful possession of burglary tools — instructions — burden of proving lawful excuse

In this prosecution for unlawful possession of burglary tools, the trial court committed prejudicial error in instructing the jury that defendant had the burden of proving lawful excuse, notwithstanding the court correctly placed the burden of proof on the State in other portions of the charge.

APPEAL by defendant from *Collier, J.*, 7 July 1969 Session of GUILFORD Superior Court.

Defendant was tried on his pleas of not guilty to separate bills of indictment charging him with (1) possession of burglary tools, (2) safecracking, and (3) breaking and entering, larceny, and receiving stolen property. The cases were consolidated for trial. The State's evidence showed: On Friday morning 28 March 1969 officials of the Florida Street Baptist Church in Greensboro, N. C. discovered that the church building had been broken into during the preceding night and the door on the office safe therein had been forced open. When the safe had been closed on the preceding afternoon, it had contained approximately $50.00 in cash. Earlier on the morning of 28 March 1969, at approximately 3:30 a.m., two Greensboro police officers in a police patrol car observed a car occupied by two young white males stopped at an intersection. Deciding to check it, the police car made a U-turn and got in behind it. The car under investigation then proceeded through the intersection on a red light and accelerated to a high rate of speed. The officers pursued the car for several blocks until it slowed down abruptly, when the occupant on the passenger's side jumped out and ran, making good his escape. The

officers were unable to identify this person but did observe him carry some article from the car, which he dropped about 30 feet from the car. This was found to be a metal box containing work gloves, a pistol holster and belt, and various tools. The driver of the car, one Jack Jordan, was apprehended and placed under arrest for running through the red light. Jordan was later found to be the owner of the car. The officers observed on the floorboard of the car two flashlights, a metal pry bar, a .22 caliber pistol, a small crowbar, a large screwdriver, and a pair of work gloves. After observing these tools, they informed Jordan he was under arrest at that time for possession of burglary tools as well as for running the red light. One of the officers then searched the glove compartment of the car and found therein an envelope containing $47.60. Part of this money was wrapped in a blue container on which were stamped the words "Florida Street Baptist Church."

At about 7:00 a.m. on the same morning, 28 March 1969, defendant was arrested at a Greensboro motel where he was registered under an assumed name and occupied room 108 with his girl friend. Jordan and his girl friend had occupied room 106 at the same motel. Defendant was initially arrested without a warrant on a charge of occupying the room for immoral purposes. Upon his arrest, defendant was taken to the police department and questioned concerning the break in at the Church and other crimes, but denied any guilt. On the same day, 28 March 1969, defendant was served with warrants charging him with possession of burglary tools and breaking and entering, larceny and receiving, in connection with the break in at the Church. The officers testified that they next interrogated defendant on the following Monday morning, 31 March 1969, and at that time he stated to them that he and Jordan had broken into the Church, forced open the safe, had taken about $50.00 out of the safe, which was the money found in the glove compartment of Jordan's car, and that when the police officers had followed them, he had jumped out and run and had then gone back to the motel. After this interrogation defendant was served with a warrant charging the offense of safecracking.

The defendant testified in his own behalf. He admitted that he and his girl friend had come with Jordan and the latter's girl friend from South Carolina and had registered at the motel, but he denied any knowledge of the crimes for which he was charged or that he had made any admissions to the police officers.

The jury found defendant guilty on all charges. Judgments were imposed sentencing defendant to prison for a term of ten years on

the charge of possession of burglary tools, for a term of ten years for breaking and entering, for a term of ten years for larceny, and for a term of not less than 25 nor more than 40 years for safecracking, all sentences to run concurrently. From these judgments, defendant appealed.

Attorney General Robert Morgan, Staff Attorney (Mrs.) Christine Y. Denson, and Staff Attorney T. Buie Costen, for the State.

Forrest E. Campbell for defendant appellant.

PARKER, J.

[1] Defendant assigns as error the admission in evidence of testimony by the police officers concerning his oral confession. This testimony was admitted only after the court had held a *voir dire* examination into the circumstances under which defendant's confession had been made. The defendant did not testify at this *voir dire* examination, and there was no conflict in the evidence presented. At the conclusion of the *voir dire,* the court found as a fact that prior to making any statement the defendant was properly warned of his constitutional rights as required by *Miranda,* making detailed findings in this regard, and that his statements to the police officers had been freely, understandingly, and voluntarily made without duress, promise or hope of reward offered or threat made against him. These findings are fully supported by the evidence presented at the *voir dire* and in turn support the trial court's ruling admitting in evidence the testimony as to defendant's confession.

[2] Defendant's argument that his confession was rendered inadmissible because his initial arrest was unlawful is without merit. On the same day he was first taken into custody he was properly served with warrants charging him with certain of the crimes for which he was tried, and at the time he confessed he was in lawful custody. Furthermore, even if it be conceded that his initial arrest was illegal ". . . every statement made by a person in custody as a result of an illegal arrest is not *ipso facto* involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility." *State v. Moore,* 275 N.C. 141, 153, 166 S.E. 2d 53, 62.

[3] Nor is there merit in defendant's argument that the trial court was required to find that his confession was coerced because he was being held under excessive bail and his preliminary hearing was de-

layed until Tuesday, 1 April 1969. No evidence introduced at the *voir dire* or at any other time during the trial would indicate that defendant's confession was the product of any requirement of excessive bail or of any delay in granting him a preliminary hearing. Defendant himself did not so contend when he testified in his own defense; rather, he simply denied that he had ever made any confession.

[4, 5] There is also no merit in defendant's contention that the judge's findings on the *voir dire* were not sufficiently complete and were more in the nature of conclusions than findings of fact. Since there was no conflict in evidence at the *voir dire,* it was not essential, though certainly it was desirable, that the judge make findings of fact. *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841. In this case the judge did make detailed findings concerning the prior warnings which had been given defendant as to his *Miranda* rights. In the absence of any conflict in the evidence at the *voir dire* it was not essential that he make further detailed findings as to all of the other circumstances of the interrogation. The findings of fact he did make were supported by the evidence, and these findings, when considered with the other facts established by the uncontradicted evidence at the *voir dire,* fully support his ruling.

[6, 7] Defendant assigns as error the admission in evidence over his objection of the tools and other articles found by the police in the car owned and operated by Jordan. In this connection he contends: (1) There was no sufficient evidence to connect him with these articles to make them admissible in evidence against him, and (2) the articles were obtained by an illegal search and for that reason were not admissible. There is no merit to this assignment of error. On the first point, defendant's confession placed him in the car and in joint possession with Jordan of the articles involved during the time the crimes for which he was tried were committed. This sufficiently connected defendant with the articles to make them admissible in evidence against him. As to the second point, most of the tools and other articles involved were observed by the officers in plain view on the floor of the car. As to these, no search warrant would have in any event been required. *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25; *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394. Upon observing these articles, the officers immediately placed Jordan under arrest for unlawful possession of burglary tools. A further search conducted at that time and as an incident to the arrest of Jordan revealed the stolen money and other articles in the glove

compartment of the car. Since the search was clearly incidental to the lawful arrest of Jordan, who was the owner and present in possession of the car, no search warrant was required and the search was legal even as to him. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544; Annotation, 19 A.L.R. 3rd 727. Even had the search been illegal as to Jordan, it is questionable if the defendant, who was not the owner or in possession of the car, had standing to raise any objection as to the manner of the search. Ordinarily "(t)he right to immunity from unreasonable searches and seizures is personal, and can be asserted only by him whose rights are violated." 47 Am. Jur. 2d, Searches and Seizures, § 11, p. 508. Since the search without a warrant here was in any event legal, it is not necessary for us to decide whether defendant would have had standing to take advantage of the exclusionary rule provided by G.S. 15-27 as now enacted.

[8, 9] Defendant's assignments of error 10 and 14, relating to admission in evidence of testimony as to other criminal offenses, are also without merit. Assignment No. 10, based on exception No. 37, was directed to the court's overruling of defendant's motion to strike made when a police officer, testifying for the State concerning the interrogation of defendant which had been made by the officers, stated that one of the officers had told defendant that "he wanted to talk to him with reference to some breaking and enterings that we had had here in the city, and also about some money and coins that was found in the motel room where he was arrested." The latter part of the statement was the only indication of any charge against defendant which might have been unconnected with the offenses for which he was being tried. While the motion to strike should have been granted, its refusal could hardly have affected the outcome of the trial. "A new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial or harmful, amounting to the denial of a substantial right." 1 Strong, N.C. Index 2d, Appeal and Error, § 47, p. 192. Defendant's assignment of error No. 14, based on his exceptions 43 and 44, related to questions asked by the solicitor of the defendant when the latter took the stand as a witness. For purposes of impeachment, defendant was subject to cross-examination as to convictions and indictments for prior criminal offenses. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310; *State v. Williams,* 272 N.C. 273, 158 S.E. 2d 85; Stansbury, N.C. Evidence 2d, § 112, p. 254. Absent a request that such evidence be restricted for purposes of impeachment, the failure to give such an instruction is not error. *State v. Williams, supra;* Stansbury, N.C. Evidence 2d, § 79, p. 174. In the present case the

trial judge, even without a request from defendant, did include such an instruction in the charge.

[10] There is no merit in defendant's contention that his rights have been violated by denial of a speedy trial. Defendant was arrested 28 March 1969 and was tried in July, 1969. The delay of approximately three and one-half months is to be contrasted with the four-year delay between issuance of arrest warrant and return of indictment which our Supreme Court found inexcusable in *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274.

We have examined all of defendant's remaining assignments of error and find them to be without merit except for assignment No. 21 which is based on defendant's exception No. 52. This related to the portion of the judge's charge to the jury concerning the case against defendant for possession of burglary tools without lawful excuse, a violation of G.S. 14-55. In this connection, the court charged:

> "Now, when a person is charged with possession of implements of housebreaking, the burden of proving lawful excuse is on the person so charged. That burden is discharged by the accused if he proves that the alleged implement of housebreaking, or capable of being used for that purpose, is a tool used by him in his trade or business."

[11, 12] In a prosecution for violation of G.S. 14-55 "the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute quoted above, and (2) that such possession was without lawful excuse." *State v. Godwin,* 269 N.C. 263, 266, 152 S.E. 2d 152, 154. While in other portions of the charge the trial judge correctly placed the burden of proof upon the State, the portion of the charge quoted above, in which the judge inadvertently placed a burden upon the defendant to prove lawful excuse, was prejudicial error, since it is impossible to know which portion of the charge was followed by the jury. This requires a new trial of the defendant in the case based on the indictment against him for unlawful possession of burglary tools.

The result is: As to the judgments in the cases for safecracking, breaking and entering, and larceny,

Affirmed.

As to the judgment in the case for possession of burglary tools,

New trial.

CAMPBELL and GRAHAM, JJ., concur.

E. RAY ETHERIDGE, ANCILLARY ADMINISTRATOR OF THE ESTATE OF GEORGE RAY BUSBY, JR., DECEASED v. NORFOLK SOUTHERN RAILWAY COMPANY

No. 691SC376

(Filed 14 January 1970)

1. Negligence § 35— contributory negligence — nonsuit

A motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom.

2. Automobiles §§ 95, 109— negligence imputed to owner-occupant — relinquishment of control of car — sufficiency of evidence

In a wrongful death action instituted by the administrator of the owner-occupant of an automobile against the defendant railroad for damages arising out of a grade-crossing collision, the contributory negligence of the driver is imputed to the owner-occupant and bars recovery by the administrator, unless there is evidence to show that the owner-occupant, prior to the collision, had relinquished the right to control the manner and method of using the automobile; the administrator's evidence that a few minutes before the collision occurred the owner-occupant had asked a passenger to take over the driving and that thereafter the owner-occupant did not direct the driver as to which road he should take at an intersection, but chose instead to talk to another passenger, *held* insufficient to support a jury finding that the owner-occupant had relinquished control of the automobile.

3. Automobiles §§ 95, 109— negligence imputed to owner-occupant

Negligence is imputed to the owner-occupant of an automobile when the owner had the legal right to control the manner in which the automobile was being operated.

APPEAL by defendant from *Parker, J.*, at the January 1969 Civil Session of CURRITUCK Superior Court.

This is an action for wrongful death brought by the ancillary administrator for the estate of George Ray Busby, Jr., deceased (Busby). Plaintiff alleged and introduced evidence showing that Busby died from injuries sustained in a collision between an automobile owned by Busby and in which he was riding and a train belonging to defendant at a grade crossing at Gregory in Currituck County on Sunday, 28 August 1960.

Briefly summarized, plaintiff's evidence pertinent to this appeal tended to show: Highway 1148 runs east and west and bisects defendant's railroad which runs north and south at near right angles in the village of Gregory, N. C. At the time of the collision — approximately 2:40 p.m. — Busby's automobile was traveling west and

defendant's train was traveling south. The automobile was being operated at the time by one Gallamore and Busby was riding in the front seat on the extreme right, four other people being in the car. All occupants of the car, with possible exception of one, were residents of Norfolk, Virginia, and prior to the collision were pleasure riding. No occupant of the car was familiar with the road on which they were traveling. Further pertinent facts are set forth in the opinion.

In his complaint plaintiff alleged various acts and omissions constituting negligence on the part of defendant. In its answer defendant alleged contributory negligence on the part of Gallamore and that his contributory negligence was imputed to Busby as the owner-occupant of the car.

Issues were submitted to and answered by the jury as follows:

"(1) Was the death of plaintiff's intestate, George Ray Busby, Jr., caused by the negligence of the defendant, as alleged in the complaint?

ANSWER: YES

(2) Was the operator of plaintiff's intestate's automobile, Lloyd D. Gallamore, negligent, as alleged in the Answer?

ANSWER: YES

(3) If so, is such negligence of the said Lloyd D. Gallamore imputable to plaintiff's intestate, George Ray Busby, Jr.?

ANSWER: NO

(4) What amount of damages, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $25,000.00"

From judgment in favor of plaintiff entered on the verdict, defendant appealed.

E. Ray Etheridge, Morris H. Fine and William N. Eason for plaintiff appellee.

J. Kenyon Wilson, Jr., and Hall & Hall by John H. Hall, Jr., for defendant appellant.

BRITT, J.

Although defendant raises no question regarding the sufficiency of plaintiff's evidence to make out a *prima facie* case of actionable

negligence, we deem it appropriate to say that the evidence of actionable negligence was sufficient to warrant submission of the first issue to the jury.

In the first question presented in its brief, defendant contends that the negligence of Gallamore was imputed to Busby and his personal representatives as a matter of law and that by reason thereof the trial court should have granted defendant's motion for nonsuit or should have granted defendant's request that the jury be peremptorily instructed to answer the second and third issues in the affirmative.

[1] We do not think the trial court erred in submitting the second issue and refusing to give a peremptory instruction as to it. It is well established in this jurisdiction that a motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom. *Johnson v. Thompson, Inc.*, 250 N.C. 665, 110 S.E. 2d 306; *Williams v. Hall*, 1 N.C. App. 508, 162 S.E. 2d 84. The rule would apply in cases where it is alleged and shown that plaintiff is contributorily negligent and in cases where someone whose negligence is imputable to plaintiff is alleged and shown to be contributorily negligent. Furthermore, since the jury in the case at bar answered the second issue in favor of defendant, we perceive no prejudice to defendant.

[2] We come now to a consideration of questions raised by defendant as to the third issue and particularly defendant's contention that it was entitled to a peremptory instruction in its favor on that issue. Specifically, two questions present themselves: (1) does the doctrine of "imputed negligence" bar recovery by the owner-occupant (or his estate) in an action against a negligent third party where the driver is found contributorily negligent, and (2) do the facts in this case show imputed negligence as a matter of law? A review of pertinent decisions and the evidence in this case impels an affirmative answer to both questions.

In *Shoe v. Hood*, 251 N.C. 719, 112 S.E. 2d 543, in a well-written opinion by Moore, J., it is said:

> "The owner-passenger of an automobile ordinarily has the right to control and direct its operation. So then, when he seeks to recover from a third party damages resulting from a collision of the vehicle with some other automobile or object, the negligence, if any, of the party who is operating the automobile with

> the owner-passenger's permission or at his request is, nothing else appearing, imputed to the owner-passenger. *Dosher v. Hunt,* 243 N.C. 247, 251, 90 S.E. 2d 374; *Harris v. Draper,* 233 N.C. 221, 225, 63 S.E. 2d 209. * * *
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> The rationale of the *Harper* decision [225 N.C. 260, 34 S.E. 2d 185] is that 'the owner of an automobile has the right to control and direct its operation . . . (and where) the owner possessed the right to control, that he did not exercise it is immaterial.' "

Plaintiff recognizes the legal principles set forth in *Shoe v. Hood, supra,* but contends that the evidence presented in the instant case showed that Busby at the time of the collision had completely relinquished control of the automobile to Gallamore and thus brought himself within the exception to the rule. It therefore becomes appropriate for us to review the evidence bearing on this contention.

Evidence pertaining to the nature of the occasion and circumstances under which Gallamore was driving was given by plaintiff's witnesses Thornburg and Clark, who were two of the occupants of the car. Their testimony revealed the following: On Sunday, 28 August 1960, at about 12:30 p.m., Busby, driving his 1956 Ford Victoria and accompanied by three other young men and two young women, left Norfolk and drove down into Currituck County, North Carolina. At that time, Gallamore was riding in the front seat on the extreme right and Janet Cox in the middle on the front seat; in the back seat, Clark was on the left, Thornburg on the right, and Carol Beck in the middle. Soon after they left Norfolk, they stopped at an unnamed place where Busby purchased 24 cans of beer which Clark and Thornburg helped pay for. Thereafter and prior to the collision, Busby, Clark and Thornburg drank all of the beer except for a few cans; neither Gallamore nor the girls drank any of the beer. Some ten minutes before the collision occurred at about 2:40 p.m., as they were riding on Highway 158 "just enjoying the country," the girls asked Busby not to drive so fast for the reason that he had been drinking. Thereupon, Busby drove his car off to the right side of Highway 158 and "relinquished control of the car" to Gallamore. From that point on Busby rode on the extreme right of the front seat and said nothing to Gallamore about how or where to drive. Gallamore proceeded to drive on Highway 158 for one or two miles and they came to the intersection of Highway 1148 where a sign indicated 1148 led to Norfolk. At Clark's suggestion, Galla-

more turned right on 1148 and proceeded in the general direction of Norfolk for some two miles to Gregory where the collision occurred.

[3] In North Carolina, negligence is imputed to the owner-occupant of an automobile according to the following test: "Did the owner, under the circumstances disclosed, have the legal right to control the manner in which the automobile was being operated — was his relation to the operation such that he would have been responsible to a third party for the negligence of the driver?" *Shoe v. Hood, supra.*

There is a strong argument that imputed negligence should be applied only for the purpose of holding the owner-occupant "responsible to a third party for the negligence of the driver" rather than as a bar to recovery by the owner-occupant. In fact, the overwhelming number of decisions invoking the principle deal with *primary negligence* rather than contributory negligence. See *Nash v. R. R.,* 202 N.C. 30, 161 S.E. 857; *Baird v. Baird,* 223 N.C. 730, 28 S.E. 2d 225; *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185; *Dosher v. Hunt,* 243 N.C. 247, 90 S.E. 2d 374; *Shoe v. Hood, supra,* and the cases therein cited.

Also, it is clear that the rule of imputed negligence *does not apply* as between the owner-occupant and the driver in cases where the owner-occupant "sues the driver for injuries resulting from the driver's negligence." *Strickland v. Hughes,* 2 N.C. App. 395, 163 S.E. 2d 24. In such cases, contributory negligence must be established to bar recovery. *Sorrell v. Moore,* 251 N.C. 852, 112 S.E. 2d 254. In *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190, the court pointed out that "it would offend justice and right to impute the negligence of a servant to his master and thus exempt him from the consequences of his own wrong-doing where the negligence proximately causes injury to a master who is without personal fault." ("Strictly speaking, the person operating with the permission or at the request of the owner-occupant is not an agent or employee of the owner, but the relationship is such that the law [and terminology] of agency is applied." *Shoe v. Hood, supra.*)

The application of imputed negligence to contributory negligence creates an anomalous situation such that the negligence of the driver Gallamore would not be imputed to Busby if Gallamore had run into a stopped train and were sued by Busby but would be imputed in Busby's action against the railroad company where Gallamore negligently ran into a *negligently operated* train. It is questionable whether a rule purporting to protect *innocent* third parties should have such an effect, and it is arguable that if the driver must

establish contributory negligence on the part of the owner-occupant to bar recovery for *his negligence,* the negligent third party should meet the same standard before being shielded by law from the consequences of *its negligent acts.*

[2] However, we interpret the authorities as upholding the application of "imputed negligence" to the contributory negligence which the jury found in the case at bar. Application of the principle to bar recovery by an owner-occupant because of the contributory negligence of the driver appears in *Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608; *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885; *Davis v. Jessup and Carroll v. Jessup,* 257 N.C. 215, 125 S.E. 2d 440; *Green v. Tile Co.,* 263 N.C. 503, 139 S.E. 2d 538. We also call attention, without comment, to the decision in *Matheny v. Motor Lines,* 233 N.C. 681, 65 S.E. 2d 368, in which the court held that where husband and wife jointly owned an automobile which was being driven by the husband with the wife's consent for a common purpose, the wife being an occupant, they were engaged in a joint enterprise so that negligence on the part of the husband barred her right to recover from a third party for injuries received in a collision with another vehicle. In the instant case, Busby was the *sole* owner of the automobile. In light of these decisions, we are of the opinion that the application of "imputed negligence" to the case at bar is required.

In *Shoe v. Hood, supra,* the court explained that "the owner of an automobile has the right to control and direct its operation . . . (and where) the owner possessed the right to control, that he did not exercise it is immaterial." The test is whether "the owner, under the circumstances disclosed, [had] the legal right to control the manner in which the automobile was being operated."

In *Eason v. Grimsley, supra,* the court stated: "The owner of an automobile, riding therein as a passenger, ordinarily has the right to control and direct its operation. The negligence, if any, of a party operating an automobile with the owner-passenger's permission or at his request is, nothing else appearing, imputed to the owner-passenger."

To avoid operation of the rule of law which imputes negligence to the owner-occupant, there must be facts showing "a bailment" or "other disposition or prevailing condition by which [he] relinquished, for the time being, the incidents of ownership and the right to control the manner and methods of its use." *Shoe v. Hood, supra.* As in *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108, "[w]hile there is testimony tending to show the defendant was intoxicated

there is no evidence to the effect he was too drunk to be conscious of what was going on * * *; or that defendant had surrendered or relinquished *his right* of control. * * *" (Emphasis added.) In *Baird v. Baird, supra,* the court said: "Maria Reid Baird was operating the automobile with the permission, if not at the request, of the owner. The owner, Mrs. Baird, was present and had the legal right to control its operation. The negligent conduct, if any, of the driver, was imputable to her. The mere fact that she chose to fall asleep in the rear seat and refrained from directing its operation did not change her rights or limit her liability."

The court submitted the issue of imputed negligence to the jury; it is our opinion that a peremptory instruction in favor of defendant should have been given. Gallamore was operating the automobile with the permission, if not at the request, of the owner Busby. The mere fact that he did not direct Gallamore as to which road to take at an intervening intersection, choosing instead to talk to another passenger during the two to three minutes between the change of drivers and the wreck, is not "susceptible of conflicting interpretations" to present a question of fact for the jury. We are governed by the settled principle that "[w]here, however, reasonable minds can reach but one conclusion from the uncontradicted facts, the question becomes one of law for the court." *Shoe v. Hood, supra.* The one conclusion possible here is that the facts fail to show a disposition or prevailing condition by which the owner relinquished the incidents of ownership and the legal right to control the automobile.

For the reasons stated, the judgment of the superior court is

Reversed.

BROCK and VAUGHN, JJ., concur.

No. 69 CR 7303 STATE OF NORTH CAROLINA v. JOHN ANDERSON HOLLOWAY

— AND —

No. 69 CR 7311 STATE OF NORTH CAROLINA v. PHILLIP JONES

— AND —

No. 69 CR 7310 STATE OF NORTH CAROLINA v. LARRY GREGORY JONES

No. 6914SC538

(Filed 14 January 1970)

1. Homicide § 10— defense of father and brother

A person may lawfully kill in defense of his father and brother when such action is necessary or reasonably appears to him to be necessary in order to protect them from death or great bodily harm.

2. Criminal Law § 115— instructions — submission of lesser degree of crime charged

Where there is evidence that would support a lesser degree of the crime charged in the bill of indictment, a defendant is entitled to have the question of his guilt of the lesser crime submitted to the jury, G.S. 15-170; if the court fails to do so, the error is not cured by a verdict of guilty of a higher offense.

3. Homicide § 14— presumption of malice — intentional use of rifle

A defendant who intentionally shot the deceased with a rifle is guilty of murder in the second degree at least unless he can rebut the presumption of malice arising from the intentional shooting and thereby reduce the offense to voluntary manslaughter.

4. Homicide § 14— presumption of malice — rebuttal

Defendant may rebut the presumption of malice which arises from an intentional killing with a rifle by proving to the satisfaction of the jury that he killed the deceased in the heat of passion, or that while exercising his right to defend his family from death or great bodily harm, he used no more force than was necessary or than reasonably appeared to him to be necessary.

5. Homicide § 30— submission of manslaughter — evidence of defense of family

Where there is evidence in a first-degree murder prosecution that defendant was acting in defense of his father and brother when he shot the deceased, the court must submit the question of defendant's guilt of voluntary manslaughter to the jury.

6. Homicide § 2— "aiding and abetting homicide" — instruction on verdict

Technically speaking, there is no offense in this State of aiding and abetting in the offense of murder, and it was therefore unnecessary for the trial judge in a first-degree murder prosecution to submit an issue of "aiding and abetting" to the jury.

7. Criminal Law § 9— parties — aiding and abetting

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and are equally guilty.

APPEAL from *Braswell, J.*, 7 July 1969 Session DURHAM County Superior Court.

Defendants were tried together under separate bills of indictment charging them with murder in the first degree of one William Worsley on 13 April 1969. Each defendant entered a plea of not guilty.

The State's evidence is summarized as follows: James Jones testified that he operated a piccolo and liquor house on North Roxboro Street in Durham. William Worsley came to his house on the night of 12 April 1969 at about 11:45 p.m. Forty-five minutes later the defendant John Anderson Holloway (Holloway) entered the house carrying a shotgun. "[H]e went to point the gun at William (Worsley), and William grabbed the gun and they started tussling and tussled into the kitchen, . . ." Larry Jones (Larry) then came in carrying a .22 caliber rifle. "[W]hen Larry came into the door he fired a shot, and then he went on to the kitchen door, and he fired two more shots and went on into the kitchen and I didn't see them any more." The witness heard Larry Jones say "turn loose the door, turn loose the damn door or I am going to kill you right now." The witness then heard a single shot and Holloway and Larry walked out of the kitchen with their weapons. They were accompanied by Phillip Jones (Phillip) who carried a .22 caliber rifle. It was the first time the witness had seen Phillip since the other defendants entered the house. The witness found Worsley lying face down in the kitchen.

Two other persons who were at James Jones' house during the early morning hours of 13 April 1969 testified for the State. They told of seeing Holloway and Larry enter the house with guns and hearing the shots. One witness saw Phillip enter the house by the back door. None of the State's witnesses actually saw what went on in the kitchen.

Expert medical evidence indicated Worsley died of a single .22 caliber bullet wound in the right forehead just below the hairline. There was no evidence to show from which of the two .22 caliber rifles the fatal bullet was fired.

Police Officer S. R. Day testified that after having been fully advised of his rights, Holloway stated that early the night of the killing, the deceased came by and fired some shots into Holloway's house. Holloway became concerned about the welfare of one of his

sons so he got them together with guns and they went to the house on North Roxboro Street after the deceased. Holloway was quoted as stating that he had done the officers a favor by shooting the deceased.

Defendants offered evidence in substance as follows: John Holloway is the father of Phillip Jones, age 18, and Larry Jones, age 19. Early on the day of 12 April 1969, the deceased, William Worsley, came to Holloway's house and threatened to shoot Holloway and his two sons. Worsley returned about 3 p.m., stated that he had lost his wallet and if he did not get it back somebody was going to be missing. Worsley left and returned about 11:30 p.m., again threatening to shoot all three defendants if his pocketbook was not returned. On each occasion Worsley was told by Holloway that he had not seen the pocketbook. Shortly after 11:30 p.m. Worsley called to Holloway from outside the front of the house stating: "you had better get ready." Worsley then shot into the front door several times. A few minutes later Worsley called out from the rear of the house saying: "John Holloway, G - - d - - - it, you in there?" Worsley then shot into the house again. Phillip, who was not at the house at the time of the shooting, was thought by Holloway to be at the piccolo house of James Jones about a half block away. Holloway, armed with a shotgun, and Larry Jones, armed with a rifle, went to the piccolo house for the purpose of warning Phillip Jones about Worsley's threats. As they entered the house Worsley stepped from behind the door, grabbed the shotgun, and pulled Holloway into the kitchen where a "tussle" ensued and Holloway was thrown to the floor. Larry fired three shots over their heads and then dropped his rifle and started scuffling with Worsley over the shotgun which Worsley had wrested from Holloway. The shotgun fell to the floor and Larry and Worsley tussled for several minutes on the floor before Worsley got free, picked up the rifle, and pointed it in the direction of Larry and Holloway. At that moment Phillip Jones, who had entered by the back door, fired a single rifle shot and Worsley fell.

Phillip Jones testified that he had been at the piccolo house until approximately midnight. He went from there to Troy's Chicken Box about three blocks away. He stayed there for about five or six minutes and then went to his father's home where he was advised that Worsley had "shot up" the house and made threats against the lives of Holloway and both sons. He was further told that his father and brother had gone to the piccolo house to warn him of the threats. Phillip then got a rifle and ran to the piccolo house. He had heard some shots while at his father's home so he entered the piccolo house

by the back door. When he looked into the kitchen he saw his brother lying on the floor at the side of the room and his father lying on the floor behind his brother. Worsley was getting up aiming the rifle toward them. Phillip raised his gun and fired one time because he was afraid Worsley was going to shoot his brother and father.

Defendants offered the testimony of several witnesses which corroborated their evidence concerning the threats made against their lives by Worsley and tended to show that Worsley had a reputation for violence. One witness identified a spent bullet as having been removed from the door of Holloway's house the morning following the shootings. Janie Thompson testified that she was at Holloway's house when Worsley made the threats and fired inside. She stated that she reported this to Phillip Jones when he returned to the house about five or ten minutes after Holloway and Larry had left and told him that his father and brother had gone to the piccolo house looking for him.

The court submitted to the jury in substance the following possible verdicts: As to John Holloway: (1) guilty of first degree murder, (2) guilty of first degree murder with a recommendation of life imprisonment, (3) guilty of aiding and abetting Phillip Jones in the offense of first degree murder, (4) guilty of aiding and abetting Phillip Jones in the offense of first degree murder with a recommendation of life imprisonment, (5) guilty of second degree murder, (6) guilty of aiding and abetting Phillip Jones in the offense of second degree murder, (7) not guilty. As to Phillip Jones: (1) guilty of first degree murder, (2) guilty of first degree murder with a recommendation of life imprisonment, (3) guilty of aiding and abetting John Holloway in the offense of first degree murder, (4) guilty of aiding and abetting John Holloway in the offense of first degree murder with a recommendation of life imprisonment, (5) guilty of second degree murder, (6) not guilty. As to Larry Jones: (1) guilty of aiding and abetting John Holloway; or either Phillip Jones in the offense of first degree murder, (2) guilty of aiding and abetting John Holloway or either Phillip Jones in the offense of first degree murder with a recommendation of life imprisonment, (3) guilty of aiding and abetting Phillip Jones or John Holloway in the offense of second degree murder, (4) not guilty.

The jury returned verdicts finding Holloway and Phillip Jones "guilty of murder in the second degree" and the defendant Larry Jones "guilty of aiding and abetting Phillip Jones or John Holloway in the offense of murder in the second degree." Judgments were entered on the verdicts imposing active prison sentences and defendants appealed.

Robert Morgan, Attorney General, by James L. Blackburn, Staff Attorney, for the State.

James R. Patton and C. Horton Poe, Jr., for defendant appellants.

GRAHAM, J.

[1] Defendants contend that the deceased was killed by Phillip Jones in defense of his father and brother and at a time when such action was necessary or reasonably appeared to Phillip Jones to be necessary in order to protect them from death or great bodily harm. A person may lawfully kill in defense of his family under such circumstances. *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154; *State v. Marshall,* 208 N.C. 127, 179 S.E. 427. The court properly instructed the jury as to the principles of self defense and the right to kill in defense of one's family but did not instruct the jury that they could return a verdict of guilty of voluntary manslaughter. Defendants assign the omission of this instruction as error.

[2] Where there is evidence that would support a lesser degree of the crime charged in the bill of indictment, a defendant is entitled to have the question of his guilt of the lesser crime submitted to the jury. G.S. 15-170. If the court fails to do so, the error is not cured by a verdict of guilty of a higher offense. *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461; *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652; *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733; *State v. Lee,* 206 N.C. 472, 174 S.E. 288; *State v. Williams,* 185 N.C. 685, 116 S.E. 736; *State v. Merrick,* 171 N.C. 788, 88 S.E. 501.

[3-5] In our opinion the issue of defendants' guilt of voluntary manslaughter arises on the evidence and should have been submitted to the jury. If Phillip Jones shot the deceased intentionally, he would be guilty of murder in the second degree at least unless he could rebut the presumption of malice arising from an intentional shooting and thereby reduce the offense to voluntary manslaughter. He could do this by proving to the jury's satisfaction that he killed the deceased in the heat of passion, or that while exercising his right to defend his family from death or great bodily harm, he used no more force than was or reasonably appeared to him to be necessary. *State v. Moore, supra; State v. Ramey,* 273 N.C. 325, 160 S.E. 2d 56. There is no evidence that deceased was killed in the heat of passion. However, evidence that Phillip Jones was acting in defense of his father and brother necessarily raises the issue of manslaughter because the jury could find that though Phillip was defending members of his family, he used more force than necessary or than rea-

sonably appeared to him necessary to protect and defend them from death or great bodily harm. "Where the evidence is susceptible to the interpretation . . . that defendant killed in self defense, . . . the court must submit the question of defendant's guilt of manslaughter." 4 Strong, N.C. Index 2d, Homicide, § 30, p. 257.

[6, 7] Defendants also contend that the verdicts rendered, when considered with the charge, were inconsistent and should have been set aside. Since a new trial will be required for all defendants it is unnecessary that we rule on this assignment of error or discuss it in detail. However, we note that technically speaking there is no such offense in this State as "aiding and abetting in the offense of murder." When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals, and equally guilty. *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398; *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670. It was therefore unnecessary for the trial judge to submit to the jury separate possible verdicts of "aiding and abetting" as to any of the defendants and the effect of doing so was to submit two possible verdicts of the same degree of crime.

We do not discuss the defendants' other assignments of error as there must be a new trial, and they are not likely to re-occur.

New trial in all cases.

CAMPBELL and PARKER, JJ., concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. CARLISLE NEWTON DAVIS, CAMILLA M. HULL, RUSSELL MAUGHN HULL, JR., AND EMPLOYERS MUTUAL CASUALTY COMPANY

No. 691SC561

(Filed 14 January 1970)

1. Insurance § 95— automobile liability policy — cancellation by insurer — notice to Department of Motor Vehicles

A liability insurance policy issued pursuant to The Vehicle Financial Responsibility Act of 1957 may not be cancelled or terminated by the insurer unless the insurer has given the Department of Motor Vehicles notice of the cancellation fifteen days prior to the effective date of the cancellation. G.S. 20-309(e).

2. Insurance § 95— automobile liability policy — cancellation by insured — notice to Department of Motor Vehicles by insurer

Where the insured terminates a policy issued pursuant to The Vehicle Responsibility Act of 1957, the insurer is required immediately to notify the Department of Motor Vehicles, but failure to give such notice does not affect the validity or binding effect of the cancellation. G.S. 20-309(e).

3. Insurance § 95— certified assigned risk policy — cancellation — notice

Provisions of G.S. 20-279.22 requiring the insurer to give statutory notice of cancellation irrespective of whether the insurance coverage is terminated through acts of the insured or the insurer apply only to cancellation of certified assigned risk policies issued under The Motor Vehicle Safety-Responsibility Act of 1953.

4. Insurance § 95— automobile liability policy — cancellation by insurer — notice to insured

In order for an insurer to terminate by cancellation or failure to renew a policy issued under the provisions of The Vehicle Financial Responsibility Act of 1957, G.S. 20-310(a) requires the insurer to give the insured 15 days notice and warning of the effect of failure to maintain such insurance, but the statute does not require the insurer to notify the insured where the insured himself terminates the policy.

5. Insurance § 95— automobile liability policy — cancellation by insurer or insured — required notice

In order for an insurer to terminate a liability policy issued pursuant to the provisions of The Vehicle Financial Responsibility Act of 1957, it must give 15 days prior notice thereof to its insured and to the Motor Vehicles Department, and failure to give notice in proper form to either renders ineffective an attempted termination by the insurer; but where such a policy is terminated or cancelled by an insured, the insurer is not required to give notice of cancellation to the insured, and although the insurer must immediately notify the Department of Motor Vehicles, failure to give such notice does not affect the termination of coverage.

6. Insurance §§ 3, 95— renewal of insurance policy — offer and acceptance — failure to renew

Renewal of an insurance policy is a bilateral transaction involving both an offer and acceptance, and where no offer to renew is made by the insurer, there can be no acceptance, and a failure to renew under such circumstances is unilateral action on the part of the insurer.

7. Insurance § 95— cancellation of automobile liability policy — offer to renew — failure to renew — unilateral act of insurer — notice to insured and Department of Motor Vehicles

Premium notice sent by insurer to the insured stating the amount of the semi-annual premium due on insured's automobile policy on a specified date and stating in small print that automobile insurance is important security which one cannot afford to be without and that prompt payment of the premium would assure continued protection of the policy, *is held* not to constitute an offer to renew the insurance policy, but is simply a statement of an account that will be due on the date indicated, and where

the insured failed to make payment within the time specified in the notice, attempted termination of the policy was a unilateral act of the insurer which required the insurer to give notice to the insured and to the Department of Motor Vehicles in order for termination of the policy to become effective.

APPEAL from *Cohoon, J.*, 20 September 1969 Session of PASQUOTANK Superior Court.

This action for a declaratory judgment was instituted on 24 April 1969 to have determined the respective rights and liabilities of the parties under liability insurance policies issued by plaintiff to defendant Carlisle Newton Davis. The court below found the facts which are set forth in substance as follows:

(1) The plaintiff, hereinafter referred to as insurer, issued to defendant Davis, hereinafter referred to as insured, automobile liability insurance policy number 61-B-282-480 from 1 April 1959 to 25 May 1959. The policy was thereafter renewed and after reinstatement of the policy effective 21 December 1965, the policy period expired on 21 December and 21 June.

(2) The said policy, and renewals of the policy thereafter, covered a 1965 Ford Thunderbird automobile of the insured which was involved in a collision on 13 July 1967 with a vehicle driven by the defendant Camilla M. Hull. The collision is the subject of this controversy.

(3) A renewal of the policy became effective for a period from 21 December 1966 to 21 June 1967. The premium date was 21 June 1967.

(4) In an envelope post-dated 1 June 1967, insurer mailed and insured received a notice advising insured that the premium in the sum of $30.60 was due on said policy on 21 June 1967.

(5) No cancellation notice was thereafter mailed by insured.

(6) The policy premium had not been paid at the expiration of the 17 day grace period on 8 July 1967.

(7) The collision out of which this controversy arises occurred on 13 July 1967 at 12:01 p.m.

(8) After the collision and on the same date insured advised insurer's agent of the collision, paid the premium due and signed a "reinstatement application." Insured also filled out the collision or accident form number SR-21, stating thereon that he was insured under policy number 61-B-282-480 and gave notice of same to the Department of Motor Vehicles.

(9) Insured had given no notice to insurer or its agent that he desired or requested a cancellation of said policy.

(10) Thereafter insurer issued to insured a new and separate policy of insurance, No. 61-502-708, bearing an effective date of from 12:01 a.m., 13 July 1967, to 12:01 a.m., 13 January 1968.

(11) At the time of the collision the insurance certified by insured and on file with the Department of Motor Vehicles was policy number 61-B-282-480 and no notice of termination of said policy was ever filed with the Department of Motor Vehicles by insurer in either 1967 or 1968 and insurer did not notify the Department of Motor Vehicles that the insured had attempted to terminate, or had terminated said policy.

(12) Neither policy issued to insured is an assigned risk policy.

(13) All parties hereto have a legal and bona fide interest in the controversy involved herein.

Based upon the findings set forth above, the trial judge concluded and adjudged that policy number 61-B-282-480 was not effectively cancelled by insured or insurer and was in full force and effect and provided liability coverage on insured's vehicle at the time of the collision on 13 July 1967. The new policy, No. 61-502-708, issued with an effective date of 12:01 a.m., 13 July 1967, was declared not to have been in effect at the time of the collision. Plaintiff appealed.

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

Hall & Hall by John H. Hall, Jr., for defendant appellee Employers Mutual Insurance Company.

Twiford and Abbott by William Brumsey, III, for defendant appellees Camila M. Hull and Russell M. Hull, Jr.

GRAHAM, J.

The plaintiff insurer does not challenge the court's findings of fact but contends that the findings do not support the conclusions of law and the judgment entered thereon.

It is conceded, and the court so found, that no notice of cancellation was given by plaintiff insurer to the insured or to the State Motor Vehicles Department. If notice to either was required in order to terminate coverage under the policy, the judgment is supported. We therefore discuss the circumstances under which such

notice must be given by the insurer in order to effectively terminate coverage under an automobile liability insurance policy.

G.S. 20-309(e) provides in pertinent part as follows:

> "No insurance policy provided in subsection (d) may be terminated by cancellation or otherwise by the insurer without having given the North Carolina Motor Vehicles Department notice of such cancellation fifteen (15) days prior to effective date of cancellation. Where the insurance policy is terminated by the insured the insurer shall immediately notify the Department of Motor Vehicles that such insurance policy has been terminated."

[1] Plaintiff insurer insists that its failure to notify the Motor Vehicles Department that the policy in question had been cancelled is immaterial and cites in support of this contention the cases of *Nixon v. Insurance Co.*, 258 N.C. 41, 127 S.E. 2d 892; and *Levinson v. Indemnity Co.*, 258 N.C. 672, 129 S.E. 2d 297. Both of these cases held that the cancellation of a policy was not conditioned upon notice being given to the Commissioner of Motor Vehicles. "Neither defective notice, nor failure to give notice, *to the Commissioner* affects the validity or binding effect of the cancellation; . . . Hence, the policy is terminated before notice is sent to the Commissioner. Notice to the Commissioner *follows* cancellation." *Nixon v. Insurance Co., supra*, at 43. However, at the time the two cases cited above were decided the statutory provision requiring that notice of cancellation be given the Commissioner of Motor Vehicles (then a part of G.S. 20-310) required that such notice be mailed by the insurer not later than fifteen days *following* the effective date of a cancellation. Hence, the policy necessarily terminated *before* notice was mailed. By amendment effective 1 October 1963, this provision became the portion of G.S. 20-309(e) quoted above and it now provides that a liability insurance policy issued pursuant to The Vehicle Financial Responsibility Act of 1957 may not be cancelled or terminated by an insurer without the insurer having given the Motor Vehicles Department notice of the cancellation fifteen days *prior* to the effective date of cancellation. Consequently, notice to the Motor Vehicles Department under this amendment is now a condition precedent to cancellation by an insurer. If the insurer does not furnish the required notice, it may not cancel and the policy of insurance continues in effect. *Insurance Co. v. Hale*, 270 N.C. 195, 154 S.E. 2d 79.

[2] No change in G.S. 20-309(e) has been made respecting the duties of an insurer where the insured terminates the policy. The

statute still provides that the insurer shall immediately notify the Motor Vehicles Department that such insurance policy has been terminated. Under such circumstances, notice to the Department still follows cancellation and the decisions of *Nixon v. Insurance Co., supra,* and *Levinson v. Indemnity Co., supra,* are, in our opinion, still controlling.

[3] Two statutory provisions relate to notice that must be given an insured before a policy is cancelled or terminated. The first, G.S. 20-279.22, relates to certified assigned risk policies issued under The Motor Vehicle Safety-Responsibility Act of 1953. Under the provisions of that statute it is incumbent upon the insurer to give the statutory notice of cancellation irrespective of whether the insurance coverage is terminated through acts of the insured or the insurer. The policy here in question was not a certified assigned risk policy and therefore the cancellation provisions of G.S. 20-279.22 are not here applicable.

The second provision is contained in G.S. 20-310(a) and it provides as follows:

> "No contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew by the insurer until at least fifteen (15) days after mailing a notice of termination by certificate of mailing to the named insured at the latest address filed with the insurer by or on behalf of the policyholder. The face of the envelope containing such notice shall be prominently marked with the words 'Important Insurance Notice.' Time of the effective date and hour of termination stated in the notice shall become the end of the policy period. Every such notice of termination for any cause whatsoever sent to the insured shall include on the face of the notice a statement that financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such financial responsibility is a misdemeanor, the penalties for which are loss of registration plate for 60 days; and a fine or imprisonment in the discretion of the court."

[4] The above provision relates to the notice and warning that must be given the insured by the insurer in the event his policy is terminated by insurer, whether the termination is by cancellation or *by failure to renew. Perkins v. Insurance Co.,* 274 N.C. 134, 161 S.E. 2d 536. It does not, as does G.S. 20-279.22 with respect to certified assigned risk policies, require the insurer to notify the insured where the insured himself terminates the policy. *Faizan v. Insurance Co.,* 254 N.C. 47, 118 S.E. 2d 303.

[5] It follows, under the applicable statutes, that where the insurer terminates a policy, it must give fifteen days prior notice thereof to its insured and to the Motor Vehicles Department. Failure to give notice in proper form to either renders an attempted termination by the insurer ineffective. But where a policy (other than a certified assigned risk policy) is terminated or cancelled by an insured, notice thereof is not required to be given to the insured, and although notice must immediately be given to the Motor Vehicles Department, the failure to give such notice does not affect the termination of coverage.

[6] The question here involved is therefore: Was the termination of the policy or its attempted termination an act of the insurer requiring notice as provided by the applicable statutes or was it an act of the insured requiring no such notice? Plaintiff insurer contends that it was an act of the insured in rejecting an offer to renew the policy made by the insurer in mailing to the insured the premium due notice. Renewal of an insurance policy is a bilateral transaction involving both an offer and acceptance. Where no offer to renew is made by the insurer there can be no acceptance and a failure to renew under such circumstances is unilateral action on the part of the insurer. *Connecticut Fire Insurance Company v. Williams,* 194 N.Y.S. 2d 952 (1959).

Plaintiff insurer insists that the premium notice in this case constituted an offer to renew the policy such as was given to the insured and rejected by him in the case of *Faizan v. Insurance Co., supra.* We do not agree.

In the *Faizan* case the written notice sent to the insured advised him that the policy would expire on 22 February 1959; that in order to renew it he must pay the premium in advance by 5 February 1959; and that if the premium was not paid by that time, the insured would have to apply through the Assigned Risk Plan if he desired further coverage. In addition the notice contained the following language:

> "UNDER THE PROVISIONS OF THE VEHICLE RESPONSIBILITY ACT OF THE STATE OF NORTH CAROLINA 'PROOF OF FINANCIAL RESPONSIBILITY IS REQUIRED TO BE MAINTAINED CONTINUOUSLY THROUGHOUT THE REGISTRATION PERIOD AND OPERATION OF A MOTOR VEHICLE WITHOUT MAINTAINING SUCH PROOF OF FINANCIAL RESPONSIBILITY IS A MISDEMEANOR.'"

In the case of *Perkins v. Insurance Co., supra,* it was held that

a notice containing the pertinent provisions of G.S. 20-310, including the warning respecting the consequences of failure to maintain insurance, was a prerequisite to termination for failure to renew a policy on account of non-payment of premium. In distinguishing the *Faizan* case, Bobbitt, J. (now C.J.), stated at page 143:

> "The ground of decision in *Faizan* was that the insured *rejected* the defendant's offer to renew the policy. In *Faizan,* notices given by the defendant to the plaintiff, although not in full compliance with the provisions of the quoted statute, were sufficient to advise the insured plainly of the consequences of his failure to renew. The insured made no response to the insurer's notices. Instead, he 'applied through the Assigned Risk Plan for further insurance, but the policy thus obtained (from another insurer) was not in effect at the time of the accident in question.'"

[7] In the instant case the notice relied upon by plaintiff as its offer to renew is entitled "Premium Notice." It states: "The semi-annual premium on your auto policy No. 61 282-480 is due on June 21, 1967." The amount due is specified as $30.60. In small print in the lower left-hand corner the following appears: "Your auto insurance is important security you can't afford to be without. Prompt payment of the premium shown above will assure you the continued protection of this policy."

This premium notice makes no reference to the expiration date of the policy. It contains no warning regarding the consequences of a failure to pay the premium. The notice standing alone does not indicate that the policy is subject to renewal on 21 June 1967 but simply that a semi-annual premium payment is due on that date. An insurer may not cancel for non-payment of premiums without following the provisions of G.S. 20-309(e) and G.S. 20-310. *Perkins v. Insurance Co., supra; Insurance Co. v. Hale, supra; Crisp v. Insurance Co.,* 256 N.C. 408, 124 S.E. 2d 149.

The small print appearing on the premium notice is at most a warning that unless payment is made the insured cannot be assured that coverage will continue. The inference from this language is that if the premium is not paid the insurer *may* terminate the coverage. If the policy is not renewed under such circumstances the failure to renew would be a unilateral act of insurer and would require strict compliance with the notice statutes.

It is our opinion that a premium due notice such as mailed to the insured in this case does not constitute an offer to renew a policy of

insurance such as was made in the *Faizan* case. Such a notice, standing alone, is simply a statement of an account that will be due on the date indicated. If payment is not made the insurer has the option of renewing the policy and treating the unpaid premium as an account receivable, or of refusing to renew the policy. If the insured refuses to renew, termination of coverage results from *its* action and notice to insured and the Motor Vehicles Department must be given as provided by the applicable statutes. The court's findings that such notice was not given in this case supports its conclusion that the insurance coverage was still in effect at the time of the collision on 13 July 1967 and the judgment is therefore affirmed.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLIE McPHERSON, ROBERT LEE JONES AND RONALD MICHAEL HARRIS

No. 6914SC515

(Filed 14 January 1970)

1. Criminal Law § 66— in-court identification of defendant — independent origin — sufficiency of State's evidence

Findings and conclusions of the trial court that the robbery victim's in-court identification of the defendants was based on the victim's observation of defendants during the robbery and not on a subsequent identification at the police station and from photographs *are held* supported by clear and convincing evidence on *voir dire* that the victim had a good and sufficient opportunity to see the defendants prior to and during the robbery and that his in-court identification was based on that observation.

2. Criminal Law § 66— in-court identification of defendant — ruling of trial court — review on appeal

The legality of the victim's identification of defendants from photographs and from a confrontation at a police station was not an issue on appeal in an armed robbery prosecution unless the trial court had erred in finding that the victim's in-court identification of defendants was unaffected by such procedures.

3. Criminal Law § 66— in-court identification — findings — clear and convincing evidence

There must be clear and convincing evidence to support findings and conclusion by the trial court that a witness' in-court identification of defendants was based upon his observation of them at the time of the offense and not upon a subsequent identification at the police station and from photographs.

4. Criminal Law §§ 99, 170— conduct of trial — colloquy between court and counsel — prejudicial error

In an armed robbery prosecution in which the victim testified that one of the defendants was wearing pea-green clothing and the defense counsel asked the victim if he "knew how to make green," a subsequent colloquy between the court and the defense counsel wherein the court asked counsel if he knew how "to make all these colors" and "why don't you go in the paint business; let's don't get meticulous with all the colors in the world," *held* not prejudicial to defendant, since the court was merely demonstrating its impatience with counsel's irrelevant line of questioning.

5. Constitutional Law § 30— criminal trial — due process — impartial judge

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

6. Criminal Law § 99— conduct of trial — exchanges between court and counsel

Unflattering exchanges between court and counsel are not conducive to the decorum that should prevail in a courtroom during a trial.

7. Criminal Law § 170— unflattering exchanges between court and counsel — test of prejudicial error

In determining whether unflattering exchanges between court and counsel are sufficiently prejudicial to require a new trial, the test applied is the probable effect of the exchanges upon the jury, considered in the light of the circumstances under which they were made.

8. Robbery § 3— relevancy of evidence — why victim carried money in change

Where defendants in armed robbery prosecution failed to show the relevancy of their question to the victim with respect to why he was carrying three dollars in change at the time of the robbery, the sustaining by the trial court of its own objection to the question cannot be prejudicial to defendants.

9. Criminal Law § 99— conduct of trial — exclusion of evidence by trial court

In the exercise of its right to control and regulate the conduct of the trial, a court may on its own motion exclude or strike evidence which is wholly incompetent or inadmissible.

10. Criminal Law § 169— exclusion of testimony — refusal to let witness state his answer

Refusal of the trial court to require the prosecuting witness to state what his testimony would have been had he been permitted to answer defense counsel's question on cross-examination, *held* not prejudicial in this case, where the question was irrelevant and it does not appear how the answer, whatever it might have been, would have benefited defendants.

APPEAL by defendants from *Bowman, J.*, 9 June 1969 Session of DURHAM County Superior Court.

Defendants were tried under a bill of indictment charging them with the armed robbery of Alvin Fisher on 4 April 1969. Each defendant entered a plea of not guilty.

The only evidence was that offered by the State. The prosecuting witness, Alvin Fisher, testified that he went to a grocery store on the corner of Fowler Avenue and old Fayetteville Street in Durham shortly after 9:45 p.m. on 4 April 1969. The store was closed, but customers were still inside. He stood outside for about 3 minutes hoping to recognize one of the customers inside who could make a purchase for him. Fisher saw the three defendants standing and talking on the sidewalk about 5 feet from him. The area was well lighted. He observed that McPherson was wearing tight gray corduroy pants, and some kind of gray-colored corduroy jacket. Harris was dressed in a light blue or pea green color and Jones had on a pair of light brown pants and a gray sweater. As Fisher left the grocery store, the defendants walked slowly in front of him up to the corner of Fowler Avenue and Fayetteville Street. Two of them crossed the street but the defendant Jones waited at the corner for Fisher to come up. When Fisher crossed the street, the two defendants who had previously crossed to the other side turned around and McPherson stated, "[y]ou are next." Fisher tried to run but defendant Jones, who was behind him, grabbed his leg and tripped him. Defendants then pulled Fisher over to the curb and started through his pockets. Harris pulled a silver pistol from under his coat and held it on Fisher. When Fisher yelled at a passing car defendants dragged him up between two houses where they removed from his pockets three one-dollar bills and about $3 in change and beat him with their fists and the pistol. When his assailants had gone, Fisher notified the police. The police took him to the hospital where he was treated for minor injuries and released.

The day following the alleged robbery a Durham detective exhibited to Fisher seven or eight photographs. Fisher identified pictures of Jones and McPherson as pictures of two of his assailants. Defendant Harris' picture was not included in the group of photographs. Fisher gave a description of the remaining assailant to the detective.

Fisher was called to the police station on 7 April 1969 to look over some "suspects" and while being shown around the police station he saw the defendant Harris who was then in custody and talking with a police officer in a room. At that time Fisher pointed out Harris as his third assailant.

The jury returned a verdict of guilty as charged in the bill of

indictment as to all of the defendants and from judgments of imprisonment they appealed.

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

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson, II, and C. C. Malone, Jr., and Blackwell M. Brogden for defendant appellants.

GRAHAM, J.

[1] Defendants assign as error the overruling by the court of their objection to an in-court identification of the defendants by the prosecuting witness Fisher.

When Fisher was asked to make an in-court identification of the three defendants, objections were interposed on the grounds that such identification would be tainted by the out-of-court identifications made of McPherson and Jones from photographs and made of Harris from the confrontation at the police station. Defendants contended the photographic technique used in this case was too suggestive in that the prosecuting witness was tendered only six or seven photographs from which he selected two as being pictures of two of his assailants. They contended that the prosecuting witness' identification of defendant Harris at the police station was illegal in that he was permitted by the police to "walk up" on Harris and identify him while Harris was in custody of the police and not represented by counsel.

Before overruling defendants' objection to the in-court identification a *voir dire* examination of the prosecuting witness was ordered. His testimony on *voir dire* indicated that he had a good and sufficient opportunity to observe defendants as they stood approximately five feet from him in front of the store for a period of about 3 minutes; that he observed them further as they walked slowly past him to the street corner and that he got a good look at all of their faces while they were robbing him. He also testified that shortly after he was robbed he gave a description of his assailants to the police as to their relative size, hair style, age, complexion, and style and color of the clothes they were wearing. The witness stated that he clearly recognized the three men in the courtroom as the men he was with on Fayetteville Street the night of the robbery. The court made appropriate findings of fact based on the *voir dire* evidence and concluded that the witness' identification of each defendant was based upon his observation of them on the night of the alleged attack and was not tainted by any illegal procedures.

[2, 3] The question of the legality of the identification of two defendants through the use of photographs and the third through the police station confrontation is before us for consideration only if the court erred in finding that the in-court identification was not affected by such procedures. Such finding must be based on clear and convincing evidence. *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149; *State v. Stamey,* 3 N.C. App. 200, 164 S.E. 2d 547. Where the evidence, as here, shows that the witness had a good and sufficient opportunity to observe a defendant at the time the offense was being committed, and testifies that his in-court identification is based on his observation made at that time, the test of "clear and convincing evidence" is met and will support findings such as were made by the court in this case. *State v. Stamey,* 6 N.C. App. 517, 170 S.E. 2d 497. See also *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353. The evidence here supported the court's findings, which are binding on appeal. This assignment of error is overruled.

[4] Defendants further contend that the court committed error in overruling their motion for mistrial based on comments made by the court in the presence of the jury.

The prosecuting witness testified on both direct and cross-examination that the defendant Harris at the time of the robbery was wearing "pea green or light blue colored clothes." While counsel for the defendant Harris was questioning this witness further on cross-examination, the following exchange took place:

"Q. Do you know how to make green?

A. Do I know—
OBJECTION BY THE STATE

THE COURT: Mr. Brogden, do you know how to make all these colors?

MR. BROGDEN: Yes sir, they teach you in grammar school. I got one eight years old can tell you.

THE COURT: Do you know how to make it?

MR. BROGDEN: Yes sir.

THE COURT: Why don't you go in the paint business. Let's don't get meticulous with all the colors in the world.

MR. BROGDEN: Make a motion for a mistrial.

THE COURT: Motion is denied. Have your seat and continue your cross-examination."

[4-7] We have held that exchanges such as this between counsel and the court should not be engaged in before the jury. *State v. Cox,* 6 N.C. App. 18, 169 S.E. 2d 134. Every person charged with a 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. Unflattering exchanges between court and counsel are not conducive to the decorum that should prevail in a courtroom during a trial. However, when determining whether such comments or remarks are sufficiently prejudicial to require a new trial the test applied is their probable effect upon the jury and the utterances must be considered in the light of the circumstances under which they were made. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9. We cannot say under the circumstances here that the colloquy between the court and counsel for defendant Harris prejudiced the jury against the defendants. It was prompted by counsel's question on cross-examination as to whether the prosecuting witness knew how to make green color. This was after the witness had been cross-examined at length concerning his ability to identify colors by looking at various objects including clothing worn by some of the jurors. Whether the witness could make green color was irrelevant to his ability to see and distinguish between colors. The court's impatience with this line of questioning, and not its opinion, is demonstrated by the exchange. In our opinion no prejudice resulted to defendants. *State v. Cox, supra.*

[8] Defendants further assign as error the sustaining by the court of its own objection to the following line of questioning:

"Q. You had three dollars worth of change?

A. Yes sir.

Q. What you doing carrying three dollars worth of change around?

THE COURT: Objection sustained.

MR. BROGDEN: I want the jury excused and put his answer in the record had he been allowed to answer the question.

THE COURT: Motion denied. ALL DEFENDANTS EXCEPTS. (sic) EXCEPTION # 14B

MR. BROGDEN: We will have to get it in the record.

THE COURT: Motion denied to put it in the record. Everything we have said is in the record."

[9] In the exercise of its right to control and regulate the conduct

of the trial, a court may on its own motion exclude or strike evidence which is wholly incompetent or inadmissible. *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912. Defendants have not shown that the questions concerning the varied change and dollar bills Fisher had when he was robbed were relevant or material. It was incumbent upon them to do so in order to show prejudice. *Greer v. Whittington, supra; Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657.

[10] Defendants complain also that they were not permitted to put in the record what the witness' answer would have been. For an exception to the exclusion of testimony to be sustained on appeal, the record must show what the testimony would have been if the witness had been permitted to answer. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342; *State v. Phillips,* 5 N.C. App. 353, 168 S.E. 2d 704. It is incumbent upon the proponent's counsel to request that the answer be given to the court reporter, and once the request is made, it is the duty of the court to see that it is done. Here, however, the question itself was irrelevant and it has not been made to appear how the answer, whatever it may have been, would have benefited defendants. Under such circumstances the failure of the court to permit the witness to answer for the record was not prejudicial error warranting a new trial.

Other assignments of error made by defendants have been considered and found without merit. All three defendants were represented by competent counsel and their rights were vigorously protected throughout the trial. We have reviewed the entire record and find no error of such a prejudicial nature as to warrant a new trial.

No error.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. KATHY CAROL JONES

No. 6910SC546

(Filed 14 January 1970)

Obscenity— indecent exposure — female breasts

The exposure by a female of her breasts to the public view in a public place is not an offense under the statute prohibiting the indecent exposure of a person's private parts, G.S. 14-190, the female breasts not being private parts within the meaning of the statute.

STATE *v.* JONES

APPEAL by the State from *Cowper, J.*, 21 July 1969 Special Session, Superior Court of WAKE County.

Defendant was charged with having, on or about the 12th day of February, 1969, unlawfully, wilfully, indecently and scandalously exposed to the public view the private parts of her person in a public place or highway, to wit: 3100 Hillsborough Street (The Keg). She appealed from her conviction in the District Court. In the Superior Court she moved to quash the warrant, which motion was denied. She then moved for a bill of particulars. In lieu of granting this motion, the court allowed the State's motion that it be permitted to amend the warrant to allege with particularity the parts of defendant's body which were exposed. The warrant was amended, without objection, to read that "on or about the 12 day of Feb., 1969, the defendant named above did unlawfully, wilfully, indecently and scandalously expose to the public view the private parts of her person to wit: her breasts, in a public place or highway, to wit: 3100 Hillsborough St. (The Keg)." The defendant moved to quash the warrant as amended. The motion was allowed and the State excepted and appealed.

Attorney General Robert Morgan by Staff Attorney (Mrs.) Christine Y. Denson for the State — appellant.

Boyce, Burns and Smith, by Eugene Boyce, for defendant — appellee.

MORRIS, J.

The warrant in this case is in the language of G.S. 14-190, the pertinent portion of which at the time of the offense provided: "Any person who shall willfully make any indecent public exposure of the private parts of his or her person in any public place or highway shall be guilty of a misdemeanor." By amendment the State defined "private parts" as including the female breasts. If the adult female breasts come within the meaning of "private parts" in reference to the anatomy of an adult female, it may be that the amended warrant is sufficient. The term "private parts" appears to be generally acceptable legal parlance in referring to male or female genitalia. In Webster's Third New International Dictionary (Unabridged) (1968), the term is defined as "the external genital and excretory organs — usu. used in pl.; called also private parts, privy parts." "Genitalia" is defined as "the organs of the reproductive system; especially: the external genital organs." Webster's Third New International Dictionary, supra. Schmidt's Attorney's Dictionary of Medicine defines

"reproductive system" as "[T]he organs and structures concerned with the begetting or bearing of offspring. . . . In the female, the system consists of the vagina, uterus, uterine tubes, and ovaries." In 2 Attorney's Textbook of Medicine, 3d Ed., paragraph 39.02 it is said "[I]n the female all organs and structures concerned with the function of reproduction lie within the body, deep in the lower part of the abdominal cavity or pelvis."

We find no case in North Carolina wherein this precise question has been raised nor do we find in the reported cases any definition or necessity for definition of the term private parts. We do find helpful discussions in reported cases from other jurisdictions.

In *Clark v. The People,* 224 Ill. 554, 79 N.E. 941 (1906), defendants were convicted of murder. The death of which defendants were accused resulted from an attempted abortion. Some of the counts of the indictment charged that the instrument used had been thrust into the "body and womb" of the deceased and other counts into the "private parts and womb". On appeal, defendants contended that there was fatal variance, in that the proof showed the instrument was not thrust into the womb, but into the bladder. As to this feature of the appeal, the Court said:

> "The testimony in the case shows that the womb in a normal female lies above and back of the bladder and is connected with the bladder for about an inch just above the neck of the womb. The urethra is a duct leading out of the bladder, to empty it. The vagina is a canal leading to the womb, and is back of the urethra. It is about an inch from the outer edge of the private parts to the opening of the urethra and about the same distance to the opening of the vagina. The urethra starts from the vagina and leads to the bladder. The same lips are around the vagina and urethra. From the outer edge of the private parts to the neck of the womb is from three to four inches. From the outer edge of the private parts to where the bladder begins is about two inches."

In *State v. Moore,* 194 Ore. 232, 241 P. 2d 455 (1952), defendant was charged with contributing to the delinquency of a minor. The specific act complained of was that he did "fondle and manipulate the private parts and attempt to have sexual intercourse with" the minor. The only evidence to support the charge was that of the minor that "he kissed me and hugged me, and then he played with my breasts". In reversing the conviction of defendant, the Court said: "It is hornbook law that, whenever and wherever the terms 'privates' or 'private parts' are used as descriptive of a part of the

human body, they refer to the genital organs. Every dictionary so defines them. . . . A woman's breasts do not come within the designation 'private parts'. Obviously they are no part of her 'genital organs'." This statement was quoted with approval in *State v. Dennison,* 72 Wash. 2d 842, 435 P. 2d 526 (1967). See also *State v. Nash,* 83 N.H. 536, 145 A. 262 (1929), and *Pendell v. State,* 158 Tex. Crim. 119, 253 S.W. 2d 426 (1952).

We conclude that the act alleged in the amended warrant in this case does not constitute a criminal offense under the above-quoted portion of G.S. 14-190.

The State contends, however, that the act complained of falls within the ambit of the statute and the intent of the legislature. In *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329 (1968), Justice Lake, speaking for the Court, after stating the elementary rule that a criminal statute must be strictly construed, said:

> " 'The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant.' (citing *State v. Heath,* 199 N.C. 135, 153 S.E. 855, 87 A.L.R. 37.) In *State v. Whitehurst,* 212 N.C. 300, 193 S.E. 657, 113 A.L.R. 740, Stacy, C.J., speaking for the Court said: 'By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed (*S. v. Earnhardt,* 170 N.C. 725, 86 S.E. 960), but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. *U. S. v. Wiltberger,* 5 Wheat. 76. Criminal statutes are not to be extended by implication or equitable construction to include those not within their terms, for the very obvious reason that the power of punishment is vested in the legislative and not in the judicial department. It is the General Assembly which is to define crimes and ordain their punishment.' "

By G.S. 14-190, the General Assembly has seen fit to classify as a criminal act the indecent public exposure by a male or female of his or her private parts and to ordain the punishment therefor. We are not at liberty to include acts not within the terms of the statute. The female breasts are not private parts within the terms of the quoted portion of the statute.

We are of the opinion, and so hold, that the exposure by a female of her breasts to the public view in a public place is not an

offense under G.S. 14-190. Neither the legislature, by its enactment of laws, nor the courts, by interpretation thereof, can make a man a gentleman nor a woman a lady — this molding must come from other elements of society.

Affirmed.

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1970

WILLIAM JAMES CARTER v. JOHN S. MURRAY AND PRISCILLA ANN BENTON

No. 695SC484

(Filed 4 February 1970)

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

Upon motion for 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, and resolving all contradictions, conflicts, and inconsistencies in plaintiff's favor.

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

Upon motion for nonsuit, defendant's evidence which contradicts that of plaintiff or tends to show a different state of facts is disregarded, and only that part of it which is favorable to plaintiff can be considered.

3. Automobiles § 62— striking pedestrian in unmarked crosswalk — sufficiency of evidence

In this action for personal injuries sustained by plaintiff pedestrian when he was struck by defendants' automobile while crossing the street, the trial court erred in granting defendants' motion for nonsuit made at the close of all the evidence, where the evidence would permit inferences that plaintiff was struck while crossing the street within an unmarked crosswalk at an uncontrolled intersection, and that defendant-driver had failed to yield the right-of-way to him as required by G.S. 20-173(a) and had failed to keep a proper lookout.

4. 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 him, so clearly establishes his own negligence as one of the proximate causes of his injuries that no other reasonable inference may be drawn therefrom, and nonsuit may not be entered on that ground if it is necessary for the court to rely on any part of the evidence offered by defendant.

5. Automobiles § 83— pedestrian in unmarked crosswalk — contributory negligence

In this action for personal injuries sustained by plaintiff pedestrian when he was struck by defendants' automobile while crossing the street, plaintiff's evidence does not establish contributory negligence as a matter of law where it tends to show that he stopped at the corner of an uncontrolled intersection, looked both ways before starting across the street, and then walked straight across the street in an unmarked crosswalk at the intersection, and that he had almost completed the crossing and reached the curb on the other side before he was struck.

6. Automobiles § 40— pedestrian in unmarked crosswalk — assumption that motorist will yield right-of-way

In the absence of anything which should give notice to the contrary, a pedestrian in an unmarked crosswalk is entitled to assume and to act upon the assumption, even to the last moment, that others will observe and obey the statute which requires them to yield the right-of-way.

APPEAL by plaintiff from *Bone, J.*, April 1969 Civil Session of NEW HANOVER Superior Court.

This is a civil action to recover damages for personal injuries suffered by plaintiff, a pedestrian, when he was struck about 7:27 p.m. on 5 January 1968, while crossing Fourth Street in Wilmington, N. C., by an automobile operated by the feme defendant and owned by the male defendant as a family-purpose automobile. Plaintiff alleged that he was struck "at or in the intersection" of Fourth and Taylor Streets and that his injuries were proximately caused by the driver's negligence in (a) failing to keep a proper lookout and to keep her car under control, (b) failing to pay heed to her surroundings and to diminish speed, (c) driving at a speed and in a manner so as to endanger persons and property, (d) failing to blow her horn or to give other warning to alert the plaintiff, and (e) failing to yield the right-of-way in violation of G.S. 20-173. Defendants answered, admitting the family-purpose status of the automobile, but denying the accident occurred in the intersection and alleging that it occurred "at a point 60 or 75 feet North of the intersection" where there was no crosswalk for pedestrians and where the driver-defendant had no reason to anticipate that a pedestrian would attempt to cross. Defendants denied negligence on

their part and pleaded contributory negligence on the part of the plaintiff.

At the scene of the accident, Fourth Street is approximately 39-feet wide from curb to curb and runs generally north and south through a residential area. On the east of Fourth Street, Taylor Street runs generally east and west and intersects Fourth Street from the east at a right angle. On the west of Fourth Street, the intersecting street turns and runs in a southwestern direction, intersecting Fourth Street from the southwest at an oblique angle. At some point southwest of its intersection with Fourth Street, the intersecting street becomes North Front Street. At the northwest corner of the intersection there is an A & P Store, separated from the streets by a parking area. The intersection at Fourth and Taylor Streets is an uncontrolled intersection.

Plaintiff's wife testified:

"My husband and I had been to the A & P prior to this collision . . .

"I would say it was around 7:30 or something like that. The intersection at the corner of Taylor and 4th has lighting. There's two lights on the corner, there's one right on the corner of 4th and Taylor and one across the street, and the A & P has got a light sign there . . . As to what sort of light it creates there, it's not dark there. When we came out of the A & P we walked to the corner of 4th and Taylor. Me and him come out of the A & P and we walked to the corner of 4th and Taylor and he had a big bag of groceries and I had one. Me and him looked good before we started across the street. We didn't see anything coming. He was ahead of me and I was behind him. I was on the white line in the street. He was nearer to the curb, he was just about to the curb and I was on the white line. As to how far he had gotten across the street, he was nearly ready to step up on the curb; on the other side.

"Well, when he got across the street I was in the intersection at the white line behind him and he was across the street just about to get to the curb and I looked up the street and I seen a car coming fast. This car was just about at 4th and Nixon when I first saw it. I would say that was near about a block from where I was. And this car was coming, and coming at a good speed. I said 'Look out James.' And when I said 'Look out' like that he tried to make it to the curb and I ran back across the street. By that time the car had hit him in the side and had

him across . . . her car across there and — I mean about the hood. She couldn't stop right then she carried him halfway the block and then when she stopped that shook him off and when she shook him off she started backing up. She started backing her car back to the corner. . . .

". . . My husband was laying in the street about half a block up from the corner. He didn't move from where he fell off the hood. . . . This automobile which struck my husband did not sound a horn. I didn't hear no horn. . . .

* * * * *

". . . They have markings laid out on the corner where we crossed the street, where people walk in; they have a sign post there that says 4th and Taylor. No, I don't think they have two lines in which you walk across. We walked right by where the post, on the other side of the sign post there, 4th and Taylor, we walked on the other side of that. That would put us right on the sidewalk. Everybody uses that walkway."

On cross-examination, plaintiff's wife testified:

"This was in January when my husband and I came out of the A & P store about 7:30 or 7:45 and it gets dark about 6:00 o'clock that time of year . . . We came right out of the A & P store and came right up the walkway where everybody else walks right to Taylor Street; right to the corner. The front of the A & P does not face squarely on 4th Street; it's kind of sidewise. . . .

"(W)e live on Taylor Street, and we came to the corner of 4th and Taylor, that's where we came to cross, that's where everybody crosses that lives on Taylor Street . . .

". . . There is no market crosswalk across 4th Street; there's no white line going across this way, but there's one up and down the middle of the street. The center line of 4th Street. . . .

". . . My husband had on a dark blue overcoat. He had on a brown hat. And had a big sugar bag in his hands. . . . Paper sugar bag full of groceries. He was carrying it on the right side, that's the side she struck him on. . . . As me and my husband started across there were no vehicles in sight at all on 4th Street then. I didn't see no cars. We didn't go out in front of no automobile. . . . He was actually in the act of stepping up on the curb on the other side when I looked down the street and saw this car coming; and I said 'Look out', and

when I said 'Look out' like that he turned like this to try to make the curb and the car had done struck him in the side and he fell across the car and she couldn't stop right then. She carried him halfway the block. . . .

* * * * *

". . . There is no electric traffic signal at this intersection that has red and green lights."

Plaintiff, James Carter, testified:

"Just before I was hurt my wife and I had been down to the A & P. That A & P store sets down the hill from Taylor Street. . . . We were coming home from the A & P and we come up to the street and traffic was pretty heavy. From the store we went to the corner. I am sure that we went to the corner. I didn't do anything then. We went to the corner, I and her, I had groceries in my hands. We were going home. Going home and we come to Taylor Street. We were living on Taylor Street. My home is east from the corner. Coming from the A & P going up Taylor Street that would be east. I was just about across the street. I didn't see any cars before I left the corner of 4th and Taylor Streets. I look thisaway and I looked thataway, each way, and I didn't see any cars. Then I started on across. I was ahead of my wife; she was behind me. I was just about across the street. Because I had this here foot here ready to put up on the sidewalk; the curb. And I went to pick this one up and that's all I can remember. I didn't hear no horn blow; and didn't see no lights. . . ."

On cross-examination, plaintiff testified:

"I said before I started across 4th Street I looked. I looked north and south, both ways. I was holding the big sack of groceries in my right arm, going across the street. I was walking fast to get out of the way of anything that was coming but I didn't see nothing coming. I looked before I started across.

* * * * *

". . . I did not see it before it struck me. If I had seen it I never would have walked in front of no car. Whatever hit me, I didn't see it before it did hit me. . . ."

Plaintiff completed his evidence by offering medical testimony as to his injuries. At the close of plaintiff's evidence, defendants' motion for nonsuit was overruled. Defendants then offered the testimony of the defendant-driver, of a passenger in her car, and of the investigating officer. Their testimony tended to show that Fourth

Street is a two-lane street and that defendants' car was proceeding north on Fourth Street in the right-hand lane in second gear and at a speed of approximately 25 miles per hour; that it passed through the intersection with Taylor Street and was about 45 feet north of the intersection before it hit the plaintiff; that plaintiff was about fifteen feet in front of the car when the passenger first saw him and called out a warning to the driver; that the driver had not seen plaintiff until her passenger called out; that at that time plaintiff had just stepped across the center line of Fourth Street; that defendant-driver turned to the left and stopped her car, but the right bumper or fender hit plaintiff; that the car did not move after it struck the plaintiff; and that after he was hit, plaintiff was lying in front of the car about four feet from the center line of the highway and approximately 45 feet north from the intersection of Taylor Street.

At the close of all the evidence, defendants renewed their motion for nonsuit, which was allowed. Plaintiff appealed.

Aaron Goldberg and Herbert P. Scott, for plaintiff appellant.

James, James & Crossley, by John F. Crossley, for defendant appellees.

PARKER, J.

[1, 2] Appellant's sole assignment of error is that the trial court erred in granting defendants' motion for nonsuit made at the close of all of the evidence. In passing upon motion for 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, and resolving all contradictions, conflicts, and inconsistencies therein in plaintiff's favor. Defendants' evidence which contradicts that of the plaintiff, or tends to show a different state of facts, is disregarded, and only that part of it which is favorable to plaintiff can be considered. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47.

The evidence in the present case, when subjected to these rules, would permit the jury to find the following facts: Plaintiff lived on Taylor Street east of Fourth Street. He went with his wife to the A & P store, which is on the west side of Fourth Street. On leaving the store, they walked to the corner of Fourth and Taylor Streets, where they stood beside the sign post, "right on the sidewalk." There they stopped and looked both ways on Fourth Street, but saw no car approaching. There was no traffic control signal and no

marked crosswalk at the intersection. After looking both ways and seeing no car, plaintiff started walking eastward directly across Fourth Street "where everybody crosses that lives on Taylor Street." It was dark, but the intersection was lighted by street lights and by the store sign. When plaintiff was almost all of the way across Fourth Street and was about to step onto the curb on the east side, he was struck by defendants' car, which was proceeding north on Fourth Street "at a good speed." Plaintiff was carried on the hood of the car approximately 45 feet north of the intersection before it came to a stop and threw plaintiff to the pavement. Defendant-driver did not sound her horn and plaintiff did not see the car before it struck him. Defendant-driver did not see plaintiff until after her passenger had first seen him and had called out a warning to her.

[3] From these facts, a reasonable inference could legitimately be drawn that plaintiff was struck by defendants' car while he was crossing Fourth Street within an unmarked crosswalk at an intersection and that defendant-driver had failed to yield the right-of-way to him as required by G.S. 20-173(a). It would further be a permissible inference that defendant-driver had failed to keep a proper lookout, as she did not see plaintiff until after her passenger had first seen him and called out a warning to her. These permissible findings and inferences would support a jury verdict of actionable negligence on the part of the defendants and nonsuit was not justified on the ground of insufficiency of the evidence on that issue.

[4-6] Nor was nonsuit proper on the issue of plaintiff's 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 injuries that no other reasonable inference may be drawn therefrom. *Bowen v. Gardner, supra.* Nonsuit may not be entered on the ground of contributory negligence on plaintiff's part if it is necessary for the court to rely on any part of the evidence offered by the defendants. *Wells v. Johnson,* 269 N.C. 192, 152 S.E. 2d 229. Plaintiff's evidence in the present case, when considered in the light most favorable to him, and ignoring defendants' evidence to the contrary, tends to show that plaintiff stopped at the corner of the intersection, looked both ways before starting to cross the street, and then walked straight across the street in an unmarked crosswalk at the intersection and thus had the right-of-way under G.S. 20-173(a). The evidence further tends to show that he had almost completed the crossing and reached the curb on

the other side before he was struck. If these were the facts, then plaintiff was not required to anticipate negligence on the part of others. "In the absence of anything which gave or should have given notice to the contrary, [plaintiff] was entitled to assume and to act upon the assumption, even to the last moment, that others would observe and obey the statute which required them to yield the right-of-way." *Bowen v. Gardner, supra.* Even if plaintiff had seen defendants' car approaching, the evidence here shows nothing unusual in the car's approach which would have put plaintiff on notice that the driver did not intend to obey the law and yield the right-of-way to him. True, it was plaintiff's duty, even with the right-of-way, to exercise ordinary care for his own safety. However, on that matter there is evidence to support a finding either way. While the evidence as to whether he continued to maintain a proper lookout throughout the entire time he was crossing is unclear, the evidence in that regard certainly does not so clearly establish negligence on his part that no other reasonable inference can be drawn therefrom.

Defendants' evidence was in sharp conflict with that of the plaintiff, and would indicate that plaintiff was not crossing at an intersection but was at least 45 feet north of the intersection and that, at night in an unlighted area and wearing dark clothing, he stepped directly into the path of defendants' car, which had the right-of-way and was proceeding within its own proper lane of traffic while being driven at a lawful speed and in a careful and prudent manner. However, determination of the true facts from the sharply conflicting evidence was for the jury.

The judgment of involuntary nonsuit is

Reversed.

CAMPBELL and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. JESSIE B. LEWIS

No. 697SC559

(Filed 4 February 1970)

1. Criminal Law § 91; Constitutional Law § 31— continuance — time to find witnesses — denial of motion

Defendant's motion for continuance on the ground that he needed additional time to locate material witnesses, *held* properly denied by the trial court in the exercise of its discretion and without prejudice to defendant's constitutional rights, where defendant had the names and tele-

phone numbers of three possible witnesses at least five days prior to trial but made no effort to phone them, nor did he inform his attorney of their existence until the day before trial.

2. Criminal Law § 91; Constitutional Law § 31— continuance — appeal — showing of prejudicial error

Whether a defendant bases his appeal upon an abuse of 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.

3. Constitutional Law § 31; Criminal Law § 50— defendant's right to expert witnesses — sufficiency of request — appeal

The denial of indigent defendant's petition that he be authorized to employ specialists "in the field of statistics" who would aid him in his defense and who would be paid by the state or county, *held* not reversible error, where (1) the petition did not specifically allege what type of specialist in statistics was needed and (2) the petition failed to show the availability of the specialists and the relevancy of their evidence.

4. Constitutional Law § 31; Criminal Law § 50— indigent defendant's right to expert witnesses — prerequisites

Trial court may properly refuse to permit the expenditure of State funds for the employment of expert witnesses for an indigent defendant, unless the defendant shows the reasonable probability of the availability of such evidence, together with its relevance.

5. Criminal Law §§ 60, 80— exhibits — fingerprint cards — hearsay — custody of police department

Fingerprint cards made in 1948 and 1955 and containing fingerprint impressions of a named individual were not hearsay and were properly admitted in evidence, where an employee of the police department testified that he was in charge of the department's fingerprint records and that the fingerprint cards had been in the custody of the department.

6. Criminal Law § 80; Evidence § 28— public records — admissibility

Wherever a public officer is required or authorized to keep a record of his official transactions and observations, the record so kept is admissible as evidence of the facts recorded which are within the scope of the authority or duty.

7. Criminal Law § 138— punishment — credit for time served on prior sentence — time pending appeal

Although a defendant is not entitled to credit for time spent in jail awaiting trial because of his inability to post bond, the defendant on the retrial of the instant case was entitled to credit for time served on the prior sentence and for time held in custody pending appeal. G.S. 15-184, G.S. 15-186, G.S. 15-186.1.

ON writ of certiorari as substitute for an appeal by defendant from *May, S.J.*, 19 May 1969 Session NASH County Superior Court.

Defendant was charged with secret assault. Upon his plea of not guilty he was tried and convicted. From judgment entered on the jury verdict, he appeals.

The assault for which defendant was tried occurred on 28 January 1955, at a time when Jessie B. Lewis was being held in the Nash County jail awaiting trial. The assault was made upon the Nash County jailer and effectuated Lewis's escape from jail. He was subsequently apprehended and returned to jail. At the August 1955 Term he entered a plea of *nolo contendere* to the charge of secret assault, and was sentenced to a term of 10 years in State Prison. He subsequently escaped and was apprehended in Philadelphia, Pennsylvania, in June 1965 and returned to North Carolina. He filed a petition for habeas corpus on 12 January 1967 and, after hearing thereon, was granted a new trial. In that proceedings he maintained that his true identity was Dr. Harold B. Richardson. Upon evidence presented, the court found as a fact that Jessie B. Lewis and Dr. Harold B. Richardson are one and the same person. Defendant was again tried at the October 1967 Session of Nash Superior Court. He was convicted and appealed. This Court affirmed the Superior Court. The Supreme Court allowed certiorari and granted a new trial. Upon a jury verdict of guilty, he was sentenced to 10 years in the State Prison. The judgment directed that he be given full credit for the time he had served on the prior sentence in this case.

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

Milton P. Fields and Leon Henderson, Jr., for defendant appellant.

MORRIS, J.

[1, 2] Upon the call of the case for trial defendant's court-appointed counsel moved for a continuance. The court, after hearing arguments presented by defendant and the solicitor, denied the motion. The refusal of the court to continue the case is the basis for defendant's first assignment of error. Defendant contends that his identity is the primary question in the case. He has contended since the habeas corpus proceeding that he is, in fact, Dr. Harold B. Richardson, a doctor who originally is from Haiti, and not Jessie B. Lewis. It appears from the record that the session of court began on Monday, 19 May 1969. Defendant's case was called on Thursday, 22 May 1969. The defendant received a letter on 17 May

1969 containing the names and addresses of three witnesses who he felt were material to his defense. He wrote these three people on 19 May 1969 by certified mail but had not received any reply on 22 May 1969. The letter he received contained the telephone number of each of the persons. No attempt had been made to reach any one of them by telephone. Counsel for defendant stated that he was not given the information until 21 May 1969. Counsel who had been previously appointed for defendant and who had previously represented him had made diligent effort to locate witnesses whose names were given them by defendant, even to consulting with the Haitian Ambassador, but not a single witness could be located. Counsel for defendant, during a recess, attempted to call two of the three listed telephone numbers. One call resulted in no answer. On the other call, the wife of the proposed witness answered, said her husband was from Haiti, was at work and could be reached by telephone at 10:30 that night. Apparently no further attempt was made that night or later to contact this proposed witness. No affidavit was ever filed as required by G.S. 1-176. No subpœna was ever issued. When the court inquired whether defendant had a letter stating that the proposed witnesses would come, counsel replied that the letter was in French and he could not read it, but no attempt to have it translated was made. There is nothing in the record to indicate to what these witnesses would have testified had they been present. Defendant concedes that ordinarily whether a continuance is allowed is addressed to the discretion of the court. *State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520 (1948), but he contends that here there was an abuse of discretion and a denial of defendant's right of confrontation. We do not perceive any abuse of discretion, nor do we think there has been a denial of defendant's constitutional rights. It is obvious that defendant, who says he is an educated man and speaks fluently English, French and Esperanto, had the names and telephone numbers of three persons he says could help in his defense, for at least five days prior to the call of his case for trial. Yet he apparently made no effort to contact them by telephone and, from the record, did not even inform his counsel of their existence and whereabouts until the day before his case was called: this in the face of the argument that diligent effort had previously been made for a period of some four years to locate these people. It seems inconceivable that when information, sought for some four years, suddenly is unsolicitedly available, no effort is made to communicate by telephone for a period of five days, and then only at the insistence of the court, and further that no follow-up effort is made when definite information is received as to the time one witness would be available

and could be reached by telephone. "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice." *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617 (1968). Defendant has shown neither. This assignment of error is overruled.

[3] Defendant next asserts error in the denial by the court of defendant's petition that he be authorized to employ experts in the field of fingerprinting and statistics and that these experts be paid by the State of North Carolina or the County of Nash.

On 31 March 1969 defendant filed a petition stating "2. That one of the crucial questions involved, or to be involved, in the trial of this action will be the question of the comparison of fingerprints of Jesse (sic) Lewis and the said Dr. Harold B. Richardson. 3. That the said Dr. Harold B. Richardson desires to employ specialists in this field and in the field of statistics, and must do so in order to properly prepare and present his defense in that the said Dr. Harold B. Richardson does not have funds with which to employ and pay the fees of these specialists, and therefore, requests the Court to enter an Order requiring the County of Nash or the State of North Carolina to pay the reasonable fees and expenses for the investigation and testimony of said specialists." The petition also requested the employment of specialists in the field of medicine and psychiatry. On 2 April 1969 Judge Hubbard entered an order directing the Department of Correction to forward to defendant's counsel a certified copy of the fingerprints taken of Jessie B. Lewis in 1955. On 4 April 1969, Judge Hubbard entered an order as follows: "1. That the defendant or his attorneys shall give an estimate of the cost for comparing the fingerprints and, if reasonable, the Court will enter an Order requiring the County of Nash to pay the same. 2. The Court denies the motion of the defendant to employ experts to give testimony upon the admissibility of fingerprint evidence, the statistical background of fingerprint evidence and upon the question of whether or not fingerprint evidence should be rejected or received in Court." Defendant excepted only to paragraph 2 of the order. We assume that since the record is devoid of any estimate of the cost for comparing the fingerprints, defendant abandoned his request.

Defendant earnestly contends that defendant has been denied the effective aid of counsel and has been discriminated against by the State for that the State was able to obtain the services of three experts on one important issue and have them testify at the trial;

whereas, defendant was not financially able to employ experts and was not allowed to do so at the expense of the State. The witnesses testified for the State as to the comparison of the fingerprints taken in 1955 and in 1966 when defendant was apprehended and returned to custody. It is noted that defendant could also have employed experts for this purpose had he complied with the condition imposed by Judge Hubbard's order. For some reason, known best to him, he chose not to pursue this portion of his request.

We recognize, of course, that there is authority outside this jurisdiction holding that the constitutional right of an indigent to counsel includes, within reasonable limits, the right, upon request, to have one or more experts appointed to act on his behalf. We are also aware of Rule 17, Federal Rules of Criminal Procedure, giving this right to indigent defendants in Federal courts. Neither are we unaware of G.S. 7A-454, effective 1 July 1969, which provides that the court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, the expense therefor to be paid by the State.

[3, 4] Nevertheless, we do not believe the question is properly raised in this case. The petition here does not allege specifically what type of expert is needed. A "specialist in the field of statistics" is requested. The field of statistics is quite broad and encompasses multitudinous subjects. Nor does the petition state whether such an expert is available, nor what defendant intends or would attempt to prove by this expert, or what relevancy the testimony would have to his defense. The defendant does not give the court the benefit of any information as to the approximate cost of the services of the expert witness. The tenor of defendant's cross-examination of the State's expert witnesses and the argument advanced in his brief indicates that he felt his defense would have been aided by the testimony of an expert as to the conclusiveness of fingerprint evidence and the statistical possibility that two or more fingerprints of different persons could be the same. The court, however, had before it the petition of defendant in which very scant information was given. The petition is so completely devoid of specifics that it is impossible to determine how or whether the defendant could or would be prejudiced. It appears that defendant in this case desires the State to furnish funds for a fishing expedition to try to find something which might possibly muddy the waters and furnish some possible evidence for his defense. Unless a reasonable probability of the availability of such evidence is shown, together with its relevance, and so found by the court, we do not think the State should

be required to pay the bill. The refusal of the court to grant *carte blanche* authority for the expenditure of funds for the employment of expert witnesses in this case does not constitute reversible error.

[5] Defendant's next assignment of error is directed to the admission into evidence of State's Exhibits 1, 3 and 4 which were identified as fingerprint cards of Jessie B. Lewis.

State's Exhibit No. 1 is a fingerprint card of Jessie Bill Lewis. The fingerprints thereon were taken 14 February 1948 by J. E. Grady. Exhibit No. 3 is a set of fingerprint impressions of Jessie B. Lewis taken by Dr. J. E. Grady on 11 January 1955. Exhibit No. 4 is a photo of the print of right ring finger taken from the 1948 set and the same ring finger from a set of impressions taken by B. C. Richardson in 1966. No objection is made to the admission of the fingerprints taken in 1966.

The fingerprint records were introduced into evidence on the testimony of B. C. Richardson who testified, in substance, that he was employed by the Rocky Mount Police Department and had been for 19 years; that he was in charge of the identification division of the police department; that it was his responsibility to do the fingerprinting and keep the fingerprint records and photographs of the Rocky Mount Police Department; that the Department had the fingerprints of Jessie B. Lewis and that they had been in the custody of the Rocky Mount Police Department. He further identified each exhibit as a fingerprint card of Jessie Bill Lewis, a part of the records of the Rocky Mount Police Department. As to Exhibit No. 4, he testified that he had himself made the photographs and had blown them up for purposes of comparison.

[5, 6] Defendant contends that the exhibits are hearsay and inadmissible. "Wherever a public officer is required or authorized to keep a record of his official transactions and observations, the record so kept is admissible as evidence of the facts recorded which are within the scope of the authority or duty." Stansbury, N.C. Evidence 2d, § 153, p. 379. With respect to this question, Stansbury further notes that "[a]dmissibility is not confined to records made and kept in a public office, but extends to reports and returns made by one officer to another" and "[i]f the original document or record itself is produced, its authenticity may be proved by the testimony of the official custodian that it is a part of the records or files of his office." Stansbury, *supra,* pp. 381, 383. Defendant's assignment of error to their admission in evidence is overruled. Their probative force was a matter for the jury.

[7] Defendant next contends that the court erred in denying his request for credit for the time spent in jail awaiting trial and pending appeal since 1965. Our courts have held that a defendant is not entitled to credit for time spent in jail awaiting trial because of his inability to post bond. *Williams v. State,* 269 N.C. 301, 152 S.E. 2d 111 (1967); *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633 (1965); *In re Wilson,* 3 N.C. App. 136, 164 S.E. 2d 56 (1968).

But the defendant is entitled to time served on prior sentence imposed in this case and for time spent while being held in custody on this charge pending appeals in this case. See G.S. 15-184 as amended effective 22 April 1969, and G.S. 15-186 and G.S. 15-186.1 effective 16 June 1969.

Before commitment is issued in this case a judge of the superior court assigned to hold the courts in Nash County shall hold a hearing at which the defendant and his counsel may be heard and shall make due inquiry and appropriate findings, both of fact and law, with respect to the time actually served by the defendant on a prior sentence in this case numbered 6713 in which a new trial was granted, and any other time actually spent by the defendant while being held in custody on this charge pending his several appeals in this case. The judge shall reduce his findings to writing, cause a transcript of the evidence taken at such hearing to be filed in the office of the Clerk of the Superior Court of Nash County and the defendant furnished a copy thereof, and make an appropriate order or orders based on his findings of fact and conclusions of law requiring the Director of the Department of Corrections to give the defendant credit on the 10-year prison sentence imposed herein for all the time the defendant served in prison on his plea of *nolo contendere* entered in this case in addition to credit for any other time the defendant has been detained on this charge by the authorities pending his several appeals in this case.

The record in this case clearly shows that this defendant first entered a plea of *nolo contendere.* Subsequently, he filed a petition for writ of *habeas corpus.* He then contended that he was not Jessie B. Lewis but was Dr. Harold B. Richardson. He did not seek review of the determination in that proceedings that Jessie B. Lewis and Dr. Harold B. Richardson are one and the same person but accepted a new trial granted to Jessie B. Lewis on the ground that Jessie B. Lewis had not had counsel appointed when he entered his plea of *nolo contendere.* Upon his retrial, represented by able and well-qualified counsel appointed by the court, he was convicted and appealed. This Court affirmed his conviction. The Supreme Court

allowed certiorari and granted a new trial. The present appeal is from a conviction and sentence upon the jury verdict of guilty upon retrial. It is obvious that defendant has had his day in court. The trial from which this appeal was taken as a matter of right was free from prejudicial error.

In the trial we find no error. The cause, however, is remanded for a hearing in accordance with this opinion.

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

IN RE: T. SPEAS ROBERTSON, FORMER JUSTICE OF THE PEACE FOR OLDTOWN TOWNSHIP, FORSYTH COUNTY, EX PARTE

No. 7021SC109

(Filed 4 February 1970)

1. Contracts § 8; Courts § 17— contract for justice of the peace to collect accounts — validity

Contract between a physician and a justice of the peace for the justice of the peace, under color of his office, to collect accounts owed the physician by his patients, if made, would be void, since no judicial officer may lawfully contract so to use "the color of his office," and no party to actions to be decided by a justice of the peace may lawfully contract with the justice of the peace as to the results of those actions.

2. Courts § 17; Clerks of Court § 1— abolishment of office of justice of the peace — compelling delivery of records to clerk of court

Statutes requiring justice of the peace to deliver his records to the clerk of superior court upon expiration of his term of office and giving the clerk power to compel such delivery, G.S. 7-133, G.S. 2-16(12), were not impliedly repealed by the abolishment of the office of justice of the peace.

3. Courts § 17— records of justice of the peace — public inspection — abolishment of office

Records of a justice of the peace are public records which should be available and open to public inspection, and the fact that the office of justice of the peace no longer exists in the county furnishes a former justice of the peace no immunity from public review of his official actions while he held that office.

4. Courts § 17; Clerks of Court § 1— records of justice of the peace — compelling delivery of records to clerk of court

Records which a former justice of the peace can be required to deliver to the clerk of superior court are not limited to the civil and criminal dockets referred to in G.S. 7-130. G.S. 7-133, G.S. 2-16(12).

5. Courts § 17; Clerk of Court § 1— abolishment of office of justice of peace — clerk's order requiring delivery of records to the clerk

Where office of justice of the peace had been abolished in a county upon establishment of a district court therein, the superior court properly affirmed an order of the clerk of superior court directing a former justice of the peace to produce for inspection by the clerk all records made or maintained by him by virtue of, or under color of, his office as a justice of the peace, including, but not limited to, docket books, receipt books, and all records relating to bank accounts into which monies collected under color of his office were deposited.

APPEAL by Respondent from *Exum, J.*, 10 November 1969 Session of FORSYTH Superior Court.

On 14 May 1969 Lathan T. Moose filed a verified petition with the clerk of Superior Court of Forsyth County in which he alleged: Petitioner, Lathan T. Moose, is a licensed physician and surgeon with an office in Forsyth County. Respondent, T. Speas Robertson, is a former justice of the peace whose term of office expired on 1 December 1968. "Prior to December 1, 1968, and dating from approximately April 1, 1967, petitioner contracted with respondent for respondent, under color of his office as Justice of the Peace of Forsyth County, for collection of certain delinquent accounts totaling in excess of $20,669.70 due petitioner as payments from patients for services rendered to them by him as a physician and surgeon." On demand of respondent, petitioner forwarded to respondent a total of $1,041.75 "as reimbursement for costs of court and service and judgments for aforesaid various accounts." Respondent "proceeded on said accounts, collecting on some, proceeding to judgment on others within the color of his office of Justice of the Peace of Forsyth County, North Carolina." On information and belief, petitioner alleged respondent collected in excess of $3,000.00 from said accounts and "refuses to forward or account for said monies" and "converted funds belonging to petitioner to his own use."

The petition prayed that the clerk issue an order directing the respondent to produce all records made or maintained by him during his term of office as a justice of the peace, that the order set the time and place for the production of said records, and that respondent be "subpœnæd to appear at the same time in order to explain said records and why he has made no accounting to petitioner."

Upon this *ex parte* petition the clerk of superior court signed an order dated 14 May 1969 directing the respondent to appear before the clerk on 28 May 1969 and to produce for inspection all records made or maintained by him by virtue of, or under color of, his office

as a justice of the peace. Copies of the petition and order were served on the respondent on 15 May 1969. On motion of respondent for additional time, the clerk entered an order allowing him until 6 June 1969 in which to appear before the clerk "to produce said records or file answer or otherwise plead in this matter."

On 6 June 1969 respondent filed answer, denying he had contracted with petitioner for the collection of delinquent accounts, but admitting certain accounts had been sent to him "to institute civil actions on." In a further answer respondent alleged: That he had instituted proceedings against the defendants named in the accounts; that some of the defendants appeared before the respondent, some could not be located for service of summons, some went to petitioner and made settlement, and some did not respond; that he was paid $1,914.75 by defendants in such actions, which was transmitted to the petitioner; that he had billed the petitioner $1,041.75 in court costs, which petitioner paid; that defendants paid respondent an additional $3,217.85, "which respondent has credited to the account of petitioner"; and that petitioner has refused to pay for the court costs and other expenses of the respondent, which amount to $918.31, but has insisted on the payment of the full amount of $3,217.85.

Respondent prayed that the order theretofore entered against him be dismissed "for the reason that the clerk is without authority and jurisdiction to enter same, and for the further reason that petitioner is and has been offered full opportunity to examine any of the records of the respondent, thereby eliminating the purpose of this proceeding."

After hearing, the clerk of superior court on 12 June 1969 signed an order adjudging that:

> "T. Speas Robertson shall forthwith produce for inspection by the clerk all records made or maintained by him by virtue of or under color of his office as a justice of the peace, including but not limited to, docket books, receipt books, bank deposit slips, bank statements for all accounts into which monies collected under color of office were deposited, all cancelled checks drawn upon said accounts, journals and ledgers or the equivalent records maintained, including cash books, bank deposit books, and check stubs for accounts where monies collected were deposited."

Respondent appealed to the Superior Court of Forsyth County and on 10 November 1969, after hearing argument of counsel, Judge James G. Exum, Jr., entered an order affirming in all respects the

order of the clerk dated 12 June 1969. From this order, respondent appealed.

No counsel for petitioner appellee.

Wesley Bailey for respondent appellant.

PARKER, J.

[1] G.S. 7A-176, enacted as part of Chap. 310 of the 1965 Session Laws, provides:

> "The office of justice of the peace is abolished in each county upon the establishment of a district court therein."

The record before us points up the desirability of this legislation. On the one hand petitioner, a physician and surgeon, alleges that he contracted with respondent, a justice of the peace, "for respondent, under color of his office as Justice of the Peace," to collect certain accounts which petitioner claimed were owed him by his patients for professional services rendered to them. Such a contract, if made, was clearly void. No judicial officer may lawfully contract so to use "the color of his office"; and it would have been equally unlawful for petitioner, as party plaintiff in civil actions to be heard and decided by respondent, to contract with respondent as to the results of such actions. On the other hand respondent, while denying he contracted with petitioner for the collection of the accounts, admits he received the accounts "for the institution of civil suits by your respondent as a justice of the peace," that he instituted such proceedings against the defendants named in the accounts, and that such defendants paid him $3,217.85, which he "credited to the account of petitioner." While the meaning of this last allegation is not clear, it is obvious that respondent, whose term of office expired 1 December 1968, is still retaining possession of funds which do not belong to him. Thus, neither petitioner nor respondent appears on this record in a favorable light.

[5] On this appeal, however, we are not called upon to decide the relative rights and liabilities of petitioner and respondent as between themselves. This is not a civil action in which those rights and liabilities can be properly adjudicated. We are concerned here only with the validity of the order of the judge of superior court which affirmed the clerk's order directing respondent to produce certain records for inspection by the clerk. Determination of this

question requires interpretation of the following statutes in the light of G.S. 7A-176 which abolished the office of justice of the peace.

G.S. 2-16 provides:

"Every clerk has power —

* * * * *

"(12) To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or, if the justice be dead, by his personal representative, of all records, papers, dockets and books held by such justice by virtue or color of his office, and to deliver the same to the successor in office of such justice."

G.S. 7-130 provides:

"Justice shall keep docket. — A civil and criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice."

G.S. 7-133 provides:

"Dockets, papers, and books delivered to successor. — When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers, to the clerk of the superior court for his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor."

[2, 3] Respondent contends that the sole purpose of G.S. 2-16(12) and G.S. 7-133 was to require delivery of the enumerated records by a justice of the peace on expiration of the term of his office *in order that such records might be delivered to his successor.* From this premise he argues that the office having now been abolished in Forsyth County by establishment of a district court therein, there is no successor to whom the records may be delivered and therefore the purpose of the statutes is no longer possible of fulfillment. We do not interpret these statutes so narrowly. A valid purpose may still be served by requiring respondent to deliver the records involved to the clerk. These are public, not private, records. They should be avail-

able and open to public inspection. The fact that the office of justice of the peace no longer exists in Forsyth County furnishes respondent no immunity from public review of his official actions while he held that office. Therefore, we do not agree that these statutes have been impliedly repealed. G.S. 7-133 still stands to command that respondent "shall deliver" certain records, books, "and all official papers," to the clerk. G.S. 2-16(12) still grants the clerk power to enforce that command.

[4, 5] Appellant next contends that even if G.S. 2-16(12) and G.S. 7-133 are still in effect, the only records which he can be required to deliver to the clerk are the civil and criminal dockets referred to in G.S. 7-130. There is no merit in this contention. G.S. 7-133 expressly commands respondent to deliver, in addition to the dockets "all law and other books furnished him as a justice of the peace, *and all official papers.* . . ." (Emphasis added.) G.S. 2-16(12) empowers the clerk to compel the return to his office of *"all records, papers, dockets and books held by such justice by virtue or color of his office.* . . ." (Emphasis added.) Neither statute is limited to apply just to the civil and criminal dockets. No valid reason appears why respondent should not comply with these statutes as written.

The order appealed from is

Affirmed.

CAMPBELL and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. LEE PARKER

No. 703SC38

(Filed 4 February 1970)

1. Assault and Battery § 14— "serious injury" — sufficiency of evidence

In this prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the State's evidence *is held* sufficient for the jury on the question of serious injury where it tends to show that the prosecuting witness, a police officer, was stabbed with a steak knife in his neck and ear, that three stitches were taken in the neck wound, that his neck was sore and stiff for a week and a half, that he was absent from work four days during which he saw a doctor twice for the purpose

of dressing the wound, and that a knot requiring treatment by a doctor developed from the neck wound.

2. Assault and Battery § 5— assault with deadly weapon — offenses created by 1969 General Assembly

The 1969 General Assembly created two new lesser offenses of the crime of assault with a deadly weapon with intent to kill inflicting serious injury, now G.S. 14-32(a), that of assault with a firearm or other deadly weapon *per se* in which serious injury is inflicted, G.S. 14-32(b), and that of assault with a firearm with intent to kill, G.S. 14-32(c).

3. Assault and Battery § 5— serious injury — facts of particular case

Rule that whether serious injury has been inflicted must be determined according to the particular facts of each case applies to a prosecution under G.S. 14-32(b) for assault with a deadly weapon *per se* inflicting serious injury.

4. Criminal Law § 132— motion to set aside verdict as against greater weight of evidence

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant the motion is not reviewable on appeal.

5. Assault and Battery § 15— instructions — declaration that knife was deadly weapon per se

The trial court did not err in instructing the jury that a steak knife allegedly used in assaulting a police officer was a deadly weapon *per se*, notwithstanding there was no verbal description of the knife, where the knife was offered in evidence and displayed to the judge and jury, and examination of the knife by the Court of Appeals reveals that it has a sharp, sawtooth blade approximately four and one-half inches long with a keen point.

6. Assault and Battery § 16— assault with deadly weapon — failure to submit simple assault

In this prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in failing to charge on the lesser offense of simple assault, there being no evidence of such offense.

APPEAL by defendant from *Fountain, J.*, 18 August 1969 Criminal Session, PITT Superior Court.

The bill of indictment returned against defendant charged that on 26 July 1969 Lee Parker did unlawfully, wilfully and feloniously assault Lt. W. M. Carr with a certain deadly weapon, to wit: a steak knife, with the felonious intent to kill and murder the said W. M. Carr, inflicting serious injuries, not resulting in death, upon the said W. M. Carr, to wit: stab wound in neck and left ear.

The State's evidence tended to show: Pursuant to several telephone calls received from defendant around 2:00 a.m. on 26 July

1969 complaining about a group of people who had caused trouble at a night club, the dispatcher at the Greenville Police Department gave the information to Lt. W. M. Carr and asked him to investigate. Accompanied by Officer Crandall, Lt. Carr went to the address given the dispatcher by defendant. The officer went to the door and knocked, after which a lady came to the door. Crandall asked for Lee Parker and while talking to the lady, defendant came through the doorway by the lady and attacked Lt. Carr with a "steak" knife. Further evidence pertinent to this appeal appears in the opinion.

The jury returned a verdict of guilty of assault with a deadly weapon *per se,* inflicting serious bodily injuries, and defendant was given an active prison sentence of not less than three nor more than five years, from which he appealed.

Attorney General Robert Morgan and Staff Attorney L. Philip Covington for the State.

John H. Harmon for defendant appellant.

BRITT, J.

[1] Defendant first assigns as error the failure of the trial court to grant his motion for nonsuit and his motion to set the verdict aside as being against the weight of the evidence. On this assignment defendant argues that the evidence was insufficient to support the verdict for that there was no substantial evidence that any injuries allegedly received by Lt. Carr were of a serious nature.

Regarding his injuries, Lt. Carr testified: While he and defendant were tussling, he (Lt. Carr) was stabbed in his neck and ear. When he (Lt. Carr) arose from the ground, blood rushed to his glasses. Following the altercation he went to the hospital emergency room where Dr. Tayloe treated him, taking three stitches in the neck wound and administering a tetanus shot. Lt. Carr spent some two and one-half hours at the hospital after which he went home and to bed. The next morning he was sore and stiff and had to have assistance in getting off the bed. The soreness lasted approximately a week and a half; he was absent from work four days during which time he saw the doctor twice for purpose of dressing the wound, and the stitches remained in his neck six days. From his neck wound he developed a knot which was treated by Dr. Mack Andrews.

[2] G.S. 14-32 was rewritten by the 1969 General Assembly, the rewrite becoming effective 27 May 1969. Under the 1969 rewrite, the offense theretofore envisioned by G.S. 14-32 is codified as G.S.

14-32(a); G.S. 14-32(b) creates a new lesser offense of G.S. 14-32(a), that of assault with a firearm or other deadly weapon *per se* in which serious injury is inflicted; and G.S. 14-32(c) creates another new lesser offense of G.S. 14-32(a), that of assault with a firearm with intent to kill. All three offenses are declared to be felonies and punishment for violation of G.S. 14-32(a) is as provided by G.S. 14-2 as follows: by fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court; violation of G.S. 14-32(b) or G.S. 14-32(c) is punishable by a fine or imprisonment for not more than five years, or both such fine and imprisonment.

[3] In *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1, defendant was indicted for and found guilty of the offense provided by then G.S. 14-32. On the question of serious injury, the court said:

> "* * * The term 'inflicts serious injury' means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. *Whether such serious injury has been inflicted must be determined according to the particular facts of each case.*" (Emphasis added.)

The foregoing was quoted with approval in *State v. Ferguson,* 261 N.C. 558, at p. 560, 135 S.E. 2d 626. We hold that the rule declared by the court in *Jones* and *Ferguson* pertaining to serious injury under G.S. 14-32 as then written also applies to G.S. 14-32(b) as now written, and the evidence in the case at bar was sufficient to go to the jury on the question of serious injury.

[4] Regarding defendant's motion to set aside the verdict as being against the weight of the evidence, it is well settled in this jurisdiction that such motion is addressed to the discretion of the trial court and its refusal to grant the motion is not reviewable on appeal. 3 Strong, N.C. Index 2d, Criminal Law, § 132, pp. 55-56.

The first assignment of error is overruled.

[5] Defendant's second, third and fourth assignments of error relate to the trial court's charge to the jury on the question of deadly weapon. He contends that the court committed prejudicial and reversible error in charging the jury (1) that the knife offered in evidence was, as a matter of law, a deadly weapon when used as a knife, (2) that said knife was a deadly weapon *per se,* and (3) that if the State had satisfied the jury from the evidence and beyond a reasonable doubt that defendant assaulted Lt. Carr with the steak

knife offered in evidence and that he inflicted serious injury, the jury might return a verdict of guilty of assault with a deadly weapon *per se* inflicting serious injury.

Defendant contends that because there was no verbal description of the knife which was offered in evidence that the trial judge had no basis upon which he could declare as a matter of law that the steak knife was a deadly weapon *per se*. Although it is generally desirable that an adequate verbal description of a weapon be set out in the record, in this case the steak knife was offered in evidence and displayed to the trial judge and the jury who were therefore in position to determine for themselves an adequate description of the knife; in addition, the knife is before this Court as an exhibit and we, also, can see that it has a sharp, sawtooth blade approximately four and one-half inches long with a keen point and a handle approximately four inches long. Lt. Carr testified: He and Officer Crandall went to the house where defendant was and Crandall knocked on the door. A lady came to the door and as she opened it defendant came out through the door by her and Crandall and up to Lt. Carr. Defendant obtained the knife from his shirt and began "tussling" with Lt. Carr, after which defendant and Lt. Carr fell off the porch onto the ground, during which time Lt. Carr was cut. Officer Crandall testified: Defendant came out of the house and attacked Lt. Carr. The two of them fell to the ground, after which defendant was on Lt. Carr's back, Carr's face being toward the ground. Defendant had the knife in his right hand and was trying to cut Lt. Carr's neck. When defendant first came out of the house, he stated he was going to kill the white S. O. B. While defendant and Lt. Carr were on the ground, Crandall sprayed mace in defendant's face, after which he jumped up, wiped his face and ran into the house.

In *State v. Smith,* 187 N.C. 469, 121 S.E. 737, defendant was charged with murder, having struck the deceased on his head with a baseball bat. In an opinion by Stacy, C.J., the court said:

> "Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. *S. v. Craton,* 28 N.C., p. 179. The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. *S. v. Archbell,* 139 N.C., 537; *S. v. Sinclair,* 120 N.C., 603; *S. v. Norwood,* 115 N.C., 789.
>
> Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the ques-

tion as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. *S. v. Sinclair, supra.* But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. *S. v. West,* 51 N.C., 505; *Krchnavy v. State,* 43 Neb., 337. A pistol or a gun is a deadly weapon (*S. v. Benson,* 183 N.C., 795); and we apprehend a baseball bat should be similarly denominated if viciously used, as under the circumstances of this case. *S. v. Brown,* 67 Iowa, 289; *Crow v. State,* 21 L.R.A. (N.S.), 497, and note."

See also *State v. Watkins,* 200 N.C. 692, 158 S.E. 393, and *State v. Perry,* 226 N.C. 530, 39 S.E. 2d 460.

[5] We hold that under the evidence in the case at bar the trial court did not err in declaring the "steak" knife introduced in evidence a deadly weapon *per se* and in its other instructions to the jury above mentioned. The assignments of error are overruled.

[6] Finally, defendant contends the trial court erred in failing to charge the jury that they might find the defendant guilty or innocent of the lesser offense of simple assault, as provided by G.S. 15-170. In *State v. Bailey,* 4 N.C. App. 407, 167 S.E. 2d 24, this Court said:

"* * * It is * * * true that under G.S. 15-170 a defendant in a criminal action 'may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.' However, '(t)he necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. * * *"

In the instant case, there was no evidence of simple assault, hence the court did not err in failing to charge on that lesser offense. The assignment of error is overruled.

The defendant received a fair trial in which we find

No error.

BROCK and GRAHAM, JJ., concur.

SHERMAN SHORE v. PATRICIA PATTERSON SHORE

No. 7021DC60

(Filed 4 February 1970)

1. Appeal and Error §§ 16, 41— consolidation of cases for purpose of appeal — authority of district court

The district court is without authority to consolidate two cases for the purpose of an appeal.

2. Appeal and Error § 41— cases consolidated for trial — record on appeal

Cases consolidated for trial may be appealed by filing in the Court of Appeals one record.

3. Appeal and Error § 45— abandonment of exceptions

Where appellant docketed in the Court of Appeals a single record on appeal attempting to appeal from the entry of orders in two separate cases, but appellant failed to bring forward his exception to the order entered in the second case, the Court of Appeals has before it only those assignments of error relating to the order entered in the first case.

4. Judgments § 9— consent judgment — lack of defendant's consent

Purported consent judgment signed by the presiding judge is void for lack of defendant's consent where there is nothing in the record to indicate that defendant or her attorney knew that the consent judgment had been tendered to and signed by the judge, and there is nothing in the record to indicate that defendant or her attorney was afforded an opportunity either to consent to the judgment or repudiate the agreement allegedly entered into earlier by the parties.

5. Judgments § 21; Courts § 9— setting aside consent judgment — motion in the cause — power to set aside judgment entered by another judge

District court judge had power to set aside a purported consent judgment entered by another district court judge upon defendant's motion in the cause to set aside the judgment on the ground that defendant and her attorney had not consented thereto.

APPEAL by plaintiff from *Alexander, District Judge,* 8 October 1969, in chambers, FORSYTH District Court.

The record on appeal docketed in this Court discloses that on 30 August 1968 the plaintiff, husband, filed in the District Court of Forsyth County, North Carolina, an action for absolute divorce on the ground of adultery, and that the defendant, wife, filed an answer denying the allegations of the complaint, and pleaded a cross-action for alimony without divorce, custody and support for the minor child, possession of the dwelling house, and counsel fees. On 29 May 1969 District Judge Clifford entered an order providing for custody

and support of the minor child, and subsistence for the defendant pending the final determination of the cause.

On 20 August 1969 plaintiff filed in the District Court of Forsyth County another action against his wife for an absolute divorce on the ground of one-year separation, and on 5 September 1969 the defendant filed an answer to the second action denying the allegations of the complaint and pleaded a cross-action for alimony without divorce, custody and support for the minor child, possession of the dwelling house, and counsel fees.

On 15 September 1969 District Judge Clifford signed, *nunc pro tunc,* a paper writing purporting to be a "Consent Judgment" in the action filed 30 August 1968. The "Consent Judgment" in part reads as follows:

> "This cause coming on for trial at the July 14, 1969 Civil Session of Forsyth District Court presiding [sic] over by The Honorable John C. Clifford, Judge of the 21st Judicial District Court, both Plaintiff and Defendant having presented evidence and the issues having been submitted to the jury, counsel for the Defendant requested a conference in chambers to attempt to reach a consent settlement between the parties; the Court being present during the negotiations of the attorneys and the attorneys conferring several times privately with their respective clients; it appearing to the Court that a reasonable settlement agreement has been reached by consent of the parties in open Court:
>
> "IT IS NOW, THEREFORE, BY CONSENT THE JUDGMENT OF THE COURT:
>
> * * *
>
> "(7) One juror is withdrawn and a mistrial declared and the Plaintiff's action for divorce on the grounds of adultery is dismissed, and the defendant's cross-action is also dismissed.
>
> "(8) That due to unexplained delays of counsel, formal judgment in this cause has not been entered; this Judgment nunc pro tunc is entered this 15 day of September, 1969.
>
> "s/ J. C. CLIFFORD
> Judge Presiding"

The "Consent Judgment" was signed by the plaintiff and his attorney, Ralph E. Goodale, but was not signed by either the defendant or her attorney.

On 19 September 1969 the defendant moved before District

Judge Alexander that the "Consent Judgment" entered by Judge Clifford be set aside as being null and void because the defendant and her attorney had not consented thereto. The plaintiff replied to the motion on 24 September 1969, and on 6 October 1969 District Judge Alexander entered an order setting aside the "Consent Judgment" as follows:

> "THIS CAUSE coming on to be heard before the undersigned Judge of the Forsyth County District Court and being heard upon the defendant's motion to set aside 'CONSENT JUDGMENT' entered in the above action on September 15, 1969;
>
> "And it appearing to the Court that the purported 'CONSENT JUDGMENT' was never consented to by either defendant or her attorney of record;
>
> "And the Court being of the opinion that the aforesaid 'CONSENT JUDGMENT' is void for a lack of defendant's consent and should be set aside;
>
> "It further appearing that the above action is pending trial in the District Court of Forsyth County, North Carolina; that temporary order for alimony and child support pendente lite entered in this cause on May 29, 1969, by The Honorable J. C. Clifford, Judge Presiding, is and remains in full force and effect; "NOW, THEREFORE, it is ORDERED that the purported 'CONSENT JUDGMENT' be, and the same hereby is, set aside.
>
> "It is further ORDERED that the Order of the Honorable J. C. Clifford, entered May 29, 1969, with regard to temporary alimony and child support is continued in full force and effect pending further order of this Court.
>
> "This the 6th day of October, 1969.
>
> "s/ ABNER ALEXANDER
> Judge Presiding"

On 17 September 1969 the plaintiff filed a "Plea in Bar" pleading the "Consent Judgment" in bar of the defendant's cross-action set up in the answer of the defendant to the second action. On 6 October 1969 District Judge Alexander entered an order sustaining plaintiff's "Plea in Bar" and extending the time for the defendant to file an amended answer in the second action.

The plaintiff excepted to the order of Judge Alexander dated 6 October 1969 setting aside the "Consent Judgment", and also excepted to Judge Alexander's order dated 6 October 1969 extending the

time for the defendant to file an amended answer in the second action, and gave notice of appeal to this Court.

On 8 October 1969 Judge Alexander entered an order purporting to consolidate the two cases "for the purpose of appeal".

Ralph E. Goodale, for plaintiff appellant.

James J. Booker and Randolph and Randolph, by Clyde C. Randolph, Jr., for defendant appellee.

HEDRICK, J.

[1, 3] The District Court is without authority to consolidate two cases "for the purpose of appeal." Cases consolidated for trial may be appealed by filing in the Court of Appeals one record. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740; 1 Strong, N.C. Index 2d, Appeal and Error, § 41. Rule 14, Rules of Practice in the Court of Appeals of North Carolina, provides that upon proper motion two cases may be consolidated for argument before this Court. In the instant case, the appellant has docketed in this Court a single record on appeal attempting to appeal from the entry of orders in two separate cases. The appellant has failed to bring forward his exception to the order entered in the second case extending the time for the defendant to file an amended answer; therefore, we have before us only those assignments of error relating to the order setting aside the "Consent Judgment" in the first case.

[4] The appellant's first assignment of error is as follows: "May a party who has personally consented to judgment in open court and accepted a benefit provided in said judgment later withdraw such consent and have the judgment set aside for want of consent?" Our Court was faced with this same question in *Highway Comm. v. Rowson*, 5 N.C. App. 629, 169 S.E. 2d 132 (1969). In that case an agreement was reached between the parties at the 12 November 1968 session of Washington Superior Court with the parties thereto agreeing that the judgment could be prepared and signed out of term, out of the county and out of the district. On 27 January 1969 Judge Cowper signed a "consent order" which contained within it the statement that the defendant refused to sign the judgment. The defendant excepted to the entry of the judgment. Parker, J., speaking for the Court, stated:

> "It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records of a

court of competent jurisdiction with its sanction and approval. *King v. King,* 225 N.C. 639, 35 S.E. 2d 893; *Keen v. Parker,* 217 N.C. 378, 3 S.E. 2d 209. 'Moreover, the power of a court to sign a consent judgment depends upon the unqualified consent of the parties thereto, *King v. King, supra,* and "the consent of the parties must still subsist at the time the court is called upon to exercise its jurisdiction and sign the consent judgment."' *Lee v. Rhodes,* 227 N.C. 240, 242, 41 S.E. 2d 747, 748."

In the instant case, there is nothing in the record to indicate that the defendant or her attorney of record had any knowledge that the "Consent Judgment" had been tendered to and signed by Judge Clifford. There is nothing in the record to indicate that the defendant or her attorney of record was afforded an opportunity to either consent to the judgment or repudiate the agreement allegedly earlier entered into by the parties. The judgment is void on its face for lack of consent. *Lee v. Rhodes,* 227 N.C. 240, 41 S.E. 2d 747; *Highway Comm. v. Rowson, supra.*

[5] The appellant contends in his second assignment of error that one district court judge may not set aside the judgment of another district court judge. Upon learning of the entry of the "Consent Judgment", the defendant made a motion in the cause that the same be set aside. "When a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause. And when the question is raised, *the court, upon motion, will determine the question.* The findings of fact made by the trial judge in making such determination, where there is some supporting evidence, are final and binding on this Court. *Ledford v. Ledford, supra.*" (Emphasis added) *Overton v. Overton,* 259 N.C. 31, 129 S.E. 2d 593 (1963).

The order of District Judge Alexander dated 6 October 1969 setting aside the "Consent Judgment" of District Judge Clifford dated 15 September 1969 is affirmed.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

IMPERIAL TOBACCO GROUP LIMITED v. PEOPLES BANK AND TRUST COMPANY OF ROCKY MOUNT, NORTH CAROLINA, ADMINISTRATOR OF THE ESTATE OF J. A. TAYLOR, HELENE GRIFFIN TAYLOR, JOSEPH STEVEN TAYLOR, A MINOR, AND PEOPLES BANK AND TRUST COMPANY OF ROCKY MOUNT, NORTH CAROLINA, GUARDIAN OF JOSEPH STEVEN TAYLOR

No. 697SC556

(Filed 4 February 1970)

1. Pensions— widow's pension rights — separation agreement

A wife who has separated from her husband but has never divorced him is, upon the husband's death, a widow within the meaning of the retirement plan of her husband's employer, and the wife is entitled to receive the widow's pension as provided in the plan.

2. Pensions; Husband and Wife § 11— widow's pension rights — separation agreement — third-party beneficiary

A widow who had separated from her husband under a separation agreement in which each party contracted away all rights in the property of the "other party" *is held* not to have relinquished her separate rights to a widow's pension under the retirement plan of her husband's employer, since the rights of the widow as a third-party beneficiary under the pension plan were not included in her husband's property which she relinquished by the separation agreement.

APPEAL by respondent Helene Griffin Taylor from *Hubbard, J.*, June 1969 Civil Session of WILSON Superior Court.

This is a declaratory judgment action in which the petitioner seeks a determination of the extent and proportion of its liability to the respondents under its employees' pension plan. The material facts, which were found by the court on the basis of admissions in the pleadings and stipulations of the parties, are as follows:

J. A. Taylor, an employee of petitioner, died intestate on 23 July 1968. At the date of his death and for many years prior thereto he was employed by petitioner and was a participating member in its pension plan, under which he had completed more than three years of pensionable service. In pertinent parts the plan provided:

"BENEFITS TO WIDOWS OF CONTRIBUTING MEMBERS DYING IN SERVICE

"In the event of the death in service of a Member who has been married for more than twelve months and who has completed three years of Pensionable Service, his widow shall be entitled to a pension . . .

* * * * *

"CHILDREN'S ALLOWANCES ON DEATH IN SERVICE

"In the event of the death in service of a Member leaving a

child under age 18, there shall be payable in respect of each such child an annual allowance . . .

* * * * *

"REFUNDS ON DEATHS OF PARTICIPATING MEMBERS

"In the event of the death of a participating Member in respect of whom no widows' pension or children's allowance is payable, there will be payable to the Member's estate or personal representative a benefit equivalent to the Member's own contributions to the Plan accumulated with interest at 3% per annum to the date of death."

Other clauses of the plan set forth the formula by which the amount of the widow's pension and the children's allowance was to be computed.

J. A. Taylor was married to the respondent, Helene Griffin Taylor, who survived him. Four children of this marriage survived their father, but only the youngest, Joseph Steven Taylor, was less than 18 years of age at the time of his death. Joseph Steven Taylor became 18 years of age on 8 September 1968.

On 20 July 1961 J. A. Taylor and his wife, the respondent, Helene Griffin Taylor, entered into a separation agreement, paragraph IV of which provided in part as follows:

"Each party has released and discharged, and by this agreement does for himself or herself, and his or her heirs, legal representatives, executors, administrators and assigns, release, discharge, convey and quitclaim all right, title, interest and estate, including all rights and shares provided by statute or otherwise, in and to all property, real and personal, which the other party now has, owns or has any interest in, as well as any right, title, interest or estate in any and all property, real or personal, which the other party may hereafter acquire; and, in the absence of any default in the performance of this agreement by the other party, and except as otherwise may be provided herein, each party covenants that he or she will not at any time in the future assert any such right, title, interest or estate. . . ."

J. A. Taylor and the respondent, Helene Griffin Taylor, were never divorced. The separation agreement continued in effect from its date and at the death of J. A. Taylor was still in effect and the parties were continuing to live separate and apart thereunder. The separation was not the result of any wrongful conduct on the part of Helene Griffin Taylor and she had committed no act of forfeiture as defined in G.S. 31A-1.

Subsequent to the death of J. A. Taylor, a prior action was brought in the superior court by the administrator of his estate against Helene Griffin Taylor and all surviving children of J. A. Taylor for a declaratory judgment determining the rights of the widow and children in his estate. This action resulted in a judgment of the superior court dated 22 March 1969 adjudging that Helene Griffin Taylor is the lawful widow of J. A. Taylor, deceased, "and is entitled to all the marital rights in his estate conferred on her by law notwithstanding any provision of the Separation Agreement of July 20, 1961, and unaffected thereby, to the same extent as if the same had not been executed, and Peoples Bank & Trust Company shall administer the estate and make disposition of the assets thereof accordingly." The present action was instituted on 3 April 1969 and the petitioner herein was not a party to the prior action which resulted in the judgment dated 22 March 1969.

Based on the foregoing facts the court concluded as a matter of law that Helene Griffin Taylor was the widow of J. A. Taylor within the meaning of petitioner's pension plan but that by virtue of Article IV of the separation agreement she released, waived, and relinquished all rights to any payments under the plan. The court entered judgment directing petitioner to pay Joseph Steven Taylor a child's allowance for two months in accordance with the pension plan and to refund the balance of J. A. Taylor's contributions, plus interest, to the administrator of his estate. The judgment further directed that upon making such payments, the petitioner be relieved of any further liability to respondents Helene Griffin Taylor, Joseph Steven Taylor, and the estate of J. A. Taylor. From this judgment, respondent Helene Griffin Taylor appeals, making as her sole assignment of error that the court erred in concluding as a matter of law that by virtue of the separation agreement she had relinquished all rights to any payments under the pension plan.

Lucas, Rand, Rose, Meyer & Jones, by David S. Orcutt, for petitioner appellee.

Spruill, Trotter & Lane, by Charles M. Brown, Jr., for respondent appellant.

PARKER, J.

[1] When J. A. Taylor died, the pension plan was in full force as a binding contract obligating petitioner to perform its promises as set forth therein. One of these was that "(i)n the event of the death in service of a Member who has been married for more than twelve

months and who has completed three years of Pensionable Service, his widow shall be entitled to a pension. . . ." At his death J. A. Taylor met these conditions. The superior court has concluded as a matter of law that appellant is J. A. Taylor's widow within the meaning of the pension plan. Petitioner did not except to or appeal from that conclusion, and we agree that it is correct. *Zachary v. Trust Co.*, 4 N.C. App. 221, 166 S.E. 2d 495. Therefore, appellant is clearly entitled to receive the widow's pension as provided in petitioner's pension plan, and as third party beneficiary she may enforce her rights, unless she "released, waived, and relinquished" such rights by virtue of the separation agreement. We do not agree that she did.

[2] By the separation agreement each party merely contracted away all rights in the property of the "other party." Petitioner was not a party to the separation agreement. Appellant and her husband were the only parties, and by executing the agreement neither of them relinquished any rights which either then had or thereafter acquired as against the petitioner under its pension plan. The fact that at the date of the separation agreement the husband had certain vested rights under the plan lends no support to the trial court's conclusion that the wife, by executing the separation agreement, thereby relinquished such separate rights as she either then had or might thereafter acquire against petitioner under the provisions of the plan. Her rights under the pension plan were not included in the property of the "other party," her husband, which she relinquished by the separation agreement.

While we cannot determine with certainty from the record before us whether the husband had the right during his lifetime to designate someone other than his wife to receive the "widow's pension" provided for in petitioner's pension plan, we do not consider such a determination necessary to decide the question presented on this appeal. If he had that right, his failure to exercise it would indicate that he did not wish to effect such a change. Although he and his wife had separated, they were never divorced, and nothing in the record indicates he desired to relieve petitioner of the obligation of paying his wife the widow's pension provided for in its pension plan in the event she should survive him. If he did not have the right to designate any other beneficiary to receive the widow's pension, then it is even clearer that appellant's rights to receive the pension were not derived from her husband and could not be considered as being included in the property of the "other party" which she released when she executed the separation agreement.

We do not suggest that it would not have been possible for appellant and her husband to have agreed, by appropriate language for that purpose, that she release her rights under the pension plan. We do hold that the language which they did employ was not sufficient to produce that result.

Support for our holding can be found in *Zachary v. Trust Co., supra,* in which this Court speaking through Campbell, J., quoted from 4 Couch on Insurance 2d, § 27:114, p. 655, as follows:

> " 'General expression or clauses in a property settlement agreement between a husband and wife, however, are not to be construed as including an assignment or renunciation of expectancies, and a beneficiary therefore retains his status under an insurance policy if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take under an insurance contract of the other, and while the failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change, each case must be decided upon its own facts. . . .' "

The rights of a wife as beneficiary under an insurance policy on the life of her husband are analogous to the provisions for the widow under the pension plan before us.

We hold that respondent Helene Griffin Taylor as the widow of J. A. Taylor is entitled to receive the widow's pension as provided in petitioner's pension plan. Accordingly, the judgment appealed from is reversed insofar as it is inconsistent with this holding and this case is remanded for entry of judgment consistent herewith.

Reversed and remanded.

CAMPBELL and GRAHAM, JJ., concur.

ANNE L. GORDON *v.* JOHN W. GORDON
No. 7021DC1

(Filed 4 February 1970)

1. Divorce and Alimony §§ 14, 16— evidence of acts of adultery occurring after pleading was filed

In this action for alimony without divorce on grounds of abandonment and adultery, the trial court erred in the admission of evidence of acts of adultery by defendant that occurred approximately a year after the

complaint was filed, there having been no motion in the trial court to amend the complaint to allege adultery on these occasions.

2. Pleadings § 36— allegata and probata

To establish a cause of action there must be both *allegata* and *probata* and the two must correspond.

3. Evidence § 15— evidence not supported by allegations — exclusion

Evidence not supported by allegations or in conflict therewith must be excluded.

4. Rules of Civil Procedure § 8— pleading occurrences intended to be proved — occurrences after pleading is filed — notice

Although the new rules of civil procedure which became effective 1 January 1970 liberalize pleading requirements, they require a claim for relief to be set forth sufficiently particular to give the court and the parties notice of the occurrences intended to be proved showing that the pleader is entitled to relief, G.S. 1A-1, Rule 8, and a pleading cannot give notice of occurrences that take place a year after the pleading is filed.

5. Divorce and Alimony §§ 14, 16— alimony without divorce — testimony of adultery by spouse

The wife is an incompetent witness to prove adultery of the husband in an action for alimony without divorce. G.S. 50-10.

APPEAL by defendant from *Henderson, District Judge,* 8 April 1969 Civil Session of FORSYTH County District Court.

Plaintiff instituted this action against her husband for alimony without divorce on 16 January 1968. The complaint alleged defendant abandoned plaintiff on 20 November 1967 and further "[t]hat throughout the marriage . . . defendant has constantly dated other women and still is dating other women; that the defendant has committed adultery on numerous occasions, and as the plaintiff is informed and believes has committed adultery since the separation of the parties in November of 1967." Defendant answered denying plaintiff's essential allegations and alleging that the separation resulted from plaintiff's wrongful conduct.

Two issues were submitted to the jury and answered as follows:

"1. Did the defendant abandon the plaintiff as alleged in the complaint?

ANSWER: No

2. Did the defendant commit adultery as alleged in the complaint?

ANSWER: Yes"

Defendant appealed from judgment entered on the verdict.

White, Crumpler and Pfefferkorn by William G. Pfefferkorn for plaintiff appellee.

Wilson and Morrow by John F. Morrow for defendant appellant.

GRAHAM, J.

[1] The principal evidence offered by plaintiff on the issue of defendant's adultery related to certain conduct of defendant that occurred in January, 1969, approximately one year after the complaint was filed. Apparently no motion to amend the complaint to allege adultery on these occasions was addressed to the court below. Rather, upon objection by defendant to the admission of this evidence, plaintiff's counsel insisted to the court that evidence tending to show that defendant was "living with someone else" was competent on the question of abandonment. Whether or not the evidence was competent for this purpose is not here material because in charging the jury on the issue of defendant's adultery the court recapitulated the testimony concerning defendant's conduct "with another woman" in January of 1969. The jury, in determining the issue of adultery, was therefore permitted to consider evidence of acts of adultery that were not alleged in the complaint.

[2, 3] It has long been the rule in this State that to establish a cause of action there must be both *allegata* and *probata* and the two must correspond. 6 Strong, N.C. Index 2d, Pleadings, § 36; *Burns v. Burns,* 4 N.C. App. 426, 167 S.E. 2d 82. Evidence not supported by allegations or in conflict therewith must be excluded. *Vending Co. v. Turner,* 267 N.C. 576, 148 S.E. 2d 531; *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885.

[4] Though the new rules of civil procedure which became effective 1 January 1970 liberalize pleading requirements, they nevertheless require a claim for relief to be set forth sufficiently particular "to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, . . ." G.S. 1A-1, Rule 8. Suffice it to say that a pleading filed 16 January 1968 cannot give notice of occurrences that do not take place until a year later.

[5] The only evidence raising inferences that defendant engaged in adultery "as alleged in the complaint" was the testimony of the plaintiff wife. She testified over objection that on one occasion she had found her husband and another woman alone together in the bedroom of a house where they were attending a party. Defendant's counsel objected and requested to be heard in the absence of the

jury. The court answered: "I am not going to let her *go that far.*" (Emphasis added). Plaintiff continued: "At the time, I left to get a cold cloth to take back to the bedroom. There was just two. There was carpet, they didn't know I was in the bedroom." Plaintiff later testified that shortly before the parties separated she found defendant's underwear and shorts covered with blood. In our opinion the admission of this evidence constitutes prejudicial error requiring a new trial. The husband and wife are incompetent witnesses to prove the adultery of the other in all divorce actions, including actions for alimony without divorce. G.S. 50-10; *Hicks v. Hicks,* 275 N.C. 370, 167 S.E. 2d 761.

We are not here concerned with whether the testimony of the wife, standing alone, was sufficient to carry the issue of the husband's adultery to the jury. The fact is the issue was submitted and the incompetent testimony of the wife was before the jury. We cannot say that the evidence was not considered by the jury as indicating adulterous conduct on the part of the husband.

Plaintiff has filed a motion in this court to amend her complaint to allege acts of adultery committed by the defendant in January of 1969. Since this case must in any event be remanded for a new trial on all issues raised by the pleadings and evidence, we deny plaintiff's motion without prejudice to her to file a similar motion in the court below.

New trial.

BROCK and BRITT, JJ., concur.

FRED M. BURK v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

No. 7021SC15

(Filed 25 February 1970)

1. Insurance § 6— construction of policies

Since contracts of insurance are prepared by the insurer, they will be liberally construed in favor of the insured and strictly against the insurer.

2. Insurance § 43.1— major medical policy — "hospital" — institution for treatment of mentally disturbed children

Institution, denominated a school, which provided a residential treatment program for mentally and emotionally disturbed children was not

a "hospital" within the terms of a major medical expense insurance policy defining a hospital as an institution for the care and treatment of sick and injured persons "with organized facilities for diagnosis and major surgery, and 24-hour nursing service," where there were no facilities for major surgery available on the premises and there was no affiliation arrangement with any other institution for the furnishing of facilities for major surgery, notwithstanding such facilities were available at two nearby hospitals.

APPEAL by defendant from *Seay, J.*, 26 May 1969 Civil Session of the Superior Court of FORSYTH County.

This is a proceeding to recover, under a major medical expense insurance policy issued to him by defendant, expenses incurred by plaintiff in connection with his daughter's stay at the Devereux Foundation, Victoria, Texas. The matter was heard by Judge Seay without a jury, jury trial having been waived. After hearing the evidence and argument of counsel, the court found facts, made conclusions of law, and entered judgment for plaintiff. Defendant appealed.

Hudson, Petree, Stockton, Stockton and Robinson by J. Robert Elster and John M. Harrington for plaintiff appellee.

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

MORRIS, J.

Appellant brings forward seven assignments of error but concedes that they present but one question: Whether the expenses of plaintiff's daughter, Vicki Burk, at the Devereux Foundation were covered by its policy as eligible expenses for medical treatment and hospital charges under its defined coverage.

If plaintiff is entitled to recover, he must bring himself within the coverage for which the policy was issued and for which defendant is obligated to pay.

The portions of the policy pertinent to this appeal are:

"Definitions.

. . .

'Hospital' — Wherever used in this Policy 'hospital' means only an institution operated pursuant to law for the care and treatment of sick and injured persons, with organized facilities for diagnosis and major surgery, and 24-hour nursing service. In no event however, shall such term include an institution which

is principally a rest home, nursing home, convalescent home or home for the aged.

Part I. Major Medical Expense Benefits.

. . .

D. Eligible Expenses. 'Eligible Expenses' wherever used in this Part I shall include only the following charges with respect to sickness or injury of a Covered Person incurred by or on behalf of such person for medical care and treatment of such person deemed necessary by a licensed physician, but shall in no event include charges in excess of the regular and customary charges for the services, supplies and equipment required for such care and treatment. A charge shall be considered to be incurred on the date of the service, purchase or rental for which the charge is made.

(1) Hospital Room, Board and Routine Services — Charges by a hospital for room, board and routine services including general nursing care during confinement as a resident inpatient in a hospital due to one sickness or one injury, incurred on or after the 91st day of such confinement.

. . .

E. Exceptions to Eligible Expenses. 'Eligible Expenses' wherever used in this Part I shall in no event include charges with respect to:

. . .

(7) Mental illness or functional nervous disorder of any type or cause, but this exception shall not apply to charges incurred during a period of confinement as a resident inpatient in a hospital;".

[1] Our courts have long subscribed to the principle that, since contracts of insurance coverage are prepared by the insurer, they will be liberally construed in favor of the insured and strictly against the insurer. *White v. Mote,* 270 N.C. 544, 155 S.E. 2d 75 (1967). The general rules of construction are succinctly stated by Justice Lake in *Insurance Co. v. Insurance Co.,* 269 N.C. 341, 152 S.E. 2d 436 (1966):

"It is well settled that, in the construction of a policy of insurance, ambiguous provisions will be given the meaning most favorable to the insured. Exclusions from and exceptions to undertakings by the company are not favored. *Insurance Co. v. Insurance Co.,* 266 N.C. 430, 146 S.E. 2d 410; *Anderson v. Insurance Co.,* 266 N.C. 309, 145 S.E. 2d 845. Nevertheless, it is

the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties. *Hardin v. Insurance Co.*, 261 N.C. 67, 134 S.E. 2d 142; *Richardson v. Insurance Co.*, 254 N.C. 711, 119 S.E. 2d 871; *Pruitt v. Insurance Co.*, 241 N.C. 725, 86 S.E. 2d 401."

[2] The principal question to be determined on this appeal is whether the Devereux Foundation at Victoria, Texas, is a "hospital" within the definition contained in the policy of insurance issued by the defendant to the plaintiff.

The evidence for the plaintiff was, in substance, except where quoted, that Vicki Faith Burk, minor daughter of plaintiff, had been under the care of various psychiatrists since about 1962 when she was 13 years of age. She was under the care of Dr. Alanson Hinman, neurologic pediatric specialist, for about a year, during which time he counseled with her once each week. Dr. Hinman reached the point at which he felt he was not making any headway with Vicki and recommended a psychiatrist. Vicki's parents then placed her in the care of Dr. John M. Pixley, a psychiatrist, who treated her for about two and one-half years. Toward the end of her treatment with Dr. Pixley, Vicki ran away from home for the second time. When she was found, she refused to go home but did agree to see Dr. Pixley who prevailed upon her to enter the minimal care unit of Baptist Hospital. While there, she refused to see her parents and continued to refuse to return home. On the advice of Dr. Pixley and the opinion of Dr. Grant that she should see a child psychiatrist, she was admitted to Duke Hospital where she remained for three weeks under the care of Dr. Jones. The plaintiff's evidence is somewhat contradictory as to whether Dr. Jones recommended Devereux. Mrs. Burk testified that Dr. Jones had told her Duke did not have the facilities for treating a patient of Vicki's sort; that he would recommend some sort of psychiatric institution but had hesitated to because "they are few and far between and very expensive." Mrs. Burk further testified that after that visit she "asked a friend of mine who was friendly with the head of Salem Academy and she told her Devereux and said she knew that Devereux was this type place, for adolescent children, and we contacted Devereux as to the possibility of getting Vicki in. I don't recall that we received any recommendation from him (Dr. Jones) about Devereux. He had heard of Devereux, as I recall, and he felt we were fortunate in being able to get her into it." The Burks called the home office of the Devereux Foundation in Devon, Pennsylvania, and were told they had no room but might have in June. They noticed there was a di-

vision in Victoria, Texas, where they had a friend, who arranged an appointment for them the Tuesday following. The plaintiff testified: "Dr. Jones recommended that Duke didn't have proper facilities for the treatment Vicki needed and he didn't think she could be successfully treated on an outpatient basis. I asked him how then should she be treated and he said there were several places in the country that could give this inpatient treatment but that they were very expensive. We went about finding facilities for Vicki and located the Devereux facilities in Victoria, Texas." Dr. David Jones testified: "I recommended Vicki Burk be treated in a facility of this type. I suggested Devereux. It would have facilities not available at Duke." "I didn't receive any follow-up reports from the Devereux School." Dr. Pixley testified that he had gotten "very complete psychological reports from Devereux Foundation in Vicki's case." He received an initial evaluation of Vicki from W. C. Leiding, Ph. D., Director of Professional Services. The report then was by Dr. Uri Gonik, of the Department of Psychology at the Devereux Foundation, also a Ph. D. and a staff psychologist.

Richard Danko testified that he was Chief Administrator of the Devereux Foundation at Victoria, Texas at the time Vicki was there. The facilities included a gymnasium, swimming pool, tennis courts, football field, track, baseball field, library, stage, theatre, woodshop, automobile maintenance shop, sewing area, recreation area, and all these are important to the therapeutic program. Members of the staff who have been trained in the Devereux approach in a residential treatment program are responsible for carrying out the program. "These persons are not medical doctors." Mr. Danko testified that persons in attendance at the Devereux facility are referred to as "students" because "therapeutically this is important." They employed 25 or 26 teachers trained in special education. "Answering your question how many classrooms we had, if you are speaking of the rooms used for therapy, art therapy, music therapy, I would assume we had approximately 30 areas for programming." The vacation schedule takes place three times during the year: Christmas, Easter and post-camp. The post-camp vacation is the latter part of August, but Christmas and Easter would coincide with the public school vacation. Some of the youngsters do not receive vacations. The fee for the care and treatment of children at Devereux is called a tuition fee. No physician is in residence on the campus with the exception that Dr. Uldahl is in residence three days and three evenings. The physicians providing staff services live in the community and have private practices. Two registered nurses were employed and when they were not there, there were licensed vocational nurses

there. Devereux did not have an X-ray machine, electroencephalograph or electrocardiograph machine, anesthetics and devices for administering them, blood bank, laboratory equipment, operating room, recovery room or electroshock equipment. None of these facilities is available on the premises. They are available in Victoria. There is no common control, purpose, administration, or financing of Citizens Memorial Hospital and Devereux. For the services performed by the hospital, they send bills to Devereux in the ordinary course of business. There is no original contract which governs the services that are to be performed. They bill Devereux on a case-by-case basis. The Citizens Memorial Hospital is a completely separate institution. It is about three and one-half miles from Devereux. The Devereux facility at Victoria has never applied for accreditation with any professional hospital or medical association. It is not listed in any professional index or directory as a private mental hospital. It is listed as a school in the yellow pages of the phone book. It is licensed by Texas as a child-care facility. Devereux does not claim that it is a hospital. It is a residential treatment program for the care of mental health and psychiatric problems. "We don't have need for major surgery at our facility. We do not have any facilities for performing major surgery." Facilities are available to the Devereux Foundation for major surgery or other medical type treatment if needed.

Dr. George A. Constant testified that he is a physician, a consultant for Devereux, considered himself to be on the staff, and was paid a fee for services as an independent contractor on an individual basis. There are no facilities at Devereux for major surgery. Surgical facilities are available to the patients at Devereux from either of the two hospitals in Victoria, the Citizens Memorial or DeTar. Over objection, Dr. Constant testified "There is an arrangement between them." Citizens Memorial is an institution that is completely separate and apart from the Devereux facility. There is no unity of control, purpose, administration or financing between them, "only just a gentlemen's agreement that we use the Citizens Memorial Hospital as an extension of Devereux for the purpose of taking care of their physical illnesses, you see, and whatever somatic therapies that have to be administered psychiatrically." (Quoted portion subject of motion to strike which was denied.)

Dr. Uri Gonik, Ph. D. in psychology, testified that Vicki Burk was under his care and supervision at Devereux, having been enrolled in early February 1965. Devereux has teachers whose primary function is to get across subject matter but this is not their sole re-

sponsibility, "because they are also trained and guided and are responsible for the monitoring the well-being of the children and reporting back and doing an awful lot of individual inter-personal type of tutorial communications and establishing relationships." When a child comes to Devereux he is not automatically examined by a psychiatrist. Dr. Uldahl, the staff psychiatrist, sees six or seven people a day for the three days she is in residence. Whenever psychiatric consultations are necessary in town, these are arranged for. Surgical facilities are available to the patients, if necessary, at the hospitals in town, either Citizens Memorial or DeTar. There are no facilities at the Devereux facility for performing major surgery. These facilities are available to Devereux. There is no psychiatrist who has operational direction and control of Devereux at Victoria.

Plaintiff's evidence also shows that while at the Devereux facility, Vicki Burk was hospitalized at Citizens Memorial Hospital from 18 December 1965 to 30 December 1965. The attending physician's report was signed by Dr. Constant and the diagnosis was "adolescent adjustment reaction". His bill showed "Consultation, Examination and Admission to Citizens Memorial Hospital 50.00; 12 hosp. days @ $15 per day 180.00", the total bill to "Miss Vicki Burk" being for $230. Plaintiff's exhibits also include a check to Dr. Uri L. Gonik for $225 for Vicki Burk.

We do not discuss defendant's evidence, because it appears to us abundantly clear that defendant's motion at the close of plaintiff's evidence should have been granted. We do not decide whether the charges for which plaintiff seeks to recover are "charges with respect to sickness or injury of a Covered Person incurred by or on behalf of such person for medical care and treatment of such person deemed necessary by a licensed physician . . ." In our view of the matter, the appeal is determined by the answer to the question: "Is Devereux a 'hospital' within the meaning of the policy?" We conclude that the answer is No.

The policy clearly and unambiguously defines "hospital" as *"only* an institution operated pursuant to law for the care and treatment of sick and injured persons, *with organized facilities for* diagnosis and *major surgery,* and 24-hour nursing service." (Emphasis supplied.)

Plaintiff earnestly contends that the evidence is clear that facilities for major surgery were *available* and that that is substantial compliance with the requirement and, therefore, sufficient. He relies on *Travelers Insurance Company v. Esposito,* 171 So. 2d 177 (Fla. Dist. Ct. App. 1965). There the policy defined "hospital" as an in-

stitution which, among other things, "continuously provides Twenty-four hour a day nursing service by or under the supervision of registered graduate nurses and is operated continuously with organized facilities for operative surgery." The institution involved was Devereux Foundation at Victoria, Texas. The appellant contended that Devereux did not qualify because of its very limited medical and diagnostic facilities and because it had no facilities for operative surgery. The Court stated that Dr. Constant's deposition "discloses ample diagnostic and medical facilities, and that there was an affiliation with another hospital for diagnostic and surgical facilities. Such an arrangement with another hospital was sufficient compliance with the requirements to have facilities for diagnosis and operative surgery.", and affirmed the trial court's judgment for plaintiff. The Florida Court cited only one case as authority for its position: *Reserve Life Insurance Company v. Marr*, 254 F. 2d 289 (9th Cir. 1958). There the plaintiff had been confined in the Jane O'Brien Hospital for 14 months. At the time of plaintiff's admission, the institution was licensed by the State of Washington as a "nursing home" to maintain 61 beds and it had a daily average of 50 patients for the year in question. It had a registered nurse on duty at all times, X-ray facilities, and full-time facilities for overnight resident patients, for administering oxygen, and for taking blood samples. The policy defined hospital as "an institution which has a laboratory, X-ray equipment and an operating room where major surgical operations may be performed, and which maintains permanent and full time facilities for the care of over-night resident patients under the supervision of a licensed Doctor of Medicine or Osteopathy and which has a Graduate Registered Nurse always on duty." Jane O'Brien had no operating room but "an arrangement existed whereby the operating room facilities of the Sacred Heart Hospital, one and one-half blocks away, were available if the patient's doctor wished to use them". The Court said the policy contained no requirement that an operating room be on the premises, that the latter portion of the definition was ambiguous in that the supervision phrase could be read to modify either the "facilities" themselves or the "patients" using the facilities. If read the latter way, the Court found sufficient compliance and construed the policy in favor of the insured, finding that the facilities of the institution in which the insured was confined were in "substantial compliance" with the definition of a "hospital" contained in the policy.

Other cases involving a similar question which were decided on the basis of an arrangement with another institution are: *Reserve Life Insurance Co. v. Mattocks,* 6 Ariz. App. 450, 433 P. 2d 303

(1967), where there was a written "Affiliation Agreement" between the Elks Hospital and St. Mary's Hospital "for the purpore of providing to the patients of the Elks Hospital accredited diagnostic, therapeutic, and surgical services". *McKinney v. American Security Life Insurance Company,* 76 So. 2d 630 (La. App. 1954), where the policy required that an institution qualifying as a "hospital" under the policy must have X-ray equipment and where, from the agreed facts, it appeared that X-ray service was available to the institution under contract with another institution. It is interesting to note that the definition of a "hospital" in the policy before the Court in *McKinney* was identical to that in *Reserve Life Insurance Co. v. Marr, supra,* decided four years later. No question of ambiguity was raised in *McKinney.*

The evidence before us discloses no affiliation arrangement with any hospital. It is true that all witnesses for plaintiff testified that facilities for major surgery were available at Citizens Memorial Hospital or DeTar Hospital. It is also true that Dr. Constant, over objection, testified that there was "a gentlemen's agreement that we use the Citizens Memorial Hospital as an extension of Devereux for the purpose of taking care of their physical illnesses . . . and whatever somatic therapies that have to be administered psychiatrically." The uncontradicted evidence is that there were no facilities for major surgery available on the premises. Mr. Danko, the administrator, testified that there was no original contract governing the services to be performed by Citizens Memorial, that Devereux was billed on a case-by-case basis, and that for services performed by Citizens Memorial, Devereux was billed in the ordinary course of business. The evidence is clear that the youngsters from Devereux in need of surgery or hospitalization were admitted to Citizens Memorial as any other patient of any practicing physician would be admitted. Plaintiff's daughter was admitted by Dr. Constant who billed plaintiff for the admission and for his daily visits to her at the hospital. The hospital bill for her hospitalization was to "Burk, Vicki; Devereux School, Victoria, Texas". It showed "Fred Berk (sic): Father" and listed Dr. Constant as physician. Even if we conceded that an agreement would bring Devereux within the terms of the policy, which we do not, we find nothing in the evidence showing an arrangement between Devereux and any other institution for the furnishing of facilities for major surgery.

In our view of the matter, availability of such facilities is not sufficient under the terms of the policy. The language used in the policy sued on is simple, clear, and unambiguous. It is repeated here for emphasis: " 'hospital' means only an institution . . . with or-

ganized facilities for diagnosis and major surgery, . . ." The word "available" nowhere appears.

In *Guardian Life Insurance Co. of America v. Scott,* 405 S.W. 2d 64 (Supreme Court of Texas 1966), the question presented on appeal was whether the Devereux Foundation of Victoria, Texas, was a hospital as that term was defined in a major medical expense policy issued by the insurer to plaintiff. The policy defined a hospital as an institution which, among other requirements, "has facilities . . . including facilities for diagnosis and major surgery." It was undisputed at that trial that Devereux had no facilities for X-ray, laboratory work, or major surgery. Devereux's administrator there stated in his deposition that Devereux had access to the facilities of one or more Victoria hospitals with which the Foundation doctors were associated. The Court stated that the policy was unambiguous and that a policy which provides coverage only if the institution "has" stated facilities does not mean that there is coverage if it "has access" to such facilities in another institution at a different place. Plaintiff argues, however, that the word "with" used in the policy before us is not as strong as the word "has" and suggests that by using the word "with" the defendant has used a " 'slippery' word to mark out and designate those who are insured by the policy" citing *Jamestown Mutual Insurance Co. v. Nationwide Mutual Ins. Co.,* 266 N.C. 430, 146 S.E. 2d 410 (1966), where the Court said: "If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound." We agree with the rule stated but fail to see its application here. Giving the words used their ordinary and accepted meaning, we find no ambiguity nor slippery words or phrases. Indeed, we find that "having" is listed as a synonym for "with". J. I. Rodale, The Synonym Finder (1967).

In *Prudential Insurance Co. of America v. Cline,* 51 Tenn. App. 636, 371 S.W. 2d 158 (1963), the policy defined "hospital" as meaning, among other things, an institution which provides named facilities "under the supervision of a staff of physicians, with twenty-four hour a day nursing service by registered graduate nurses." The institution involved was the Brown Schools, Austin, Texas, a resident treatment center for children with mental or emotional disorders. There the Court said: "The daily visit of a physician, whose office was in Austin, Texas, even when supplemented by frequent visits of other Austin physicians, cannot be considered as constituting, 'staff of physicians'. Neither can the daily presence of one registered

nurse for eight to nine hours at the school, even though she might be subject to being called back at any time during the period of twenty-four hours, constitute the 'twenty-four hour a day nursing service by registered graduate nurses' required by the insurance certificate." Obviously, the lacking facilities were available but the plain, unambiguous terms of the policy did not include the word "available".

A very recent case involving the Devereux Foundation in Devon, Pennsylvania, is *Travelers Insurance Co. v. Page,* 120 Ga. App. 72, 169 S.E. 2d 682 (1969). There one of the requirements in the policy definition of "hospital" was that it be "operated continuously with organized facilities for operative surgery." Although recovery was allowed under a broad interpretation of "operative surgery", the Court refused to accept the argument that "with organized facilities for operative surgery" meant "available" facilities. The Court found no "working arrangement" with another institution from the evidence and said: "The evidence shows conclusively that no 'arrangements' existed and that area hospitals were used only when a private physician would be called in, who was a member of the staff of the nearby hospital, and this physician would get the child admitted for surgery or for the use of other facilities not available at the institution, just as any other member of the public would be admitted."

While we recognize that institutions such as the Devereux Foundation are filling a real need in the treatment of many emotionally and mentally disturbed adolescents and furnishing services not available at most hospitals, and that the necessary expense for treatment for a child at such an institution is frequently rather astronomical; nevertheless, our compassion for the parents cannot override what we think are plain and unambiguous terms of an insurance contract. To construe this policy otherwise would result in creating an ambiguity where none exists. We are not at liberty to rewrite, under the guise of judicial construction, a contract the terms of which are plain and unambiguous. *Anderson v. Insurance Co.,* 266 N.C. 309, 145 S.E. 2d 845 (1966).

For the reasons stated herein, the judgment of the trial court must be

Reversed.

MALLARD, C.J., and VAUGHN, J., concur.

LEWIS B. UNDERWOOD, ADMINISTRATOR OF THE ESTATE OF HAROLD DEAN UNDERWOOD, DECEASED v. O. F. STAFFORD, JR., PICKETT C. STAFFORD, ROBERT L. LENTZ, MRS. ROBERT L. LENTZ, SOUTHERN EXCESS, INC., AND BARBARA C. WESTMORELAND, RECEIVER OF SOUTHERN, EXCESS, INC.

No. 7021SC135

(Filed 25 February 1970)

1. Appeal and Error § 57— findings to which no exception is made

Findings of fact to which appellant has taken no exception are binding on appeal.

2. Corporations §§ 12, 13— wrongful appropriation of corporate property by stockholders — findings by court

In this action by a judgment creditor of a corporation alleging that stockholders and directors of the corporation committed a fraud on the corporation and its creditors by appropriating the corporate assets to their own use, the trial court on competent evidence made findings of fact which support its conclusions of law that there has been no wrongful or fraudulent conveyance, distribution or appropriation of assets of the corporation by defendants.

3. Corporations §§ 13, 30— improper preference of creditors — sufficiency of allegations

In an action by a judgment creditor of a corporation against stockholders of the corporation, allegations that there were no other creditors of the corporation whose rights have been affected by defendant stockholders' wrongful appropriation of corporate assets is insufficient to allege a cause of action based on the theory that payments had been made to other creditors in which plaintiff had a right to share.

4. Appeal and Error § 4; Corporations §§ 13, 30— theory of case at trial and on appeal

Where a case was tried upon the theory that defendant stockholders had wrongfully appropriated corporate assets to their own use, plaintiff may not on appeal urge a different theory based upon the contention that other creditors were improperly preferred.

5. Corporations § 16— failure to issue stock for valuable consideration — lack of proof

In this action by a judgment creditor of a corporation against directors and stockholders of the corporation, there was a failure of proof of plaintiff's allegation that defendants were liable to the corporation for failure to issue its stock for a valuable consideration or to issue any stock.

6. Corporations § 12— sale of corporate assets to stockholders — valuable consideration — sufficiency of evidence

In this action by a judgment creditor of a corporation against directors and stockholders of the corporation for wrongful appropriation of corporate assets, the evidence was sufficient to support findings by the court that two automobiles acquired by defendants from the corporation had

no economic value to the corporation since the unpaid balance of the payments due thereon assumed by defendants equalled or exceeded their value, and that defendants paid the corporation a fair and adequate price for corporate assets having a value to the corporation or its creditors.

APPEAL by plaintiff from *Martin, (Robert M.), S.J.,* 29 July 1969 Session of FORSYTH Superior Court.

Plaintiff originally instituted this action on 31 October 1963 against the individual defendants, alleging that in May 1963 plaintiff had recovered a judgment in the amount of $8,000.00 against Southern Excess, Inc., a corporation, and that after notice of plaintiff's claim, defendants, as officers, directors and stockholders of Southern Excess, Inc., had committed a fraud upon creditors by wrongfully appropriating to themselves all of the assets of the corporation. A trial held at the 31 October 1966 civil session of Forsyth Superior Court resulted in a judgment of involuntary nonsuit. On appeal, the North Carolina Supreme Court, without dealing with the merits, vacated the judgment and remanded the case, holding that the corporation should be made a party to the action and that the appointment of a receiver would be appropriate. *Underwood v. Stafford,* 270 N.C. 700, 155 S.E. 2d 211. The opinion of the Supreme Court contains a statement of the circumstances which gave rise to plaintiff's claim against the corporation, and these will not be restated here.

On remand to the Superior Court, the corporation, Southern Excess, Inc., was made a party defendant, a receiver was appointed for it, and the receiver was also joined as a party defendant. On 28 March 1968 plaintiff filed an amended complaint in which he repeated essentially the same allegations as contained in the original complaint, with appropriate changes to reflect the presence of the two additional defendants. The gravamen of the amended complaint, as of the original complaint, is the allegation, contained in paragraph XII of the amended complaint, to the effect that between 30 September 1960 and 1 April 1961 the defendants (presumably referring to the individual defendants) distributed and divided among themselves all of the assets of Southern Excess, Inc., and appropriated such assets to their own use, that such appropriation of assets was fraudulent as to the corporation and its creditors, and that the reasonable value of the assets so appropriated by the defendants exceeds the amount of plaintiff's claim. The amended complaint contained a new allegation, in paragraph XIII, that the individual defendants "are jointly and severally liable to Southern Excess, Inc. for the fraudulent distribution of its assets and the failure to issue

its stock for a valuable consideration or to issue any stock, and said assets should be recovered by the receiver of Southern Excess, Inc. and held for the use and benefit of the creditors of Southern Excess, Inc., who have claims against the same." The original complaint contained an allegation, not repeated in the amended complaint, in which plaintiff alleged on information and belief that "there are no other creditors of Southern Excess, Inc., whose rights have been adversely affected by defendants' wrongful appropriation of corporate assets."

The receiver filed answer alleging that according to information available to her the corporation was without assets with which to satisfy plaintiff's claim or to finance legal proceedings against the other defendants, but that the receiver was ready and willing to accept and administer any funds which might be recovered in this action. The individual defendants, O. F. Stafford, Jr., and Pickett C. Stafford, filed answer denying the material allegations as contained in paragraphs XII and XIII of the complaint, and in a further answer set up the statute of limitations as pleas in bar.

The parties waived jury trial and agreed that the judge might make findings of fact, conclusions of law, and enter judgment thereon. At the close of plaintiff's evidence and at the close of all the evidence defendants moved for nonsuit. These motions were overruled. The court then overruled the pleas in bar and entered judgment making detailed findings of fact, including, in substance, the following:

Southern Excess, Inc., (formerly Freeman and Stafford Insurance Agency, Inc.) is a North Carolina corporation which previously was engaged in business as an insurance agency specializing in hard-to-place risks. The corporation had formerly enjoyed some success, but in late 1960 it could no longer find any insurance company with which this type of business could be placed at rates which could be marketed successfully, and by February, 1961, it had ceased doing business. At that time it owned only certain office fixtures and furniture, two automobiles, a lot at Atlantic Beach, and a boat and trailer. The officers of the corporation had a used office furniture company make an appraisal of the office fixtures owned by the corporation and subsequently the defendant O. F. Stafford, Jr., purchased approximately one-half of these fixtures and the defendant Robert L. Lentz purchased the other one-half. Each, in April, 1961, paid to the corporation an amount which was a fair and adequate consideration for all the furniture and fixtures thus acquired.

In January, 1962, the officers and stockholders retained Charles E. Dameron, an attorney, to effect an orderly dissolution of the cor-

poration and Articles of Dissolution were prepared and filed with the Secretary of State on 6 June 1962. Notice of dissolution was published in the newspapers as required by law beginning on 11 June 1962. Mr. Dameron then took appropriate steps to ascertain what the assets of the corporation were which were available for distribution and what liabilities were to be paid from the assets. Mr. Stafford and Mr. Lentz paid into Mr. Dameron's hands $230.00 each to be used in liquidating the corporation, since no funds were in corporate hands. Also, Mr. Stafford paid into Mr. Dameron's hands $472.97 to be used to satisfy certain tax and other liabilities.

Findings of Fact Nos. 18, 19 and the first portion of No. 20 were as follows:

"(18) Mr. Dameron, after considerable difficulty and placing of the lot with a realtor, sold the lot at Atlantic Beach for $1500.00 and this amount was used by him in the satisfaction of claims against the corporation.

(19) Mr. Dameron advertised the boat and trailer and that was finally sold to a Dr. Grady Love in Greensboro for $350.00, which sum was used by Mr. Dameron in the satisfaction of claims against the corporation.

(20) Southern Excess, Inc. owned title to two automobiles which had no economic value to the corporation, it having no equity therein at the time the defendants acquired them and assumed liability for the payments due thereon, which payments equaled or exceeded the value of the automobiles.

All funds received by Mr. Dameron were distributed to *bona fide* creditors and all obligations and claims against Southern Excess, Inc., of which Mr. Dameron was aware were resolved. . . ."

No exception was taken to any of the foregoing findings of fact. The court, in addition, made the following findings of fact, to all of which the plaintiff excepted:

"(13) . . . There has been no wrongful or fraudulent distribution of corporate funds to the defendants or otherwise."

"(20) . . . The defendants received none of the proceeds realized from the sale of the assets of Southern Excess, Inc. No one on behalf of the plaintiff made any demand upon Mr. Dameron for payment of this or any claim."

"(22) All property of Southern Excess, Inc., which was acquired by the defendants, having value to the corporation or its

creditors was acquired by defendants as the result of a *bona fide* purchase for adequate consideration."

Upon the findings of fact and mixed findings of fact and conclusions of law, the court made the following conclusions of law, to all of which plaintiff excepted:

"(1) There has been no wrongful distribution, appropriation or sale of assets of Southern Excess, Inc., by or among the defendants;

(2) The defendants are not liable to the corporation or to this plaintiff, there having been no breach of any fiduciary obligation and no breach of any duty owed by the defendants to Southern Excess, Inc., or to the plaintiff;

(3) The defendants' conduct in regard to the corporate assets of Southern Excess, Inc. has been one of fair dealing and full disclosure and as to this plaintiff, creditors of Southern Excess, Inc., and Southern Excess, Inc., itself, there has been no fraudulent appropriation of assets of the corporation by the defendants.

(4) The property of Southern Excess, Inc., having value which was received by the defendants was received under *bona fide* sales for adequate consideration.

(5) There has been no fraudulent conveyance distribution or appropriation of any of the assets of Southern Excess, Inc.

(6) Neither Southern Excess, Inc., Barbara Westmoreland, as Receiver of Southern Excess, Inc., nor this plaintiff have any right of recovery from and of these defendants or any of them by reason of the matters and things alleged in the complaint in this action."

From judgment that plaintiff recover nothing of defendants and dismissing the action, plaintiff appealed.

Alvin A. Thomas and Randolph and Randolph by Clyde C. Randolph, Jr., for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey and Hill, by William T. Caffrey for defendants, O. F. Stafford, Jr., and Pickett C. Stafford, appellees.

PARKER, J.

Appellant assigns as error the trial court's conclusions of law and the judgment based thereon. In this assignment we find no merit.

[1, 2] Plaintiff alleged that the stockholders and directors had committed a fraud upon the corporation and its creditors by distributing and dividing among themselves all of the corporate assets and appropriating such assets to their own use. Plaintiff's evidence failed to support this allegation. On competent evidence the trial court found the facts to be otherwise. To most of these findings appellant has taken no exception. They are conclusive on appeal. *Nationwide Homes v. Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693. The court's findings of fact support the conclusions of law, which in turn support the judgment entered.

By brief and argument appellant stresses the fact that the corporate balance sheet of 30 September 1960 showed total assets of $70,617.16, of which $57,334.53 were current, and that the evidence disclosed and the judge found as a fact that by February, 1961, when the corporation had ceased doing business, only certain fixed assets remained. From this appellant argues there must have been some improper distribution of the approximately $57,000.00 of current assets. The evidence, however, is that the same balance sheet showed liabilities of $59,926.02, of which $56,754.02 were current liabilities, and that corporate assets were applied to pay corporate liabilities. There was a complete failure of proof to support plaintiff's allegation that corporate assets were improperly distributed among the stockholders. The only corporate assets which, so far as the evidence disclosed, were transferred to the stockholders, consisted of certain office furniture and fixtures and two automobiles. The trial court found as a fact that the stockholders had paid the corporation a fair and adequate consideration for the furniture and fixtures and that the automobiles had no economic value to the corporation, since the unpaid balance of the mortgage payments due thereon assumed by the transferees equalled or exceeded their value. Appellant did not except to these findings.

[3, 4] It is true, of course, that those charged with the liquidation upon dissolution of a corporate business may not lawfully prefer one creditor or group of creditors over others in the same class. Plaintiff, however, has never alleged that the defendant stockholders and directors did this. Neither in the original complaint filed in 1963, nor in the amended complaint filed in 1968 after one trial and appeal to the Supreme Court, is there any such allegation. The allegation in the original complaint that "there are no other creditors of Southern Excess, Inc., whose rights have been adversely affected by defendants' wrongful appropriation of corporate assets," falls far short of alleging a cause of action based on the theory that payments

had been made to other creditors in which plaintiff had a right to share. Furthermore, this allegation was omitted from the amended complaint. "The plaintiff must make out his case secundum allegata, and may recover, if at all, only on the theory of the complaint. Proof without allegation and allegation without proof are equally fatal." 6 Strong, N.C. Index 2d, Pleadings, Sec. 36. This cause having been twice tried upon the theory alleged, that the defendant stockholders had wrongfully appropriated corporate assets to their own use, the appellant may not now on this appeal urge a different theory based upon the contention that other creditors were improperly preferred. "Where a cause has been tried on one theory in the lower court, appellant will not be permitted to urge a different theory on appeal." 1 Strong, N.C. Index 2d, Appeal and Error, Sec. 4, p. 108.

[5] There was also a failure of proof of the allegation, which first appeared in paragraph XIII of the amended complaint, that the defendants were liable to the corporation for "the failure to issue its stock for a valuable consideration or to issue any stock." The evidence indicates that the present defendant stockholders acquired their stock in Southern Excess, Inc., by purchase from earlier stockholders. The corporation was previously named Freeman and Stafford Insurance Agency, Inc., and the evidence indicates the corporation had a tax loss carry over at the time the present stockholders acquired their stock and took control of its operations. However, no evidence was offered to support plaintiff's allegation that there had been a failure to issue stock for a valuable consideration or to issue any stock.

Appellant's assignments of error 2 through 6 inclusive are directed to the trial court's rulings excluding certain proffered testimony. We have examined all of these carefully and are of the opinion that none of the excluded testimony bore with sufficient materiality upon any issue in this case as to make the court's action in excluding it prejudicial to the appellant. These assignments of error are overruled.

[6] Appellant assigns as error the finding of fact made by the trial court that the two automobiles acquired by the defendants had no economic value to the corporation at the time defendants acquired them, contending there was no competent evidence to support this finding. In our opinion there was sufficient competent evidence to support this finding. In addition, appellant made no exception to this finding, and in the absence of any exception, this finding of fact is binding on appeal. *Nationwide Homes v. Trust Co., supra.* Appellant did except to and assign as error the finding of fact that "[a]ll

property of the corporation which was acquired by the defendants, having value to the corporation or its creditors was acquired by defendants as a result of a *bona fide* purchase for adequate consideration." This finding was clearly supported by competent evidence, and the assignment of error directed to this finding is overruled.

Appellant's final assignment of error is directed to the trial court's refusal to make certain findings of fact as proposed by the plaintiff. We have examined all of these and are of the opinion that the proposed findings were not determinative of any issue in the case or were adequately covered by findings of fact which the court did make. This assignment of error is also overruled.

The judgment appealed from is

Affirmed.

CAMPBELL and HEDRICK, JJ., concur.

QUADRO STATIONS, INC. AND ATLANTIC RICHFIELD COMPANY v. JAMES R. GILLEY AND WIFE, SYLVANIA M. GILLEY; WESLEY BAILEY, TRUSTEE; AND THE NORTHWESTERN BANK

No. 7021SC5

(Filed 25 February 1970)

1. Deeds § 19— restrictive covenants — use of property — competition with covenantee — enforcement

Covenants restricting the use of property for purposes competitive with those of the covenantee are generally enforceable where they involve only partial restraints of trade, are founded on sufficient consideration, and are reasonably limited as to duration and area covered.

2. Contracts § 7— partial restraint of trade — contracts enforceable

Contracts in partial restraint of trade are enforceable where (1) they are founded on a valuable consideration, (2) the restrictions imposed are reasonably necessary to protect the legitimate interest of the covenantee, and (3) the limitations or restrictions are reasonable as to time and area.

3. Deeds § 19— restrictive covenants — consideration — sufficiency of stipulation

In action by an oil company seeking injunctive relief against defendants for their alleged violations of a covenant agreement restricting the use of certain property from the sale and advertisement of petroleum products, a stipulation between the parties that the restrictive covenant agreement was part and parcel of the consideration running to oil company's grantor

from the original grantor in connection with the purchase of the property, *held* sufficient to establish that the restrictive agreement was founded on a valuable consideration.

4. Deeds § 19; Monopolies § 2— restrictive covenants — filling station — protection against competition — enforcement of covenant

A restrictive covenant between the grantor of a lot and the grantee, the predecessor in title to an oil company, providing that a four-acre tract adjoining the lot will not be used for the sale and advertising of any petroleum products for a period of twenty-five years, which covenant was executed contemporaneously with the conveyance to the grantee of the lot as a site for a filling station, *held* legally enforceable by the oil company and not in violation of the statute prohibiting monopolies and trusts, G.S. 75-5(b)(6), since (1) the covenant was reasonably necessary to protect the oil company's investment in the filling station from future competition on the four-acre tract and (2) the restrictions as to area and duration were not unreasonable or injurious to the public.

5. Deeds § 19— restrictive covenants — sufficiency of language — negative easement

An agreement between a covenantor and a covenantee providing that the covenantor, for itself, its successors and assigns, hereby covenants and agrees with the covenantee, its successors and assigns, that a four-acre tract will not be used for the sale or advertisement of any petroleum products, *is held* to impose a negative easement on the tract, and the agreement is enforceable against a subsequent purchaser through *mesne* conveyances from the covenantor.

6. Deeds § 19— creation of restrictive covenants — prerequisites

An owner of land may impose upon his land any restrictions that he deems fit, so long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated.

7. Deeds § 19— restrictive covenants — enforcement — subsequent purchasers

Restrictive covenants in a deed are enforceable not only as between original parties but also by subsequent purchasers by *mesne* conveyances even though their deeds contain no reference to the restrictions.

8. Deeds § 19; Registration § 3— restrictive covenants — notice to subsequent purchasers

A purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed.

9. Boundaries § 10— description — reference in deed to another deed

Reference to one deed in another for the purpose of description is equivalent to incorporating and setting out its description in full.

10. Boundaries § 10— description — evidence of monuments — attorney

It was proper for an attorney, an expert in local property transactions,

to testify for the purpose of more definitely identifying the monuments contained in the description of a deed.

11. Deeds § 19— action on restrictive covenant — description of property — sufficiency of court's findings

In an action by an oil company seeking injunctive relief against defendants for their alleged violation of a covenant agreement restricting the use of certain property from the sale and advertisement of petroleum products for a twenty-five year period, the evidence and the court's findings are sufficient to support the court's conclusion that the description in the agreement adequately described the property restricted.

APPEAL by defendants from *Armstrong, J.*, 29 May 1969 Session of FORSYTH Superior Court.

This action was instituted on 26 June 1967 by plaintiffs seeking injunctive relief against defendants for allegedly violating a covenant agreement restricting certain property from use in connection with the sale or advertising of any petroleum products.

On 19 April 1963 Satterfield Development Company (Satterfield) conveyed by deed to Sibarco Corporation (Sibarco) a certain lot located in Forsyth County. The lot was thereafter conveyed by Sibarco to the plaintiff Quadro Stations, Inc., (Quadro) and leased by Quadro to plaintiff Atlantic Richfield Company for a period of twenty-five years. Also on 19 April 1963 Satterfield and Sibarco entered into a "Restrictive Covenant Agreement" which was recorded in the Forsyth County Public Registry on that date simultaneously with the recordation of the deed. The agreement provided in part as follows:

"WHEREAS, SATTERFIELD has this day conveyed to SIBARCO premises SITUATE in Southfork Township, County of Forsyth, State of North Carolina, located at the northwesterly intersection of Lewisville Road (also known as Country Club Road) and Peace Haven Road, the deed of conveyance being intended for recording in said Forsyth County Records immediately prior hereto; and

WHEREAS, SATTERFIELD is the owner of lands SITUATE in Southfork Township, County of Forsyth, State of North Carolina, adjoining to the west, north, and northeast, the premises conveyed in the aforesaid deed, fronting approximately 643 feet on Lewisville Road, 85 feet on Peace Haven Road, 125 feet on 'A' Street, and 174.42 feet on Conrad Road; and

WHEREAS, SATTERFIELD has agreed to restrict its said above described lands.

NOW, THEREFORE:

For and in consideration of the sum of ONE DOLLAR ($1.00) by SIBARCO to SATTERFIELD in hand paid, SATTERFIELD, for itself, its successors and assigns, hereby covenants and agrees with SIBARCO, its successors and assigns, that for a period of twenty-five (25) years from the date hereof, said lands shall and will not be used or permitted to be used, directly or indirectly, for the sale or advertising of any petroleum product, nor for the display of any trademark, trade name or symbol characteristic of any petroleum product supplier or marketer; . . ."

Defendants are the owners of a lot adjoining plaintiffs' property and acquired from Satterfield through *mesne* conveyances made subsequent to 19 April 1963. It is with respect to the use of this lot that plaintiffs seek the enforcement of the restrictive covenant agreement.

By consent of the parties the trial court heard the evidence, made findings of fact and conclusions of law. Judgment based thereon was rendered for plaintiffs, and defendants, their successors and assigns were enjoined from any further violation of restrictions contained in the agreement. Defendants appealed assigning error.

Hatfield, Allman and Hall by C. Edwin Allman and William C. Myers for plaintiff appellees.

Wesley Bailey and White, Crumpler and Pfefferkorn by William G. Pfefferkorn for defendant appellants.

GRAHAM, J.

Defendants admit the sale and advertising of petroleum products on the lot in question but contend: (1) the restrictive covenant agreement is illegal and unenforceable as an agreement in restraint of trade such as prohibited by the statutes on monopolies and trusts, codified as Chapter 75 of the General Statutes and in particular G.S. 75-5(b)(6); (2) the agreement cannot be enforced against defendants because they were not parties to it; (3) the description of the property covered by the agreement is so vague and indefinite as to render the agreement unenforceable and it was error for the court to admit parole evidence with respect to the description.

We consider the contentions of the defendants in the order set forth above.

(1) G.S. 75-5(b)(6) provides as follows:

"(b) In addition to the other acts declared unlawful by this

chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

(6) While engaged in buying or selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to buy or sell such goods within certain territorial limits within the State, with the intention of preventing competition in selling or to fix the price or prevent competition in buying such goods within these limits."

[1] Covenants restricting the use of property for purposes competitive with those of the covenantees have generally been held to be enforceable where they involve only partial restraints of trade, are found on sufficient consideration and are reasonably limited as to duration and area covered. *Savon Gas Stations Number Six, Inc. v. Shell Oil Company,* 309 F. 2d 306, (4th Cir. 1962), *cert. denied,* 372 U.S. 911, 9 L. Ed. 2d 719, 83 S. Ct. 725; *Goldberg v. Tri-States Theatre Corporation,* 126 F. 2d 26, (8th Cir. 1942); *Parker v. Lewis Grocer Company,* 246 Miss. 873, 153 So. 2d 261; *Vaughan v. General Outdoor Advertising Co.,* 352 S.W. 2d 562, (1961 Ky.); *Ladd v. Pittsburgh Consolidation Coal Co.,* 309 Ky. 405, 217 S.W. 2d 807; *Gonzales v. Reynolds,* 34 N.M. 35, 275 P. 922; *Vanover v. Justice,* 180 Ky. 632, 203 S.W. 321; *Wheatley v. Kollear,* 63 Tex. Civ. App. 459, 133 S.W. 903; *Herpolsheimer v. Funke,* 1 N.U. 304, 95 N.W. 687.

Such restrictions are usually subjected to the same tests whether attacked as being against public policy generally or as in violation of a specific anti-trust statute. See for instance the following cases where restrictions were sustained though challenged as violating specific statutes: *Sun Oil Company v. Trent Auto Wash, Inc.,* 2 Mich. App. 389, 140 N.W. 2d 551; *Goldberg v. Tri-States Theatre Corporation, supra; Jackson v. Price,* 140 Miss. 249, 105 So. 538; *Wheatley v. Kollear, supra.*

The rule concerning such agreements is set forth in 6A Corbin on Contracts, § 1389, as follows:

"[T]he owner of a business, who also owns land nearby, may sell or lease such land to a buyer or tenant who promises not to use it for business purposes in competition with that of the seller or lessor. Here, the restriction is limited to the use of the land transferred. Or, the owner of a tract of land or business block may sell or lease a portion thereof to one intending to use it for a particular purpose, making to him an ancillary

promise not to permit the remaining part of the tract or building to be used for a competitive business purpose. . . . These agreements are usually sustained as being reasonable, even though the purpose is to prevent competition and no business good will is being transferred."

In Annot., 46 A.L.R. 2d 119 (1956), we find the following at pages 198, 199:

"It appears to be well settled that the seller or lessor of property (as distinguished from business or good will) may by a reasonably limited restrictive promise agree to refrain from (1) himself engaging in, or (2) from disposing of his property in such a way that others can engage in, a business which would impair the value of the property to the buyer for the purpose for which he intended to use it."

In a later annotation entitled "Lease-Covenant Against Competition" in 97 A.L.R. 2d 4 (1964) the following statements appear at page 11 *et seq.*

"Although the courts will not tolerate unreasonable restraints upon trade, and frown upon restrictions upon the free use of land, there is no doubt of the validity, under ordinary circumstances, of a restriction imposed by a lessor, ancillary to a leasing of part of his property, upon the remainder of the property owned or controlled, . . .

* * *

The right of the covenantee to enforce the covenant against one other than the covenantor is subject to little, if any, doubt, in its main areas.

* * *

[T]he covenant is enforceable, by way of injunctive relief, as against any subsequent taker of the restricted premises, whether a purchaser or a lessee, where such party takes with notice, either actual or constructive, of the restriction imposed upon the premises under the lessor's covenant."

The case of *Sun Oil Company v. Trent Auto Wash, Inc., supra,* is particularly in point. There the grantor conveyed lots 4 and 5 of a subdivision to plaintiff. In the deed grantor agreed that property owned by her and "lying north of and adjacent to the within described premises" would not be used for a gasoline station or for automotive services generally. She later sold lots 6-9 in the subdivision to defendant. Defendant was restrained from installing gasoline storage and dispensing equipment on the lots. In rejecting de-

fendant's contention on appeal that the agreement violated the Michigan anti-trust statute the court summarily noted that the case law of that state interpreted the statute as prohibiting only unreasonable restraints of trade and that the restrictions imposed were not unreasonable.

[2] We find no cases in this State wherein a covenant restricting the use of land (other than in connection with the sale of a business) has been challenged as violating any of the provisions of our anti-trust statutes. However, closely related cases establish that contracts tending only to partially restrain trade are enforceable where: (1) they are founded on a valuable consideration; (2) the restrictions imposed are reasonably necessary to protect the legitimate interest of the covenantee; and (3) the limitations or restrictions are reasonable as to time and area. *Jewel Box Stores v. Morrow,* 272 N.C. 659, 158 S.E. 2d 840; *Buick Co. v. Motors Corp.,* 254 N.C. 117, 118 S.E. 2d 559; *Paper Co. v. McAllister,* 253 N.C. 529, 117 S.E. 2d 431; *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 42 S.E. 2d 352; *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543; *Moskin Bros. v. Swartzberg,* 199 N.C. 539, 155 S.E. 154. We quote from the opinion of Bobbitt, J. (now C.J.), in *Buick Co. v. Motors Corp., supra,* at p. 125 as follows:

> "Under G.S. 75-1 *et seq.,* as interpreted in *Mar-Hof Co. v. Rosenbacker,* 176 N.C. 330, 97 S.E. 169, and later cases, 'agreements in partial restraint of trade will be upheld when they are "founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." ' As stated by *Allen, J.,* in *Sea Food Co. v. Way,* 169 N.C. 679, 682, 86 S.E. 603: '. . . the true test now generally applied is whether the restraint is such as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public.' "

[3] The parties stipulated at the trial that the restrictive covenant agreement was a part and parcel of the consideration running to Sibarco from Satterfield in connection with the purchase of the property described in the deed referred to in the agreement. This stipulation is sufficient to establish that the agreement in question was founded on a valuable consideration.

[4] On the question of whether the restriction imposed was reasonably necessary to protect the legitimate interest of the covenantee, we note that uncontradicted evidence in the record indicates that Sibarco sought out the lot purchased from Satterfield as a specific

site for a gasoline service station. While Sibarco had no right to insist on an agreement that would generally protect it and its successors and assigns from competition, it is our opinion that Sibarco was protecting a legitimate interest in taking steps through the agreement to assure that its investment would not be substantially impaired by future competition on an adjoining lot. Rather than restraining trade, such agreements may in some instances actually increase business competition. A businessman would naturally be inclined to pass up a location where he has no minimal protection from future "next door" competition, thus leaving similar businesses already located in the general area free from his competition.

We also find the agreement reasonable as to area covered and time. Evidence below indicated and the court found that the area subject to the agreement consisted of less than four acres. Certainly the restriction of such a small area is not unreasonable under the circumstances. On the question of duration we find the following in Annot., 45 A.L.R. 2d 77 (1956), at p. 115:

> "Where the duration of the restraint is limited as to time, the mere length of the period of time during which the restraint is to operate, standing alone, is never sufficient to render the restrictive covenant not to compete ipso facto [sic] unenforceable. This proposition is so well settled that no case has been found that would even intimate a contrary viewpoint."

Such covenants are not unreasonable as to time if their duration is no longer than reasonably necessary to afford fair protection to the covenantee and not so long as to be injurious to the public. *Beam v. Rutledge,* 217 N.C. 670, 9 S.E. 2d 476. See also *Jewel Box Stores v. Morrow, supra,* and cases therein cited.

The covenantee and its successors have a protectable interest for such period of time as they could reasonably be expected to use their property for the purpose sought to be protected by the agreement. A period of twenty-five years is not an unduly long time to expect property purchased for gasoline service station purposes to continue to be applied to such use. In fact, the plaintiff Atlantic Richfield Company is now in possession of the protected property under a twenty-five year lease.

Furthermore, we do not find the duration of the restriction unduly harsh or oppressive to defendants or to the general public. Defendants are not restrained from engaging in a competitive business anywhere in the world save for the four acres covered by the agreement. The only practical effect the agreement could have insofar as

the public is concerned is that it prohibits two or perhaps more service stations from locating side by side in an area consisting of less than four acres. It is hard to see how this could impose any undue inconvenience on the general public. The agreement does not tend to create a monopoly nor does it restrict competition over a general area. Indeed, the record discloses that other service stations are in fact located next to and directly across the street from the one being operated by plaintiff Atlantic Richfield. In *Jackson v. Price, supra,* an owner sold his restaurant business and agreed not to open up or conduct a restaurant business for an unlimited time in the city where the business was located. The court held that the agreement was not against public policy, on the ground that there were other restaurants to which the public could resort. See also *Bradshaw v. Millikin,* 173 N.C. 432, 92 S.E. 161; *Sea Food Co. v. Way,* 169 N.C. 679, 86 S.E. 603.

We hold that the court below properly found the agreement in question legal and enforceable and not in violation of G.S. 75-5(b)(6).

[5-8] (2) Defendants' contention that the agreement is unenforceable as to them is without merit. The agreement provides that "SATTERFIELD, for itself, its successors and assigns, hereby covenants and agrees with SIBARCO, its successors and assigns, that . . . said lands shall and will not be used or permitted to be used, directly or indirectly, for the sale or advertising of any petroleum product, . . ." This language clearly evidences an intention on the part of the parties to impose on the land in question a negative easement rather than to enter an agreement personal between themselves. An owner of land may impose on his land any restrictions that he deems fit, so long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated. 3 Strong, N.C. Index 2d, Deeds, § 19. Such restrictions are enforceable not only as between original parties but also by subsequent purchasers by *mesne* conveyances even though their deeds contain no reference to the restrictions. *Realty Co. v. Hobbs,* 261 N.C. 414, 135 S.E. 2d 30; *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344. Furthermore, "a purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed *or other instrument in his line of title,* even though it does not appear in his immediate deed." (Emphasis added). *Higdon v. Jaffa,* 231 N.C. 242, 248, 56 S.E. 2d 661. The agreement in question was on record and defendants are charged with constructive notice of the restrictions contained therein. *Cummings v. Dosam, Inc.,* 273 N.C. 28, 159 S.E. 2d 513; *Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88.

[9-11] (3) Defendants' final assignments of error relating to the description contained in the agreement are overruled. The property is described in the agreement as being the property owned by Satterfield and adjoining the property conveyed to Sibarco to the west, north and northeast. "Reference to one deed in another for the purpose of description is equivalent to incorporating and setting out its description in full." *Realty Corp. v. Fisher*, 216 N.C. 197, 199, 4 S.E. 2d 518. In addition, the description contained references to four ascertainable monuments and four ascertainable calls. The language used in the description is not so patently ambiguous as to render inadmissible extrinsic evidence in order to fit the description to the land. *Self Help Corp. v. Brinkley*, 215 N.C. 615, 2 S.E. 2d 889. It was not error for the court to permit testimony by an attorney, an expert in local property transactions, for the purpose of more definitely identifying the monuments contained in the descriptions. *Duckett v. Lyda*, 223 N.C. 356, 26 S.E. 2d 918; see *McDaris v. "T" Corporation*, 265 N.C. 298, 144 S.E. 2d 59. The evidence and the court's findings are sufficient to support the court's conclusion that the description in the agreement adequately described the property restricted and applies to the property now owned by defendants and being used by them in violation of the restrictions.

Affirmed.

BROCK and BRITT, JJ., concur.

IN THE MATTER OF LYNWOOD CLARENCE BOWEN, III

No. 7018DC10

(Filed 25 February 1970)

1. Divorce and Alimony § 22; Infants § 9— modification of child custody order — changed circumstances

Child custody orders may be modified or vacated at any time upon motion in the cause and a showing of changed circumstances by either party or anyone interested. G.S. 50-13.7.

2. Divorce and Alimony § 24; Infants § 9— change in child custody — absence of finding that person having custody is unfit

A change in child custody may be ordered even though there is no finding that the person having custody under a previous order has become unfit or is no longer able or suited to retain custody.

3. Divorce and Alimony § 24; Infants § 9— child custody — changed conditions

A judgment awarding custody is based upon conditions found to exist at the time it is entered and is subject to such change as is necessary to make it conform to changed conditions when they occur.

4. Divorce and Alimony § 24; Infants § 9— modification of child custody — findings of fact — appellate review

Court's findings of fact in modifying a child custody order are conclusive on appeal if supported by competent evidence.

5. Divorce and Alimony § 24; Infants § 9— modification of child custody — change of circumstances — sufficiency of findings

In this proceeding upon motion of the mother for modification of a child custody order which awarded custody to the father, findings by the trial court supported by competent evidence were sufficient to support the court's modification of the original order to award custody to the mother on the basis of a material change of circumstances, where, at the time the original order was entered, the mother was attending high school in both the summer and winter months, her plan was to take the child to the out-of-state home of the maternal grandfather, who was divorced and remarried with two stepdaughters and a daughter of the second marriage living with him, and who would be absent from home for three weeks out of each month, and the father's plan was to keep the child in the home of the paternal grandparents, and the court found that the mother had since become married to a man of good character and reputation and had a good and comfortable home into which to take the child, that for at least a year she had demonstrated stability and established an excellent reputation, that she planned to care for the child full time in the home, and that while in the father's custody the child was being cared for by various persons, including the father, paternal grandparents, and nursery school personnel.

APPEAL by respondent from *Gentry, District Judge,* 11 June 1969 Session of GUILFORD County District Court.

Motion was filed in this cause on 24 February 1969 by Karen Sue Dickerson (formerly Karen Sue Bowen) seeking a modification of a custody order entered in the Guilford County Domestic Relations Court on 28 July 1967. The proceeding was transferred from the Domestic Relations Court to the District Court on 2 December 1968 pursuant to G.S. 7A-135.

The movant and the respondent, Lynwood Clarence Bowen, Jr., were married on 5 May 1966 at the respective ages of 15 and 17. Both were in school at the time. Lynwood Clarence Bowen, III, was born to the marriage on 19 November 1966. On 21 June 1967 the parties separated and on 29 June 1967 the father instituted a proceeding for custody of the infant child. A custody hearing was held

on 26 July 1967 and based on evidence presented at the hearing the presiding judge made findings, including the following:

> "[T]he court finds that both the petitioner and the respondent are living in the City of Greensboro, North Carolina, at the present time. The court finds that the petitioner has offered plans to keep the child in the home of the paternal grandparents where he resides and that the respondent has offered plans to keep the child with the maternal grandfather in Albany, Georgia.
>
> The court finds that the petitioner is gainfully employed in the City of Greensboro where he works as Assistant Manager of Carolina Theater, and that the respondent has been attending high school during the summer months and will be a student during the winter months, she being a rising senior in high school. The court finds that the respondent will be in school a great deal of the time and that her father, the maternal grandfather, in whose home the child would be residing, is away from his home in Albany, Georgia, for approximately three weeks out of each month.
>
> The court finds, upon hearing all of the evidence presented, that both the petitioner and the respondent are fit, proper and suitable persons to have the care, custody and tuition of the minor child born of the marriage, but the court finds and holds under all of the circumstances, and after fully considering the plans offered by each party for the care, custody and tuition of the minor child, that the plan offered by the petitioner is in the best interest of the said child and that the home of the paternal grandparents where the petitioner is residing is a fit, proper and suitable place for the rearing of the minor child.
>
> * * *
>
> This matter is retained for further orders of the court."

On 28 July 1967 an order based on the court's findings was entered awarding custody to the father and granting liberal visitation privileges to the mother.

A hearing was held on the present motion on 23 April 1969. After hearing extensive testimony and reviewing numerous affidavits presented by both parties the court made findings including the following which are summarized:

1. The child's mother, Karen Sue Dickerson, was granted a divorce from the father on 8 March 1968 in the State of Georgia and married David J. Dickerson on 16 March 1968.

2. David J. Dickerson, 22 years of age, is a Marine Corps veteran and has a disability rating of forty percent as a result of wounds sustained in service. He is a high school graduate and has taken courses in drafting, electricity and pipe fitting. Following his discharge from the Marines in October, 1968, he and his wife returned to his home town of Cleveland, Tennessee, and purchased a three-bedroom home in a good residential area consisting of new homes being occupied by young people with small children. One bedroom is furnished as a nursery. Mr. Dickerson is employed in a transfer and storage business owned by his family and has an annual income of from $6,500 to $7,500 a year. His duties do not preclude his being home nights.

3. David Dickerson saw the child daily while the child was in the custody of his mother for a three weeks visitation in 1968; he loves the child and will give the child all the love and care of which he is capable. The child appears to be very fond of him.

4. Karen Dickerson is extremely fond of her child and has given the child good care and treatment during periods when the child was visiting with her. She has completed all of her high school work with the exception of a few credits and since living in Tennessee, has been employed by the Cleveland National Bank and more recently, by the Duplan Corporation at a weekly salary of $68.00; that she has an understanding with her employer that, should she obtain custody of her child, she would quit work and stay home and look after her child.

5. The Department of Public Welfare of Cleveland, Tennessee, investigated Mr. and Mrs. Dickerson and the home surroundings, and reported to the court that the Dickerson home is a very livable home in an excellent neighborhood; and that a bedroom has been completely furnished as a nursery; also, that Mr. and Mrs. Dickerson bear a good character and reputation and are highly thought of in the area where they live. The report recommended the home as being a suitable home and Mr. and Mrs. Dickerson as excellent parents who would love and well care for the child.

6. Mr. and Mrs. Dickerson attend church and are in the young couples class; Mr. Dickerson bears an excellent reputation and character in the community and he is recommended by the leading citizens in the community where he lives as a mature and responsible person.

7. Mrs. Dickerson, during her one year in the community, has established herself as a person of good character and reputation who

is fond of children, and she has conducted herself in a manner that has convinced her associates that she is a responsible person and would provide good care for her child.

8. While Mr. Bowen and his former wife were living together, the child was kept for them during the daytime by Mrs. R. E. Haynes and she has continued to keep said child during the daytime, four days each week. At the time of the separation between Mr. and Mrs. Bowen, Mr. Bowen was employed by the Carolina Theater of Greensboro and worked from 11:00 a.m. until 11:00 p.m. throughout most of the week. The child was sometimes taken to and from Mrs. Haynes' nursery by the father and at other times by the paternal grandmother and paternal grandfather. For the past six months, the father has been employed by Southern Bell Telephone Company and does not work on the third Saturday of each month.

9. The father has shown considerable interest in the welfare of the child and considerable affection toward him. Since the separation the child has lived with his father in the three-bedroom home of the paternal grandparents, at 2515 Glenhaven Drive, Greensboro, North Carolina. One bedroom has been particularly arranged for the child. The paternal grandmother is employed with the Parking Control Division of the Greensboro Police Department, and the paternal grandfather works for Talley Laundry and Machine Company. Both have excellent reputations and character in the community; they are active in their church, and they have given the child excellent care. The child appears to be well adjusted and very fond of his father, paternal grandparents and a teenage uncle who resides in the home. The child has gotten all of his shots and appears to be in excellent health.

10. The father is a mature individual and bears a reputation beyond question; he has carried the child to church and has been brought up in church himself.

Based upon its findings the court concluded that both parents are fit and proper persons to have the custody of the minor child but that the full development of the physical, mental and moral faculties of the child would be most easily attained in the home of the mother since she has the capacity, desire, time and facilities for such. The court further concluded:

> "6. That there has been a substantial change in the condition and circumstances as the same existed at the time the original order of custody was entered in July of 1967, in that the mother's living conditions have become fixed and definite and that

she is able to spend more time with her son and be available to him at all times to take care of his needs and to give him the tender love and affection that only a mother can give.

7. That it would be to the best interest and welfare of Lynwood Clarence Bowen III that he be placed in the care, custody and control and supervision of his mother, Karen Sue Dickerson and her husband, David Dickerson.

8. That it would be to the best interest and welfare of said child that he have ample opportunity to visit with his father and paternal grandparents and that provisions for such should be incorporated herein."

Judgment was entered upon the findings and conclusions modifying the order of 28 July 1967 and granting general custody of the child to the mother. The father was granted reasonable visitation privileges and temporary custody each year for one week in December and the entire months of June, July and August. The father appealed assigning error.

Latham, Pickard & Ennis by James F. Latham for petitioner appellee.

Comer and Harrelson by John F. Comer for respondent appellant.

GRAHAM, J.

[1] Custody orders may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. G.S. 50-13.7. "[T]he control and custody of minor children cannot be determined finally. Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify." *In re Marlowe,* 268 N.C. 197, 199, 150 S.E. 2d 204.

Respondent contends that the court erred in modifying the custody order without a showing "of a *substantial change* in circumstances that would enhance the child's welfare and with no showing or finding that the father was *not* a fit and proper person to have the custody and control of his son as he had been found to be on June 28, 1967."

[2] We do not understand the law in this jurisdiction to be, as respondent argues, that a change in custody may not be ordered absent a finding that the person having custody under a prior order

has become unfit or is no longer able or suited to retain custody. While such a consideration is of utmost importance in inquiring into the matter of custody, it is not alone determinative. In *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357, Branch, J., speaking for the court, reiterated the rationale concerning the modification of custody decrees upon a change of circumstances by quoting the following principle set forth in *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884, as follows:

> "'. . . the welfare of the child at the time the contest comes on for hearing is the controlling consideration. . . . It may be well to observe . . . that the law is realistic and takes cognizance of the ever changing conditions of fortune and society. While a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require. . . .'"

[3] "A judgment awarding custody is based upon the conditions found to exist at the time it is entered. The judgment is subject to such change as is necessary to make it conform to changed conditions when they occur. . . ." *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332.

[4] The record discloses substantial competent evidence in support of the court's findings and the findings are therefore conclusive on appeal. *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649; *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871. The more difficult question is whether the findings establish a change in circumstances of such a material nature as to permit a change in the custody order of 28 July 1967. We are of the opinion that they do.

[5] When the original order was entered the mother was attending high school in both the summer and winter months. Her plan was to take the child to the home of her father who lived in Albany, Georgia. She would be in school during the day and her father would be absent from the home for three weeks out of each month. The record indicates that a decision in the matter was reserved so that a report could be obtained as to the conditions and circumstances in the home of the maternal grandfather. No report appears in the record but the record does indicate that the grandfather was divorced and remarried. Living with him in the home were two stepdaughters and a child by the second marriage. No findings were made concerning the suitability of his home but there was a finding that ". . . the court finds and holds under all of the circumstances, and after

fully considering the plans offered by each party . . . that the plan offered by the petitioner [father] is in the best interest of the said child." At that time the mother was hardly more than a child herself. It was evident that her plan to take the child into the home of her father and his new family, without assurances that the child would receive proper care while the mother attended school, offered little basis for an award of custody when compared with the father's plan for the care of the child.

The mother's circumstances at the time of the hearing on the motion to modify the original order had changed substantially. She was married to a man of good character and reputation and had a good and comfortable home into which to take the child. She was older and more mature. For at least a year she had demonstrated commendable stability and established an excellent reputation. She planned to terminate all employment so as to care for the child full time in the home. These findings, when contrasted with a situation where the child was being cared for at various times by various persons including a father, grandfather, grandmother (all of whom were employed outside the home) and nursery school personnel, formed a basis for the court's conclusion that the interest and welfare of the child would best be served through a modification of the prior custody order. The trial judge observed the parties and witnesses and had an opportunity to evaluate their testimony first hand. The evidence fully supports his findings which in our opinion support his conclusions and judgment.

Respondent insists that a different result is dictated by the cases of *Shepherd v. Shepherd, supra,* and *Stanback v. Stanback, supra.* We do not agree. In the *Shepherd* case, the lack of a finding of fact of any change of circumstances affecting the welfare of the child required that the matter be remanded for a hearing *de novo.* In the *Stanback* case, the evidence offered was practically identical to the evidence that had been considered by the judge that entered the first custody order less than two months previously. In the instant case we have before us extensive findings and substantial evidence indicating a change in circumstances.

Affirmed.

BROCK and BRITT, JJ., concur.

NORTHWESTERN MUTUAL INSURANCE COMPANY v. J. W. HYLTON, INDIVIDUALLY AND TRADING AS HYLTON INSURANCE AGENCY

No. 7017SC4

(Filed 25 February 1970)

1. Evidence § 5; Pleadings § 36— allegations — burden of proof

A plaintiff has the burden of proof on all allegations, negative as well as affirmative, which are essential to his claim or cause of action.

2. Insurance §§ 2, 10— insurer's action against agent — clerical mistake — reformation of policy — defense — liability of insurer

Where an employee of an insurance agent erroneously attached to a fire insurance policy a rider providing for the unlimited occupancy of the insured's premises, rather than the standard policy rider providing that the insured's premises could not be unoccupied for more than 90 days, the insurance company issuing the policy could validly raise the defense of reformation of the policy to show the true intent of the parties in an action by the insured to recover for losses incurred by fire to premises unoccupied for 128 days; consequently, the trial court properly entered a judgment of involuntary nonsuit in the insurance company's action against the agent for recovery of a compromise payment made by the company to the insured in settlement of the claim arising out of the fire, since the insurer was not legally obligated to make the compromise payment to the insured.

3. Insurance § 10— reformation of policy — clerical mistake

Reformation of an insurance policy is allowed because of the insurer's clerical mistake, since in such instance it is apparent that the policy which was issued in fact does not set forth what had been agreed to and what was intended by all parties.

4. Insurance § 10— reformation of policy — mistake of agent

Where the insurer's agent is authorized to act in the premises and through his mistake or fraud the policy fails to express the real contract between the parties, or if by inadvertence or mistake of the agent provisions other than those intended are inserted, or stipulated premises are omitted, a court of equity has the power to grant relief by a reformation of the contract.

5. Reformation of Instruments § 7— sufficiency of evidence — jury determination

To reform or correct a written instrument on the ground of mutual mistake of the parties, the evidence must be clear, strong and convincing; whether or not the evidence is clear, strong and convincing in a particular case is for the jury to determine.

6. Negligence § 11— indemnity — right ex contractu

Indemnification is essentially a right *ex contractu.*

7. Negligence § 11— common-law indemnity — active and passive negligence

Common-law indemnity rests upon a contract implied by law from the circumstance that a passively negligent or derivatively liable tort-feasor

had discharged an obligation for which the actively negligent tort-feasor was primarily liable.

8. Negligence § 11— common-law indemnity — primary and secondary liability

The right of one compelled to pay money to "A" to obtain common-law indemnity from "B" is based on the principle of primary-secondary liability.

9. Insurance § 2; Negligence § 11— insurer's action against agent — clerical error — indemnity — primary-secondary liability

An insurance company is not entitled to recover from an insurance agent, on the theory of common-law indemnity, for the company's compromise payment to an insured under a policy of fire insurance to which a rider was erroneously attached by an employee of the agent, where (1) there was neither allegation nor proof that the agent was primarily liable to the insured, (2) there was no suggestion of misrepresentation or reliance or that the insured suffered any injury at the hands of the agent, and (3) even if indemnity were applicable, the insurer failed to show that it was legally liable to the insured.

10. Negligence § 11—indemnity — legal liability of indemnitee

Indemnity against losses does not cover losses for which the indemnitee is not liable to a third person, and which he improperly pays.

APPEAL by plaintiff from *Collier, J.*, 9 June 1969 Session of SURRY Superior Court.

In this action the parties waived jury trial and agreed that the trial judge would hear the evidence, find the facts, make his conclusions of law, and render judgment.

Admissions in the pleadings, stipulations, and other evidence — fully supported by the pleadings — tended to show the following:

In 1961 and 1962 defendant (Hylton) was operating an insurance agency and had an agency agreement with plaintiff (Northwestern). In March 1961 Hylton, as agent of Northwestern, issued a new standard fire insurance policy to Clarence and Robert Ayers (Ayers) covering a certain tenant dwelling in the amount of $10,000, the policy to be effective from 10 May 1961 to 10 May 1962. Work in connection with assembling and issuing the policy was done by Margaret Nichols (Nichols), an agent or employee of Hylton. The policy included a provision for rider form No. 256 to be attached thereto, said rider providing that the insured premises could not be unoccupied for more than 90 days. In assembling the policy, Nichols erroneously attached to the original policy rider form No. 252 which provided for unlimited unoccupancy of the insured premises. The face sheet of the policy showed that it was subject to endorsement

No. 256. The original policy and endorsements were forwarded to Workmen's Federal Savings and Loan Association, holder of lien on the insured premises, and carbon copies of the face sheet only were forwarded to Ayers, Northwestern, and the Fire Insurance Rating Bureau of Raleigh; a fifth copy of the face sheet only was kept by Hylton for his record. Standard endorsement No. 256 extended non-occupancy of the dwelling to 90 days in lieu of the 60-day non-occupancy standard policy.

On or about 10 March 1962, Hylton issued a renewal certificate renewing the policy for the period from 10 May 1962 until 10 May 1963. Premiums for both years were charged for the type of coverage subject to endorsement No. 256 and the renewal certificate recited that the policy was subject to endorsement No. 256. The insured dwelling became vacant on or about 7 April 1962 and was continuously vacant from that time until it was destroyed by fire on 14 August 1962, some 128 days later.

Following the fire, Ayers made demand on Northwestern for payment of the loss but Northwestern, laboring under the impression that the policy was subject to rider form No. 256 and knowing nothing of the attachment of rider No. 252 to the original policy, denied liability. In March of 1963, Ayers instituted suit against Northwestern to recover for loss occasioned by the fire. Thereafter, Northwestern discovered the apparent error made by Nichols and in its pleadings denied liability or coverage, contending that if the policy contained a rider No. 252 permitting an unlimited period of nonoccupancy, such rider was not according to the contract and Northwestern was entitled to have the contract reformed to speak the true agreement of the parties.

Prior to an adjudication of the Ayers case on the merits, Northwestern made a compromise payment to Ayers in the amount of $4,500 in settlement of their action. There has been no judicial determination that Northwestern was legally obligated to Ayers for the fire loss and Hylton was not a party to the Ayers action or the settlement agreement reached therein.

In this action plaintiff attempts to recover the $4,500 paid Ayers, plus court costs and counsel fees and expenses incurred in defending the Ayers action. Among other defenses, Hylton pleaded laches on the part of Northwestern and also the three-year statute of limitations.

After plaintiff introduced its evidence, defendant introduced into evidence the pleadings and judgment in the case of *Ayers v. North-*

western Mutual Insurance Company and renewed its motion for judgment of nonsuit. Thereafter, the trial court entered judgment of involuntary nonsuit from which plaintiff appealed.

Deal, Hutchins & Minor by Fred S. Hutchins and William K. Davis for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster for defendant appellee.

BRITT, J.

[1] It is well settled in this jurisdiction that a plaintiff has the burden of proof on all allegations, negative as well as affirmative, which are essential to his claim or cause of action. 3 Strong, N.C. Index 2d, Evidence, § 5, pp. 603-604. Defendant contends that judgment of involuntary nonsuit was proper in the instant case for the reason that plaintiff failed to carry the burden of proving its legal obligation to pay the money for which it seeks indemnity from the defendant. We agree with this contention.

[2] In testing the sufficiency of the evidence in the instant case to survive motion for nonsuit, we start with the assumption that the evidence does raise a reasonable inference that the wrong rider was attached to the original policy by Hylton's employee by error and mistake; defendant so stipulated. But, plaintiff had the burden of going further and proving that it incurred a *legal liability* because of the mistake. In its "Answer to Reply" filed in the *Ayers* case, Northwestern alleged that if a printed rider on form No. 252 was attached to the original policy issued to Ayers, it was by mistake and inadvertence and Northwestern asked that the policy be reformed to speak the true agreement between the parties. The question now arises, did Northwestern plead a valid defense in the *Ayers* action.

The mistake or clerical error upon which one seeks to base a cause of action may be approached as a "scrivener's error" or as a "mutual mistake." A scrivener is one "whose occupation is to draw contracts, write deeds and mortgages, and *prepare other species of written instruments.*" (Emphasis added.) Black's Law Dictionary, 4th Ed. The defense of mutual mistake is applicable to the facts of the *Ayers* case because "where the insurer's clerk has erroneously recorded the agreement, the mistake common to both parties * * * rests in the supposition of both that their writing states their agreement correctly." 17 Couch on Insurance 2d, § 66:51, p. 286.

[3] Whether the clerical error here is considered to be a "scrivener's error" or "mutual mistake", the defense of reformation of the policy — so as to be enforceable only to the extent of the coverage within the actual intent of the parties — was available to Northwestern when it chose to settle the Ayers claim. The rationale of allowing reformation is concisely set out in 17 Couch on Insurance 2d, § 66:51, p. 286: "Reformation has been allowed because of the insurer's clerical mistake, since in such instances it is apparent that the policy which was issued in fact does not set forth what had been agreed to and what was intended by all parties."

[4] Again in 17 *Couch*, § 66:42, p. 278, it is observed: "Where the insurer's agent is authorized to act in the premises, and through his mistake or fraud the policy fails to express the real contract between the parties, or if, by inadvertence or mistake of the agent, *provisions other than those intended are inserted,* or stipulated provisions are omitted, *there is no doubt* as to the power of a court of equity to grant relief by a reformation of the contract * * *." (Emphasis added.)

In *Williams v. Insurance Co.*, 209 N.C. 765, 185 S.E. 21, the court said of reformation: "The principle, as we have seen, applies to policies of insurance." In *Williams* the names of the plaintiffs as owners of certain insured buildings and as beneficiaries of the policy were omitted due to the inadvertence of the agent. The court allowed reformation as the policy of insurance did not represent the intention of the parties. The court in *Williams* said: "It is well settled that in equity a written instrument, including insurance policies, can be reformed by parol evidence, for mutual mistake, inadvertence, or the mistake of one superinduced by the fraud of the other or inequitable conduct of the other."

[2, 5] It is also well settled that to reform or correct a written instrument on the ground of mutual mistake of the parties, the evidence must be clear, strong and convincing, and that "[w]hether or not the evidence is clear, strong and convincing in a particular case is for the jury to determine." *Insurance Co. v. Lambeth*, 250 N.C. 1, 108 S.E. 2d 36, and authorities therein cited. Thus, we do not hold here that on the record before us Northwestern, in the *Ayers* case, was entitled as a matter of law to have its policy of insurance corrected to include endorsement 256 rather than 252; what we do hold is that in the *Ayers* case Northwestern pled a valid defense — that of inadvertence or mutual mistake — and was in position to present sufficient evidence for the jury to determine under proper instructions if endorsement 252 rather than 256 was attached to the orig-

inal policy by inadvertence or mutual mistake, and in the absence of agreement — actual or implied — to the contrary, defendant Hylton, before being liable to Northwestern for indemnity, was entitled to the benefit of such determination. We are not required here to say if Hylton was a necessary or proper party to the *Ayers* suit. (See *Hildreth v. Casualty Co.*, 265 N.C. 565, 144 S.E. 2d 641).

[6, 7] Plaintiff's arguments in asserting a cause of action against Hylton refer to negligence, mistake and indemnity. Indemnification is essentially a right *ex contractu*. Here, there is neither allegation nor proof of an express contract of indemnification. Common-law indemnity is said to rest upon a contract implied by law from the circumstance that a passively negligent [or derivatively liable] tort-feasor had discharged an obligation for which the actively negligent tort-feasor was primarily liable." *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768.

In *Hildreth v. Casualty Co., supra,* an injured party who had obtained judgment against the alleged insured brought an action against the insurer and its underwriter agent on an automobile liability policy, and the insurer pleaded a cross-action against its agent in which it asserted a right of common-law indemnity from the agent. The court allowed the cross-action. In *Hildreth* the plaintiff, an injured party standing in the shoes of the insured, asserted alternative rights of recovery: he sought to recover from the company on the theory the policy was effective and from the agent in the event the policy was found not to be effective. In *Hildreth* then, the insurance agent might subsequently be found liable to the claimant, and the insurer, as a secondarily liable party, would have the right of common-law indemnity against the agent.

[8] The right of one compelled to pay money to "A" to obtain common-law indemnity from "B" is based on the principle of primary-secondary liability. See numerous cases in 10A N.C. Digest, Indemnity, § 13(1). The court in *Edwards v. Hamill,* 262 N.C. 528, 138 S.E. 2d 151, said:

> "Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff [citations]; and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. [citations]"

[9] In the instant case, there is neither allegation nor proof that the agent is in any fashion primarily liable to the insured or even

that the insured could have made any case of actionable negligence against him. There is no suggestion of misrepresentation or reliance or that the insured has suffered any injury at the hands of the agent. The court in *Edwards* held that the liability of both the indemnitee and the indemnitor to the third party (in the instant case, the insured) was essential: "The doctrine of primary-secondary liability cannot arise where an original defendant alleges that the one whom he would implead as a third-party defendant is *solely* liable to plaintiff." (Emphasis added.) In the instant case, if anyone is liable to the insured, it would be the insurer who would be *solely* liable.

[10] Defendant's argument puts the indemnity issue to rest by pointing out that, even if indemnity applied, the plaintiff cannot recover because it has failed to carry the burden of proof of showing, in response to defendant's denials, that it was liable to the insured. A concise summary of the applicable law is found in 41 Am. Jur. 2d, Indemnity, § 33, p. 723: "Indemnity against losses does not cover losses for which the indemnitee is not liable to a third person, and which he improperly pays." The plaintiff rested its case on this issue, conceding "it must be shown that the insurer has properly made payment to the insured." Plaintiff has made no such showing.

Defendant argues that the judgment of nonsuit was justified on other grounds including the applicability of the three-year statute of limitations, but we do not deem it necessary to discuss the other points raised.

The judgment of the superior court is
Affirmed.

BROCK and GRAHAM, JJ., concur.

IN RE: WILL OF WILLIAM FARR

No. 6928SC385

(Filed 25 February 1970)

1. Wills § 23— caveat proceeding — instructions — legal effect of codicil

In this caveat proceeding brought by testator's wife challenging on grounds of mental incapacity and undue influence a purported codicil which revoked two articles of testator's will and substituted other provisions therefor, the trial court did not err in refusing to charge the

jury that under G.S. 31-5.8 a subsequent codicil executed by testator revoking the codicil challenged by the caveator did not have the legal effect of reviving the two articles of testator's will which the challenged codicil had revoked, G.S. 31-5.8 not being relevant to the theory of the trial.

2. Wills § 22— caveat proceeding — jury argument — mental capacity — legal effect of codicil

In this caveat proceeding brought by testator's wife challenging on grounds of mental incapacity and undue influence a purported codicil which revoked two articles of testator's will and substituted other provisions therefor, the trial court erred in preventing counsel for the caveator from arguing to the jury that a subsequent codicil executed by testator revoking the challenged codicil but failing to reexecute the articles of the will which had been revoked by the challenged codicil had the effect under G.S. 31-5.8 of leaving testator intestate as to a considerable portion of his property, which shows that testator did not know the legal effect of the subsequent codicil and is some evidence that testator did not have the mental capacity to execute the challenged codicil the previous month.

3. Wills § 22— caveat proceeding — mental capacity — admissibility of evidence — events before and after execution of instrument

When a will is filed for probate and a caveat to the will is filed on the ground that testator lacked sufficient mental capacity to execute the will, the caveator may present to the jury evidence of events which have a bearing on the mental capacity of the testator, both before and after the instrument was executed, as long as it tends to shed light upon the mental capacity of the testator at the time he made the instrument.

APPEAL by caveator from *Snepp, J.*, 20 January 1969 Session BUNCOMBE Superior Court.

This is a caveat proceeding filed by Alice M. Farr alleging that the paper writing which purports to be a codicil to the Last Will and Testament of William Farr dated 22 February 1966 was executed at a time when he lacked the mental capacity to make a will and that it was executed as a result of undue influence exerted by his son, William Farr, II, and his daughter, Frances Farr Plunkett.

Answer was filed to the caveat by Suzanne Farr Ivey, William Farr, II, Frances Farr Plunkett and Eva Farr Sharp denying the allegations of undue influence and lack of mental capacity and praying that the caveat be dismissed.

The paper writing purporting to be the Last Will and Testament of William Farr was executed on 17 August 1961, and consisted of fourteen separately numbered paragraphs, paragraphs four and thirteen being as follows:

"ARTICLE FOUR

"I give, devise and bequeath to my wife, Alice M. Farr, provided she survives me, the sum of Ten Thousand ($10,000.00)

Dollars in cash or securities for her immediate needs to be paid over to her as soon after my death as possible, and I direct my Executor to pay off in full any indebtedness which may be outstanding against real estate held by my wife and me by the entireties. I devise and bequeath to my wife, provided she survives me, the rest of my books not hereinabove devised and all of my household furniture, personal effects of every kind in and about my home place or residence not heretofore devised, but said effects shall not include any stocks, bonds, securities, notes, money or bank deposits belonging to me or held in my name. Should my wife predecease me, or should we both die in a common disaster, the devises and bequests that would have gone to her under this article shall go to my daughters Suzanne Farr Ivey and Eva Farr Sharp and Frances Farr Plunkett, to be divided equally between them."

"ARTICLE THIRTEEN

"All the rest, residue and remainder of my property of whatever nature and wherever situated, including future and contingent, as well as vested interests, right of entry and powers of appointment, or property over which I have power to will, hereinafter referred to as my residuary estate, shall be divided and distributed as follows, such distributions to be made as far as practicable in kind:

"(a) I devise and bequeath two-fifths of my said residuary estate to my wife, Alice M. Farr, and if my wife fails to survive me or we both die in a common disaster, the said two-fifths of my residuary estate that would have gone to my wife shall be divided equally between my children.

"(b) I give, devise and bequeath one-fifth of my said residuary estate to my son William Farr II.

"(c) I give, devise and bequeath one-tenth of my said residuary estate to my daughter Eva Farr Sharp.

"(d) I give, devise and bequeath one-tenth of my said residuary estate to my daughter Elizabeth Farr McNary.

"(e) I give, devise and bequeath one-tenth of my said residuary estate to my daughter Suzanne Farr Ivey.

"(f) I give, devise and bequeath one-tenth of my said residuary estate to my daughter Frances Farr Plunkett, or if she predeceases me then to her daughter Sandra."

Testator executed six codicils to this paper writing dated 17 August 1961, 21 November 1963, 28 September 1964, 18 March 1965, 22 February 1966 and 16 March 1966. The codicil executed on 22 February 1966 was as follows:

"I, WILLIAM FARR, of Asheville, Buncombe County, North Carolina, being of sound mind and memory, but considering the uncertainty of my earthly existence, make this Codicil to my Last Will and Testament dated August 17, 1961.

"A. I revoke in full all the provisions set out in Article Four of my said Will made August 17, 1961, and in lieu thereof do substitute and provide an entirely new Article to be known as Article Four as follows:

"'ARTICLE FOUR'

"I give and bequeath my books, household furniture and personal effects of every kind in and about my home place not hereinbefore devised, (but said effects shall not include any stocks, bonds, securities, notes, money or bank deposits belonging to me or held in my name), to be divided by my son William Farr, Jr., and delivered to the following designated beneficiaries:

"To my wife, Alice M. Farr, provided she survives me, one-third.

"Two-thirds, which I direct shall include all articles of a family or sentimental value and which should therefore go to my daughters are to be divided equally between my four daughters, Suzanne Farr Ivey, Eva Farr Sharp, Frances Farr Plunkett and Mildred Farr Buck.

"B. I revoke in full the provisions set out in Article Thirteen of my said will of August 17, 1961, and in lieu thereof do substitute and provide an entirely new Article to be known as Article Thirteen as follows:

"'ARTICLE THIRTEEN'

"All the rest, residue and remainder of my property of whatever nature and wherever situated, including future and contingent, as well as vested interests, rights of entry and powers of appointment, or property over which I have power to will, hereinafter referred to as my residuary estate, shall be divided and distributed as follows, such distributions to be made as far as practicable in kind:

"(a) I devise and bequeath twenty per cent (20%) of my said residuary estate to my wife, Alice M. Farr, and if my wife fails to survive me or we both die in a common disaster, the said twenty percent (20%) of my residuary estate that would have gone to my wife shall be divided equally between my children.

"(b) I give, devise and bequeath sixteen percent (16%) of my residuary estate to my son William Farr II.

"(c) I give, devise and bequeath sixteen percent (16%) of my said residuary estate to my daughter Eva Farr Sharp.

"(d) I give, devise and bequeath sixteen percent (16%) of my said residuary estate to my daughter Elizabeth Farr McNary.

"(e) I give, devise and bequeath sixteen percent (16%) of my said residuary estate to my daughter Suzanne Farr Ivey.

"(f) I give, devise and bequeath sixteen percent (16%) of my said residuary estate to my daughter Frances Farr Plunkett, or if she predeceases me then to her daughter Sandra.

"Except as changed hereinabove by this Codicil, I hereby ratify and confirm all of the provisions of my said will executed by me on August 17th 1961, as altered or amended by all former Codicils thereto heretofore executed by me in all respects."

The codicil executed 16 March 1966 revoked the codicil dated 22 February 1966 but did not re-execute Articles Four and Thirteen of the Will in compliance with G.S. 31-5.8.

The propounders introduced evidence tending to show that the paper writing dated 17 August 1961 and all of the codicils were executed in accordance with the formalities required by law.

The caveator offered evidence tending to show that she and Mr. Farr were married on 27 November 1947 and that she and Mr. Farr had no children and that Mr. Farr's children were all grown at the time of her marriage to Mr. Farr. Mr. Farr was admitted to the hospital in February, 1966, for treatment of a broken hip. While hospitalized he executed the codicil dated 22 February 1966, and after being discharged he executed the codicil dated 16 March 1966. The evidence tended to show that Mr. Farr was 91 years of age, that he had had an operation upon his leg which was slow in healing and that following the operation he had developed shingles. Mr. Farr also suffered from Parkinson's disease. One witness, J. H. Tinsley, testified that just prior to his death, Mr. Farr told him that his son, William, brought an attorney to the hospital while he was confined

for the broken hip and had him make another codicil to his Will and that when he discovered what the paper writing was upon his return home he revoked it and scratched through it. Nannie Dennis, the Farr's maid for twenty years, testified that on the day prior to his death Mr. Farr told her that his son and daughter had come to him while he was in the hospital and had him sign some papers and that he was so sick he didn't know what he was doing.

The propounders offered evidence tending to show that Mr. Farr's condition was substantially the same as it had been for several years prior to this date. The evidence further tended to show that on 22 February 1966 the testator sent the nurse to summon G. E. Bishop, a friend with a place of business nearby, to act as a witness to the execution of the codicil which he did in conformance with the request of Mr. Farr.

Sixteen issues, including issues of mental capacity and undue influence, were submitted to the jury and answered in favor of the propounders. From judgment entered thereon, the caveator appealed to this Court assigning error.

Bennett, Kelly & Long, by George Ward Hendon, for caveator-appellant.

Landon Roberts, for executor, Van Winkle, Buck, Wall, Starnes and Hyde, by O. E. Starnes, Jr., and Williams, Morris and Golding, by William C. Morris, Jr., for propounders.

HEDRICK, J.

[1] The appellant first assigns as error the court's refusal to instruct the jury as requested in writing as to the provisions of G.S. 31-5.8 as follows:

> " 'No will or any part thereof, which shall be in any manner revoked, can be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference.'
>
> " 'Therefore, the court instructs you that the execution of the last paper writing dated March 16, 1966, did not have the legal effect of reviving paragraphs Four and Thirteen of the paper writing dated August 17, 1961.' "

G.S. 31-5.8 was not relevant to the theory of the trial. Fourteen of the issues submitted to the jury related to the formalities of the execution of the will and the six codicils. The other two issues

related to mental capacity and undue influence. The evidence given in the case related only to the formal execution of the will and to the physical and mental condition of Mr. Farr, and to the influences which might have been exerted upon him to make the codicil dated 22 February 1966. It was not necessary for the jury to be instructed as to the legal effect of the codicil dated 16 March 1966. The court does not commit error when it refuses to give instructions which, though correct in the abstract, are not applicable to the case. *McMillan v. Baxley,* 112 N.C. 578, 16 S.E. 845 (1893); *Mendenhall v. R. R. Co.,* 123 N.C. 275, 31 S.E. 480 (1898).

[2] The appellant contends that all of the evidence offered tended to show that Mr. Farr did not want to die intestate as to any of his property but that the result of the codicil dated 16 March 1966, in conjunction with G.S. 31-5.8, is that he did in fact die intestate as to a considerable portion of his property since he failed to reexecute Articles Four and Thirteen of his will. Counsel argues that Mr. Farr did not know the legal effect of the instrument he executed 16 March 1966, that this was some evidence of a lack of mental capacity to execute the codicil dated 22 February 1966, and that he should be allowed to argue this to the jury.

G.S. 84-14, in part, provides that ". . . the whole case as well of law as of fact may be argued to the jury." Under this statute counsel's right to argue law generally to the jury has been upheld or expressly recognized. In *Puett v. R. R.,* 141 N.C. 332, 53 S.E. 852 (1906), the trial court stopped counsel during his argument to the jury and refused to allow him to comment upon the testimony of a witness. The court, in holding this to be error on the part of the trial judge, stated: "Being thus competent, material, and relevant, there can be no doubt of the right of counsel to make proper comment upon it in his address to the jury. This was all that he was doing when admonished by the judge to stop, which he did, as he should have done, in submission to the intimation of the court. But this client was thereby prejudiced, and prevented, through his chosen counsel, from developing his case before the jury. The judge has a large discretion in controlling and directing the argument of counsel (*S. v. Caveness,* 78 N.C., 484), but this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. *S. v. Miller,* 75 N.C., 73. What is here said is subject, however, to the restrictions imposed by Laws 1903, ch. 433; Revisal, sec. 216. The right to argue the whole case has been expressly conferred by statute. Rev. Code, ch. 31, sec. 57, par. 15; Code, ch. 4,

sec. 30; Revisal, sec. 216. The history of this legislation is well known to the bench and bar. *S. v. Miller, supra.* The reason of the court for stopping counsel is not given. We assume, and we think not unreasonably, that the learned judge who presided at the trial thought the comment improper, as the declaration of Pope was immaterial. Entertaining this opinion, it was proper to interfere as he did. But we think this declaration was material and a proper subject of comment."

In *Irvin v. R. R.*, 164 N.C. 5, 80 S.E. 78 (1913), the Court states that the ". . . conduct of counsel in presenting their causes to the jury is left largely to the discretion of the trial judge . . ." and that this discretion has been exercised liberally. The Court further states that even though the counsel in this case did not exercise all of his privileges in arguing to the jury, nevertheless the discretion vested in the judge does not give him the right to deprive a client of the benefit of his attorney's argument when it is within proper bounds and when it is addressed to the material facts of the case. The Court, in *Brown v. Vestal*, 231 N.C. 56, 55 S.E. 2d 797 (1949), while discussing the role of the trial judge in charging the jury, stated: "Counsel have the right to argue 'the whole case as well of law as of fact.' G.S. 84-14; *Howard v. Telegraph Co.*, 170 N.C. 495, 87 S.E. 313. Frequently it is necessary for them to do so in order to present, in an intelligent manner, the facts they contend the jury should find from the evidence offered. *Sears, Roebuck & Co. v. Banking Co.*, 191 N.C. 500, 132 S.E. 468."

[2, 3] We hold that it was error for the trial judge to prevent counsel for the appellant from arguing G.S. 31-5.8 to the jury. In North Carolina when a will is filed for probate and a caveat to that will is also filed attempting to prevent probate of the will on the ground that the testator lacked sufficient mental capacity to execute a will, the caveator may present to the jury evidence of events which have a bearing on the mental capacity of the testator, both before and after the instrument is executed as long as it tends to shed light upon the mental capacity of the testator at the time he made the instrument. *In Re Hall's Will*, 252 N.C. 70, 113 S.E. 2d 1 (1960); *In Re Knight's Will*, 250 N.C. 634, 109 S.E. 2d 470 (1959).

We have not discussed the appellant's other assignments of error since they are not likely to occur in a retrial.

For the reasons set forth above, the appellant is entitled to a New trial.

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

ATLANTIC MICROFILM CORPORATION v. DR. WILLIAM L. TURNER, R. D. McMILLAN, THOMAS J. WHITE, SAMUEL H. JOHNSON, RALPH H. SCOTT, THORNE GREGORY, LINDSAY C. WARREN, JR., AND FRANK FORSYTH

No. 7021SC45

(Filed 25 February 1970)

1. State § 4— sovereign immunity

The sovereign may not be sued without its consent.

2. Parties § 1; Pleadings § 1— individual or representative action — record as a whole

An action should be treated as individual or representative as its true nature is disclosed by an inspection of the whole record.

3. Injunctions § 11; State § 4— action against individual State officials — unauthorized action against State

Action to restrain individual defendants, officials of the State, from awarding a contract for the microfilming of patient medical records at a State hospital to the apparent low bidder or to anyone other than plaintiff *is held* an unauthorized action against the State and not an action against the defendants as individuals, where the record reveals that every act alleged against any individual defendant was an act performed or to be performed in his capacity as a representative of the State, and the trial court properly sustained defendants' demurrer and dismissed the action.

APPEAL by plaintiff from *Seay, J.*, 6 October 1969 Session of Superior Court held in FORSYTH County.

Plaintiff brings this action against these defendants "as individuals" alleging in a complaint filed on 24 September 1969, among other things, that it "is engaged in the business of supplying and installing microfilm services for business, industry and governmental agencies in the State of North Carolina"; that the defendant Dr. William L. Turner is the Director of North Carolina Department of Administration; that the defendant R. D. McMillan is the State Purchasing Officer in charge of the Purchase and Contract Division of the Department of Administration, and that the other defendants are members of the North Carolina Board of Award and the Advisory Budget Commission of North Carolina; that the Director of Administration prepared specifications and advertised for bids for the microfilming of certain active and inactive patient medical record files of the North Carolina Memorial Hospital at Chapel Hill, North Carolina; that bids were opened on 31 October 1968, and "the Director of Administration and the Board of Award, appointed by the Advisory Budget Commission, rejected all bids and

readvertised for bids . . ."; that bids were again opened on 5 June 1969, with the "apparent" low bidder being Charles-Leyburn Company; however, said low bidder had failed to comply with the specifications in several respects; that plaintiff was the only bidder submitting a bid which conformed to the invitation and specifications; that "(a)s a consequence of the foregoing circumstances, this plaintiff was the only bidder who met the required specifications in the invitation for bids, and plaintiff has been so advised by officials of the North Carolina Memorial Hospital at Chapel Hill, North Carolina. Notwithstanding these facts, the defendants herein named, purporting to act in their various capacities as the Advisory Budget Commission, the Board of Award, the Director of the Department of Administration and State Purchasing Officer, have announced that they will proceed to award and execute a contract with Charles-Leyburn Company, in pursuance with authority which they claim is given them under Article 3, Chapter 143 of the General Statutes of North Carolina"; that such is contrary to the law; that plaintiff requested "the defendant R. D. McMillan for a hearing before the State Board of Award" but such was denied; that the execution of a contract to any bidder except the plaintiff "would be void and beyond the authority of the defendants for the reasons herein set forth, and therefore that the defendants are acting and proposing to act without any authority and should be individually and collectively restrained from so doing"; that "(p)laintiff, as a responsible bidder and as a taxpayer of North Carolina will be irreparably injured and damaged if the defendants are allowed to execute a contract with the purported low bidder or with any other bidder who failed to meet specifications. Plaintiff has no adequate remedy at law and could not sue the State of North Carolina for failure to award a contract to the plaintiff." Plaintiff further asks that the defendants be restrained and enjoined from entering into a contract with any bidder who failed to meet specifications.

On the date the complaint was filed, Judge Lupton issued a temporary restraining order restraining the defendants "from entering into a contract with Charles-Leyburn Company or with any other person, firm or corporation, for the furnishing of microfilming system or services to North Carolina Memorial Hospital at Chapel Hill, North Carolina. And it is further ordered that the said defendants appear before His Honor Thomas W. Seay, Jr., or such other Judge as may then and there be presiding over a Session of Superior Court of Forsyth County, and particularly on the 6th day of October 1969, at 10:00 o'clock a.m., or as soon thereafter as they

can be heard, and show cause, if any there be, why this Order should not be continued until the final determination of this action."

On 6 October 1969 the defendants filed a demurrer to the complaint stating therein:

"1. That this Court has no jurisdiction of the subject of this action for that it appears upon the face of the complaint that the action is for an injunction to restrain the defendants in their official positions as officers of the State from carrying out the duties which the law requires them to perform; that the relief sought affects the State and not the defendants individually and, therefore, this is an action against the State of North Carolina which has not waived its sovereign immunity and has not consented to be sued.

2. That from the facts alleged in the complaint, it does not appear that the defendant State officials acted either corruptly, in violation of law or in excess of authority.

3. That the Court has no authority to control by mandamus injunction or otherwise the exercise of a discretionary duty by a State official.

4. That it appears upon the face of the complaint that the contract complained of is a service contract; that there is no statutory provision which requires such a contract to be awarded to the lowest responsible bidder and plaintiff's allegations with respect thereto are erroneous conclusions of law.

5. That the complaint does not allege facts which show that the plaintiff does not have an adequate remedy at law; that the complaint fails to allege facts establishing that the plaintiff will be injured or affected by the acts of the defendants which are sought to be restrained or that if the relief sought were granted that plaintiff would be protected thereby from injury, in that plaintiff does not pray that the contract be awarded to them or that the defendants be restrained from readvertising or awarding the bid upon said readvertisement or negotiating a contract as they are authorized by law to do."

After a hearing, Judge Seay entered judgment on 10 October 1969:

"1. That the demurrer filed herein be and the same is hereby sustained.

2. That the temporary injunction entered on the 24th day of September, 1969, against the defendants be and the same is hereby dissolved.

3. That this cause of action be and the same is hereby dismissed.

4. That the plaintiff pay the costs of this action."

To the entry of this judgment, the plaintiff excepts and appeals to the Court of Appeals.

Kluttz & Hamlin by Clarence Kluttz for plaintiff appellant.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis, and Trial Attorney Eugene A. Smith for defendant appellees.

MALLARD, C.J.

[1] In the case of *Schloss v. Highway Commission,* 230 N.C. 489, 53 S.E. 2d 517 (1949), it is said:

> "That the sovereign may not be sued, either in its own courts or elsewhere, without its consent, is an established principle of jurisprudence in all civilized nations. *S. v. R. R.,* 145 N.C. 495; *Bennett v. R. R.,* 170 N.C. 389, 87 S.E. 133; *Carpenter v. R. R.,* 184 N.C. 400, 114 S.E. 693; *Dredging Co. v. State,* 191 N.C. 243, 131 S.E. 665; *Rotan v. State,* 195 N.C. 291, 141 S.E. 743; *Vinson v. O'Berry,* 209 N.C. 287, 183 S.E. 423; *Insurance Co. v. Unemployment Compensation Com.,* 217 N.C. 495, 8 S.E. 2d 619; 49 A.J. 301, and citations in note; Anno. 42 A.L.R. 1465, 50 A.L.R. 1408. In the absence of consent or waiver, this immunity against suit is absolute and unqualified. *Dalton v. Highway Com.,* 223 N.C. 406, 27 S.E. 2d 1; 40 A.J. 304."

In the case of *Electric Co. v. Turner,* 275 N.C. 493, 168 S.E. 2d 385 (1969), the plaintiff brought an action against some of these same individuals and others who were at that time holding the same official positions that the individual defendants in this action hold. The plaintiff sought to restrain the defendants from accepting any new bids on certain television transmitting equipment and also requested that a mandatory injunction be issued requiring the defendants to award the plaintiff the contract according to its bid. The Court said:

> "The record discloses that every act charged against any defendant was performed in his capacity as representative of the State, and related to a contract to be performed on behalf of the State. The facts and issues involved, and the relief demanded, permit only one conclusion: This is an action against the State of North Carolina. The suit was without the State's consent.

'It is axiomatic that the sovereign cannot be sued in its own courts or in any other without its consent and permission. . . . An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State.' *Ins. Co. v. Unemployment Compensation Comm.*, 217 N.C. 495, 8 S.E. 2d 619; *Dredging Co. v. State*, 191 N.C. 243, 131 S.E. 665; *U. S. v. Lee*, 106 U.S. 196, 25 R.C.L. 412.

* * *

'The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued. When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. . . .' *Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E. 2d 792."

The Director of the North Carolina Department of Administration, the State Purchasing Officer in charge of the Purchase and Contract Division of the Department of Administration, the North Carolina Board of Award, and the Advisory Budget Commission of North Carolina are State officials and State agencies. Their authority is defined by statute. The plaintiff does not allege that these State officials and State agencies can be sued by plaintiff; neither does plaintiff allege that it has permission to sue them as State officials. In fact, in its complaint the plaintiff alleges that it has no adequate remedy at law and that it could not sue the State of North Carolina for failure to award a contract to the plaintiff.

In the case of *Lynn v. Clark*, 254 N.C. 460, 119 S.E. 2d 187 (1961), one of the defendants was described in the caption as "Administrator of Charles Clark, deceased" but there was no allegation in the complaint that he was such administrator or that he had qualified and was acting in his representative capacity. The Supreme Court there said:

"While a complaint should specifically allege whether the action is brought against the defendant in his representative capacity, it is sufficient if the complaint, taken as a whole, shows that the defendant is being sued in a representative capacity, though it is not expressly so alleged."

In the case before us the complaint specifically states that the defendants are being sued as individuals, but the complaint, taken as a whole, shows that the defendants are being sued as State offi-

cials. A group of individuals, acting as individuals, have no authority to award a contract in the name of the State. The plaintiff says that the defendants are intending to act in their official capacity by awarding a contract. When the defendants act in their official capacity, it is the State acting. The awarding of a contract as described in the complaint would be action on the part of the State.

[2] In *Lynn v. Clark, supra,* the Court said:

> "An action should be treated as individual or as representative, as its true nature is disclosed by an inspection of the whole record."

When the complaint in the instant case is considered as a whole, we think that the plaintiff is seeking to do indirectly what it cannot do directly in asking the Court to restrain the defendants, as individuals, from doing that which they can do only as public officials. Plaintiff does not allege that defendants, as individuals, have authority to advertise for bids or award a contract to anyone for the microfilming of the patient medical record files of the North Carolina Memorial Hospital at the University of North Carolina at Chapel Hill, North Carolina.

Plaintiff, however, contends that the defendants, as State officials, cannot be acting on behalf of the State because they propose to exceed their authority as State officials. State officials have been given certain discretionary powers under G.S. 143-52, G.S. 143-49(3), and G.S. 143-49(6). In *Electric Co. v. Turner, supra,* the Court said:

> "Neither mandamus nor mandatory injunction may be issued to control the manner of exercising a discretionary duty. *Ponder v. Joslin,* 262 N.C. 496, 138 S.E. 2d 143; *Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; *Harris v. Bd. of Education,* 216 N.C. 147, 4 S.E. 2d 328."

The plaintiff seeks to restrain State officials by an action alleged to be against individuals. If this action is brought against individuals, and plaintiff states it is, then the plaintiff is not entitled herein to a restraining order against them restraining them from acting as State officials. If the action is against the defendants as State officials, then the allegations of the complaint fail to reveal that plaintiff has the right to maintain such an action.

In the case before us the plaintiff prays that the defendants be restrained and enjoined from entering into a microfilming contract, as set out in the invitation for bids, with Charles-Leyburn Company or with anyone other than the plaintiff. As in *Electric Co. v. Turner,*

supra, the record here reveals that every act alleged against any individual defendant was an act performed or to be performed in his capacity as a representative of the State.

We are of the opinion and so hold that this is an unauthorized action against the State, that it is not an action against the defendants as individuals. The judgment of the Superior Court dissolving the restraining order and dismissing the action should be, and it is

Affirmed.

MORRIS and VAUGHN, JJ., concur.

A. P. CARLTON v. W. H. ANDERSON AND RANDALL SHEPPARD
No. 7018SC17

(Filed 25 February 1970)

1. Frauds, Statute of § 2— sufficiency of description of land

A deed conveying land, a contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, G.S. 22-2, must contain a description of the land either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed, contract or memorandum refers.

2. Frauds, Statute of § 7; Boundaries § 10; Vendor and Purchaser § 3— option to purchase land — description of land — presumption

Where a party contracts to convey land by a description which actually corresponds with property that he professes to own or control, there is a strong presumption that the contract was intended to apply to that particular property even though the description is in such general terms as to fit equally well property that the contracting party does not profess to own or control, and extrinsic evidence should be allowed to fit, if it can, the description to the land professed to be owned or controlled by the contracting party.

3. Frauds, Statute of § 7; Boundaries § 10; Vendor and Purchaser § 3— option to purchase land — sufficiency of description — extrinsic evidence

Description in an option contract referring to the land to be conveyed as "a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85" *is held* sufficient to admit extrinsic evidence to determine the location of the property, and the trial court erred in ruling as a matter of law that the option contract did not comply with the statute of frauds, G.S. 22-2.

BRITT, J., dissenting.

CARLTON *v.* ANDERSON

APPEAL by plaintiff from *Peel, J.*, 7 July 1969 Session, GUILFORD Superior Court.

Plaintiff instituted this action against the defendants to recover damages for breach of an option contract to convey land. Pertinent allegations of the complaint are briefly summarized as follows: On 21 July 1966 defendants executed and delivered to plaintiff a written option agreement embracing ". . . a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85." In said agreement defendants agreed to convey said lands to plaintiff, or his assignee, upon demand at any time within 180 days after the date of the option upon the payment by plaintiff of $40,000, less $500 paid for the option. Within the stated period, plaintiff tendered to defendants $39,500 and demanded a deed for the premises, but defendants failed and refused to convey the land to plaintiff. Because of said breach of contract, plaintiff has been damaged $60,000 and asks that he recover that amount, plus the $500 paid for the option.

Defendants filed answer admitting the execution of the option agreement and the timely tender of the full purchase price, but denied other material allegations of the complaint. In their further answer, they alleged that the option agreement did not comply with the requirements of the statute of frauds, G.S. 22-2, and therefore the agreement is void. By amendment to their answer, defendants expressed their willingness to return to plaintiff the $500 paid for the option.

When the case came on for hearing in superior court, Judge Peel conducted a hearing on the plea in bar asserted by defendants. He concluded as a matter of law that defendants' plea of the statute of frauds was valid, sustained the plea, and rendered judgment in favor of plaintiff for $500 plus interest and costs. Plaintiff appealed.

Booth, Fish & Adams, by H. Marshall Simpson, for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by Luke Wright and Edward L. Murrelle, for defendant appellees.

BROCK, J.

The trial judge ruled as a matter of law that the option contract, attached as an exhibit to the complaint, does not comply with the statute of frauds, G.S. 22-2. The only assertion is that the description contained in the option is insufficient.

Plaintiff was not allowed to offer evidence to clarify the description or to locate the property. Therefore the only question with which we are concerned on this appeal is whether the description in the option contract is sufficient to admit extrinsic evidence to determine the location of the property, or whether the language of the option is so patently ambiguous as to prevent resort to extrinsic evidence to aid it.

We are not blind to the fact that in another case pending in this Court on appeal the defendants in this action were unsuccessful in the trial court in their attempt to recover damages for failure to convey to them the identical property involved in this case (*Randall Sheppard and W. H. Anderson v. W. H. Andrews and wife, Nellie B. Andrews,* No. 7018SC33). But, in defendants' case against Andrews, the case was submitted to the jury and the jury answered an issue that defendants had failed to make a timely tender of the agreed purchase price. However, regardless of the outcome of defendants' case, either in the trial court or upon appeal, the present appeal is concerned only with a proper application of the statute of frauds to the option before us in this case.

The description in the option before us in the present case reads as follows:

> ". . . a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows:
>
> "About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85."

[1] The principle is undoubtedly well established in this jurisdiction ". . . that a deed conveying land, or a contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, G.S. 22-2, must contain a description of the land, the subject matter thereof, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed, contract or memorandum refers." *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593. It appears that the difficulty arises in the application of the principle.

The option contract in the present case refers to a single tract or parcel of land containing approximately four acres lying in the north-east intersection of Mt. Hope Church Road and Interstate 85 which defendants, by the execution of the option, profess to own and promise to convey.

Paraphrasing the words of Smith, C.J., in *Farmer v. Batts,* 83

N.C. 387, it can be said about the present case, suppose a defined tract of land containing approximately four acres can be found lying in the north-east intersection of Mt. Hope Church Road and Interstate 85, as distinguished from some other tract of land, would not such proof satisfy any reasonable mind that this was the land intended? And, if so, would it not be competent to ascertain and identify the subject matter of the contract and make it effectual?

In *Self Help Corporation v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889, the following descriptive words were held sufficiently definite to admit extrinsic evidence for the purpose of identification: ". . . a certain store lot in the town of Manteo, in the County of Dare, North Carolina, containing one-half acre, more or less, the interest hereby conveyed being an undivided one-half interest."

In *Comrs. of Beaufort v. Rowland,* 220 N.C. 24, 16 S.E. 2d 401, the following description was held to be sufficiently definite to admit extrinsic evidence for the purpose of identification: "300 acres swamp, the said land being two miles from Pinetown and adjoining the land of H. N. Waters, James D. Boyd heirs, and others." However, in the *Rowland* case no evidence was offered and therefore it was held that unaided by extrinsic evidence the description of itself was insufficient to identify the land.

In *Farmer v. Batts, supra,* it was held that the following description in a contract to convey was sufficient to admit extrinsic evidence to identify the land: ". . . one tract of land containing one hundred and ninety-three acres, more or less, it being the interest in two shares, adjoining the lands of James Barnes, Eli Robbins and others."

[2] It seems to us that the presumption should be strong that where a party contracts to convey land by a description which actually corresponds with property that he professes to own or control, the contract was intended to apply to that particular property even though the description is in such general terms as to fit equally well property that the contracting party does not profess to own or control; and extrinsic evidence should be allowed to fit, if it can, the description to the land professed to be owned or controlled by the contracting party.

[3] In our opinion the description in the option in the present case is sufficient to admit extrinsic evidence for the purpose of identification. It follows, therefore, that in our opinion the trial judge erred in refusing to allow evidence to identify more specifically the land described in the option, and in ruling as a matter of law that the de-

scription in the option was patently ambiguous. Whether the complaint sufficiently alleges a cause of action, or whether plaintiff can make out a case with his evidence, are matters which are not before us and upon which we make no ruling.

Reversed.

GRAHAM, J., concurs.

BRITT, J., dissents.

BRITT, J., dissenting:

The Supreme Court of North Carolina has rendered numerous decisions interpreting and applying our statute of frauds. One of the clearest decisions on the question is that in *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269, where the late Justice Clifton L. Moore, in his usual scholarly manner, reviewed many pertinent decisions pertaining to the statute. The following is quoted from the opinion:

> "The statute of frauds, G.S. 22-2, provides that 'All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . .' A memorandum or note is, in its very essence, an informal and imperfect instrument. *Phillips v. Hooker,* 62 N.C. 193. But it must contain expressly or by necessary implication the essential features of an agreement to sell. *Elliott v. Owen,* 244 N.C. 684, 94 S.E. 2d 833; *Keith v. Bailey,* 185 N.C. 262, 116 S.E. 729; *Hall v. Misenheimer,* 137 N.C. 183, 49 S.E. 104. It must contain a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593; *Timber Co. v. Yarbrough,* 179 N.C. 335, 102 S.E. 630; *Bateman v. Hopkins,* 157 N.C. 470, 73 S.E. 133; *Farmer v. Batts,* 83 N.C. 387. * * * The most specific and precise descriptions require some proof to complete the identification of the property. More general descriptions require more. The only requisite in evaluating the written contract, as to the certainty of the thing described, is that there be no patent ambiguity in the description. *Norton v. Smith,* 179 N.C. 553, 103 S.E. 14. There is a patent ambiguity when the terms of the writing leaves the subject of the contract, the land, in a state of absolute uncertainty, and refer to nothing extrinsic by which it might possibly be identified with cer-

tainty. *Gilbert v. Wright,* 195 N.C. 165, 141 S.E. 577; *Bryson v. McCoy,* 194 N.C. 91, 138 S.E. 420. When the language is patently ambiguous parol evidence is not admissible to aid the description. *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759. * * *"

The contract in the instant case calls for "a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85." The contract does not contain a description of the land "either certain in itself or capable of being reduced to certainty by reference to something extrinsic *to which the contract refers.*" *Searcy v. Logan, supra.* (Emphasis added.) It is true that two of the boundaries of the land — the right-of-way lines of Mt. Hope Church Road and Interstate 85 — could be determined, but how would the court determine with certainty the other boundaries? Inasmuch as the written instrument relied on by plaintiff "leaves the subject of the contract, the land, in a state of absolute uncertainty, and refer(s) to nothing extrinsic by which it might possibly be identified with certainty," *Gilbert v. Wright, supra,* I think there is a patent abbiguity which may not be aided by parol evidence. In my opinion the trial court properly sustained defendants' plea in bar and I vote to affirm the judgment of the superior court.

HAROLD W. LICHTENBERGER v. AMERICAN MOTORISTS INSURANCE COMPANY

— AND —

DOROTHY LICHTENBERGER v. AMERICAN MOTORISTS INSURANCE COMPANY

No. 7018SC3

(Filed 25 February 1970)

1. Insurance § 69— uninsured motorist coverage — construction of statute

The compulsory uninsured motorist statute, G.S. 20-279.21(b)(3), was enacted as remedial legislation and is to be liberally construed to effectuate its purpose.

2. Insurance § 79— automobile liability insurance — statutory provisions

The provisions of G.S. 20-279.21, setting forth the contents of automobile liability insurance policies, are written into every policy as a matter of law.

3. Insurance § 69— uninsured motorist coverage — rejection by insured

Compulsory uninsured motorist coverage as required by G.S. 20-279.21(b)(3) does not apply where the insured named in the policy rejects the coverage.

4. Insurance § 69— uninsured motorist protection — extent of coverage — rejection — burden of proof

The delivery or issuance of a motor vehicle liability policy carries with it as a matter of law the requisite uninsured motorist liability, unless it is shown that the statutory coverage is rendered inapplicable by a rejection; the burden of proving the defense of rejection shifts to the insurer.

5. Trial § 27— nonsuit — party having burden of proof

Judgment of nonsuit will not be granted in favor of the party upon whom rests the burden of proof.

6. Trial § 27— nonsuit — plaintiff's evidence — affirmative defense

Nonsuit is proper where plaintiff's own evidence establishes an affirmative defense as a matter of law.

7. Insurance § 69— uninsured motorist protection — question of coverage — rejection by insured — nonsuit

In plaintiff's action against his automobile liability insurer to recover compensation under the uninsured motorist provision of the policy, plaintiff's evidence that he requested his insurance agent to reduce his automobile liability coverage to the minimum because of financial difficulties and that he accepted the liability policy showing omission of uninsured motorist coverage, *held* insufficient to establish as a matter of law that plaintiff rejected the uninsured motorist coverage, and the insurer's motion for nonsuit was improperly denied.

APPEAL by plaintiffs from *Gambill, J.*, 19 May 1969 Civil Session, GUILFORD Superior Court.

These are civil actions instituted by plaintiffs to recover amounts allegedly due under a policy of automobile liability insurance issued by the defendant to the male plaintiff. The plaintiffs attempt to recover damages arising from a collision between an automobile owned and operated by the male plaintiff and a hit-and-run automobile which was subsequently discovered approximately one-half mile from the scene of the collision with its license plates removed.

The 1952 Plymouth which collided with plaintiffs was owned by one Dempsey Odom of Seagrove, North Carolina, and was insured under a policy of automobile liability insurance issued by Nationwide Mutual Insurance Company. Nationwide denied coverage under its policy on the ground that at the time of the collision the Ply-

mouth was being operated by someone who had stolen it from its owner.

The evidence tended to show that the collision occurred on 22 July 1967, that plaintiffs and their son suffered personal injuries, and that the driver's side of the male plaintiff's automobile was considerably damaged. Defendant admitted the issuance of an automobile liability insurance policy to the male plaintiff and that the policy was in effect on 22 July 1967, but denied that it was liable by reason of uninsured motorist coverage. Further facts and contentions sufficient for an understanding of this appeal are hereinafter set forth in the opinion.

At the close of plaintiffs' evidence, judgment as of involuntary nonsuit was entered, from which plaintiffs appealed.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd and Richard W. Ellis for plaintiff appellants.

Jordan, Wright, Nichols, Caffrey & Hill by Karl N. Hill, Jr., and Edward L. Murrelle for defendant appellee.

BRITT, J.

The principal question presented by this appeal is: Did the trial court err in entering judgment of involuntary nonsuit? We think that it did.

Defendant contends that nonsuit was proper for the reason that plaintiffs' evidence discloses that the male plaintiff had rejected uninsured motorist protection and, therefore, did not have uninsured motorist coverage at the time of the collision in question.

In *Moore v. Insurance Co.*, 270 N.C. 532, 155 S.E. 2d 128, the court declared:

> "Our uninsured motorist statute was enacted by the General Assembly [Chapter 640, Session Laws of 1961] as a result of public concern over the increasingly important problem arising from property damage, personal injury, and death inflicted by motorists who are uninsured and financially irresponsible. Its purpose was to provide, within fixed limits, some financial recompence to innocent persons who receive bodily injury or property damage, and to the dependents of those who lose their lives through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages. * * *"

The pertinent provisions of Chapter 640, Session Laws of 1961, now codified as G.S. 20-279.21(b)(3), read as follows:

"No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State *unless coverage is provided therein or supplemental thereto,* in limits for bodily injury or death set forth in subsection (c) of § 20-279.5, * * * for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured * * *. *The coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage.*" (Emphasis added.)

The quoted portions of the statute were in effect in 1966 and 1967.

[1] In *Hendricks v. Guaranty Co.*, 5 N.C. App. 181, 167 S.E. 2d 876, this Court followed *Moore, supra,* saying: "This statute was enacted as remedial legislation and is to be liberally construed to effectuate its purpose * * *."

[2] The North Carolina Supreme Court has frequently held that the provisions of G.S. 20-279.21, setting forth the contents of automobile liability insurance policies, are written into every policy as a matter of law. In *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610, the court said: "Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and *form a part of the policy* to the same extent *as if they were actually written in it.* In case a provision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls. As a consequence, an insurance company cannot avoid liability on a policy of insurance issued pursuant to a statute by omitting from the policy provisions favorable to the insured, which are required by the statute." (Emphasis added.)

"North Carolina, in company with several other states, requires compulsory 'uninsured motorists coverage,'" the court pointed out in *Wright v. Casualty Co. and Wright v. Insurance Co.*, 270 N.C. 577, 155 S.E. 2d 100, and in *Moore v. Insurance Co., supra,* commented: "We consider that G.S. 20-279.21(b)(3) provides for a

limited type of compulsory automobile liability coverage against uninsured motorists."

[3] Uninsured motorist coverage as a compulsory insurance required by G.S. 20-279.21(b)(3) is limited by the following provision: "The coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage." Defendant contends that the plaintiffs did in fact reject such coverage.

[4-5] The statute quoted from is to be considered in conjunction with the principle reiterated in *Howell,* that "the provisions of the statute enter into and form a part of the policy." The delivery or issuance of a motor vehicle liability policy such as the male plaintiff's carries with it as a matter of law the requisite uninsured motorist liability, unless it is shown that the statutory coverage is rendered inapplicable by a rejection. As is true with cancellation or termination, the burden of proving the defense of rejection shifts to the defendant. In *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320, the court stated the general principle which governs us: "* * * [J]udgment of nonsuit will not be granted in favor of one on whom rests the burden of proof."

[6] Nonsuit is proper, nevertheless, where plaintiffs' own evidence establishes an affirmative defense as a matter of law. Plaintiffs' evidence thus raises the following question for our consideration: Does the plaintiffs' evidence of the male plaintiff's transactions with the insurer's agent clearly establish rejection of uninsured motorist coverage?

[7] The male plaintiff testified to the following: "* * * I mentioned earlier having a telephone conversation with Mr. Rankin [insurer's agent]. That was the early part of December, 1965. * * * American Motorists was my liability insurer in December, 1965." (Plaintiffs introduced into evidence the policy in effect at and prior to that time for two automobiles, including liability insurance, "50-100-5"; medical payments, $2000; collision, $35000 and $2600; other physical damage, and supplementary coverage LP78 A26 which includes uninsured motorist protection. The premium after dividend was $245.01.) "* * * I wanted to talk to Mr. Rankin * * * because the premium was too high. * * * I did request that my liability insurance be changed in some respects in December of 1965. * * * I requested that my coverage be reduced to the minimum at that time because I was having financial troubles or was pressed for money. *In that conversation there was no discussion concerning uninsured motorists coverage.* * * * In talking with Mr. Rankin, I

asked him to reduce by liability coverage. I also asked him to drop the medical payments because I was covered under group insurance but I kept the rest in order to have adequate protection. * * * I know that he agreed to follow my wishes, yes. I know on liability for instance, he mentioned the fact that I traveled from time to time to Indiana where my folks live, and that under the liability that I should have fifteen and thirty thousand dollars coverage in order to cover me through the State of Virginia. That is all I recall about it. * * *" (Emphasis added.)

Plaintiffs' evidence further tended to show: Following the conversation between the male plaintiff and agent Rankin, defendant's policy No. MK 083 179 was issued to the male plaintiff. The original policy was mailed by Rankin to Central Savings Bank, holder of lien on cars covered by the policy. On the policy and opposite the item "Uninsured Motorists Coverage" was written or typed "No cov." As a part of the policy "package" was "Part IV — PROTECTION AGAINST UNINSURED MOTORISTS." The policy stated that it was effective from 7 December 1965 to 7 December 1966. (The male plaintiff's testimony was conflicting as to whether he received a copy of the policy.) On or before 7 December 1966, defendant's agent issued and sent to the male plaintiff a Continuation Certificate for policy No. MK 083 179 purporting to extend policy coverage from 7 December 1966 to 7 December 1967. Attached to the Continuation Certificate was a Loss Payable Clause Endorsement and a Protection Against Uninsured Motorists Insurance endorsement. On the Continuation Certificate form is a column "J — Uninsured Motorists" and nothing was written in this column. No premium was charged or paid for uninsured motorist coverage under the policy issued in December 1965 or the Continuation Certificate issued in December 1966.

The possibility that rejection took place other than expressly raises an additional question: Does the evidence of the male plaintiff's accepting the policy with uninsured motorist coverage omitted clearly establish rejection of that coverage?

In *Distributing Corp. v. Indemnity Co.*, 224 N.C. 370, 30 S.E. 2d 377, the court stated:

> "It is the duty of the applicant to communicate acceptance or rejection of the policy. In Couch's Enc. of Insurance Law, Vol. 1, page 172, sec. 94, the author states that: 'There is apparently some conflict of authority as to the duty of an applicant for insurance to discover that the policy delivered to him does not conform to the proposal or agreement, and to notify the com-

pany of his rejection or acceptance of the policy as written. The weight of authority seemingly supports the rule that it is incumbent upon an applicant who receives a policy which does not conform, as to terms, to the agent's representations, to notify the company of his refusal to accept the policy. And to this end he must examine the policy within a reasonable time after it comes to hand, and promptly, upon discovering obvious departures from the agreement, rescind the transaction and give the company due notice thereof, since, if an applicant receives and retains, without objection, policies made and sent to him, it is regarded as an acceptance.' * * *"

A policy issued under G.S. 20-279.21(b)(3), however, is substantially different from a "voluntary" policy. Where the provisions of the statute "enter into and form a part of the policy," *Howell, supra,* the coverage is provided although the insured has never requested that coverage. In *Howell,* the court stated: "In case a provision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls." In the absence of rejection, G.S. 20-279.21(b)(3) writes uninsured motorist coverage into every automobile liability insurance policy although the policy may not indicate the coverage on its face. If the insurer "cannot avoid liability on a policy of insurance issued pursuant to a statute by omitting from the policy provisions favorable to the insured," *Howell, supra,* then neither can the insured's acceptance of the policy alone operate as a rejection of the coverage written into it by statute.

In our opinion the instructions of the male plaintiff to agent Rankin in December 1965, including his request "that my coverage be reduced to the minimum * * * because I was having financial troubles or was pressed for money," raised an issue of fact for the jury to determine, namely, did the male plaintiff reject uninsured motorist coverage. The evidence did not establish as a matter of law that the male plaintiff rejected uninsured motorist coverage.

We have carefully considered the other reasons advanced by defendant as to why the nonsuit should be sustained but find them without merit. We have also considered the other points raised in both briefs but refrain from discussing them as they may not arise upon a retrial of these actions.

For the reasons stated, the judgment of the superior court is

Reversed.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. ABRAM C. CAUDLE, III

No. 7018SC98

(Filed 25 February 1970)

1. False Pretense § 5— credit card fraud — felony — misdemeanor — punishment

If goods or services or other things of value obtained by fraudulent use of a credit card do not exceed $500 in any six-month period, conviction is punishable by fine of not more than $1000 or imprisonment for not more than one year, or both; if the value is more than $500, the crime is a felony punishable by fine of not more than $3,000 or imprisonment for not more than three years, or both. G.S. 14-113.13, G.S. 14-113.17.

2. False Pretense § 5— credit card fraud — sufficiency of warrant

Warrant alleging that defendant on three consecutive dates wilfully and feloniously purchased goods and services valued at $631.78 from named businesses by use of a specified credit card when he knew the credit card had been revoked by the bank which issued it, and with intent to defraud said bank, *is held* sufficient to charge felonious credit card fraud and necessarily to charge all the essential elements of misdemeanor credit card fraud.

3. Criminal Law § 16; Courts § 14— warrant charging felony — guilty plea to misdemeanor — jurisdiction of municipal-county court

Where defendant was brought before a municipal-county court upon a warrant charging felonious credit card fraud, jurisdiction of the court was not limited to a probable cause hearing, but the municipal-county court had jurisdiction to accept defendant's plea of guilty of the lesser included offense of misdemeanor credit card fraud.

4. Criminal Law § 23— guilty plea — appellate review of judgment

Where a defendant pleads guilty, his appeal from judgment entered thereon cannot call into question the facts charged or the regularity and correctness in form of the warrant, but can only bring up for review the question of whether the facts charged and admitted by the plea constitute an offense punishable under the laws and constitution.

5. Criminal Law §§ 143, 161— exception to judgment activating suspended sentence

Exception to a judgment activating a suspended sentence challenges the sufficiency of the findings of fact by the judge to support his judgment.

6. Criminal Law § 143— revocation of suspension of sentence — conclusion that violation was without lawful excuse — sufficiency of findings

Where defendant was required under the terms of a suspended sentence for credit card fraud to make restitution to the bank which issued the credit card, mere finding that defendant had violated the terms of the suspended sentence and was $800 in arrears in his restitution payments is insufficient to support the court's conclusion that the violation was without just cause or excuse.

STATE *v.* CAUDLE

APPEAL from *May, S.J.,* 10 September 1969 Session of GUILFORD County Superior Court.

Defendant was charged in a warrant with a felonious credit card fraud in violation of G.S. 14-113.13. He was arrested 28 August 1968, and his case was called at the 17 September 1968 Session of the Greensboro Municipal-County Court. He was represented by privately retained counsel and entered a plea of guilty to a non-felonious fraudulent use of a credit card. The plea was accepted and judgment was entered that he be confined in county jail to be assigned to any county institution to work for one year. The judgment was suspended for four years upon the following conditions: (1) that he pay a fine of $15 and costs, (2) that he pay into court the sum of $7,326.29 for the use and benefit of North Carolina National Bank, Greensboro, North Carolina, in monthly payments of $200 each, the first payment to be made on 1 November 1968 and monthly thereafter until the entire amount of $7,326.29 is paid, and (3) that he be of general good behavior and not violate any criminal laws of the State of North Carolina for four years. The fine and costs were paid on 1 November 1968. On 2 December 1968, in accordance with the provisions of G.S. 7A-131 and 7A-135, the matter was transferred to the docket of the District Court of Guilford County. On 3 April 1969, the prosecutor filed a bill of particulars alleging that defendant had violated the terms and conditions of his suspended sentence in that he had failed to make the payments required thereby and was, at that date, $820 in arrears. On 5 June 1969, the following order was entered:

> "It appearing to the court and the court finding as a fact: The defendant, willfully failed and refused to comply with the judgment in the above entitled cause in that he willfully violate (sic) Terms of Suspended Sentence
>
> IT IS ORDERED THAT the above sentence be placed in effect."

From the entry of this order defendant appealed to the Superior Court.

After a hearing *de novo,* the defendant being represented by counsel, the court entered an order finding facts and making conclusions of law. The court found as a fact "That on the 3rd day of April, 1969, the defendant had paid only $180.00 for restitution and at said time he was in excess of $800.00 in arrears on the required restitution payments", and "That the defendant was on the date of his hearing in the District Court several hundred dollars in arrears

on the restitution payments required by the terms of his suspended sentence; that this constituted a wilful and deliberate violation of the terms of said suspended sentence and said violation was without just cause or excuse." Upon the findings of fact the court concluded as a matter of law that the defendant "wilfully violated the terms of said sentence and that said violation was without just cause and excuse." Defendant appealed to this Court.

Attorney General Robert Morgan by Staff Attorney Mrs. Christine Y. Denson for the State.

John W. Hinsdale for defendant appellant.

MORRIS, J.

At the hearing, defendant made two motions in arrest of judgment. One was based upon his contention that the municipal-county court of the City of Greensboro had no jurisdiction to render a verdict of guilty of a misdemeanor in that the only process it had before it charged a felony, and the guilty plea did not remove the requirement that a bill of indictment is necessary to be returned by the grand jury. The basis for the second motion was that the warrant charges no crime. Defendant excepted to the court's denial of both motions. His only two assignments of error are directed to the court's denial of these two motions.

The assignments of error are without merit.

[2] The warrant charges that the defendant "on or about the 17, 18 and 19th day of July, 1968, with force and arms, at and in Guilford County, except High Point, Deep River and Jamestown townships; did unlawfully and willfully and feloniously, and knowingly purchase goods and service, valued at $631.78, from Gate City Pharmacy, Piedmont Jewels, Gin-Ettes, Roses, Incorporated, Sports and Hobbies Unlimited, Incorporated, Thomas Photo, Lafayette Radio Electronics, Bryson's Florist, Rogers Jewelers, Guy Hill, Incorporated, Barth Men Shop, Cass Jewelers, Warren's Toyland, G.I. 1200, Charcoal Steak House, and Max Feiner Rex, all of Greensboro, North Carolina, By use of North Carolina National Bank-Americard Card Number 342-120-304-239, when he knew that the said credit card had been revoked by North Carolina National Bank, and with the intent to defraud North Carolina National Bank out of the said sum of $631.78, in violation of Chapter 14, Section 113.13(a)(1), General Statutes of North Carolina, . . ."

[1] G.S. 14-113.13 and 14-113.17 provide that if the goods or ser-

vices or other things of value obtained do not exceed $500 in any six-month period, conviction is punishable by fine of not more than $1000 or imprisonment for not more than one year, or both. However, if the value be more than $500, the crime is a felony and shall be punishable by a fine of not more than $3000 or imprisonment for not more than three years, or both.

[2] Obviously, the warrant, in charging the major offense necessarily includes within itself all of the essential elements of the minor offense. Since it does contain all the essential elements of the minor offense, it sufficiently alleges the misdemeanor to which defendant entered a guilty plea. *State v. Rorie,* 252 N.C. 579, 114 S.E. 2d 233 (1960).

[3] The municipal-county court in Greensboro is given "Original, exclusive and final jurisdiction of all violations of ordinances of the City of Greensboro and of all criminal offenses below the grade of felony, as defined by law, and above the grade of those offenses, the final jurisdiction of which is now, or may hereafter be, given to justices of the peace under the Constitution and laws of North Carolina;", Chapter 971, § 3(b)(1), 1955 Session Laws, and "Original and concurrent jurisdiction, as the case may be, to hear and bind over to the proper court all persons charged with any crime committed within the territorial jurisdiction of the court, wherever the Superior Court is now given exclusive original jurisdiction;". Ibid, § 3(b)(3). The legislation authorizing the court also provides that "In all cases heard by the judges of the court as committing magistrates in any case where the court does not have final jurisdiction, and in which probable cause of guilt is found, the defendant, or defendants, shall be bound in bond or recognized, with sufficient surety, to appear at the next succeeding criminal term of the Superior Court of Guilford County, Greensboro Division, . . ." Ibid, § 4, Rule 15.

Defendant contends that the municipal-county court was without jurisdiction to accept a plea to a misdemeanor but was restricted to a probable cause hearing, and that, therefore, the judgment entered by the court is a nullity. Though we find no specific and direct authority on this particular point, we are loathe to condemn a procedure of the courts practiced in this State for many years. It is used, not as a hinderance, but as an aid to the due and fair administration of justice. Nor do we perceive this position to be devoid of authority. In 2 Strong, N.C. Index 2d, Criminal Law, § 16, p. 502, we find this: "Where a court having original jurisdiction limited to petty misdemeanors issues its warrant charging misapplication of partnership funds, the warrant charges a misdemeanor beyond the

jurisdiction of the court, and is invalid. Similarly, where an inferior court does not have jurisdiction of felonies, it may not convict defendant of a misdemeanor upon a warrant charging a felony *unless the misdemeanor is a lesser degree* of the crime charged." (Emphasis supplied.)

In *State v. Jernigan,* 255 N.C. 732, 122 S.E. 2d 711 (1961), defendant appealed from a judgment of the superior court activating a suspended sentence imposed by the municipal-county court of Guilford County. Defendant was brought before the municipal-county court on a warrant charging the abominable and detestable crime against nature with a woman, specified by name in the warrant, in violation of G.S. 14-177. The record proper in that court revealed the following: "The defendant entered a plea of Probable Cause Hearing to the above offense, and, upon hearing the evidence, the court rendered a verdict of Guilty (Assault on Female)". A prison sentence was imposed suspended upon certain conditions. Subsequently, after a hearing, the court found that defendant had violated the conditions and entered judgment activating the sentence. Defendant appealed to the Superior Court. There the court heard *de novo* the question whether defendant had violated the conditions and also entered judgment activating the sentence. On appeal to the Supreme Court, defendant contended that when he, in municipal-county court, entered a "plea of probable cause hearing to the offense charged", the court should have bound him over to Superior Court for trial on that offense and committed error when it heard evidence and found him guilty of an assault on a female, because it had no jurisdiction. The Court, speaking through Justice Parker (later C.J.) noted that the warrant did not aver that the woman named therein was unwilling, or that compulsion or force was used, or that an assault was committed against her. Therefore, the offense of assault on a female could not be a lesser included offense included in the felony charge set out in the warrant. The Court said:

> "An assault upon a woman is not a less degree of the crime of sodomy charged in the warrant here. (Citations omitted.)
>
> The municipal-county court 'rendered a verdict' the defendant is guilty of an assault upon a female, and imposed sentence upon him without a warrant, or a waiver thereof, *and without a plea by defendant to such an offense,* or the intervention of a jury." (Emphasis supplied.)

The Court concluded that the municipal-county court was without jurisdiction to "render a verdict" on the misdemeanor, impose sen-

tence, or activate the sentence. Our interpretation of the opinion is that had the misdemeanor been a lesser included offense and had defendant entered a guilty plea to the lesser included offense, the Supreme Court would have had no difficulty in approving the procedure. Nor do we perceive that this interpretation does violence to Article I, Section 12, North Carolina Constitution.

[4] Defendant urges that even if the court had jurisdiction, the warrant is defective in not setting out the particular goods or services obtained.

> "Defendant's plea of guilty was equivalent to a conviction of the offense charged, and no other proof of guilt was required. *S. v. Smith,* 265 N.C. 173, 143 S.E. 2d 293, quotes *S. v. Warren,* 113 N.C. 683, 684, 18 S.E. 498, 498, as follows: 'The defendant having pleaded guilty, his appeal could not call in question the facts charged, nor the regularity and correctness in form of the warrant. * * * The appeal could only bring up for review the question whether the facts charged, and of which the defendant admitted himself to have been guilty, constitute an offense punishable under the laws and constitution.' To the same effect, 5 Wharton's Criminal Law and Procedure (Anderson Ed. 1957) § 2247, p. 498." *State v. Woody,* 271 N.C. 544, 157 S.E. 2d 108 (1967) quoting *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591 (1965).

[5, 6] It appears from the record before us that the court found as facts that the defendant had paid only $180 for restitution and at the time of his hearing in municipal-recorder's court was in excess of $800 in arrears; that this constituted a willful and deliberate violation of the terms of said suspended sentence and said violation was without just cause and excuse. It also appears from the record that on these findings of fact the court concluded as a matter of law that the failure to pay was without just cause and excuse. The exception to the judgment challenges the sufficiency of the findings of fact by the judge to support his judgment putting the one-year sentence into effect. *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376 (1958). The mere finding that defendant has violated the terms of the suspended sentence and was in arrears on 3 April 1969 in excess of $800 is insufficient to support the conclusion reached by the judge "that this constituted a wilful and deliberate violation of the terms of said suspended sentence and said violation was without just cause or excuse." *State v. Robinson, supra.*

The judgment activating the twelve months sentence is vacated and the proceeding remanded for further hearing in order that the

judge may, in his sound discretion, determine whether the failure of defendant to make the required payments was without lawful excuse. The judge's findings of fact should be definite, and not mere conclusions. *State v. Robinson, supra.*

Remanded.

MALLARD, C.J., and VAUGHN, J., concur.

STATE OF NORTH CAROLINA v. ALLEN SPENCER (68CR27), ALVIN SPENCER (68CR28), HENRY JOHNSON, JR. (68CR29), PRESTON SIMMONS (68CR128), BENJAMIN PHELPS (68CR130), SAMUEL BRYANT (68CR131)

No. 692SC535

(Filed 25 February 1970)

1. Highways and Cartways § 10— impeding traffic — criminal offense

It is unlawful for any person to wilfully stand, sit, or lie upon a highway or street in such a manner as to impede the regular flow of traffic. G.S. 20-174.1.

2. Highways and Cartways § 10— impeding traffic — what constitutes "standing on highway" — instructions

Conduct of defendants in walking slowly back and forth across a public highway in such a manner as to cause traffic to be blocked in both directions for approximately five minutes, *held* within the purview of the statute making it unlawful for any person to wilfully stand upon a highway and impede the regular flow of traffic; and the trial court correctly charged that "if the defendants were on the highway and standing, whether they were standing still or walking is of no consequence," since standing is an integral and necessary part of the act of walking.

3. Statutes § 10— criminal statutes — strict construction

Statutes creating criminal offenses must be strictly construed against the State and liberally construed in favor of a defendant with all conflicts resolved in favor of the defendant.

4. Statutes § 10— criminal statutes — construction

Criminal statutes must be construed with regard to the wrongful conduct which they are intended to suppress.

5. Statutes § 10— criminal statutes — strained construction

Interpretations of criminal statutes should not be made which lead to strained constructions or ridiculous results.

6. Criminal Law § 138— punishment — presumption of trial court's fairness

As long as the punishment rendered is within the maximum provided

by law, an appellate court must assume that the trial judge acted fairly, reasonably, and impartially in the performance of his office.

7. Criminal Law § 138— punishment — appeal from district to superior court — increased sentence

In cases where defendant receives a trial *de novo* in the superior court upon his appeal from a conviction in the district court, imposition of a severer sentence by the superior court judge than that imposed by the district court judge does not violate defendant's constitutional rights.

8. Highways and Cartways § 10— impeding traffic — amount of punishment

The offense of wilfully standing, etc., upon a highway or street in such a manner as to impede the regular flow of traffic is a misdemeanor and is punishable by fine, imprisonment up to two years, or both; the sentencing of one defendant to a nine month jail term, and the sentencing of another defendant to a six month jail term, *held* lawful. G.S. 20-174.1(b), G.S. 20-176(a).

9. Criminal Law § 138; Constitutional Law § 36— unfixed amount of punishment — two years' maximum

When no maximum time is fixed by statute, an imprisonment for two years will not be held cruel or unusual punishment.

10. Criminal Law § 138— motor vehicle offense — punishment — which statute controls

G.S. 20-176(b), which authorized punishment for violating any of the various sections of Article 3, G.S. Ch. 20, where no form of punishment is set forth, does not apply to those sections in which the punishment is specified as fine or imprisonment or both in the discretion of the court with no maximum limitation being specified.

11. Jury § 7— challenge to the array — racial discrimination — opportunity to offer evidence

The record in an obstructing traffic prosecution fails to support defendants' contention that the trial court denied their motion to be allowed to make a showing of racial discrimination in the composition of the jury venire, which in fact consisted of 54 white persons and 20 Negroes; on the contrary, the record affirmatively shows that defendants were given an opportunity to offer evidence in support of their motion.

12. Constitutional Law § 29— right to jury free from racial discrimination

A defendant has a right to be tried by a jury from which members of his race have not been arbitrarily and systematically excluded.

13. Jury § 7— challenge to the array — racial discrimination — opportunity to offer evidence

A defendant must be given a reasonable opportunity and time to investigate and produce evidence, if such exists, to support his allegations of racial discrimination in the selection of the jury venire; whether a defendant has had a reasonable opportunity and time for such purpose must be determined from the facts in each particular case.

APPEAL by defendants from *Fountain, J.*, 23 May 1969 Session of HYDE County Superior Court.

Defendants were tried and convicted on charges of impeding the normal flow of traffic by standing upon a public highway in violation of G.S. 20-174.1. They appeal from judgments imposing active jail sentences.

Robert Morgan, Attorney General, by Burley B. Mitchell, Jr., Staff Attorney, for the State.

Chambers, Stein, Ferguson & Lanning by James E. Ferguson, II, for defendant appellants.

GRAHAM, J.

[1] G.S. 20-174.1 makes it unlawful for any person to wilfully stand, sit, or lie upon a highway or street in such a manner as to impede the regular flow of traffic.

[2] It is undisputed that the defendants impeded the flow of traffic along a public highway in the community of Swan Quarter on 11 November 1968 by walking slowly back and forth across the highway in such a manner as to cause traffic to be blocked in both directions for approximately five minutes. They insist, however, that this conduct did not violate G.S. 20-174.1 because that statute does not specifically prohibit "walking" as contrasted with standing, sitting or lying upon a highway. They also challenge the following instructions given by the trial court to the jury:

> "If the defendants were on the highway and standing, whether they were standing still or walking is of no consequence. If they walked, standing and walked on the highway and did so willfully in such a manner as to impede the regular flow of traffic, that would constitute a violation of this statute even though they were not standing still. . . . So the question is whether the defendants, or either of them, stood by walking on Highway 264 in such a manner as to impede the regular flow of traffic, that is, to cause it to stop or to detour or to restrain the normal flow of traffic, or the regular flow of traffic, and, if so, did they do it willfully."

The question raised is whether the term "stand" as used in the statute is subject to the interpretation placed thereon by the trial court. If not, the cases should have been nonsuited because there was no testimony that defendants impeded the flow of traffic by standing still.

[3-5] Statutes creating criminal offenses must be strictly construed against the State and liberally construed in favor of a defendant with all conflicts resolved in favor of the defendant. *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596; *State v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97; *State v. Whitehurst,* 212 N.C. 300, 193 S.E. 657. They must also be construed with regard to the wrongful conduct which they are intended to suppress. *State v. Brown,* 221 N.C. 301, 20 S.E. 2d 286; *State v. Hatcher,* 210 N.C. 55, 185 S.E. 435. Interpretations of statutes should not be made which lead to strained constructions or ridiculous results. *State v. Pinyatello, supra.*

[2] The purpose of G.S. 20-174.1 is obviously to make it unlawful for a person to wilfully place his body upon a street or highway in such a manner as to purposely impede the regular flow of traffic. To say that one can escape the force of the statute and accomplish the very end it was enacted to prevent by walking rather than remaining motionless requires, in our opinion, a strained interpretation of the statutory language. The old adage "one must stand before he can walk" finds support in *Webster's Third New International Dictionary* (1968) which gives as the first definition of "stand" the following: "to support oneself on the feet in an essentially erect position." Standing is an integral and necessary part of the act of walking and we hold that the trial court correctly applied the statute to the facts of these cases.

[6, 7] Defendants assign as error the jail sentences they received, contending that it was a violation of their constitutional rights for the Superior Court to impose sentences in excess of those given them upon their original trial and conviction in District Court. The Superior Court sentenced defendant Henry Johnson, Jr., to a nine month active jail term and the other defendants to active terms of six months. They had received sentences in District Court of sixty days in the county jail, suspended upon the payment of fines ranging from fifty to seventy-five dollars and upon condition that they remain on probation for eighteen months. The disparity in the sentences imposed by two separate judges, both of whom are widely noted for their fairness and integrity, may indeed be noticeable. However, it is not for us to say that the first was too lenient or that the latter was too severe, for so long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371.

Defendants cite the case of *North Carolina v. Pearce,* 395 U.S.

711, 23 L. Ed. 2d 656, 89 S. Ct. 2072, in support of their position. The holding of that case is that a defendant who is awarded a new trial on an appeal may not be given a lengthier sentence upon retrial unless reasons and factual data arising from events occurring subsequent to the first trial appear affirmatively in the record in support of the more severe sentence. The question here presented is whether the prohibition of *Pearce* applies where a defendant is convicted in a lower court having criminal jurisdiction over misdemeanors only and upon appeal receives a trial *de novo* in a court of general jurisdiction such as our superior court. This court has held that it does not. *State v. Sparrow,* 7 N.C. App. 107, 171 S.E. 2d 321. At least two other courts, including the United States Court of Appeals for the 1st Circuit, have reached the same conclusion. *Lemieux v. Robbins,* 414 F. 2d 353; *People v. Olary,* 382 Mich. 559, 170 N.W. 2d 842. We follow these cases and overrule defendants' assignment of error attacking the constitutionality of the sentences imposed.

[8, 9] Defendants further contend that their sentences exceeded the statutory maximum for the offenses charged. At the time of these convictions, G.S. 20-174.1(b) provided: "Any person convicted of violating this section shall be punished by fine or imprisonment, or both in the discretion of the court." G.S. 20-176(a) provides that the violation of any provision of Article 3, Chapter 20 of the General Statutes shall constitute a misdemeanor unless declared to be a felony by the Article or by any law of the State. Thus, as one of the provisions of Article 3, Chapter 20, the offense set forth in G.S. 20-174.1 is a misdemeanor and it is punishable by fine, imprisonment, or both, in the discretion of the court, and as in the cases of misdemeanors where no maximum period of imprisonment is fixed. "[I]t is well settled law in this jurisdiction that when no maximum time is fixed by the statute an imprisonment for two years will not be held cruel or unusual punishment, . . ." *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245; *State v. Lee,* 247 N.C. 230, 100 S.E. 2d 372.

[10] Defendants argue, however, that G.S. 20-176(b) limits the punishment that may be imposed because of its provision that: "Unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than one hundred dollars ($100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both fine and imprisonment: . . ." This section authorizes punishment for violating any of the various sections of the Article where no form of punishment is set forth, including, for instance, those sec-

tions making it unlawful to operate a motor vehicle with defective mufflers, mirrors, directional signals, and numerous other provisions relating to motor vehicles and their use. It does not apply to the various sections, including G.S. 20-174.1, where the punishment is specified as fine or imprisonment or both in the discretion of the court with no maximum limitation being specified. *State v. Morris, supra.* It is noted that G.S. 20-174.1(b) was amended by the 1969 Session of the General Assembly and it now provides for punishment by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court. We hold that the sentences imposed are within the limits set by law at the time of the offenses and at the time of trial therefor.

[11] Defendants contend by their final assignment of error that their constitutional rights were violated by the court's denial of their motion to quash the jury venire for the systematic exclusion of Negroes and by the court's refusal to allow them to make an evidentiary showing on their motion. All of the defendants are members of the Negro race.

[12, 13] It is fundamental in this State, as elsewhere, that a defendant has a right to be tried by a jury from which members of his race have not been arbitrarily and systematically excluded. *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897; *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870; *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109. Furthermore, a defendant must be given a reasonable opportunity and time to investigate and produce evidence, if such exists, to support his allegations of racial discrimination in the selection of the jury venire. *State v. Covington,* 258 N.C. 495, 128 S.E. 2d 822; *State v. Perry,* 248 N.C. 334, 103 S.E. 2d 404. Whether a defendant has had a reasonable opportunity and time for such purpose must be determined from the facts in each particular case. *State v. Perry, supra.*

The record here indicates that before defendants entered a plea the following transpired between their counsel and the court:

"MR. FERGUSON: I want to make a motion to quash the jury venire and would like to make a showing on it.

THE COURT: If you want to offer evidence I will hear it now. I think you have had ample time.

MR. FERGUSON: I would like for the record to reflect that counsel requested an opportunity to make a showing.

THE COURT: Let the record show that and further show that the court is now willing to hear any evidence defend-

ants wish to offer on that question and denies the motion for continuance or delay to gather evidence on the question.

MR. FERGUSON: Let the record show that the only evidence we have at this time is the makeup of the jury.

THE COURT: Let the record show that of those present on the regular jury panel and the supplemental jurors, upon a roll call the Clerk reports that 54 are white and 20 Negro."

[11] No portion of the record supports defendants' contention that their motion to be allowed to make a showing concerning allegations of discrimination was denied. On the contrary, the court clearly indicated that the defendants could proceed and evidence was in fact presented that of those present on the jury panel 54 were white and 20 were Negro. Defendants do not argue that this evidence, standing alone, constitutes a showing of discrimination but they insist that the court should have granted a delay to allow counsel to make a further showing. We find nothing in the record to indicate that a delay was requested nor do we find any grounds set forth in the record that would have justified the granting of such a request if made. The court stated that defendants had had sufficient time to gather necessary evidence on the question. There is nothing in the record to suggest that the court's conclusion was inaccurate. This case does not present the factual situations of *State v. Perry, supra,* or *State v. Covington, supra,* where written motions were filed setting forth requests for a hearing and asking to have process issue to certain persons whose testimony was needed as evidence with respect to the selection of grand juries. Here, all that was requested was leave to make a showing. Leave was granted. We cannot hold that the court erred in denying a request for a delay that was not made and where nothing appears indicating that a delay was warranted.

In the entire trial we find

No error.

CAMPBELL and PARKER, JJ., concur.

RALEIGH MOBILE HOME SALES, INC. v. TRAVIS H. TOMLINSON, MAYOR OF THE CITY OF RALEIGH, NORTH CAROLINA, AND GEORGE B. CHERRY, EARL H. HOSTETLER, SEBY B. JONES, WILLIAM M. LAW, CLARENCE E. LIGHTNER, WILLIAM H. WORTH, MEMBERS OF THE CITY COUNCIL FOR THE CITY OF RALEIGH, NORTH CAROLINA, AND THOMAS W. DAVIS, CHIEF OF POLICE OF THE CITY OF RALEIGH, NORTH CAROLINA

No. 6910SC74

(Filed 25 February 1970)

1. Constitutional Law § 4; Injunctions § 5— action to restrain enforcement of ordinance — constitutional issues

Notwithstanding the general rule that the constitutionality of a statute or ordinance purporting to create a criminal offense may not be challenged in an action to enjoin its enforcement, such action is permitted when injunctive relief is essential to the protection of property rights and the rights of persons against injuries otherwise irremedial.

2. Constitutional Law § 4; Municipal Corporations § 32— constitutionality of Sunday observance ordinance — standing to litigate

Although a Sunday observance ordinance makes no express reference to "mobile homes" or to "conventional homes," plaintiff mobile home dealer has standing to challenge the constitutionality of the ordinance as applied to plaintiff and other mobile home dealers, where plaintiff has alleged that the ordinance is being enforced by preventing mobile home dealers from offering for sale or selling mobile homes on Sunday but is not being similarly enforced to prevent the offer for sale or sale of conventional homes.

3. Constitutional Law § 14; Municipal Corporations § 32— Sunday observance ordinance — constitutionality

A city ordinance regulating Sunday sales will be upheld as a valid exercise of the police power delegated to municipalities by G.S. 160-52 and G.S. 160-200(6), (7), and (10), if the classifications created by the ordinance are founded upon reasonable distinctions, affect equally all persons within a particular class, and bear a reasonable relationship to the public health and welfare sought to be promoted.

4. Constitutional Law § 14— constitutionality of ordinance classifications

So long as the classification made by an ordinance bears some reasonable relationship to the public welfare which the ordinance seeks to promote, the ordinance will not be rendered unconstitutional merely because persons in one class derive some incidental competitive advantage over those in another.

5. Constitutional Law § 14; Municipal Corporations § 32— Sunday observance ordinance — prevention of sale of mobile homes — constitutionality

Sunday observance ordinance which prevents the offer for sale or sale of mobile homes on Sunday but does not prevent such offer for sale or sale of conventional homes does not create classifications not founded on

reasonable distinctions and affects equally all members of the same class, since a conventional home is real property and a mobile home while in the hands of a dealer is personal property, and the distinctions between real and personal property provide a legitimate basis for such classification.

6. Constitutional Law § 14; Municipal Corporations § 32— Sunday observance ordinance — prevention of sale of mobile homes — constitutionality

Sunday observance ordinance which prevents the offer for sale or sale of mobile homes on Sunday but does not prevent such offer for sale or sale of conventional homes *is held* not to create classifications bearing no reasonable relationship to the purpose of the ordinance of providing for the due observance of Sunday as a day of rest, since the sale of mobile homes requires a concentration of employees and customers at a single location, while the sale and display for sale of conventional homes, which by their nature are scattered over a wide area, do not create a high concentration of potential sellers and buyers.

APPEAL by plaintiff from *Hobgood, J.*, September 1968 Session of WAKE Superior Court.

Plaintiff corporation, which operates a mobile home sales lot in the City of Raleigh, instituted this action to enjoin enforcement against it and others similarly situated of the ordinance enacted by the Raleigh City Council on 3 June 1968 which is entitled "An Ordinance to Provide for the Due Observance of Sunday." This ordinance is quoted in full in *Kresge Co. v. Tomlinson,* 275 N.C. 1, 165 S.E. 2d 236, and will not be repeated here.

Insofar as material to the questions presented by this appeal, plaintiff in its complaint in substance alleged: Plaintiff operates a mobile home sales lot in the City of Raleigh at which it sells, offers and exposes for sale, only mobile homes, deriving its entire income from the sale of such homes. For several years plaintiff has sold, offered or exposed for sale, mobile homes at said lot seven days per week. The ordinance referred to is being enforced against mobile home dealers and their agents and employees by preventing the selling, offering or exposing for sale, of mobile homes on Sunday, but said ordinance is not being enforced as to dealers in the sale or offering for sale of conventional homes on Sunday. Prospective purchasers of conventional homes are also prospective purchasers of mobile homes, and the plaintiff is in direct competition with sellers of conventional homes. Sellers of conventional homes and sellers of mobile homes are similarly situated and are in the same class and there is no reasonable or legal basis for distinguishing between them. If the City of Raleigh is permitted to continue to enforce the ordinance in the matter described and plaintiff is thereby prevented

from continuing to sell, offer or expose for sale, mobile homes on Sunday, while sellers of conventional homes are permitted to sell conventional homes on Sunday, plaintiff would be deprived of its property rights without due process of law in that (1) such an application of the ordinance does not affect all persons, firms or corporations in the same class as plaintiff, and (2) the classification of articles the sale of which is prohibited on Sunday by the ordinance is arbitrary and discriminatory and has no reasonable relationship to the public peace, welfare, safety and morals.

On motion of plaintiff, a temporary restraining order was entered, enjoining enforcement of the ordinance against the plaintiff and other mobile home dealers, their agents and employees. At the show cause hearing, defendants demurred *ore tenus* to the complaint, and from judgment sustaining the demurrer plaintiff appealed.

Phillip C. Ransdell for plaintiff appellant.

Donald L. Smith for defendant appellees.

PARKER, J.

In *Kresge Co. v. Tomlinson,* 275 N.C. 1, 165 S.E. 2d 236, our Supreme Court sustained the Raleigh Sunday Ordinance here in question against the attack that it was unconstitutional as violative of the First Amendment to the United States Constitution. Plaintiff appellant here attacks the ordinance as unconstitutional on the ground that, as enforced against it, the ordinance is discriminatory because its application does not affect equally all persons in the same class and engaged in similar operations as plaintiff, and on the ground that the classifications in the ordinance bear no reasonable relationship to the public health, welfare, safety and morals of the citizens of Raleigh. Plaintiff contends that for these reasons the ordinance violates the Fourteenth Amendment to the United States Constitution and Section 17 of Article I of the North Carolina Constitution.

[1, 2] An initial question presented by this appeal is whether plaintiff has standing to litigate the issue of the constitutionality of the ordinance on the grounds upon which it is here attacked. We hold that it does. "Notwithstanding the *general* rule that the constitutionality of a statute or ordinance purporting to create a criminal offense may not be challenged in an action to enjoin its enforcement, a well-established exception permits such action when injunctive relief is essential to the protection of property rights and the rights of persons against injuries otherwise irremediable." *Kresge*

Co. v. Tomlinson, supra. Plaintiff's factual allegations, which are admitted on demurrer, are sufficient to support its conclusion that enforcement of the ordinance in the manner alleged would cause it to suffer "substantial direct economic injury and subject plaintiff to irreparable damage." While the ordinance makes no express reference to "mobile homes" on the one hand, or to "conventional homes" or real estate on the other, plaintiff has alleged, and defendants' demurrer admits, that the ordinance is in fact being enforced against plaintiff and other dealers in mobile homes by preventing the offering for sale or selling of mobile homes on Sunday, but that it is not being similarly enforced to prevent the offering for sale or selling of conventional homes and real estate on Sunday. On these factual allegations, which are admitted for purposes of ruling on the demurrer, plaintiff has standing to challenge the constitutionality of such enforcement of the ordinance on the grounds here asserted.

[3, 4] In this jurisdiction it is well established that a city ordinance regulating Sunday sales will be upheld as a valid exercise of the State's police power, delegated to municipalities by G.S. 160-52 and G.S. 160-200(6), (7) and (10), if the classifications created by the ordinance are founded upon reasonable distinctions, affect equally all persons within a particular class, and bear a reasonable relationship to the public health and welfare sought to be promoted. *Kresge v. Tomlinson, supra; Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370; *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364; *State v. Towery,* 239 N.C. 274, 79 S.E. 2d 513; *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783; *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198. Plaintiff contends that the Raleigh ordinance here involved creates classifications not founded upon reasonable distinctions and does not affect equally all persons similarly situated to the plaintiff. This contention is based on the argument that since potential purchasers of mobile homes are also potential purchasers of real estate and conventional homes, no reasonable distinction can be made to prohibit the sale of one type of home while permitting the sale of the other. This argument has been answered against plaintiff's contention, insofar as this jurisdiction is concerned, by the holding in *State v. Towery, supra.* The plaintiff here, as the plaintiff in that case, "falls into error in undertaking to make competition as between classes the test rather than discrimination within a class." So long as the classification made by the ordinance bears some reasonable relationship to the public welfare which the ordinance seeks to promote, the ordinance will not be rendered unconstitutional merely because persons in one class derive some incidental competitive advantage over those in another.

[5] A conventional home is real property. A mobile home, at least until it becomes so affixed to land as to become a part thereof, is personal property. Certainly, a mobile home while in the hands of a dealer such as the plaintiff, remains personal property. Distinctions between real and personal property are so numerous and have existed for so long a time in our jurisprudence that there can be no doubt that they provide a legitimate basis for classification at least for many purposes. The classification of property into these two types, real and personal, rooted as it is in our history, could not be considered on its face as being arbitrary. The question remains whether the classification bears a reasonable relationship to the public purpose which the ordinance here in question seeks to promote. We hold that it does.

[6] The public purpose of the ordinance, as stated in its preamble, is to provide for the due observance of Sunday as a day of rest, and to protect and promote the public health and the general welfare of the citizens. This purpose is sought to be attained by making it unlawful "for any person to sell, offer or expose for sale any goods, wares or merchandise in the city on Sunday." (Sales of certain limited categories of goods are expressly permitted by the ordinance; these express exceptions were held not unreasonable, arbitrary, or discriminatory as applied to the plaintiffs in *Kresge v. Tomlinson, supra,* and plaintiff here makes no contention that they are unreasonable or discriminatory as applied to it.) Dealer sales of mobile homes, as sales of other "goods, wares or merchandise," are customarily made from the dealer's premises, where many of such homes are displayed in a small area for the purpose of attracting customers. By advertising and other means the dealer in mobile homes, as the dealer in any other merchandise, attempts to attract to his premises as many customers as possible. When open for business, the dealer must provide a sufficient number of salesmen and other employees to service his customers. This concentration of employees and customers for purpose of engaging in commercial transactions at a single location certainly detracts from "the due observance of Sunday as a day of rest." On the other hand, sales and display for sale of conventional homes, which by their nature are scattered over a wide area, do not create the high concentration of would-be sellers and potential buyers. We find the classification in the ordinance here attacked by plaintiff sufficiently relevant to the objectives of the ordinance to meet the test of reasonableness. The demurrer to the complaint was properly sustained.

Affirmed.

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

NATIONWIDE MUTUAL INSURANCE COMPANY v. CHARLES LEROY HAYES, SHAFER EWELL GWYN, SHAFER EWELL GWYN, ADMINISTRATOR OF THE ESTATE OF BERNICE O. GWYN, GLENICE KEY LYNCH, DONALD JOE LYNCH, DONNA CHERYLEEN LYNCH, AND GREAT AMERICAN INSURANCE COMPANY

No. 7017SC93

(Filed 25 February 1970)

1. Insurance §§ 79, 85; Automobiles § 5— automobile insurance — non-owner's liability coverage — transfer of title

An insured under a non-owner's liability policy whose recently purchased automobile was involved in an accident on 27 January 1968 was covered under a provision of the non-owner's policy which stated that if the insured acquired ownership of an automobile during the policy period the policy shall apply with respect to the ownership or use of the automobile "for a period of 30 days next following the date of such acquisition," where the evidence was to the effect that the seller of the automobile delivered it to the insured on 27 December 1967 and received a check in full payment but that the seller did not execute and transfer to insured the title certificate to the automobile until 28 December 1967, the title to the automobile having passed to the insured, within the meaning of G.S. 20-72(b), only on 28 December 1967.

2. Automobiles § 5— transfer of automobile title — prerequisites

No title passes to the purchaser of a motor vehicle until the certificate of title has been assigned by the vendor, and delivered to the vendee or his agent, and the motor vehicle delivered to the transferee. G.S. 20-72(b).

APPEAL by defendant Great American Insurance Company from *Johnston, J.*, 1 September 1969 Session of SURRY Superior Court.

Nationwide Mutual Insurance Company (Nationwide) brings this action for a declaratory judgment that no coverage was afforded by it to Charles Leroy Hayes (Hayes) for claims against Hayes because of an accident involving Hayes' automobile.

The plaintiff, Nationwide, issued under the Assigned Risk Plan a non-owner's liability insurance policy, No. 61-686-428, to Hayes, effective 12:01 a.m., 14 December 1967 and running until 14 December 1968. The policy provided that it did not apply "(a) to any automobile or land motor vehicle owned by the Policyholder (Named Insured) or a member of the same household. . . ." The non-owner's endorsement of the policy provides that "3. If the Policyholder (Named Insured) acquires ownership of an automobile or land motor vehicle during the policy period, the insurance hereunder shall nevertheless apply with respect to the ownership, maintenance or use of such automobile or land motor vehicle for a period of 30 days next following the date of such acquisition; . . ."

Hayes, with the assistance of his employer, Harold Y. Hodges (Hodges), sought to acquire a 1959 Pontiac automobile from Bertie S. George. According to the testimony, preliminary negotiations resulted in the delivery of the car to Hodges' warehouse on December 26 or 27, 1967. A check in the amount of $450.00 was delivered to the seller in full payment for the automobile on December 27, 1967. The title certificate was signed and executed on December 28, 1967, by the seller, Bertie George.

Hodges testified that he called the Surry Insurance Agency on December 27th and 28th with respect to getting insurance coverage on the Pontiac for Hayes. He testified that he notified whoever answered the telephone that Hayes had acquired ownership of an automobile and that Nationwide should be notified that his non-owner policy should be changed to an owner's policy. Subsequently, forms necessary for Hayes to acquire license plates were forwarded to Hayes by the Surry Agency.

Hayes was involved in a collision at 11:52 a.m. on 27 January 1968 with a car driven by Shafer Ewell Gwyn. Great American Insurance Company (Great American) insured Gwyn's car, such coverage including uninsured motorists protection. Claims for personal injury and property damage have arisen against Hayes because of the accident.

Written notice was sent to Nationwide on 30 January 1968 requesting a change to an owner's policy, telling of the accident, and asking that coverage be made retroactive to 27 December 1967. Nationwide refused to make the new policy retroactive and would defend Hayes only with a reservation of rights under the old policy.

Upon the trial of the matter the trial judge entered the following order, in part:

"THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding at the September 2, 1969 Session of Superior Court of Surry County; and all parties in open court having stipulated and agreed to waiver of trial by jury, and having consented to the case being heard and determined by the Court sitting without a jury; and the Court having heard and considered the evidence presented by the parties;

"The Court makes the following FINDINGS OF FACT:

* * *

"XXII. On December 26, 1967, Charles Leroy Hayes reached an agreement to purchase said automobile from Bertie S. George for the sum of $450.00. Hayes' employer, Harold Y. Hodges

agreed to advance said money to Hayes for purchase of said automobile, and to deduct repayment of said amount from the salary of Charles Leroy Hayes at a stipulated sum per month.

"XXIII. Enos James George agreed with Charles Leroy Hayes to deliver said automobile at the place of his employment, the warehouse owned by Harold Y. Hodges.

"XXIV. On December 26, or December 27, 1967, Enos James George delivered said automobile to the warehouse of Harold Y. Hodges pursuant to his agreement with Hayes. George parked the automobile in the warehouse, removed the license tags, and left the keys in the automobile.

"XXV. On December 27, 1967, a check in the amount of $450.00 drawn on the account of the Smith-Douglas Agency, and signed by Dot Hodges, wife of Harold Y. Hodges, was delivered by Mrs. Hodges to Bertie S. George in payment for said automobile. Said check appears in evidence as plaintiff's Exhibit No. 7.

"XXVI. On December 28, 1967, the certificate of title on the aforesaid automobile was brought to the Hodges' warehouse by Bertie S. George, and assignment of title in Block A thereon was signed by her on said date. On the same date, Block D, purchaser's application for new certificate of title, was signed by Charles Leroy Hayes. On the same date, Harold Y. Hodges was listed as lien holder on said title certificate.

* * *

"XXVIII. From the date of its delivery, said automobile remained parked at the Hodges' warehouse until after Hayes had obtained license tags for said automobile. Hayes first was aware that the automobile had been delivered to the Hodges' warehouse either on the night of December 26, 1967, or the morning of December 27, 1967.

"XXIX. As of December 27, 1967, there was nothing left to be done to consummate the purchase and sale of said automobile except formal transfer of the title certificate.

"XXX. The Court finds as a fact that Charles Leroy Hayes 'acquired ownership' of said 1959 Pontiac automobile on December 27, 1967.

* * *

"XXXII. The accident which occurred at 11:52 a.m. on January 27, 1968, while said 1959 Pontiac automobile was be-

ing operated by Charles Leroy Hayes occurred more than 30 days after Charles Leroy Hayes acquired ownership of said automobile.

* * *

"Upon the foregoing findings of fact, the Court reached the following CONCLUSIONS OF LAW:

* * *

"II. Charles Leroy Hayes acquired ownership of the 1959 Pontiac automobile involved in the accident more than 30 days prior to occurrence of the accident.

"III. No coverage is afforded to Charles Leroy Hayes by Nationwide as to claims arising out of the accident of January 27, 1968; and Nationwide has no obligation to defend Charles Leroy Hayes in said actions.

"IV. Charles Leroy Hayes was uninsured at the time of said accident, and therefore the uninsured motorist coverage of the Great American Insurance Company policy is applicable to claims arising out of said accident by Shafer Ewell Gwyn and passengers in the Gwyn automobile.

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Nationwide Mutual Insurance Company affords no coverage to and has no obligation to defend claims arising out of an automobile accident which occurred on January 27, 1968 between a 1959 Pontiac automobile owned by Charles Leroy Hayes and a 1965 Pontiac automobile owned by Shafer Ewell Gwyn; that the uninsured motorist coverage afforded under a policy of insurance issued by Great American Insurance Company to Shafer Ewell Gwyn is applicable to claims of Shafer Ewell Gwyn and his passengers arising out of said accident; that Nationwide Mutual Insurance Company is hereby authorized to withdraw defenses previously afforded to Charles Leroy Hayes under a reservation of rights in civil actions arising out of said accident which are presently pending in the Superior Court of Surry County, North Carolina; and that the costs of this declaratory judgment action be taxed against the defendant Great American Insurance Company.

"This the 9th day of September, 1969.

"s/ Walter E. Johnston
JUDGE PRESIDING"

The question on this appeal is whether the non-owner liability insurance afforded by Nationwide on Hayes' Pontiac or the unin-

sured motorists protection on Gwyn's automobile covers (to the extent of the respective policy limits) the liabilities which may result from adjudication of claims against Hayes.

Womble, Carlyle, Sandridge & Rice by Jimmy H. Barnhill and Allan R. Gitter for defendant appellant.

Hudson, Petree, Stockton, Stockton and Robinson by J. Robert Elster and John M. Harrington for plaintiff appellee.

Folger & Folger by Fred Folger, Jr., for defendant appellees, Shafer Ewell Gwyn, Shafer Ewell Gwyn, Administrator of the Estate of Bernice O. Gwyn, Glenice Key Lynch, Donald Joe Lynch and Donna Cheryleen Lynch.

CAMPBELL, J.

[1] This appeal boils down to the question whether title passed to Hayes' newly-acquired automobile on 27 December or 28 December 1967. If the former is true, the collision involving Hayes' car occurred more than 30 days from the date title to the automobile passed to Hayes, and the protection provided by the Nationwide Non-Owner's Endorsement, paragraph 3, does not apply. If the latter is the case, then the Nationwide policy would cover Hayes' car at the time of the accident, in that it was acquired during the policy period and the accident occurred within 30 days of the time title passed to the owner, Hayes.

The recent case of *Insurance Company v. Insurance Company,* 276 N.C. 243, 172 S.E. 2d 55 (1970), treated the question of when title to an automobile passes. Construing G.S. 20-72(b) as applicable to that case, the Court held that title to a vehicle passed when, as the statute provided, "the provisions of this section have been complied with." The wording of the statute then was:

"Sec. 20-72. *Transfer by owner.* — * * *

"(b) The owner of any vehicle registered under the foregoing provisions of this article, transferring or assigning his title or interest thereto, shall also endorse an assignment and warranty of title, including in such endorsement the name and address of the transferee and the date of transfer, in form approved by the Department upon the reverse side of the certificate of title or execute an assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall

deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle, except that where deed of trust, mortgage, conditional sale or title retaining contract is obtained from purchaser or transferee in payment of purchase price or otherwise, the lien holder shall forward such certificate of title papers to the Department within twenty days together with necessary fees, or deliver such papers to the purchaser at the time of delivering the vehicle, as he may elect, but in either event the penalty provided in § 20-74 shall apply if application for transfer is not made within twenty days. Any owner selling or transferring his interest to a motor vehicle who willfully fails or refuses to endorse an assignment of title and any person who delivers or accepts a certificate of title endorsed in blank shall be guilty of a misdemeanor. Transfer of ownership in a vehicle by an owner is not effective until the provisions of this section have been complied with."

It is to be noted that subsequent to the time covered in the above case, the section of the statute was rewritten effective 1 July 1963, and it now reads:

"(b) In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Department, including in such assignment the name and address of the transferee; and no title to any . . . motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. The provisions of this section shall not apply to any foreclosure or repossession under a chattel mortgage or conditional sales contract or any judicial sale.

Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the certificate of title to the lienholder and the lienholder shall forward the certificate of title together with the transferee's application for new title and necessary fees to the Department within twenty (20) days. Any person who delivers or accepts a certificate of title assigned in blank shall be guilty of a misdemeanor."

[2] While the "provisions" which must be complied with have changed and it is no longer necessary that application be made for a new certificate of title before title passes, the fact remains that the statute still sets up standards which must be met before passage of title to a new owner. *Insurance Co. v. Insurance Co., supra.* The statute now prescribes that no title passes to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the vendor, and (2) delivered to the vendee or his agent, and (3) the motor vehicle delivered to the "transferee." In this case, these conditions were not fulfilled until December 28, 1967.

[1] We hold then that the accident happened at a time when the Non-Owner's Endorsement in the Nationwide policy provided coverage for the Hayes vehicle. Since the trial judge in this case found otherwise, this cause must be reversed and remanded.

Reversed.

PARKER and HEDRICK, JJ., concur.

LILLIE P. BRADLEY v. TEXACO, INC.

No. 7021SC2

(Filed 25 February 1970)

1. Waters and Watercourses § 1— diversion of surface waters — liability of dominant landowner

Owners of land on the higher level cannot divert the surface water or interfere with its natural flow by artificial obstruction or device so as to injure the premises of the servient owner without incurring actionable liability.

2. Waters and Watercourses § 1; Nuisance § 7— injury to land — landfill — diversion of waters — permanent damages — evidence

In an action between private landowners for recovery of damage incurred by plaintiff when a fill constructed by defendant on its land diverted water and washed dirt onto plaintiff's land, it was prejudicial error for the jury to consider the testimony of plaintiff's witness relating to the cost of constructing a waterproofed wall between the properties, since the witness' testimony related to a complete abatement of the water and dirt problem and thus constituted evidence of permanent damages, and since plaintiff was not entitled to permanent damages in the absence of an agreement by the parties that permanent damages might be assessed.

3. Damages § 13— competency of evidence — incomplete and speculative testimony

In action for injury to land, plaintiff's testimony relating to loss of gross income from loss of roomers, with no evidence connecting the reduction in the number of roomers to defendant's conduct, *held* incomplete and speculative, and therefore the testimony should have been removed from the jury's consideration.

APPEAL by defendant from *Seay, J.*, 29 January 1969 Session, FORSYTH Superior Court.

This is an action seeking to recover damages for injury to plaintiff's property caused by the construction of a fill adjacent thereto by defendant.

Defendant purchased the property adjoining and to the west of plaintiff's property. Upon the edge of its property defendant constructed a fill for the purpose of making its land appropriate for the construction of a gasoline filling station.

Plaintiff alleges that her property has been damaged as follows:

". . . that the said embankment is very high and very steep and extends to and upon the plaintiff's property; that the defendant in constructing the said embankment and fill, dumped dirt, trash and rocks upon the plaintiff's property and destroyed the plaintiff's fence and shrubbery."

". . . that the said bank is washing down and has washed down upon the plaintiff's property, and has created a further embankment on the plaintiff's property thereby destroying the plaintiff's fence, trees and damaging the plaintiff's dwelling house."

". . . that the defendant by its acts hereinabove complained of, had (sic) damaged the plaintiff's property by the collecting and dumping water upon the plaintiff's property, by the washing of the said bank upon the plaintiff's property and against her dwelling house, trees, shrubs and fence; that by reason of the great height of the said embankment, the plaintiff's enjoyment of the air and light has been substantially interfered with and diminished; that the sunlight has been cut off from the plaintiff's property. . . ."

Insofar as is deemed necessary to a decision, the evidence will be discussed in the opinion. From verdict and judgment awarding damages, defendant appealed.

White, Crumpler & Pfefferkorn, by James G. White and William G. Pfefferkorn, for plaintiff.

Deal, Hutchins & Minor, by Fred S. Hutchins and William K. Davis, for defendant.

BROCK, J.

[1] There seems to be no controversy between the parties over the principle that owners of land on the higher level cannot divert the surface water or interfere with its natural flow by artificial obstruction or device so as to injure the premises of the servient owner without incurring actionable liability. See, *Phillips v. Chesson,* 231 N.C. 566, 58 S.E. 2d 343; *Winchester v. Byers,* 196 N.C. 383, 145 S.E. 774; *Brown v. R. R.,* 165 N.C. 392, 81 S.E. 450; *Porter v. Durham,* 74 N.C. 767.

[2] The crux of defendant's appeal centers upon plaintiff's evidence of the cost of constructing a wall along the dividing line of plaintiff's and defendant's property. Plaintiff's witness McClenny testified on direct examination as follows:

"Q. Mr. McClenny, do you have an opinion as to whether repairs could be made in such way as to protect the property of Mrs. Bradley from the water and the dirt coming from that bank?

"Objection overruled, and the defendant, in apt time, excepts.

"EXCEPTION NO. 2

"A. It would be rather expensive. I think it could be done, but it would be rather expensive.

"Motion to strike overruled, and the defendant, in apt time, excepts.

"EXCEPTION NO. 3

"Q. What, in your opinion, would have to be done, Mr. McClenny?

"Objection overruled, and the defendant, in apt time, excepts.

"EXCEPTION NO. 4

"A. I don't see, in my judgment in building — not being a professional engineer — that it would — the only solution for that would be to put a wall against that dirt and waterproof it on the inside as it comes up, just like you would building a house, and then put your tile down in the ground, in the proper

way, and have it fixed so that there would be no water come beyond that wall, and that would stop it. And I don't know any other solution for it."

Thereafter the witness McClenny was allowed to testify over defendant's objection that in his opinion the cost of properly constructing such a wall would be $8,500.00. The same witness testified that the wall would have to be twelve inches thick, twenty-three feet high, seventy-five feet long, reinforced with steel rods, waterproofed and filled with dirt on defendant's side.

Obviously this testimony relates to a complete abatement of the water and washing dirt problem of which plaintiff complains, and therefore constitutes evidence of permanent damages.

Bobbitt, J. (now C.J.), speaking for the Supreme Court in *Wiseman v. Construction Co.*, 250 N.C. 521, 109 S.E. 2d 248, gave a clear and concise summary of the law respecting the recovery of damages for continuing nuisances or trespasses as follows:

"Our decisions sanction the recovery of permanent damages by a landowner as a matter of right when the defendant, a municipal or other corporation having the power of eminent domain, could acquire by condemnation the right to commit the alleged continuing nuisance or trespass. In such case, permanent damages will be assessed upon demand of either party; and, when such demand is made, the action becomes in effect a condemnation proceeding. *Clinard v. Kernersville, supra* [215 N.C. 745, 752, 3 S.E. 2d 267], and cases cited. When the defendant's right to continue the alleged nuisance or trespass is protected by its power of eminent domain, the remedy of abatement is not available to the landowner. *Rhodes v. Durham,* 165 N.C. 679, 81 S.E. 938, and cases cited.

"On the other hand, this Court has held that a landowner may not as a matter of right recover permanent damages from a private corporation or individual for the maintenance of a continuing nuisance or trespass. His remedy is to recover in separate and successive actions for damages sustained to the time of the trial. *Phillips v. Chesson, supra* [231 N.C. 566, 58 S.E. 2d 343], and cases cited. However, the parties may consent that an issue as to permanent damages be submitted; and in such case the defendant, upon payment of permanent damages so assessed, acquires a permanent right to continue such nuisance or trespass as in condemnation. *Aydlett v. By-Products Co.,* 215 N.C. 700, 2 S.E. 2d 881; *Clinard v. Kernersville, supra.*

"With reference to actions against private corporations or individuals, our decisions suggest two reasons for the stated rule: (1) The defendant may voluntarily abate the nuisance, or the nuisance or trespass may be abated or restrained by court action. (2) '. . . the defendant's willingness to abate or remove the cause of damage may be stimulated when repeatedly mulcted in damages by reason of its continued maintenance.' *Phillips v. Chesson, supra,* and cases cited; *Ridley v. R. R.,* 118 N.C. 996, 24 S.E. 730."

See also, *Wharton v. Manufacturing Company,* 196 N.C. 719, 146 S.E. 867.

It is true that the trial judge instructed the jury that it could not assess permanent damages in this action; however, the trial judge not only allowed this testimony before the jury, but in his instructions he summarized the testimony. Nowhere did he instruct the jury that it should not take the evidence into consideration in assessing damages. Nowhere did he instruct the jury that the testimony concerning the cost of constructing the wall constituted evidence of permanent damages. The error of allowing the jury to consider evidence of permanent damage was prejudicial to defendant.

There has been no agreement between the parties that permanent damages may be assessed in this lawsuit. Therefore the vice in the error is that, upon payment of the judgment by defendant, plaintiff would be free to spend the recovery in any way she saw fit; and under the law would be entitled to bring successive actions against defendant for continuing trespass.

[3] The plaintiff's testimony concerning loss of income from loss of roomers seems to have been an afterthought; but, in any event, we note that the testimony related only to gross income, and there was no evidence connecting the reduction in the number of roomers to defendant's conduct. Such incomplete evidence could lead only to such speculation as the jury might care to engage in and therefore should have been removed from their consideration.

It is not deemed necessary to discuss the remaining assignments of error.

New trial.

BRITT and GRAHAM, JJ., concur.

HAROLD K. GREGORY v. ANN J. ADKINS

No. 7018SC61

(Filed 25 February 1970)

1. Negligence § 30— issue of negligence — nonsuit

Judgment of nonsuit on the issue of negligence should be sustained if (1) the evidence taken in the light most favorable to plaintiff fails to show negligence on the part of defendant or (2) plaintiff's own evidence establishes contributory negligence as the sole reasonable conclusion.

2. Negligence § 35— contributory negligence — nonsuit

A judgment of nonsuit on the ground of plaintiff's contributory negligence can be granted only when plaintiff's evidence so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable conclusion can be drawn.

3. Automobiles § 83— pedestrian's contributory negligence — stalled automobile — nighttime — nonsuit

Plaintiff's evidence (1) that he voluntarily stood in the lane of a heavily traveled highway in the nighttime in front of a stalled black automobile, the major portion of which was on the highway, (2) that he observed three vehicles go by him at high speed and within three or four feet from where he was standing, (3) that he knew that he was in danger and could remove himself to a place of safety, and (4) that he was injured when defendant's automobile struck the rear of the stalled automobile and caused it to be pushed into him, *held* to establish plaintiff's contributory negligence as a matter of law; and the trial court properly granted defendant's motion for nonsuit.

APPEAL by plaintiff from *Gambill, J.*, 17 August 1969 Session of GUILFORD Superior Court.

This is a civil action in which plaintiff seeks to recover damages for personal injuries sustained by him at approximately 11:30 p.m. on 20 October 1967 when the stalled automobile in front of which he was standing was struck from the rear and pushed into him by an automobile being driven by the defendant. Plaintiff alleged negligence on the part of the defendant in failing to keep a proper lookout, failing to keep her vehicle under reasonable control, driving at a speed greater than was reasonable and prudent under existing conditions, and in other respects. Defendant answered, denying negligence on her part, pleading contributory negligence on the part of the plaintiff, and counterclaiming against the plaintiff. The defendant also pleaded a cross action against one Kenneth R. Sawyers, who was made an additional party defendant and who was the owner-operator of the stalled automobile in front of which plaintiff

was standing. At the commencement of the trial defendant submitted to a judgment of voluntary nonsuit in her cross action against Sawyers.

Plaintiff introduced evidence to show in substance the following facts: The collision occurred on U.S. Highway 29 approximately three miles north of Greensboro and near the point where the ramp leading from Hicone Road enters the northbound lanes of Highway 29. At this point Highway 29 is a four-lane highway running north and south with two northbound lanes and two southbound lanes divided by a grass median. Hicone Road runs east and west and passes over Highway 29 on an overpass bridge which is approximately four to five hundred feet south of the point of collision. South from the point of collision Highway 29 passes over a small hill, the hillcrest being in the general vicinity of the Hicone Road overpass. Traveling north from the hillcrest toward the point of collision Highway 29 runs slightly downgrade to and beyond the point of collision, the bottom of the grade being approximately 1500 feet further north from the point of collision. South from the point of collision Highway 29 is straight all the way back to the city limits of Greensboro. The highway is not illuminated in any way and the posted speed limit is 60 miles per hour.

Southwardly from the point where the Hicone Road ramp enters and merges into the northbound lanes of Highway 29, the ramp and the Highway are separated by a raised concrete strip with metal posts sitting in the concrete. This concrete strip extends approximately 30 feet south from the point where the ramp and Highway 29 merge. At the south end of the concrete strip there is a curb which runs 25 to 30 feet further south, starting about one foot from the eastern edge of the pavement of Highway 29 and slanting away from the pavement as it runs south. At the south end of the curb there is a 10 to 12 foot grass shoulder which runs along the eastern edge of the pavement of the outside northbound lane of Highway 29.

Plaintiff testified: On the night of the accident he was driving his car north on Highway 29 when he had a flat tire. He pulled over to the side and stopped about 275 to 300 feet south from the intersection of the Hicone Road ramp and Highway 29. He did not have a lug wrench, so he tried to flag down a passing motorist for assistance. A Mr. Sawyers, driving a black 1951 Chevrolet, stopped to help plaintiff. He first stopped on the east side of Highway 29 about 125 feet from plaintiff's car. Plaintiff noticed that the left side of the Sawyers car was in the highway and suggested that Sawyers move his car off the highway "to avoid an accident." However, the

Sawyers car stalled. Plaintiff said, "Let's push it," and with Sawyers at the wheel, plaintiff began pushing the car northwardly down Highway 29. The right wheels were off the pavement on the shoulder of the road, and the left wheels were on the pavement. The car rolled down the grade until Sawyers stopped it at a point near the raised concrete strip which separates Highway 29 from the ramp leading from Hicone Road. When it stopped, the right wheels of the Chevrolet were about two feet off the pavement, and the remainder of the car was in the highway. Sawyers got out of the car and began to adjust something under the hood. Plaintiff got in the car and tried to start it, but without success. Plaintiff then got out and stood in front of the car with Sawyers. Plaintiff stood in front of the left front headlight, the one closest to the center of Highway 29. Plaintiff watched several vehicles, two cars and a tractor-trailer, drive by the stopped car at high speed, some 60 to 65 miles per hour. The last thing plaintiff remembers is the tractor-trailer passing. One to two minutes elapsed from the time Sawyers stopped until plaintiff blacked out. Plaintiff did not remember hearing any horn, or screeching brakes, or seeing any lights that might have come from defendant's car. The headlights and taillights on the Sawyers car were burning at all times before the collision.

On cross examination plaintiff testified:

"I knew it was dangerous. As a matter of fact, I was standing there — I wasn't helping him except for the time I got under the wheel — the only thing I was doing was looking up and down the road to see if anything was coming. I was standing there some six, possibly seven, feet away from the center of the two northbound lanes of travel. . . .

". . . When I was standing six or seven feet away from the center line, the car was sticking out in that right lane three feet or so. Then I am only three or four feet, the distance of about like this, as those two cars went by me at speeds of sixty or sixty-five miles per hour. As to whether I didn't say anything to Mr. Sawyers about getting out of the road, I didn't have a chance to. That is what I was going to say to him. I don't recollect what I started to say; but apparently that was what I was going to say.

". . . As to whether I ever did help him, he didn't ask me. The only thing he asked me was to get under the wheel and try to start the car. There was no reason why I couldn't have stepped off the road to a place of safety. With regard to standing three of four feet from automobiles going 60 or 65 miles an

hour, I felt obligated. As to whether there was any reason I couldn't have done the same service to him by stepping over on the shoulder of the road, there was no use leaving him by himself. As to whether I could have stepped over to the other side and been close to him on the shoulder, I still would have got him, maybe.

"It sure was dangerous out there anywhere, then. And I knew it."

The patrolman who investigated the accident testified: He found the Sawyers Chevrolet in a wrecked condition straddling the concrete strip between Highway 29 and the ramp and he found defendant's car, a 1962 Mercury, also in a wrecked condition, just at the rear of the Chevrolet and in the outside northbound lane of Highway 29. Glass and other debris was scattered over a large area around the vehicles, the majority of the debris being in the outside lane of Highway 29. Five feet of skid marks in the outside lane of Highway 29 led up to the rear of defendant's car. The lights of the Chevrolet were not burning when he first arrived, and the light switch was in the off position.

At the close of plaintiff's evidence, the court granted the defendant's motion for judgment of involuntary nonsuit, and defendant then took a voluntary nonsuit on her counterclaim against plaintiff. Plaintiff appealed.

Schoch, Schoch & Schoch by Arch K. Schoch, Jr., for plaintiff appellant.

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

PARKER, J.

[1] Appellant's sole assignment of error is directed to the granting of defendant's motion for nonsuit. The judgment of nonsuit should be sustained if (1) the evidence taken in the light most favorable to plaintiff fails to show negligence on the part of defendant, or (2) plaintiff's own evidence establishes contributory negligence as the sole reasonable conclusion. *Price v. Miller,* 271 N.C. 690, 157 S.E. 2d 347. We find it unnecessary to resolve both of these issues for the determination of this appeal. Assuming *arguendo* that plaintiff's evidence was sufficient to present a case for the jury on the issue of defendant's negligence, we hold that nonsuit was proper in any event because plaintiff's own evidence established his contributory negligence as a matter of law.

[2, 3] A judgment of nonsuit on the ground of the plaintiff's contributory negligence can be granted only when the plaintiff's evidence, taking it to be true and considering it in the light most favorable to him, resolving all contradictions therein in his favor, and giving him the benefit of every legitimate inference in his favor which can be reasonably drawn therefrom, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable conclusion can be drawn. *Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607. Considering plaintiff's evidence in the manner prescribed by the foregoing well-established rule, we are of the opinion and so hold that it leads inescapably to the conclusion that he did not use that care for his own safety which an ordinarily prudent man in the same circumstances would have used, and that his failure so to do was one of the proximate causes of his injuries. He voluntarily stood in the main traveled portion of a heavily-traveled high speed highway in the nighttime, in front of a stalled black vehicle, the major portion of which was within the highway. Even assuming that the lights on the stalled vehicle were burning, thereby resolving the conflict in evidence in that regard in plaintiff's favor, a clear and obvious danger still remained that a fast moving vehicle might collide with the rear of the stopped car and that a person standing immediately in front thereof would be injured. Nevertheless, plaintiff voluntarily placed himself, and for an appreciable period of time remained, in this position of obvious peril. During this time he observed three vehicles go by the stalled automobile at high speed and only three or four feet from the place plaintiff was standing. Plaintiff himself testified that he knew his danger and that there was no reason he could not have stepped off the road to a place of safety.

Underwood v. Usher, 261 N.C. 491, 135 S.E. 2d 201, cited by appellant, is distinguishable on its facts. The evidence in that case disclosed that the plaintiff in that case and two companions were engaged in pushing a vehicle on the highway when it was struck from behind. The road was straight and level, the collision occurred in a residential section, street lights were burning and visibility was good, and there was no heavy traffic. The trial court judgment overruling motion for nonsuit was sustained. Our Supreme Court speaking through Parker, J., (later C.J.) said: "We believe that fair-minded men could reasonably draw from plaintiff's evidence a legitimate conclusion that plaintiff did not voluntarily place himself in a position of peril known to him and voluntarily continue therein

and that he was free from contributory negligence." In the case before us we are compelled to come to the opposite conclusion.

The judgment of nonsuit here appealed from is

Affirmed.

CAMPBELL and HEDRICK, JJ., concur.

PATSY LOU PAYNE JOHNSON v. JULIAN NEAL JOHNSON

No. 7021DC30

(Filed 25 February 1970)

1. Pleadings § 37— material facts — admitted in answer

Where a material fact is alleged in the complaint and admitted in the answer, it will, for the purpose of the trial, be taken as true and beyond the range of questioning; evidence controverting the facts so admitted is properly excluded.

2. Courts §§ 9, 11.1— district court — appeal from one judge to another

No appeal lies from one district court judge to another, but appeals in civil cases must be from the district court to the Appellate Division of the General Court of Justice.

3. Courts §§ 9, 11.1; Divorce and Alimony § 22— child custody order — district court — authority of other judges to enter subsequent orders

An order of a district court judge, which awarded custody of children to the mother upon proper findings that the parties to the child custody proceeding were husband and wife and that the children were born of the marriage, became the law of the case when the father did not appeal therefrom; and consequently, three other district court judges were without authority to enter subsequent orders relating to the husband's motion for a blood grouping test of the parties and the children.

4. Courts § 11.1; Divorce and Alimony § 22— practice and procedure — district courts — child custody case — "judge shopping"

The Court of Appeals disapproves of the "judge shopping" procedures in a child custody case, whereby four of the five district judges in a judicial district heard separate fragments of the lawsuit within an eight-month period.

5. Courts §§ 11.1, 14— district courts — "judge shopping" — chief judge — administrative duties

Legislative anticipation of the procedural quagmires and "judge shop-

ping" that could result from multi-judge districts was presumably a factor prompting the enactment of G.S. 7A-146, which vests in the chief district judge the administrative supervision and authority over the operation of the courts of the district.

6. Divorce and Alimony § 22— child custody — blood grouping test — welfare of children

Under the particular facts in a wife's proceeding for child custody and for alimony, the father's motion for a blood grouping test of the parties and the children would be properly denied on grounds of public policy and the welfare of the children, notwithstanding the broad language of G.S. 8-50.1 allowing such test, where the husband admitted in his pleadings that he was married to the plaintiff in 1959 and lived with her until November 1968, during which marriage a daughter was born in 1962 and a son in 1964.

APPEAL by defendant from *Alexander, District Judge,* at the 1 August 1969 Session of FORSYTH District Court.

On 11 November 1968 plaintiff instituted this action for custody of two minor children of the parties, temporary and permanent support for herself and her children, and counsel fees. Paragraph II of the complaint alleges:

> "II. That the parties hereto are husband and wife having been lawfully married to each other in Stokes County, North Carolina, on the third day of April, 1959; that there have been two children born to the aforesaid marriage, namely: Dana Renee Johnson, age six, who was born January 29, 1962 and Joseph Charles Johnson, age three, who was born December 18, 1964; . . ."

Defendant filed answer and admitted this paragraph of the complaint. Defendant also filed a counterclaim seeking custody of the two children who he alleged were born of his marriage to the plaintiff. In Paragraph VIII of the defendant's further answer and counterclaim he alleged "[t]hat the plaintiff is not a fit and proper person to have the care and custody of the aforesaid minor children of the plaintiff and defendant." Nothing in the record indicates that the parties separated prior to November of 1968.

On 6 December 1968 the cause was heard by Billings, District Judge. The court found as a fact that the parties were lawfully married on 3 April 1959 and that two children were born to said parties, Dana Renee Johnson on 21 January 1962 and Joseph Charles Johnson on 18 December 1964. Plaintiff was awarded temporary custody of the children pending an investigation and report on both of the parties by the "Juvenile Division of the District Court." Defendant

was ordered to pay plaintiff $125.00 per month for the use and benefit of the children and to pay plaintiff's attorney $150.00.

On 29 May 1969 the cause was heard before Clifford, District Judge, for the purpose of determining permanent custody, the amount to be paid for the support of the children, and whether defendant should be adjudged in contempt for failure to comply with the order of 6 December 1968. Judge Clifford found plaintiff to be a fit and proper person to have the permanent custody of the minor children and made no substantial change in the custody order entered 6 December 1968. Defendant was also found to be in contempt for failure to comply with Judge Billings' order of 6 December 1968 and was ordered to comply by noon of the next day or be confined for thirty (30) days.

On 2 July 1969 defendant filed a written motion for a blood grouping test. On the same day Henderson, District Judge, signed an order requiring the parties and the children to submit to the test.

By order dated 1 August 1969 Alexander, District Judge, "ORDERED, ADJUDGED AND DECREED that the aforesaid order of July 2, 1969 ordering a blood grouping test be and the same is hereby vacated." In this order Judge Alexander found as a fact:

> "That during the pendency of the hearing of plaintiff's motion for alimony and custody, a motion was made by the defendant requesting a blood grouping test pursuant to the provisions of N.C. General Statute 8-50.1 which motion was denied by the Honorable Rhoda B. Billings, Judge of the District Court; that neither said motion nor order denying same was filed in the records of this case, the only reference in the court records to same being a letter from the defendant to Judge Billings stating that by reason of her denial of the blood grouping test he did not intend to make any further payments pursuant to a temporary order signed by Judge Billings on December 6, 1968."

To the entry of this order the defendant excepts and appeals.

Wood and Phillips by George F. Phillips for plaintiff appellee.

Robert M. Bryant for defendant appellant.

VAUGHN, J.

[1] The defendant admitted in his answer and affirmatively alleged in his counterclaim that the children were born of his marriage

to the plaintiff. Where a material fact is alleged in the complaint and admitted in the answer, it will, for the purpose of the trial, be taken as true and beyond the range of questioning. *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767; *Royster v. Hancock*, 235 N.C. 110, 69 S.E. 2d 29. It has the same effect for the plaintiff as if found by the jury. 2 McIntosh, N.C. Practice 2d, § 1235. Evidence to controvert the facts so admitted is properly excluded. *Fleming v. R. R.*, 160 N.C. 196, 76 S.E. 212. There was no issue of paternity before the court, and defendant's motion for a blood test was properly denied by Judge Billings. Included in Judge Billings' Findings of Fact in her order of 6 December 1968 is the following:

> "That the parties hereto are husband and wife having been lawfully married to each other in Stokes County, North Carolina on the 3rd day of April, 1959; that there have been born to said parties two children, namely: Dana Renee Johnson, age six, who was born January 21, 1962, and Joseph Charles Johnson, age three, who was born December 18, 1964; . . ."

[2, 3] The defendant did not appeal from this order. It became, therefore, the law of the case, and other district judges were without authority to enter orders to the contrary. It is well established that no appeal lies from one superior court judge to another and that ordinarily one superior court judge may not modify, overrule or change the judgment of another superior court judge previously made in the same action. 2 Strong, N.C. Index 2d, Courts, § 9. Identical reasons proscribe appeals from one district judge to another. Appeals in civil cases must be from the district court to the Appellate Division of the General Court of Justice. If justice is to be administered in an orderly fashion in the district court division, these fundamentals must be observed.

[4, 5] We note with some concern that within the span of less than eight months this case has been before four of the five district judges in the Twenty-First District which includes only one county. In addition to observing the restrictions on the authority of one district judge to reverse the orders of another, whenever reasonably possible, judicial discretion should be exercised to avoid having several judges hear separate fragments of the same lawsuit. This is particularly important in domestic cases involving the welfare of infants. "Justice to all parties is best served when one judge is able to see the controversy whole." *In Re Custody of King*, 3 N.C. App. 466, 165 S.E. 2d 60. Presumably legislative anticipation of the procedural quagmires and "judge shopping" that could result from multi-judge districts (as are all our district court districts) was a factor prompt-

ing the enactment of G.S. 7A-146. This section vests administrative supervision and authority over the operation of the district courts in the chief judge of the district. Subsection (2) of this section gives him the specific power and duty of "arranging or supervising the calendaring of matters for trial or hearing." Subsection (7) provides that he shall have the power and duty of "arranging sessions, to the extent practicable for the trial of specialized cases, including . . . domestic relations . . . and assigning district judges to preside . . . so as to permit maximum practicable specialization by individual judges; . . ."

[6] We do not reach, nor do we imply, an affirmative answer to the question of whether this defendant's motion for a blood grouping test could have been allowed even if defendant had, by answer, denied paternity. In the light of the facts of this case, in which the defendant was married to plaintiff in 1959 and lived with her until November 1968, seven years after the birth of their daughter and four years following the birth of their son, common sense, public policy and overriding consideration for the welfare of innocent children would seem to dictate the contrary, despite the broad language of G.S. 8-50.1.

Although, as set out herein, some of the procedures followed to obtain them are disapproved, the results reached in the order appealed from are

Affirmed.

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

HAROLD EDWARD STITH v. MALCOLM PERDUE

No. 7021DC14

(Filed 25 February 1970)

1. Automobiles § 55— negligence in stopping on highway — sufficiency of evidence

In this action for personal injuries and property damage which occurred when plaintiff's car left the highway and overturned after defendant's car stopped suddenly in front of plaintiff, the evidence *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in stopping on the highway without seeing that such movement could be made in safety and without giving the required signal in violation of G.S. 20-154, where plaintiff's evidence tends to show that after a camper trailer in

front of defendant had completed a right turn and had cleared the highway by 30 feet, defendant's car came to an abrupt stop in the highway in front of plaintiff without any hand signal, brake lights or warning whatsoever, and that plaintiff's car left the road in trying to avoid defendant's car, and defendant testified that the brakes on his automobile suddenly failed when he attempted to use them about 12 car lengths behind the turning camper, that when he was about two car lengths behind the camper, he pulled up his emergency brake and his car came to a sharp stop, and that he didn't think about giving any signal.

2. Automobiles § 76— contributory negligence — accident while avoiding stopped vehicle

In this action for personal injuries and property damage which occurred when plaintiff's car left the highway and overturned after defendant's car stopped suddenly in front of plaintiff, plaintiff's evidence does not disclose contributory negligence as a matter of law, but presents a jury question, where some of his evidence tends to show that plaintiff applied his brakes when defendant negligently stopped his car on the highway in front of plaintiff in violation of G.S. 20-154, that plaintiff's car went into a skid, and that plaintiff lost control thereof when he pulled to his left to avoid striking defendant's stopped car.

3. Appeal and Error § 30— striking of entire answer competent in part

In this action arising out of an automobile accident, the trial court erred in striking defendant's entire answer to a question on direct examination as to how the accident happened, where there were four separate sentences in the answer, each containing separate factual information, and some of the answer was clearly admissible.

4. Appeal and Error § 49— exception to exclusion of evidence — failure to show what evidence would have been

An exception to the exclusion of evidence will not be considered when the record fails to disclose what the excluded evidence would have been.

APPEAL by plaintiff from *Clifford, District Judge,* 30 June 1969 Session of the District Court held in FORSYTH County.

This is a civil action by plaintiff, Harold Edward Stith, (Stith) seeking to recover of the defendant, Malcolm Perdue, (Perdue) for property damages and personal injuries alleged to have been received in an automobile accident on 27 July 1967. Stith alleges that he was injured and his automobile damaged by the actionable negligence of Perdue; that Perdue was operating an automobile on the public highways with improper brakes and stopped on the highway in front of Stith's automobile without giving any signal of his intention to stop. Perdue denied that Stith was injured or his automobile damaged as a result of Perdue's negligence. Perdue also pleads contributory negligence on the part of Stith by alleging that Stith was following too closely, failed to keep a proper lookout, failed to main-

tain control of his automobile, and drove his automobile in a reckless manner and at excessive speed resulting in its turning over into a ditch.

At the close of all the evidence, the trial court allowed Perdue's motion for judgment of nonsuit. Stith assigned error and appealed.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and David A. Irvin for plaintiff appellant.

Deal, Hutchins & Minor by William K. Davis and Edwin T. Pullen for defendant appellee.

MALLARD, C.J.

Stith, as plaintiff's only witness, testified in substance, except where quoted, that on the date alleged he was traveling West in his 1962 Rambler automobile on Highway 421 in Forsyth County; that the speed limit there was fifty-five miles per hour; that there were three vehicles going in the same direction; that Stith's automobile was approximately two hundred feet behind the middle car of the three vehicles; that the automobile Perdue was operating was the middle vehicle and was approximately two hundred feet behind the front vehicle which was a camper trailer (trailer); that Stith was traveling at a speed of approximately fifty to fifty-five miles per hour; and that the three vehicles were approaching a school yard at the crest of a hill. Stith stated:

> "He turned. I saw his turn signal. I took my foot off the accelerator so as to let my car decelerate; and the trailer cleared the road by approximately thirty feet, and suddenly Mr. Perdue's car came to a very abrupt stop without any hand signal, any brake lights, any warning whatsoever. At this time I took action, trying to attempt to stop myself. In doing so I had to keep in mind there was a curve just beyond this point — a blind curve — which I could not tell whether there would be cars coming in this direction. As soon as I could see beyond his car, I attempted to pass him and in doing this, the car became uncontrollable and slipped into the ditch on the other side. When I first saw Mr. Perdue's car come to an abrupt stop, I was approximately one hundred ten feet from it."

Stith also testified in substance that there was no contact between his automobile and the automobile of Perdue. On cross-examination Stith testified that when he saw Perdue's car stopping, he applied his brakes and his car started skidding and had skidded 80 feet or

more when the front end went into the ditch and the car turned on its side. Stith's automobile went into the ditch before it reached the point where Perdue's automobile was stopped in the highway. Stith received injuries and his automobile was damaged as a result thereof.

Perdue, as the defendant's only witness, testified that the brakes on the automobile he was driving suddenly failed to work when he attempted to use them at a point about twelve car lengths behind the trailer; that when he was about two car lengths behind the trailer and traveling at a speed of about "ten, fifteen, twenty" miles per hour, he pulled up his hand or emergency brake and his automobile came to a "real sharp stop." Perdue testified on cross-examination that:

> "When I realized I didn't have any brakes, I did not notice Mr. Stith was behind me. I did not notice before that he was behind me. He said he had been following me for about a mile. When I realized my brakes weren't working, I didn't think about giving any signal back to him."

The rule as to how the evidence of defendant's negligence is to be considered on defendant's motion for nonsuit is stated by Justice Huskins in the case of *Clarke v. Holman,* 274 N.C. 425, 163 S.E. 2d 783 (1968), as follows:

> "On motion to nonsuit, all the evidence which tends to support plaintiff's claim must be taken as true and considered in its light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom. *Homes, Inc. v. Bryson,* 273 N.C. 84, 159 S.E. 2d 329; *Insurance Co. v. Storage Co.,* 267 N.C. 679, 149 S.E. 2d 27. Contradictions and discrepancies are resolved in plaintiff's favor. *Watt v. Crews,* 261 N.C. 143, 134 S.E. 2d 199; *Nixon v. Nixon,* 260 N.C. 251, 132 S.E. 2d 590; *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d 894; *Raper v. McCrory-McLellan Corp.,* 259 N.C. 199, 130 S.E. 2d 281. Defendant's evidence which contradicts that of the plaintiff, or tends to show a different state of facts, is ignored. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. Only that part of defendant's evidence which is favorable to plaintiff can be considered. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330." See also *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969).

G.S. 20-154 requires a motorist intending to stop on a highway to see that such a movement can be made in safety and to give the signal required by such statute when the operation of any other vehicle may be affected.

[1] Applying the foregoing rules of law to the factual situation in the case before us, we hold that there was ample evidence of defendant's negligence in stopping on the highway, in violation of G.S. 20-154, to require submission of this case to the jury on that phase of the case.

The rule as to how the evidence of plaintiff's contributory negligence is to be considered on defendant's motion for nonsuit is set out in the case of *Atwood v. Holland,* 267 N.C. 722, 148 S.E. 2d 851 (1966), as follows:

> "In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and defendant must assume the burden of proving his allegation of contributory negligence. G.S. 1-139 and annotations thereon. Therefore, a motion for judgment of compulsory nonsuit upon the ground of contributory negligence should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with inferences favorable to him which may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38, and authorities cited."

[2] Some of the evidence for the plaintiff tends to show that for some unstated reason Stith lost control of his automobile while attempting to pass Perdue's stopped automobile. However, some of the testimony elicited from Stith tends to show that Stith applied his brakes because Perdue negligently stopped his automobile in front of him; that Stith's car went into a skid; and that he lost control thereof when he pulled to his left to avoid striking Perdue's stopped automobile. We think the evidence on this record presents questions for the jury as to whether the negligence of the defendant Perdue was a proximate cause of the occurrence and whether Stith was contributorily negligent. We hold that contributory negligence on the part of the plaintiff has not been so clearly established by his evidence that no other conclusion can reasonably be drawn therefrom.

[3] Plaintiff assigns as error the action of the court in allowing defendant's motion to strike a portion of the evidence. This assignment of error is based on plaintiff's exception number one which was taken on the direct examination of Stith under the following circumstances:

> "Q. If you would go ahead now and state how the accident happened.

A. Three vehicles were approaching the school yard at the crest of the hill, a steep hill, however. It is an elevation of about twenty to twenty-five feet as you come up the hill. The trailer was attempting to make a right turn on to the school yard. Regarding the separation of the three cars, I could see no reason why he couldn't do that safely.

MR. DAVIS: Objection.

MR. PULLEN: Objection, move to strike.

THE COURT: Strike it out, and the plaintiff, in apt time, excepts.

EXCEPTION NO. 1."

The motion to strike and the ruling thereon was not limited to any particular portion of the answer but applied to the entire answer. Some of the answer was clearly admissible. There were four separate sentences in the answer, each containing separate factual information. While the meaning of the last sentence is not clear, and therefore its exclusion alone would not constitute prejudicial error, we think the exclusion of the entire answer was prejudicial error. "Objections to evidence *en masse* will not ordinarily be sustained if any part is competent." *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 357 (1963). "The rule is that where a question asked a witness is competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that is objectionable." *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196 (1953).

[4] Plaintiff assigns as error the failure of the court to permit him to cross-examine the defendant in regard to whether he had pleaded guilty to having improper brakes "as a result of the incident" involved in this action. The record does not reveal what the answer would have been. An exception to the exclusion of evidence will not be considered when the record fails to disclose what the excluded evidence would have been. *Heating Co. v. Construction Co.,* 268 N.C. 23, 149 S.E. 2d 625 (1966).

For the reasons stated, we are of the opinion and so hold that the case should have been submitted to the jury and that the trial judge committed error in allowing the defendant's motion for judgment as of nonsuit.

Reversed.

MORRIS and VAUGHN, JJ., concur.

STATE v. JESSE EARL ASHFORD

No. 7018SC149

(Filed 25 February 1970)

1. Criminal Law § 43— photographs taken after event to which it relates

A photograph is not incompetent evidence and will not be excluded merely because it was not made at the time of the event to which it relates.

2. Criminal Law § 43— photographs of robbery victim's swollen arm

In this armed robbery prosecution, the trial court did not err in admitting for illustrative purposes a photograph of the victim's arm taken a few days after the robbery, where the victim testified that his arm and fingers had swollen and turned blue as a result of being twisted by defendant and that the photograph was a clear and accurate representation of his arm at the time it was taken.

3. Criminal Law § 43— photographs — restriction of admission

The trial court is not required to restrict the admission of a photograph absent a request that its admission be restricted.

4. Criminal Law § 42— knife used in robbery — admissibility — identification

In this armed robbery prosecution, a knife allegedly used in the robbery was sufficiently identified for admission in evidence where the robbery victim testified that the knife was like the one he was threatened with by defendant on the day of the robbery.

5. Criminal Law § 42— trousers worn by robbery victim — admissibility

In this armed robbery prosecution, the trial court properly admitted in evidence the trousers worn by the victim at the time of the robbery, where the victim identified the trousers and testified that the right pocket, which was torn, was the pocket in which he was carrying his money and that defendant tore the pocket in taking his money from him.

6. Robbery § 4— armed robbery — identification of defendant — sufficiency of evidence

In this armed robbery prosecution, testimony by the victim was sufficient to show a positive identification of defendant as a perpetrator of the robbery, and defendant's motion for nonsuit was properly overruled.

7. Criminal Law § 132— motion to set aside verdict as contrary to evidence — appellate review

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the trial judge and his ruling on the motion will not be reviewed on appeal absent a manifest abuse of discretion.

STATE *v.* ASHFORD

APPEAL from *Collier, J.*, 27 October 1969 Regular Criminal Session of GUILFORD Superior Court.

The defendant was tried on a valid bill of indictment for armed robbery and was found guilty by a jury. From a judgment of imprisonment of not less than twenty-five nor more than thirty years, the defendant appealed to the North Carolina Court of Appeals.

The evidence at the trial tended to show the following facts: On Saturday, 26 October 1968, Henry Martin Kellam was selling produce in the City of Greensboro, North Carolina. As he approached the intersection of Burbank Street and Bragg Street, two men ran from Bragg Street and waved for him to stop the truck. After Kellam stopped the truck, one of the men came to the driver's side and the other went to the passenger's side. At the driver's side of the truck, the defendant pointed an open knife at Kellam, and the other man got in the truck on the passenger's side and took some money from Kellam. The defendant gave the open knife to the other man in the truck, and then got in the truck and then drove the truck until they reached Logan Street. At this point, Kellam grabbed the keys from the ignition causing the truck to stop. The defendant jumped from the truck, grabbed Kellam's arm and twisted it and broke two ribs. He took a billfold from Kellam which contained $2,200.00 and both men ran down Logan Street. Kellam drove to the house of a customer who called the police.

Sergeant R. C. Booth of the Greensboro Police Department testified that he investigated this case and that as a result of his investigation he was looking for a particular person. Sergeant Booth testified that Mr. Kellam looked at several hundred photographs and picked out two photographs, one as a "look-alike" of the robbers and a picture of the defendant. The defendant was extradited from Waynesville, Missouri, to stand trial for armed robbery.

The defendant did not present any evidence. At the end of the State's evidence and again at the close of all of the evidence, the defendant moved for judgment as of nonsuit. Each motion was denied. When the verdict was returned, the defendant moved to set aside the verdict as contrary to the law and evidence. This motion was also denied.

Robert Morgan, Attorney General, and Carlos W. Murray, Jr., for the State.

Lee, High, Taylor & Dansby, by Major S. High, for the defendant appellant.

HEDRICK, J.

[1-3] The appellant contends that the trial court committed prejudicial error in admitting into evidence a photograph of Mr. Kellam's arm, the trousers he was wearing at the time of the robbery and the knife allegedly used by the defendant. The evidence shows that the photographs were taken at the police station approximately three to four days after the robbery occurred. Mr. Kellam, just prior to the introduction of the photograph by the solicitor, had testified that the defendant had twisted his arm and that as a result his fingers and arm had swollen and turned blue. The solicitor then offered the photograph to illustrate the condition of the arm a few days after the robbery. It is settled law in North Carolina that photographs may be used by a witness to illustrate and explain his testimony to the court and jury in order that they may better understand and interpret the testimony. *Simpson v. Oil Co.*, 219 N.C. 595, 14 S.E. 2d 638 (1941); *State v. Casper*, 256 N.C. 99, 122 S.E. 2d 805 (1961); Stansbury, North Carolina Evidence 2d, § 34. A photograph is not incompetent evidence and will not be excluded merely because it was not made at the time of the event to which it relates. *State v. Lentz*, 270 N.C. 122, 153 S.E. 2d 864 (1967). The photograph in the present case was identified by the witness as being a clear and accurate representation of the condition of his arm at the time it was taken and was admitted over a general objection. The defendant objected to the questions identifying the photograph but failed to ask that its admission be restricted. Without a request that the admission be restricted, his exception is not good. *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7 (1939). Had the defendant requested that the admission be restricted, it would have been error for the court to have failed to do so; however, when a general objection is made and overruled, if the evidence is competent for any purpose, it is not prejudicial error. *State v. Casper, supra.*

[4, 5] The knife and the trousers which were introduced into evidence were sufficiently identified by the witness Kellam. He testified that the knife which was introduced was like the one he was threatened with by the defendant on the day of the robbery. In North Carolina it is competent to admit weapons where there is evidence which tends to show that they were used in the commission of a crime. *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4 (1967); *State v. Macklin*, 210 N.C. 496, 187 S.E. 785 (1936). Mr. Kellam identified the trousers, offered as State's Exhibit Two, as those worn by him on the day of the robbery. He testified that the right pocket, which was torn, was the pocket in which he was carrying his money

and that the defendant tore the pocket in taking his money from him. "In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the circumstances of the crime. . . ." Stansbury, North Carolina Evidence 2d, § 118. This assignment of error is not sustained.

[6] The appellant next contends that the court committed prejudicial error in failing to grant the defendant's motion for judgment as of nonsuit because the State's evidence failed to show that the witness positively identified the appellant. On a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State. Kellam testified that the robbery took between five and ten minutes and that during this time he had an opportunity to see the faces of the men. He testified as follows regarding the defendant:

> "This one here had his face stuck right in mine. He had his face up — rubbed against mine a time or two, and I saw him plenty good. There's the man without a doubt (The witness points to the defendant)."

On cross-examination, the witness again stated:

> "I had seen this defendant before. After the robbery, I next saw him when he appeared in City Court for the hearing. I identified him by photographs. Just as soon as I saw it, I told them that that was the man and they got him."

He further testified on cross-examination that:

> ". . . I would hold my right hand up that that was the man if it was my last breath. He's the man. That's my honest to God opinion. I try to tell the truth if I know the truth, and if I can't I won't tell anything.
>
> "His face was rough looking, bumpy. He had his face right up here, pushed his face all the way up in mine right in mine. I don't know about scars or cuts on his face. He had bumps in his face. His skin was rough. I couldn't say about scars or cuts on his face. I said his face was rough and bumpy. He was right up close to me. He was all over me. If he had had a big scar I don't know whether I would have seen it or not. I seen him enough that I know he's the man, I'm honest, I'd risk my life on that, I would do it — if I'm wrong, I'd be willing to lose my life."

The evidence is sufficient to show a positive identification of the defendant by the witness. There was no error committed by the trial

court in overruling the defendant's motion for judgment as of nonsuit.

[7] The appellant's final assignment of error is that the trial court erred in refusing to set aside the verdict. A motion to set aside the verdict as being contrary to the evidence is addressed to the sound discretion of the trial judge and his ruling on the motion will not be reviewed on appeal absent a manifest abuse of discretion. *State v. Massey,* 273 N.C. 721, 161 S.E. 2d 103 (1968); *State v. Siler,* 2 N.C. App. 683, 163 S.E. 2d 537 (1968). In the present case there was no showing of any abuse of discretion on the part of the trial judge.

We have considered the assignments of error brought forward by the appellant and we find

No error.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM WINSTON BLACK

No. 7022SC73

(Filed 25 February 1970)

1. Criminal Law § 161— exceptions — form and sufficiency

Exceptions which appear nowhere in the record except under the assignments of error are insufficient to present for review the questions sought to be presented.

2. Criminal Law §§ 161, 166— exceptions and assignments of error — the brief

Exceptions and assignments of error not set out in the brief and properly numbered with reference to the printed record as required by Rule of Practice in the Court of Appeals No. 28 are ineffectual.

3. Criminal Law § 166— the brief — failure to file on time — copy to Attorney General

Failure of defendant to file his brief in the Court of Appeals within the time allowed, and his failure to deliver or mail a copy of his brief to the Attorney General on the same date the brief was filed in the Court, will subject the appeal to dismissal. Court of Appeals Rules of Practice Nos. 28 and 29.

4. Appeal and Error § 1— rules of appellate practice and procedure — authority of Supreme Court

The Supreme Court has exclusive authority to make rules of procedure

and practice for the Appellate Division of the General Court of Justice, N. C. Constitution, Art. IV, § 11; pursuant to this authority the Supreme Court has prescribed, approved, and adopted the Rules of Practice in the Court of Appeals.

5. Criminal Law § 146— mandatory rules

The Rules of the Court of Appeals are mandatory and not directory.

6. Appeal and Error § 6; Criminal Law § 148— right of appeal — final judgment

For all practical purposes there is an unlimited right of appeal to the Appellate Division of the General Court of Justice from any final judgment of the superior court or the district court in civil and criminal cases.

7. Criminal Law § 148— orders appealable — interlocutory order — denial of motion to dismiss

An appeal from an order denying defendant's motion to dismiss the warrants on the ground that he was denied the right to a speedy trial and from an order of the superior court remanding the cases to a recorder's court, *is held* an appeal from interlocutory orders when the defendant has not been tried on the charges against him; and the appeal is subject to dismissal by the Court of Appeals.

8. Criminal Law § 148— interlocutory order — appeal as a matter of right

In a criminal case there is no provision in G.S. 7A-27 for an appeal to the Court of Appeals as a matter of right from an interlocutory order entered therein.

9. Criminal Law § 146— right to appeal — compliance with rules — dismissal of appeal

In order to preserve the right to appellate review, one must comply with the applicable rules; and upon a failure to do so, the appeal may be dismissed as provided in Rule 48 of the Rules of Practice in the Court of Appeals.

APPEAL by defendant from *Armstrong, J.*, August 1969 Session of Superior Court held in IREDELL County.

The defendant was charged on 22 September 1967 in three warrants with (1) carrying a concealed weapon, (2) driving while under the influence of liquor, and (3) unlawful transportation of liquor. The warrants issued from the Mooresville Recorder's Court. The following motion, without caption or title, appears in the record immediately after the warrant charging the defendant with the unlawful transportation of intoxicating liquor:

"MOTION FOR JURY TRIAL IN RECORDER'S COURT

The undersigned attorney for the defendant, William Winston

Black, does hereby move the court that the above entitled matter be tried by jury in the Mooresville Recorder's Court.

This the 2nd day of November, 1967.

COLLIER, HARRIS & COLLIER
By: s/ T. C. Homesley, Jr.
Attorney for Defendant"

Chapter 38 of the Session Laws of 1969, effective upon its ratification on 6 March 1969, amends Chapter 613 of the Public-Local Laws, Regular Session, 1913, relating to the Recorder's Court at Mooresville, Iredell County, by providing that "(w)hen any person shall request a trial by jury, the case shall automatically be transferred to the Superior Court of Iredell County for trial." No provision was made therein relating to pending actions.

The record does not reveal why this case was transferred to the Superior Court of Iredell County from the Mooresville Recorder's Court other than the following which appears under the heading of "Statement of Case on Appeal": "As a result of the 1969 amendment to Chapter 613 of the Public-Local Laws, these cases were transferred from the Mooresville Recorder's Court to the Iredell County Superior Court for trial."

When the case came on to be heard in superior court, the defendant made a "Motion to Dismiss the Charges." The first basis asserted in support of such motion was that the defendant had been denied his right to a speedy trial. The second basis asserted in support of such motion was that the Superior Court of Iredell County lacked jurisdiction.

From a denial of the motion to dismiss, and remanding the cases "to the Mooresville Recorder's Court for disposition as provided by law," the defendant gave notice of appeal to the Court of Appeals.

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

Collier, Harris & Homesley by T. C. Homesley for defendant appellant.

MALLARD, C.J.

On this record it can be questioned whether the defendant has properly moved for a jury trial in all three of the cases against him. The answer seems to depend upon the interpretation of the words "above entitled matter" as used in the motion.

The defendant is not an indigent and is now and has been represented by privately employed counsel.

[1] The only exceptions in the record appear under the assignments of error. This is not sufficient to present for review the questions sought to be presented. 1 Strong, N.C. Index 2d, Appeal and Error, § 24; see also *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476 (1967).

[2] The exceptions and assignments of error are not set out in the brief and properly numbered with reference to the printed record as required by Rule 28 of the Rules of Practice in the Court of Appeals of North Carolina. See *State v. Newton,* 207 N.C. 323, 177 S.E. 184 (1934). A failure to comply with this rule also results in a failure to present for review the questions sought to be presented. *Shepard v. Oil & Fuel Co.,* 242 N.C. 762, 89 S.E. 2d 464 (1955); *State v. Floyd,* 241 N.C. 79, 84 S.E. 2d 299 (1954).

[3] Defendant's brief, under Rule 28, should have been filed by noon on 20 January 1970. It was not filed until 21 January 1970. On 22 January 1970 the Attorney General filed a motion to dismiss defendant's appeal for failure to file the brief on time and also for failure of the defendant to deliver or mail to the office of the Attorney General a copy of the defendant's brief on the same date it was filed, as required by Rule 28. The Attorney General's brief, under Rule 29, was due to be filed by noon of 27 January 1970. Defendant admits in his response to the Attorney General's motion that "due to an oversight" on the part of his attorney, he did not send the Attorney General a copy of his brief until 26 January 1970.

[4, 5] The Supreme Court of North Carolina has exclusive authority to make rules of procedure and practice for the Appellate Division of the General Court of Justice. N. C. Constitution, Article IV, § 11. Pursuant to this authority the Supreme Court has prescribed, approved, and adopted the Rules of Practice in the Court of Appeals of North Carolina. See 1969 Supplement to the Appendix appearing in Volume 4A of the General Statutes of North Carolina. These rules are mandatory and not directory. *Cudworth v. Insurance Co.,* 243 N.C. 584, 91 S.E. 2d 580 (1956); *State v. Moore,* 210 N.C. 686, 188 S.E. 421 (1936).

[6] For all practical purposes there is an unlimited right of appeal in North Carolina to the Appellate Division of the General Court of Justice from any final judgment of the superior court or the district court in civil and criminal cases. G.S. 7A-27. In civil actions there is also an appeal from certain interlocutory orders or

judgments of the superior court or district court as is provided in G.S. 7A-27(d).

[7, 8] The defendant has not been tried on the three charges pending against him. The appeal is therefore not from a final judgment on the warrants but is from interlocutory orders. In a criminal case there is no provision in the statute for an appeal to the Court of Appeals as a matter of right from an interlocutory order entered therein. G.S. 7A-27; *State v. Lentz,* 5 N.C. App. 177, 167 S.E. 2d 887 (1969); *State v. Lance,* 1 N.C. App. 620, 162 S.E. 2d 154 (1968); *State v. Henry,* 1 N.C. App. 409, 161 S.E. 2d 622 (1968). In the case of *State v. Smith,* 4 N.C. App. 491, 166 S.E. 2d 870 (1969), an appeal from an order denying defendant's motion to dismiss a bill of indictment against him on the ground that he was deprived of his constitutional right to a speedy trial was held to be an appeal from an interlocutory order, and the appeal was dismissed.

In this case the defendant attempts to appeal from the order denying his motion to dismiss on the ground that he was denied the right to a speedy trial. He also attempts to appeal from the order remanding the cases to the Mooresville Recorder's Court. Both of these orders are interlocutory orders, and this appeal is therefore subject to dismissal.

[9] The right to appeal must be exercised in accordance with the established rules of practice and procedure. *State v. Moore, supra; Wolfe v. North Carolina,* 364 U.S. 177, 4 L. Ed. 2d 1650, 80 S. Ct. 1482. In order to preserve the right to appellate review, one must comply with the applicable rules; and upon a failure to do so, the appeal may be dismissed as provided in Rule 48 of the Rules of Practice in the Court of Appeals.

As hereinabove set out, the appellant has failed to comply with the Rules of Practice in this Court. However, we have examined the record and find no valid reason for disturbing the order of Judge Armstrong in denying defendant's motion to dismiss and remanding the cases to the Mooresville Recorder's Court for disposition as provided by law. See *State v. Rooks,* 207 N.C. 275, 176 S.E. 752 (1934). Neither do we find any valid reason for treating defendant's appeal as a petition for a writ of *certiorari* as requested in his response to the Attorney General's motion to dismiss.

The defendant has failed to comply with the rules, and the attempted appeal is premature. For these reasons, the appeal should be dismissed.

Appeal dismissed.

MORRIS and VAUGHN, JJ., concur.

EDNA W. HOLCOMB v. GERALD G. HOLCOMB

No. 7021DC125

(Filed 25 February 1970)

1. Divorce and Alimony § 18— temporary alimony — discretion of court

The granting or denial of a motion for temporary alimony (pendente lite) is within the discretion of the trial court and is normally not reviewable on appeal.

2. Trial § 40— issues of fact — jury trial

Issues of fact raised by the pleadings must be tried by a jury unless there has been a waiver of that right. G.S. 1-172.

3. Trial § 40— issues of fact — jury trial — waiver

A jury determination of "any issue triable of right by a jury" may be requested within 10 days of the filing of the last pleading directed to the issue; the failure of a party to make such demand is a waiver of the right to a jury trial. G.S. 7A-196.

4. Divorce and Alimony §§ 2, 18; Trial § 40— temporary alimony — hearing — issues of fact — right to jury trial

In a hearing on the wife's application for temporary alimony and counsel fees pending her action for alimony without divorce, wherein the wife alleged that she was mentally incompetent at the time she had signed the deed of separation and that the certificate of the examining magistrate had been procured by fraud of the husband, an order of the trial court, entered within 10 days of the filing of the last pleading, dismissing the wife's action on the ground that her allegations and affidavits failed to show the invalidity of the agreement, *held* improper, since the wife was entitled to request a jury trial on the issue unless she waived such right.

APPEAL by defendant from *Alexander, Chief District Judge,* Twenty-First District, in Chambers, 1 December 1969.

Mrs. Edna W. Holcomb, by her next friend, William K. Davis, instituted this suit for permanent alimony without divorce and counsel fees, temporary alimony and counsel fees and for an order prohibiting her husband from removing her from her home, cutting off utilities to the home or removing the license plate from the car she is driving. She alleges details to show that her husband has "offered such indignities to her person as to render her life burdensome and her condition intolerable"; that no children have been born of the marriage; that she is without funds to subsist during this action; that her husband has threatened to sell her home and remove the license tag from the automobile that he permits her to use and that she is now "unable physically or mentally to do any work whatever, or to understand the nature or effect of her acts and that she is now,

and has been in such mental state for nearly a year that she is mentally incompetent."

Gerald G. Holcomb (Holcomb) answered, denying the material allegations of the complaint. He alleged that on 28 August 1969 he entered into a valid separation agreement with the plaintiff as a full and final settlement of all matters between them. The separation agreement was incorporated in the answer with a certificate of a Magistrate, H. W. Thomerson, Sr., attesting to his private examination of her as required by G.S. 52-6.

Mrs. Holcomb replied on 21 November 1969 admitting that the purported deed of separation was recorded in the office of the Register of Deeds of Forsyth County, but that she had not read, or understood the meaning of, the paper when she had signed it. She replied further that she had been in great fear of her husband at the time of the alleged execution of the document and that his threatening phone calls had caused her to become hysterical and to require a sedative, with the result that she did not understand the terms and effect of the purported deed of separation. In addition, she alleged that the Magistrate, H. W. Thomerson, Sr., had not read the deed of separation and that he "relied on the representations of defendant's attorney that he was trying to advise both plaintiff and defendant" and that he had "no evidence or information as to whether the deed of separation was unreasonable or injurious to her." Plaintiff alleged that her husband did not separate from her but merely abandoned her. She pleaded that his actions were such as to constitute a fraud upon the court, in that he made false representations to procure the magistrate's certificate after harassing the plaintiff until he knew she was mentally incompetent.

Various affidavits were made a part of the record. Dr. Ruth Henley, a gynecologist, in an affidavit signed and sworn to 4 November 1969, stated that Mrs. Holcomb

> "For the past several months, up to a year ago, in my opinion, she has not been mentally competent. She is not in my opinion and has not been mentally capable of understanding the nature and effect of a contract, particularly, a Deed of Separation during that time."

Harold W. Thomerson, Sr., stated in an affidavit that on the occasion of his examination of Mrs. Holcomb, "I asked Mrs. Holcomb if she had read it and understood it. She said she had, and 'I just want to get rid of him as soon as possible'" and also that "I asked her if she had an attorney, and she said she did not. Mr. White said

'I am representing both of them, and they cannot get along together.' " He said that he advised her to consult an attorney of her own but that she refused. He stated further that "I did not read the Deed of Separation and do not know its contents, or terms. Mrs. Holcomb did not read it in my presence."

James White, Holcomb's attorney, in an affidavit, stated that the terms of the separation agreement were those specified by Mrs. Holcomb, and later agreed to by Holcomb.

Several affidavits were placed in the record which tended to show that Gerald Holcomb had not been violent or threatening with his wife, that she had often been very drunk and that he had often been embarrassed by her behavior.

On 30 October 1969 Chief Judge Alexander signed an order requiring that the defendant "shall not molest or threaten the plaintiff in any manner." Holcomb was also ordered not to remove her effects from their home, cut off her utilities or take the car or remove its license plate. A hearing on the "plaintiff's application for temporary alimony and counsel fees" was set for 2:00 p.m. on Wednesday, 5 November 1969 in the Judge's chambers. Further, the temporary restraining order "entered herein shall be continued until the hearing on the merits shall be had."

The hearing was delayed until 24 November 1969 by order dated 5 November 1969, which order also kept the temporary restraining order in effect until 30 November 1969. At the hearing, with the affidavits and the pleadings alone before the court, Judge Alexander entered the following order:

> "This cause being heard before Honorable Abner Alexander, District Judge, in chambers on November 24, 1969, pursuant to the order of court entered on November 5, 1969, on the application of the plaintiff for alimony, temporary alimony and for a restraining order and counsel fees, and it appearing to the Court that the defendant in his answer has plead in bar of plaintiff's motions a deed of separation executed by plaintiff and defendant on August 29, 1969, and that in her reply the plaintiff has attacked the validity of the deed of separation on the grounds therein stated, and the Court being of the opinion as a matter of law that the reply of plaintiff and the evidence offered by her does not sufficiently show that the deed of separation is not valid, and that until the deed of separation is set aside, the plaintiff is not entitled to the allowance of counsel fees or temporary alimony or other relief prayed for;

It is therefore ORDERED that the plaintiff's application for temporary alimony and counsel fees, and for a restraining order are hereby denied, and that the action is hereby dismissed, and the costs are taxed against the plaintiff.

The Court further ORDERS in its discretion that the temporary restraining order entered on November 5, 1969, shall remain in full force and effect pending the determination of the appeal to the Court of Appeals, of which appeal plaintiff has given notice.

The Court in its discretion further ORDERS that pending the appeal, the defendant shall not cut off any utilities, including oil for the furnace, in the house now occupied by plaintiff, and shall keep the payments on the deed of trust on the house paid up to date, so that it will not be foreclosed.

This the 1 day of December, 1969.

s/ Abner Alexander
District Judge"

Plaintiff appealed to this court, assigning as error that the court should not have dismissed her action since she had alleged that she was mentally incompetent at the time of the signing of the deed of separation and that the certificate of the magistrate was procured by fraud and was improperly made.

Deal, Hutchins and Minor by Roy L. Deal and William K. Davis for the plaintiff appellant.

White, Crumpler & Pfefferkorn by William G. Pfefferkorn and Carl D. Downing for defendant appellee.

CAMPBELL, J.

[1] The granting or denial of a motion for temporary alimony (*pendente lite*) is within the discretion of the trial judge and as such is normally not reviewable on appeal. *Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589 (1965).

However, the same may not be said about a dismissal of an action for alimony without divorce, as was done in this case by order dated 1 December 1969.

[2] Issues of fact raised by the pleadings, as in the instant case, must be tried by a jury unless there has been a waiver of that right. G.S. 1-172.

[3] A jury determination of "any issue triable of right by a jury"

may be requested within 10 days of the filing of the last pleading "directed to the issue." The failure of a party to make such a demand is a waiver of the right to a jury trial. G.S. 7A-196.

[4] In this case, the judge entered his order dismissing the action within 10 days of the filing of the last pleading on 21 November 1969. He did not at this time have the capacity to act as the trier of the facts since the right to demand a jury trial could still have been exercised, and there was no waiver of this right nor was there consent of the parties for the trial judge to determine factual issues. The trial court did not find any facts even if he had had the authority to do so.

Reversed.

PARKER and HEDRICK, JJ., concur.

W. J. LEFFEW v. SARAH NELSON ORRELL, EXECUTRIX OF W. HARRIS NELSON, JR., AND SARAH H. NELSON ORRELL, INDIVIDUALLY

No. 7017SC58

(Filed 25 February 1970)

1. Laborers' and Materialmen's Liens §§ 1, 8— construction of residence — failure to show express contract

Plaintiff contractor is not entitled to have a lien enforced against property owned by femme defendant and her late husband as tenants by the entirety for labor and materials furnished in constructing a residence on the property, where plaintiff's evidence is insufficient to show that either the femme defendant or her late husband entered into a contract with plaintiff for construction of the residence.

2. Laborers' and Materialmen's Liens § 2— lien on entirety property — contract with deceased husband

Even if plaintiff contractor's evidence had been sufficient to make out a case of contract for indebtedness against the estate of the deceased husband of femme defendant, plaintiff contractor would not be entitled to a laborers' and materialmen's lien against property which had been held by femme defendant and her late husband as tenants by the entirety.

3. Unjust Enrichment— implied promise to pay

Where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor.

4. Actions § 6; Courts § 2; Pleadings § 2— equitable or legal relief — pleadings

While a party may obtain legal or equitable relief, or both, in the same court and in the same action, he must allege the facts upon which the court may grant such relief.

5. Equity § 1; Judgments § 3— equitable relief — sufficiency of pleadings

Equitable relief will be granted only when the facts set forth bring the case within the recognized jurisdiction of equity.

6. Appeal and Error § 4— theory of case on appeal

When a case has been tried in the trial court on a particular theory, a litigant may not switch theories when he gets to the appellate court.

APPEAL by plaintiff from *Beal, S.J.*, July 1969 Session, ROCKINGHAM Superior Court.

The allegations of plaintiff's complaint are briefly summarized as follows: Plaintiff is engaged in the construction business and in November 1967 the feme defendant (Mrs. Nelson) and her late husband (Mr. Nelson) entered into an entire and indivisible contract with plaintiff whereby plaintiff agreed to furnish the labor and materials to construct a residence upon certain lands belonging to Mr. and Mrs. Nelson as tenants by the entirety, the lands being particularly described in the complaint. Pursuant to said contract, plaintiff furnished labor and materials of the value of $6,580.76 as shown on an itemized statement attached to the complaint. Said labor and materials were furnished between 18 November 1967 and 23 April 1968. During the construction of said residence, Mr. Nelson died and Mrs. Nelson, individually and as executrix of the estate of her said husband, has failed and refused to pay for said labor and materials. Within six months after said labor and materials were furnished, plaintiff filed a notice of lien in the office of the Clerk of Superior Court of Rockingham County and by this action plaintiff seeks monetary judgment against the defendants for the amount aforesaid and to have a lien declared on and enforced against the real estate as provided by law.

In her individual capacity, Mrs. Nelson filed a separate answer denying the material allegations of the complaint and specifically denying that she at any time entered into a contract with plaintiff or authorized plaintiff to make any improvements on the subject real estate. She filed an answer as executrix of Mr. Nelson's estate and denied the material allegations of the complaint.

At the close of plaintiff's evidence, defendants' motion for judg-

ment as of involuntary nonsuit was allowed and from judgment predicated thereon, plaintiff appealed.

Thomas S. Harrington for plaintiff.

Walker & Walker, by James R. Walker and W. T. Combs, Jr., for defendants.

BROCK, J.

Did the trial court err in entering judgment of involuntary nonsuit?

[1] In *Brown v. Ward,* 221 N.C. 344, 20 S.E. 2d 324, in an opinion by Barnhill, J. (later C.J.), it is said:

> "In order to create a lien in favor of a person who builds a house upon the land of another the circumstances must be such as to first create the relationship of debtor and creditor, and then it is for the debt that he has a lien. The lien does not exist without a contract. [Citations]
>
> " 'The law seems to be settled in this State that there must be a debt due from the owner of the property before there can be a lien. The debt is the principal, the basis, the foundation upon which the lien depends. The lien is but an incident, and cannot exist without the principal.' [Citations] And a debt contracted is a debt agreed to be paid. [Citations]
>
> "The debt must be such as would entitle the claimant to a personal judgment for the amount due. [Citation]"

The complaint alleges that an express contract was entered into between plaintiff and Mr. and Mrs. Nelson, but the evidence was not sufficient to support this allegation. In fact, the evidence was insufficient to show a contract between plaintiff and either of the other parties. The evidence is summarized as follows:

Plaintiff testified that on one occasion he met with Mrs. Nelson in Mr. Nelson's office for a discussion of the plans for constructing a residence for her and her husband; that Mrs. Nelson participated in said discussion and made suggestions specifically as to the construction of a powder room. On another occasion plaintiff met the parties in their home and there discussed plans for the proposed house; Mrs. Nelson participated in that conversation and discussion. Pursuant to these conversations, plaintiff began construction of a residence on the land described in the complaint.

The witness Milton Leffew testified that he was present during the meeting in the home at which Mrs. Nelson and Mr. Nelson were present and the discussion dealt with the plans for the construction of the proposed house. Two employees of plaintiff were called as his witnesses. Each testified regarding separate occasions when Mrs. Nelson and Mr. Nelson went to the site on which the residence was being constructed.

No testimony was provided as to any agreement regarding the contract price of the house, when the house would be paid for, etc. The evidence presented did not make out a case of simple debt against the feme defendant or the estate of her late husband.

[2] Had the evidence been sufficient to make out a case of contract for indebtedness against the estate of Nelson, for the reasons set forth in *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828, and *Clark v. Morris,* 2 N.C. App. 388, 162 S.E. 2d 873, plaintiff would not be entitled to a laborers' and materialmen's lien against the property described in the complaint. We do not deem it necessary to repeat the well-settled principles stated in those decisions.

[3] In his brief plaintiff argues that if the judgment appealed from is allowed to stand, Mrs. Nelson will be unjustly enriched at the expense of plaintiff. In *R. R. v. Highway Commission,* 268 N.C. 92, 150 S.E. 2d 70, it is said:

> "The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor. *Beacon Homes, Inc. v. Holt,* 266 N.C. 467, 146 S.E. 2d 434; *Dean v. Mattox,* 250 N.C. 246, 108 S.E. 2d 541.
>
> "The action is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. . . ."

[4-6] Plaintiff's action is based on breach of contract for which he seeks legal relief. While a party may obtain legal or equitable relief, or both, in the same court and in the same action, he must allege the facts upon which the court may grant such relief; equitable relief will be granted only when the facts set forth bring the case within the recognized jurisdiction in equity. Furthermore, when a case has been tried in the trial court on a particular theory, a litigant may not switch theories when he gets to the appellate court.

1 McIntosh, N.C. Practice and Procedure § 999(4)(5), and cases therein cited.

The judgment of the superior court is

Affirmed.

BRITT and GRAHAM, JJ., concur.

B. J. TUTTLE v. RONALD GREY BECK AND WIFE, JEAN (MRS. RONALD GREY) BECK, AND THELMA COX BECK

AND

LENNER TUTTLE v. RONALD GREY BECK AND WIFE, JEAN (MRS. RONALD GREY) BECK, AND THELMA COX BECK

AND

B. J. TUTTLE AND WIFE, LENNER TUTTLE v. RONALD GREY BECK AND WIFE, JEAN (MRS. RONALD GREY) BECK, AND THELMA COX BECK

No. 7019SC16

(Filed 25 February 1970)

1. Automobiles § 105— liability of owner upon proof of registration — negligence of another — G.S. 20-71.1

Defendant's admission and stipulation that the automobile involved in the accident was registered in her name is sufficient evidence to support, but not compel, a finding for the plaintiffs that defendant was legally responsible for the acts and omissions of the co-defendant in the operation and parking of the automobile; but before the plaintiffs can recover they must prove by evidence competent against the owner defendant that the co-defendant was negligent and that her negligence was the proximate cause of plaintiffs' damages. G.S. 20-71.1(a), (b).

2. Automobiles § 75— parking of automobile — negligence — sufficiency of evidence

Plaintiffs' evidence was to the effect that an automobile owned by defendant was found unattended against their mobile home; that the doors of the automobile were closed, its emergency brake off, and its gear shift in drive position; and that the terrain between plaintiffs' and defendant's homes consisted of an inclining dirt street. *Held:* The evidence was sufficient to support an inference that the automobile was parked by the co-defendant with the emergency brake off and the gear shift in drive position, and the case was properly submitted to the jury.

3. Automobiles § 10— parking of automobile — what constitutes negligence.

To park an automobile on an incline without securing its position by use of the brake and transmission constitutes negligence; and if such neg-

ligence is the proximate cause of plaintiffs' damages, it is actionable negligence.

APPEAL by plaintiffs from *Lupton, J.*, 5 May 1969 Session, RANDOLPH Superior Court.

These are three separate actions by plaintiffs, husband and wife, to recover damages for personal injury and property damage alleged to have been proximately caused by the negligence of defendants in failing to properly park one 1956 Mercury automobile at approximately 9:00 p.m. on 31 August 1967. In one action the husband seeks to recover for his personal injuries; in another the wife seeks to recover for her personal injuries; and in the third the husband and wife jointly seek to recover for damages to their mobile home. The allegations of negligence are identical in each of the three actions, and the three actions were consolidated for trial.

Plaintiffs allege that defendants Ronald Grey Beck and his mother, Thelma Cox Beck, were the owners of the 1956 Mercury automobile; that the automobile was maintained by them as a "family purpose" automobile and was being operated for a family purpose by defendant Jean Beck, wife of Ronald Grey Beck. Plaintiffs allege that Jean Beck was negligent in the following respects:

"(a) She failed to effectively set the parking brake as required by G.S. 20-124(b) and as required by the common law of North Carolina in exercising reasonable care to secure the car.

"(b) She failed to turn her front wheels toward the side of the drive as required by G.S. 20-124(b) and as required by the common law of North Carolina in exercising reasonable care to secure the car.

"(c) She failed to engage the transmission or to place the car in park as required by the common law of North Carolina in exercising reasonable care to secure the car.

"(d) She failed to maintain adequate brakes on the car."

Defendants Ronald Grey Beck and Jean Beck admitted that Jean Beck parked the car on an incline in the driveway to their mobile home at approximately 9:00 p.m. on 31 August 1967; and defendant Thelma Cox Beck admitted the car was registered in her name. All other material allegations of the complaints were denied.

Plaintiffs' evidence tended to show the following: The parties live in mobile homes on opposite sides of a dirt street named Dixie

Place. Dixie Place is downgrade from east to west. Plaintiffs' mobile home is on the south side of Dixie Place and down the hill a little distance from defendants' mobile home, which is on the north side of Dixie Place. The driveway to defendants' mobile home is upgrade from Dixie Place. At about 9:00 p.m. on 31 August 1967 defendant Jean Beck came down Dixie Place, made a right hand turn into defendant's driveway, pulled up the driveway and parked the 1956 Mercury with its rear towards Dixie Place. About thirty minutes later the front of the 1956 Mercury collided with the front corner of plaintiffs' mobile home. The plaintiff B. J. Tuttle went out and found the 1956 Mercury against the front of his mobile home. When he arrived the doors to the Mercury automobile were closed, the emergency brake was off, and the gear was in drive position. Plaintiff did not see anyone in or near the automobile until others came out later.

Plaintiffs offered further evidence which tended to show personal injury to each, and damage to their mobile home.

At the close of plaintiffs' evidence judgments of compulsory nonsuit were entered as to each defendant. Plaintiffs appealed.

John Randolph Ingram for plaintiffs.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter, for defendants Ronald Grey Beck and Jean Beck.

Jordan, Wright, Nichols, Caffrey & Hill, by G. Marlin Evans, for defendant Thelma Cox Beck.

BROCK, J.

The record is absolutely void of evidence or admission to connect defendant Ronald Grey Beck with the ownership or operation of the Mercury automobile. Therefore, nonsuit as to him was proper.

[1] The defendant Thelma Cox Beck admitted and stipulated that the 1956 Mercury automobile was registered in her name. "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 [as set out in G.S. 20-71.1(a)], 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." G.S. 20-71.1(b). Because of G.S. 20-71.1 the admission and stipulation by defendant Thelma Cox Beck is sufficient evidence to support, but not compel, a finding for plaintiffs that she was

legally responsible for the acts and omissions of defendant Jean Beck in the operation and parking of the car. But that is the full effect of the statute, and, before plaintiffs can recover they must prove by evidence competent against defendant Thelma Cox Beck, that Jean Beck was negligent and that her negligence was the proximate cause of plaintiffs' damages. *Branch v. Dempsey,* 265 N.C. 733, 145 S.E. 2d 395.

[2] The question remaining is whether plaintiffs' evidence of negligence on the part of defendant Jean Beck was sufficient to withstand motions for nonsuit as to Jean Beck and Thelma Cox Beck. Defendants argue stressfully that the only reasonable inference from the evidence is that the automobile backed down the Beck driveway, turned its wheels to the right so as to back up Dixie Place, straightened its wheels, rolled down Dixie Place for some distance, turned its wheels to the left, ran in plaintiffs' driveway, and collided with plaintiffs' mobile home. Defendants argue that an automobile cannot behave in such fashion, and therefore the only reasonable inference is that someone was at the steering wheel. This, they argue, shows that the manner of parking the automobile in the Beck driveway could in no way constitute a proximate cause of plaintiffs' damages. This may be persuasive argument for the finders of the facts, but we are not prepared to say as a matter of law that an unattended automobile could not behave in this fashion. Dirt driveways and dirt streets commonly have ruts, tracks, or rocks, any one of which is capable of causing the front wheels of a rolling and unattended automobile to turn in unpredictable ways.

In our view plaintiffs' evidence of the physical characteristics of the terrain, coupled with their evidence that the automobile was found at the accident scene unattended and with its doors closed, its emergency brake off, and its gear shift in drive position is sufficient to withstand the motions for nonsuit. The evidence of the position of the emergency brake and the gear shift after the collision, with no intervening human element, support a reasonable inference that the car was parked with the emergency brake off and the gear shift in drive position.

[3] To park an automobile on an incline without securing its position by use of the brake and transmission constitutes negligence, and, if such negligence is the proximate cause of plaintiffs' damages, it is actionable negligence. In our view it is a question for the jury to resolve under proper instructions by the trial judge.

The result is this: The judgment of nonsuit as to the defendant

Ronald Grey Beck is affirmed, and the judgments of nonsuit as to defendants Jean Beck and Thelma Cox Beck are reversed.

Affirmed in part.

Reversed in part.

BRITT and GRAHAM, JJ., concur.

GEORGE PRESTON FRIES; ROBERT M. WILLIAMS; MILTON H. PRIDGEN; JAMES M. CROWELL, JR.; MARVIN RONE, JR.; HERMAN L. EAGLE; DOY E. BAXTER; R. BERT STARNES, INDIVIDUALLY, AND FOR AND ON BEHALF OF THE SAVE OUR SCHOOLS COMMITTEE AND ALL OTHER PERSONS WHO MAY WISH TO JOIN v. THE ROWAN COUNTY BOARD OF EDUCATION, A CORPORATION; LANE C. DRYE; H. LAMAR TREXLER; JAMES A. SLOAN; E. LINWOOD FOIL; W. C. ROGERS; AND JESSE C. CARSON, JR., INDIVIDUALLY

No. 7019SC29

(Filed 25 February 1970)

Schools § 10— pupil assignment — challenge by citizen's group — statutory procedure

A citizen's group challenging the pupil assignment plan adopted by a county board of education must appeal the plan to the superior court within 10 days from the date of its adoption by the board, G.S. 115-179, and the failure of the group to follow this procedure subjects its action to dismissal.

APPEAL by plaintiffs from an order of *McConnell, J.*, entered 6 August 1969 in CABARRUS County Superior Court sustaining a demurrer and dismissing the action which was pending in the Superior Court of Rowan County.

This action was instituted 18 July 1969 by plaintiffs as residents, citizens and taxpayers of the North Rowan School District and who allege that they "have been authorized to appear as plaintiffs herein on behalf of the recently organized Save Our Schools Committee of Rowan County."

The complaint filed by the plaintiffs alleges in substance, except where quoted, the following:

The individual defendants constitute the Rowan County Board of Education and the County Superintendent of Public Instruction; that for several months the Board has considered a new plan of as-

signment and enrollment of pupils in a zoned area of the county designated as "North Rowan"; that five separate plans have been under consideration; that North Rowan is divided by the Southern Railroad tracks with some sixty percent (60%) of the population residing on the west side of the tracks and forty percent (40%) on the east side; that heretofore school facilities have been constructed and maintained on each side of the tracks without the necessity of students on one side of the tracks going to the other side of the tracks and vice versa; that under the new Plan No. 5, the schools have been arranged so that certain grades are on one side of the tracks and other grades on the other side of the tracks with the result that "increased bussing" is required which necessitates cross-bussing and "that Plan No. 5 as presently adopted by the defendants prohibits any student from seeking a transfer to another school within his own district for that only one class of its kind is available"; that before the adoption of the plan the plaintiffs met with the defendants and "vehemently argued against the adoption of such plan presenting in detail many of the obvious difficulties attendant on such a plan pointing out the defects therein and the advantages for one of the other plans then under consideration by the Board"; "[t]hat approximately thirty (30) days ago the school board rendered its final decision . . . and formally notified all concerned that Plan No. 5 was then and there adopted"; that there were at least three other plans, any one of which would have been acceptable by the plaintiffs and compatible with the national scheme of integration; that the adoption of Plan No. 5 under the authority of N.C. G.S. 115-176 makes assignments without regard to the orderly and efficient administration of the public schools, fails to provide for the effective instruction, creates unnecessary additional hazards to the health and safety of the pupils so assigned and is detrimental to the general welfare of all pupils in the district in violation of the said N.C. G.S. 115-176, and compels students to attend schools under a plan designed to create a balance or ratio of race and compels them to accept involuntary bussing for which public funds must be used to pay the cost, in violation of N.C. G.S. 115-176.1.

The plaintiffs then seek to have the action of the school board declared invalid, the defendants perpetually enjoined and restrained from putting the plan into effect, the defendants directed to adopt another available plan and a temporary injunction or restraining order issued.

Under date of 18 July 1969 Judge Lupton, who was holding the courts of the Nineteenth Judicial District, entered an order to show

cause why the injunction should not be granted and made it returnable before Judge McConnell in Cabarrus County on 4 August 1969.

The defendants appeared and demurred ore tenus to the complaint. Judge McConnell reserved his ruling on the demurrer until the end of the hearing on the show cause motion. At the completion of the hearing the following order was entered:

"This cause coming on to be heard and being heard on August 4, 1969, before the undersigned Judge of the Superior Court assigned to hold a Special Civil Session of the Superior Court for Cabarrus County in accordance with an Order of Judge Harvey A. Lupton, dated the 18 day of July, 1969, for the defendants to show cause why they should not be restrained from placing into effect and implementing a plan for the operation of schools and assignment of pupils in the North Rowan School District of Rowan County for the year 1969-70 (being known as Plan 5), as adopted by the Rowan County Board of Education on March 20, 1969. The defendants appeared before the undersigned as ordered and were represented by Attorneys James G. Hudson, Jr. and Nelson Woodson, of the Rowan County Bar. The plaintiffs appeared and were represented by George Burke, of the Rowan County Bar.

That at the opening of the hearing to show cause and before the filing of Answer and before any evidence or affidavits were presented, the defendants through their attorneys demurred ore tenus to the complaint on the ground that it failed to state a cause of action. That the undersigned reserved the right to rule on the Demurrer and proceeded with the hearing at which the defendants offered testimony and affidavits and the plaintiffs offered affidavits, and the court heard arguments of the attorneys both for the plaintiffs and the defendants.

It appearing to the court that neither the complaint nor the affidavits of the plaintiffs allege or tend to show that the defendant Rowan County Board of Education acted arbitrarily or abused its discretion or acted in other than good faith in adopting on March 20, 1969, a plan (known as Plan 5) for the operation of and the assignment of pupils in the North Rowan School District of Rowan County for the year 1969-70, and that the Board acted within the scope of the authority conferred upon them as duly elected members of the Rowan County Board of Education.

It further appearing to the court that although the plaintiffs objected to the plan as adopted, as they had a right to do, that

none of the plaintiffs' rights as provided for under the Constitution of the State of North Carolina or the Constitution of the United States have been violated. It further appearing that the plan was adopted by the Rowan County Board of Education on March 20, 1969, and after public meetings, the Board, on June 10, 1969, ordered that the plan be implemented and placed into effect for the opening of school August 27, 1969, for the school year 1969-70. It further appears that G.S. 115-176.1, referred to in the complaint, was not enacted into law by the General Assembly of North Carolina until July 2, 1969.

And the court having determined that the demurrer should be sustained,

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Demurrer be sustained and that the action be dismissed.

This the 6 day of August, 1969.

s/ John D. McConnell
Judge Presiding"

Plaintiffs appealed to this Court assigning as error the dismissal of the action by the trial judge.

George L. Burke, Jr., for plaintiff appellants.

Woodson, Hudson & Busby by J. G. Hudson, Jr., Nelson Woodson and Donald D. Sayers for defendant appellees.

CAMPBELL, J.

In the instant case, a citizen's group seeks to challenge the action of the Rowan County School Board assigning pupils to the various schools of the North Rowan School District of Rowan County. General Statutes 115-176 to 115-179 establish a method of assignment of pupil school students and a method of challenge of that assignment. A "person aggrieved" by an order of a school board is given the right to appeal from an order of the board, within 10 days of the date of the order, to the Superior Court for a hearing *de novo*. G.S. 115-179.

There does not appear in the record any reason why this procedure was not followed in this case. When such an "integrated and adequate" procedure is established by the Legislature, it is meant to be followed. See *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970).

Prior to the institution of this action, no appeal having been taken from the final order of the School Board as provided by G.S. 115-179, the School Board proceeded with the changes necessary to implement its final order. This plan has now been in effect since the opening of school 27 August 1969, and most of the present school year has passed. To permit this type of action contrary to the procedure established by the Legislature would result in complete chaos and confusion for the school system. Compare with *In Re Varner*, 266 N.C. 409, 146 S.E. 2d 401 (1965).

The present action shows on its face that the plaintiffs have not complied with the procedure established by the Legislature for an action by "any person aggrieved by the final order of the [board]."

The action was properly dismissed.

Affirmed.

PARKER and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. ALPHONZO STALEY

No. 7018SC82

(Filed 25 February 1970)

1. Searches and Seizures § 3— confidential informer — sufficiency of officer's affidavit

Police officer's affidavit for a search warrant based on an informant's report contains sufficient information for the magistrate to consider in support of the affiant-officer's allegation that the informant is credible and his information reliable, where the officer's oath states that the informer is well known to the officer and has given the officer information on several past occasions which proved highly reliable and accurate.

2. Searches and Seizures § 3— warrant for narcotics — confidential informer — sufficiency of officer's affidavit

Police officer's affidavit for a search warrant for narcotics based on an informant's report sets forth sufficient underlying circumstances for the magistrate reasonably to infer that the informant had gained his information in a reliable way and to enable the magistrate independently to judge the validity of the informant's conclusion that narcotics were where he said they were, where the affiant-officer's oath declares that the informant stated as a fact that defendant has in his possession marijuana located in a specified hotel room, that defendant is supplying marijuana to occupants at the hotel, that defendant sells marijuana cigarettes for $1.00, that defendant is using drugs himself and has a needle in his

possession which he uses to administer drugs to himself, and that defendant would have a supply of marijuana in his room on a certain date.

3. Searches and Seizures § 3— statements in officer's affidavit — consideration by magistrate

Although police officer's statements that he had received information from another reliable informer that defendant has rented motel rooms and calls his buyers by phone to pick up marijuana, and that the officer and other members of the vice division had also received other information concerning defendant's sale of marijuana from a specified hotel room would be insufficient to show probable cause for a search warrant, the magistrate could properly consider such information with the other evidence before him.

4. Searches and Seizures § 3— standard of probable cause

Only the probability and not a *prima facie* showing of criminal activity is the standard of probable cause.

5. Searches and Seizures § 3— affidavit for search warrant — hearsay information

An affidavit for a search warrant may be based on hearsay information and need not reflect the direct personal observation of the affiant.

6. Searches and Seizures § 3— affidavits of probable cause — standard of testing

Affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial.

7. Searches and Seizures § 3— determination of probable cause — appellate review

Determination of probable cause by a magistrate should be paid great deference by the reviewing courts.

8. Searches and Seizures § 3— sufficiency of officer's affidavit

Police officer's affidavit based on an informant's report was sufficient reasonably to satisfy the magistrate that probable cause existed for issuance of a search warrant for narcotics.

9. Criminal Law § 113— trial of two defendants — instructions — separate determination of guilt or innocence of each

In a consolidated trial of two defendants for unlawful possession of narcotics, the charge, when considered as a whole, made it clear to the jury that the guilt or innocence of each defendant was to be determined separately.

ON *Certiorari* from *Martin, S.J.*, 3 March 1969 Session GUILFORD Superior Court, Greensboro Division.

The defendant was tried for unlawfully and feloniously possessing narcotic drugs in violation of G.S. 90-88. The case of Herman Bernard Marshall, upon an identical charge arising from the same

factual situation, was consolidated with that of this defendant. In apt time the defendant moved to suppress the evidence obtained as a result of the search of the defendant's hotel room, contending that the search warrant was defective. This motion was overruled. The State's evidence was substantially as follows. Officer Cox and two other officers of the Vice Division of the Greensboro Police Department went to Room 346 of the O'Henry Hotel at approximately 10:30 p.m. on 13 January 1969 and knocked on the door. When defendant opened the door, the officers identified themselves and presented their search warrant. The room was then dark but as the officers entered someone turned on the lights. The officers smelled the odor of marijuana. They observed Herman Bernard Marshall seated on a bed. A search of Marshall revealed seven marijuana cigarettes in his shirt pocket. Marijuana leaves, stems and seeds were on the bed where Marshall was seated. A third male identified as Oscar Washington was also in the room. Cigarette butts containing marijuana were found on the floor and on the dresser. The bathroom was full of smoke having the strong odor of burning marijuana. Three marijuana cigarettes were found in a paper dispenser located in the bathroom. A pipe containing a "reefer" or a little marijuana cigarette was found on the defendant's desk. The defendant attempted to take the pipe from the officers stating that they could not take it because it was his. The cigarettes, pipe, seeds and leaves were introduced into evidence. The defendant offered no evidence. The case against Herman Bernard Marshall is not before us.

The jury found the defendant guilty and a judgment of imprisonment was entered. This Court allowed defendant's petition for a writ of *certiorari* as a substitute for appeal.

Attorney General Robert Morgan by Staff Attorney Burley B. Mitchell, Jr., for the State.

William Zuckerman for defendant appellant.

VAUGHN, J.

The defendant assigns as error the denial of his motion to suppress the evidence obtained as a result of the search of his hotel room. He contends that the search warrant is invalid because the affidavit upon which the same is based is insufficient. Defendant relies principally on *Aguilar v. Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509; and *Spinelli v. United States,* 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584. In each of those cases the United States Supreme Court held that the affidavit in the application for the search

warrant did not contain sufficient information to enable the magistrate to adjudge for himself the persuasiveness of the facts relied on to show probable cause. The Court held the warrants invalid and declared the evidence obtained as a result of such search warrants to be inadmissible in any criminal trial, state as well as federal. The admissibility of the evidence in this case is subject to the rules pronounced in these and other decisions of the United States Supreme Court. *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674.

[1] In *Aguilar v. Texas, supra,* the affidavit was held to be inadequate for two reasons. One was that it contained nothing for the magistrate to consider in support of the affiant's allegation that the informant was credible or his information reliable. This objection is met in the present case by the police officer's oath that:

> "The affiant further supports the request for issuance of a search warrant with statement that he has received information from a reliable confidential informer who is well known to this affiant and who has given this affiant and other members of the Vice Division, Greensboro Police Department information on several occasions in the past. The information which has been given by this informant in the past has proven highly reliable and accurate, and this informant has been most dependable in all of his dealings with members of the Vice Division."

[2] The other objection to the affidavit in *Aguilar* was that it failed to set forth any of the underlying circumstances necessary to enable the magistrate independently to judge the informant's conclusion. In the present case the informant's statements to the officer are unequivocal and on their face appear to be based on absolute personal knowledge rather than rumor or mere "information and belief." This is emphasized by the details related by the informer. The informer states as a fact ". . . that Alphonzo Staley has in his possession marijuana, located in his room, number 346 at the O'Henry Hotel, Greensboro, N. C. The informer states that Alphonzo Staley is supplying marijuana to occupants at the O'Henry Hotel, Greensboro, N. C. and that he sells reefers (marijuana cigarettes) for $1.00. Informer further states that Alphonzo Staley is using drugs himself and that he has a needle in his possession which he uses to administer drugs to himself. Informer states that Alphonzo Staley will have a supply of marijuana in his room on Jan. 13, 1969." *Spinelli v. United States, supra,* holds that in the absence of a statement by the informer detailing the manner in which he gathered his information, it is especially important that he describe the accused's criminal activities in sufficient detail that the magistrate may know

he is acting on something more substantial than a casual rumor circulating in the underworld or the accused's general reputation. When confronted with the details related in the affidavit in the present case, the magistrate could reasonably infer that the informant had gained his information in a reliable way. *Draper v. United States,* 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329.

[3] In a further effort to convince the magistrate that probable cause existed, the police officer offered the following:

> "This affiant has also received information from another reliable confidential informer, who states that Alphonzo Staley has rented motel rooms and calls his buyers by phone to pick marijuana up.
>
> "This affiant along with other members of the Vice Division Greensboro Police Department have also received information concerning Alphonzo Staley selling 'Pot' marijuana from his room, 346 O'Henry Hotel, Greensboro, N. C."

Although under decisions of the United States Supreme Court this testimony, standing alone, would have been insufficient to affirm the existence of probable cause, the magistrate could properly consider it along with the other evidence before him. It is substantially stronger than the "bald and unilluminating assertion of suspicion" rejected in *Spinelli.*

[4-8] Only the probability and not a *prima facie* showing of criminal activity is the standard of probable cause. *Beck v. Ohio,* 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223. The affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant. *Jones v. United States,* 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725. Affidavits of probable causes are tested by much less rigorous standards than those governing the admissibility of evidence at trial. *McCray v. Illinois,* 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056. It must be remembered that the object of search warrants is to obtain evidence — if it were already available there would be no reason to seek their issuance. They must be issued upon information which may not at that time be competent as evidence by strict rules. *State v. Bullard,* 267 N.C. 599, 148 S.E. 2d 565. In judging probable cause, issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. *United States v. Ventresca,* 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741. Their determination of probable cause should be paid great deference by reviewing courts. *Jones v. United States, supra.* As Justice Fortas observes in his dissenting opinion in *Spinelli,*

"a policeman's affidavit should be not judged as an entry in an essay contest." We are of the opinion that the affidavit in the present case is sufficient to reasonably satisfy the magistrate that probable cause existed.

[9] The defendant also brings forward an assignment of error based on his contention that the court failed to submit to the jury separate questions as to the guilt or innocence of each defendant. We find no merit in this contention. A charge must be construed "as a whole in the same connected way in which it was given." *State v. Valley,* 187 N.C. 571, 122 S.E. 373. When so considered, the charge in this case makes it unmistakably clear to the jury that the guilt or innocence of the defendant and that of Herman Bernard Marshall were to be determined separately.

No error.

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

STATE OF NORTH CAROLINA v. ONAS THOMAS

No. 7020SC79

(Filed 25 February 1970)

1. Homicide § 21— second degree murder — rifle wounds — sufficiency of evidence

In a prosecution for murder in the second degree, the issue of defendant's guilt was properly submitted to the jury where the State's evidence tended to show that the body of the deceased, lying in the bedroom of defendant's home, had two bullet wounds, one of which was conclusively caused by a .22 caliber bullet; that defendant had in his pocket .22 caliber cartridges similar to those found on the floor of the bedroom and also a bill of sale for two .22 rifles; that the serial number on one of the rifles listed in the bill of sale corresponded with the serial number on a .22 rifle which was found about 300-400 yards from defendant's home; that the discovered rifle did not have a magazine rod; that a magazine rod for a .22 rifle was found in the room adjoining the bedroom and was of a type similar to the rod missing from the discovered rifle; and that defendant stated to officers that he had been heavily drinking with deceased on the day of the homicide, that deceased had tried to "fondle" him, and that he would not allow anybody to "mess with me."

2. Homicide §§ 15, 21— proof of crime — circumstantial evidence

Circumstantial evidence is satisfactory in proof of matters of the gravest moment, including homicide cases.

STATE *v.* THOMAS

3. Homicide § 30— second degree murder — submission of issue of involuntary manslaughter — evidence

The trial court in a second degree murder prosecution did not err in failing to submit an issue of involuntary manslaughter, where the State's evidence consisted of the fact that deceased was shot twice and of defendant's statements that the deceased had attempted to "fondle" him and that he would not allow anybody to "mess with him," and there was no evidence that the death was caused by culpable negligence.

APPEAL by defendant from *Crissman, J.*, 25 August 1969 Session of UNION County Superior Court.

Defendant was tried upon a bill of indictment charging him with the murder of Parks Jordan (Jordan). The Solicitor announced upon calling the case for trial that he would try the defendant for murder in the second degree.

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 the term of 8 to 12 years.

From the judgment imposed, the defendant appealed, assigning error.

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

James E. Griffin for the defendant appellant.

CAMPBELL, J.

[1] The defendant offered no evidence. The State's evidence is summarized as follows, except where quoted. On 18 November 1968 the defendant, together with his father and mother, lived in a rural area of Union County, North Carolina about 15 miles from Monroe and about 8 or 9 miles from Marshville. In response to a call, officers of the Union County Sheriff's Department went to the home of the defendant shortly after 7:00 o'clock P.M. The house consisted of four rooms, two of which were bedrooms. Upon arrival, the officers found the body of Jordan lying on the floor in a back bedroom. Jordan was lying on his back with a bullet wound in his stomach and one in his upper left leg. The wounds were about the size of a pencil. There were abrasions or cuts about his head. All the wounds appeared to be fresh. The defendant was not present, and the officers proceeded to ride around the countryside looking for him. Pursuant to a call, the officers returned to the house about 1:30 A.M. Officers

went to the front door and also to the rear door. The defendant came out the rear door with a pistol in his hand. Deputy Sheriff McCain fired a warning shot over the defendant's head after he had refused to throw the pistol down. The defendant then put the pistol in his pocket. The officers talked to the defendant about 10 minutes trying to get him to dispose of the pistol. Deputy McCain colorfully described the situation as follows:

> ". . . He was not in custody at this time. I did not tell him about his rights as he still had his rights in his pocket. I think I talked to him about ten minutes, after which Mr. Thomas took his gun out and throwed it on the ground. He took it out of his pocket and we then advanced upon him, handcuffed him, and placed him in the back of [the] car."

The pistol was a foreign make .38 Special Derringer. It had one spent cartridge and one live cartridge in it.

The bedroom where Jordan's body was found was in disarray, the bedclothes were in a pile, and blood was "all over the place". There were twelve live cartridges and twelve spent cartridges on the floor. The cartridges were .22 caliber, long, hollow point. There were twelve bullet holes in the double window at the foot of the bed which were made by bullets shot from inside going out. The front doorknob of the house had three bullet holes in it. It was not determined whether these bullet holes were fresh or not, but the broken window glass between the window and the outside screen looked fresh. Thomas had in his pocket twenty-three cartridges similar to the .22 caliber cartridges found in the bedroom. Defendant also had in his pocket a bill of sale for two .22 rifles. One of these rifles the defendant had reported stolen. The other rifle had been bought that week, and the serial number corresponded with the serial number on a Remington .22 rifle which was found Friday morning, 22 November 1968 in the grass between the paved road and a wheat field, about 300 or 400 yards from the house where the defendant lived. This rifle did not have a magazine rod in it. A magazine rod for a Remington .22 rifle was found in the living room adjoining the bedroom where the body was found. This rod was of a type similar to the rod missing from the rifle.

The County Medical Examiner, an admitted medical expert, testified that in his opinion Jordan's death was proximately caused by the bullet wounds. Two lead bullets were extracted from Jordan's body. One was "just a little piece of splattered up metal". The other was a .22 caliber and was a hollow point and of the general appearance of the other cartridges found in the bedroom. It could not be

ascertained whether or not it had been fired from the rifle which was found.

The defendant after having been advised of his constitutional rights told the investigating deputy sheriff that he had gotten up with Jordan in Marshville, Monday morning, 18 November 1968. The defendant got a taxicab to take him to Monroe, and Jordan wanted to go with him. In Monroe, the defendant purchased a gallon of whiskey consisting of two quarts of Pembroke and four pints of grain alcohol. They then proceeded to the defendant's home. On the way they took two or three drinks apiece.

> "When he arrived there, his father and mother were present and they told him that if he was going to start drinking, they were going to leave. He told them not to leave and he would leave himself. And that he and Jordan left the house and went out to the barn in back of the house in the edge of the woods. That they started drinking. They were drinking on this Pembroke; that they drank up one quart and started on the second quart, and that Jordan went to putting his arm around him, apparently loving him up; he told him to keep his hands off him, that he didn't go for that kind of stuff; and they left the barn and went back to the house, and there wasn't anybody present, that is, that his mother and father had left, and that they, he and Jordan, were the only ones there at that time.
>
> He did not tell me what time they went back to the house but they had stayed at the barn a good long while. . . ."

Another officer testified

> "And I asked him what had happened at the house, he was hesitant about what happened at the house. I asked him why did he shoot Parks. When I asked why he shot Parks he said, he told me, says, 'Listen, don't no god damn body mess with me.' . . ."

A neighbor of the defendant who lived about a half a mile away testified that he saw the defendant about 7:00 o'clock P.M. on 18 November 1968 and that at that time the defendant was drunk and wanted to be taken home. He stated that there was somebody hurt up at his house and he wanted someone to go with him and see. About this time an ambulance and officers went by, and the neighbor went on down to the defendant's house but did not take the defendant with him. It was at this time that Jordan's body was found in the house by the officers.

Defendant contends that the court committed error in overrul-

ing 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, including homicide cases. *State v. Lawson,* 6 N.C. App. 1, 169 S.E. 2d 265 (1969), (certiorari denied, 276 N.C. 85).

[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 to require the submission of the case to the jury. The trial judge did not commit error in overruling the motion for nonsuit. The evidence in this case places it in line with *State v. Lawson, supra,* and distinguishes it from the evidence in the case of *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

[3] 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, Homicide, § 6, p. 198.

In this case there is no evidence in the record tending to show that the death of Jordan was caused by culpable negligence. The evidence is to the contrary. The defendant's statement about Jordan attempting to fondle him at the barn and his later statement "[l]isten, don't no god damn body mess with me" and the fact that Jordan was shot twice and not just once all tend reasonably to show an intentional shooting of Jordan by the defendant.

All assignments of error presented on the record have been considered, and we find no prejudicial error.

No error.

PARKER and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. DEWEY ATKINSON

No. 707SC77

(Filed 25 February 1970)

1. Constitutional Law § 32; Criminal Law § 143— probation revocation hearing — right to counsel

A defendant charged with the violation of conditions of a probation sentence is entitled to representation by an attorney.

2. Constitutional Law § 32— right to counsel — time to prepare defense

The right of a defendant to be represented by counsel is not complied with as a mere formality and does not contemplate that counsel shall be compelled to act without being allowed reasonable time within which to understand the case and prepare for the defense.

3. Constitutional Law § 31; Criminal Law §§ 91, 143— probation revocation hearing — time to prepare defense — denial of continuance

Attorney retained to represent defendant at a probation revocation hearing did not have a fair opportunity to acquaint himself with the law and the facts of the case, and defendant is entitled to a new hearing, where defendant, who was represented by court-appointed counsel at his trial a month before the revocation hearing, diligently endeavored while confined in jail to retain counsel to represent him at the hearing after being notified of the hearing the day before it was held, but was unsuccessful in doing so until an hour before the hearing, and the court denied a motion for continuance of the hearing made by defendant's counsel.

ON certiorari to NASH County Superior Court to review judgment of *Parker, J.*, entered 18 June 1969.

At the March-April 1969 Session of the Superior Court of Nash County, two true bills of indictment were returned against the defendant. In one he was charged with the unlawful possession of narcotic drugs on 9 February 1969. In the other, he was charged with the unlawful possession of narcotic drugs on 10 February 1969. Upon application and proper finding of indigency, W. O. Rosser was appointed by Judge Hubbard on 1 April 1969 to represent the defendant.

On 19 May 1969 the defendant entered a plea of guilty in each case. In one case he was given a sentence of two years, and in the other case he was given a sentence of not less than 3 nor more than 5 years. In both cases Judge May suspended the sentence and placed the defendant on probation for a period of 5 years.

On 16 June 1969 R. L. Gay, State Probation Officer, issued a warrant to the Sheriff of Pitt County to arrest the defendant so that

he could be returned to court to answer a charge of violation of the terms of probation. On the same day, 16 June 1969, pursuant to this warrant, the defendant was taken into custody. The following day on 17 June 1969 at 12:30 p.m., R. L. Gay, State Probation Officer, delivered a notice to the defendant pursuant to the provisions of Sec. 15-200.1 of the General Statutes of North Carolina advising the defendant that he planned to submit the attached report relating to the alleged violations of the terms and conditions of probation to the Judge of the Superior Court. The defendant acknowledged receipt of this notice on 17 June 1969. The report, in addition to setting out the alleged violation of the terms and conditions of probation, concluded:

> "The hearing in this case is set for Superior Court on the ..... day 18, 1969, at 2:30 P.M.
>
> This the 18 day of June, 1969.
>
> s/ R. L. Gay
> State Probation Officer"

On 17 June 1969, which was Tuesday, and while the defendant was still in jail in Pitt County, he got in touch with Mr. Leroy Scott, an attorney. Mr. Scott in turn communicated with Judge Parker, who was holding the Nash County Court, and requested a continuance. Judge Parker advised Mr. Scott that since he was on special assignment and his jurisdiction would only last the one week, he was unwilling to continue the case. Mr. Scott thereupon advised Judge Parker that he had been approached about employment in the case and that the defendant would just have to secure the services of another attorney.

The defendant did undertake to procure the services of "Attorney Diedrick," and Attorney Diedrick advised the defendant in the presence of Probation Officer Gay that he could not accept the case because he had to be in Raleigh at that time in another matter. The defendant then had someone communicate with Mr. W. O. Rosser, an attorney in Whitakers, N. C., to represent him. (Mr. Rosser had represented the defendant in the original trial in May.) This occurred sometime during the night of 17 June, and at a time when the defendant was still in jail in Pitt County. Mr. Rosser advised the defendant's messenger that he was scheduled to be in District Court in Tarboro, N. C., the morning of 18 June 1969 at 9:30, and that the messenger should meet him in the District Court in Tarboro at 9:30. The messenger missed Mr. Rosser at 9:30 a.m., and again later in the morning at the Patrol Station in Tarboro. Mr. Rosser re-

turned to his office in Whitakers where he received a telephone call, "probably an hour ago and I came immediately to the courtroom."

The record further reveals that sometime during the evening of 17 June 1969 or the morning of 18 June 1969 the defendant arranged for a $2,000.00 bail bond for his appearance in court in Nash County at 2:30 p.m. on 18 June 1969.

At the start of the hearing before Judge Parker, Probation Officer Gay stated that he had served notice on the defendant at 12:30 p.m. the day before together with a bill of particulars showing what he would be charged with, and that the defendant had denied all of the charges and thereupon Probation Officer Gay had subpœnæd witnesses to testify in the case. W. O. Rosser, the attorney for the defendant, duly moved the court for a continuance and stated:

> ". . . I was notified as of just a short while ago, if the Court pleases, and I think that if the State is entitled to have witnesses to show that his probation has been violated that we are entitled to get evidence to satisfy the Court on his behalf as to whether or not there has been a violation."

In answer to this motion the Court stated:

> ". . . This was served at 12:30 yesterday for him to be here this afternoon. I don't know how many attorneys there are between Greenville and Nashville, which I assume is some 65 or 70 miles or more, but he has had an opportunity to get his attorneys and to get his witnesses, and the motion for continuance will be denied."

At the conclusion of the hearing Judge Parker entered a judgment revoking probation and placing into effect the sentence in both cases. This judgment was entered 18 June 1969. To the findings, rulings and judgment the defendant in apt time objected, took exceptions and gave notice of appeal.

On 27 June 1969 W. O. Rosser filed an affidavit to the effect that he had not been retained to represent the defendant on appeal, and that he had no objection to any other attorney representing him and would be glad to furnish any information that any other attorney might desire and which he had available.

On 17 July 1969 Judge Fountain found the defendant to be an indigent and in need of services of an attorney, and thereupon appointed Mr. Leon Henderson to represent the defendant. Time for perfecting the appeal having elapsed, Mr. Henderson, on behalf of the defendant, filed a petition for writ of certiorari which was granted by this Court.

Attorney General Robert Morgan by Staff Attorney Edward L. Eatman, Jr., for the State.

Fields, Cooper & Henderson by Leon Henderson, Jr., for defendant appellant.

CAMPBELL, J.

We are not passing upon the merits of this case as to whether the defendant violated the conditions of his probation sentence. The determination of that will be at a subsequent hearing. We are confronted with whether the defendant's constitutional rights have been denied in the trial below.

[1] A defendant charged with the violation of conditions of a probation sentence is entitled to representation by an attorney. *Mempa v. Rhay,* 389 U.S. 128, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967); *McConnell v. Rhay,* 393 U.S. 2, 21 L. Ed. 2d 2, 89 S. Ct. 32 (1968).

[2] Where a defendant is entitled to counsel, this requirement is not complied with as a mere formality and

> ". . . It does not contemplate that counsel shall 'be compelled to act without being allowed reasonable time within which to understand the case and prepare for the defense.'" *State v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322 (1943).

North Carolina General Statutes 15-200.1 provides for notice on the part of the probation officer to the accused that he proposes to pray for revocation of probation. This statute further provides:

> ". . . The Court, at the request of the defendant, shall grant a reasonable time for the defendant to prepare his defense. . . ."

The North Carolina Supreme Court in *State v. Farrell, supra,* stated:

> "Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal. . . . This rule is so firmly established in this and other jurisdictions as to become axiomatic. It is not debated here.
>
> But when the motion is based on a right guaranteed by the Federal and State Constitutions, 14th Amend., U.S. Const., Art. I, sections 11 and 17, N. C. Const., the question presented is one of law and not of discretion, and the decision of the court below is reviewable."

[3] The record in this case discloses that the defendant was an indigent in May and had court-assigned counsel representing him

at his trial. At the hearing one month later while confined in jail many miles distant from the court where he was to be tried, he nevertheless diligently endeavored to retain counsel. He was unsuccessful in doing so until about one hour before the hearing. It is obvious that the attorney retained by the defendant did not have "a fair opportunity to acquaint himself with the law and the facts of the case." *State v. Farrell, supra.*

New hearing.

PARKER and HEDRICK, JJ., concur.

LEXINGTON STATE BANK v. SUBURBAN PRINTING COMPANY OF LEXINGTON; ALBERT W. BROWNING AND WIFE, KATE T. BROWNING; AND L. F. McCASKILL, JR., AND WIFE, PEGGY McCASKILL

No. 7022SC11

(Filed 25 February 1970)

1. Appeal and Error § 6— orders appealable — striking further answer and defense

When a motion to strike an entire further answer and defense is granted, an immediate appeal is available, since such motion is in substance a demurrer.

2. Usury § 1— action on demand note — 6½ % interest — defense of usury

In an action by a bank to recover on a demand note which was executed by a corporate defendant and endorsed by individual defendants to secure a loan to the corporation of $30,000, the transaction is governed by the 6 per cent interest limitation set forth in G.S. 24-2, and defendants are entitled to the defense that the 6½ per cent annual interest rate on the note is usurious; the bank's contention that the 6½ per cent rate was permissible under G.S. 24-8 in that the loan was to a corporation for five years or more is inconsistent with the theory of the bank's complaint seeking recovery on a demand note.

3. Pleadings § 42— action on demand note — striking of defendants' irrelevant pleadings

In an action by a bank to recover on a demand note executed by a corporate defendant and endorsed by individual defendants, the trial court properly struck those portions of defendants' answer which consisted of confusing and redundant allegations of misconduct by the bank in obtaining possession of the collateral, selling it at auction, and applying a portion of the proceeds to attorneys' fees.

APPEAL by defendants Suburban Printing Company of Lexington, Albert W. Browning and wife, Kate T. Browning, from *McConnell, J.*, June, 1969 Civil Session, DAVIDSON Superior Court.

Plaintiff filed this civil action on 22 January 1969 to recover $27,649.13 allegedly due and owing on a demand note executed by the corporate defendant to secure a loan of $30,000. The note was endorsed by the individual defendants. The complaint alleges that the note was secured by a security agreement, a copy of which is attached to the complaint. The security agreement purports to pledge as collateral security for the payment of the note various items of personal property owned by the corporate defendant. The ancillary remedy of claim and delivery for the property pledged under the agreement was instituted at the same time the complaint was filed.

The corporate defendant and the defendants Browning filed answer responding to the complaint and setting forth five purported "further answers and defenses" and a sixth "further answer and defense and counterclaim." Plaintiff's motion to strike all of the further answers was allowed on the ground that the allegations contained therein were irrelevant, immaterial and improper. Defendants appealed.

Walser, Brinkley, Walser & McGirt by Charles H. McGirt for plaintiff appellee.

Ned A. Beeker for defendant appellants.

GRAHAM, J.

[1] When a motion to strike an entire further answer and defense is granted, an immediate appeal is available since such motion is in substance a demurrer. *Bank v. Easton,* 3 N.C. App. 414, 165 S.E. 2d 252; *Insurance Co. v. Surety Co.,* 1 N.C. App. 9, 159 S.E. 2d 268.

[2] Subparagraphs A, B and C of appellants' sixth further answer and defense and counterclaim allege in substance that the interest charged under the terms of the note and the interest paid by the corporate defendant during the period of June through December of 1968 constituted usurious interest. The amount paid during that period is also alleged.

The interest called for by the note is in the amount of 6½ per cent per annum. Plaintiff contends in its brief that this rate of interest was permissible under G.S. 24-8 in that the loan was to a corporation, was in the amount of $30,000, and was for a period of five years or longer. The argument as to the five-year duration is based

on what plaintiff says was a requirement that prepayments be made against the loan in the amount of $500 a month and that therefore the amount of time required to repay the loan plus interest exceeded five years. However, the note sued on is a demand note and plaintiff's theory as set forth in the complaint is that the unpaid balance is due because demand has been made, not because there has been a default in monthly payments under the terms of some collateral agreement.

Before amendment by the 1969 Session of the General Assembly and at the time of the transaction here in question, G.S. 24-8 set the legal interest limit for loans of $30,000 or more to corporations at an annual rate of 8%. However the statute specifically provided, "that this section shall not be applicable to any loan which matures less than five (5) years from the date thereof or which provides for repayments of principal to be made by the borrower in an amount in excess of one fifth of the total principal indebtedness during any year of the first five (5) years of the term of such loan; . . ." The pleadings before us reflect a demand note securing a loan made 2 May 1968 and maturing sometime before complaint was filed on 22 January 1969 as the result of demand having been made. Under such circumstances the loan was governed by interest limits in the amount of 6 per cent as set forth in G.S. 24-2. In our opinion appellants have sufficiently alleged facts which, if proven, would entitle them to the relief provided for in that section. The order striking subparagraphs A, B and C of appellants' sixth further answer and defense and counterclaim is therefore reversed.

[3] The court's order as it applies to the remaining allegations of appellants' further answers is affirmed. Those portions of the answer cover more than ten pages in the record and consist of confusing and redundant allegations of misconduct on the part of plaintiff in obtaining possession of the collateral after complaint was filed, selling it at auction, and applying a portion of the proceeds toward payment of attorneys' fees incurred in connection therewith. Appellants do not allege that the fees paid were unreasonable, or that they were unlawful under the terms of the security agreement, or by reason of G.S. 25-9-504 which specifically authorizes the payment of expenses of a sale and reasonable attorneys' fees from the proceeds of the sale before applying the balance to the indebtedness.

It is possible that appellants were attempting to allege that in disposing of the collateral plaintiff failed to act in good faith as required by G.S. 25-1-203 or in a commercially reasonable manner as required by G.S. 25-9-504. The state of their pleadings, however, is

such as to render it impossible to tell the theory of their purported affirmative defenses, how they claim to have been damaged, or the relief they seek.

The order granting plaintiff's motion to strike provided that the appellants would have thirty days from the date of the order within which to amend their answer if they elected to do so. If there are affirmative defenses which may properly be pleaded, defendants will have thirty days from the date this opinion is certified to the Superior Court in which they may amend their answer.

That portion of the court's order striking subparagraphs A, B and C of appellants' sixth further answer and defense and counterclaim is reversed.

The remaining portions of the order are affirmed.

BROCK and BRITT, JJ., concur.

PAUL A. BENNETT REALTY COMPANY v. CARL HOOTS, TRADING AS HOOTS REALTY COMPANY

No. 7021DC124

(Filed 25 February 1970)

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

An appeal from a judgment of nonsuit presents the question of whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury.

2. Brokers and Factors § 6; Pleadings § 36; Trial § 26— action by corporation — acts of corporate owner as individual — fatal variance

In this action by plaintiff realty company, a corporation, to recover from defendant real estate agent one-half the sales commission for sale of a farm to the owner of plaintiff corporation and his wife, there was a fatal variance between plaintiff's allegations and proof where plaintiff alleged that an express or implied contract existed between it as selling broker and defendant as listing broker for division of the sales commission, but plaintiff's evidence showed that all the negotiations between the corporation owner and defendant were by the corporation owner as an individual, and plaintiff corporation failed to introduce evidence of any contract between it and defendant.

3. Pleadings § 36; Trial § 26— correspondence of allegations and proof

A plaintiff must make out his case *secundum allegata.*

4. Pleadings § 36; Trial § 26— nonsuit for variance

When there is a material variance between allegation and proof, motion for judgment of nonsuit will be allowed.

APPEAL by plaintiff from *Henderson, District Judge,* 28 July 1969 Session, FORSYTH District Court.

This action was instituted in the District Court of Forsyth County by Paul A. Bennett Realty Company, a corporation, against the defendant, Carl Hoots, Trading as Hoots Realty Company, to recover one-half of the sales commission for the alleged sale of a farm in Yadkin County, North Carolina, to Paul A. Bennett and wife, Zephya P. Bennett. The case came on for trial before Henderson, District Judge, without a jury, on 5 August 1969, where all of the evidence tended to show the following facts:

The defendant Hoots, a resident of Yadkin County, and a licensed real estate broker, with his office in Forsyth County, North Carolina, sometime in January 1967 had listed with him for sale by Mr. and Mrs. E. B. Mills, Jr., a farm in Yadkin County, North Carolina. On 28 January 1968, Paul Bennett, also a resident of Yadkin County, North Carolina, owner of the plaintiff corporation, with its office in Forsyth County, North Carolina, telephoned the defendant that he had a prospective purchaser for the Mills' farm, and Paul Bennett asked the defendant if "he would cooperate with him on commissions". Paul Bennett testified that the defendant agreed to cooperate with him on the sales commission if the property was sold but that he subsequently advised the defendant that he was unable to sell the property to the prospective purchaser, Jacobsen, but that he was interested in the property himself, and Bennett testified that defendant again agreed to cooperate with him on commissions.

During this conversation, Bennett and Hoots made arrangements for Bennett and his wife to see the farm which they did on the following Sunday afternoon. As they were inspecting the property they came upon a large barn, and in talking about the condition of the barn Bennett remarked, "Well, I can take part of the commissions and fix up the barn." Hoots agreed with him and Bennett then said, "Well, I think we will buy it."

Paul Bennett testified that they negotiated with Hoots and Mills for several weeks and that they had many problems reaching an agreement but ". . . we finally worked it out and purchased the property." Bennett testified that at the closing ". . . I asked Mr. Hoots if he wanted me to take out of the proceeds my share of the

commission, and/or did he want to write me a check. He said 'What check?' I said, 'of course, the commission,' and he had a couple of words to say that I would rather not repeat, and said he was not going to pay me anything. . . ."

Mr. Bennett also testified that after he and his wife had agreed to purchase the property from Mr. and Mrs. Mills, the defendant requested that he prepare a contract on his stationery to be forwarded to Mr. and Mrs. Mills. Mr. Bennett testified that he prepared the contract on his stationery to purchase the property which he forwarded to the defendant who in turn obtained an acceptance of the contract from Mr. and Mrs. Mills. The contract indicated that the plaintiff corporation was the sales agent, Mr. and Mrs. Mills were the sellers and Mr. and Mrs. Bennett were the purchasers. The defendant Hoots was not in any way a party to the contract.

The plaintiff also offered evidence tending to show that it was customary that sales commissions would be divided between the listing broker and the selling broker. The defendant offered evidence denying any agreement to divide commissions with the plaintiff corporation. At the close of all of the evidence, the defendant's motion for a judgment as of nonsuit was allowed. To the entry of the judgment of nonsuit, the plaintiff corporation excepted and appealed to this Court.

Roberts, Frye and Booth, by Leslie G. Frye, for the plaintiff appellant.

Frank J. Yeager for the defendant appellee.

HEDRICK, J.

[1] The sole question before this Court is whether the trial court committed error in granting the defendant's motion for judgment as of nonsuit. An appeal from a judgment as of nonsuit presents to the court the question of whether the evidence, considered in the light most favorable to the plaintiff, is sufficient to be submitted to the jury. *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519 (1967). Whether the evidence is sufficient to carry the case to the jury is a question of law and is always to be decided by the court. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463 (1943).

[2-4] In the present case, the plaintiff, a corporation, alleged that an express or implied contract existed between it and the defendant Hoots for one-half of the commissions the defendant received from the sale of real estate. The plaintiff alleged that a custom existed

in the real estate profession whereby a listing broker would forward to the selling broker one-half of the commission received for the sale of real estate and that the defendant was aware of that custom and had agreed with the plaintiff corporation to honor the custom but that he had subsequently refused to do so. The evidence presented at the trial by the plaintiff corporation through Paul A. Bennett revealed that all of the negotiations in connection with the sale and purchase of this property were between Paul A. Bennett, individually, and the defendant Hoots. We have searched the record of the proceeding below and have not found one scintilla of evidence which would support the plaintiff corporation's allegations that it was entitled to one-half of the commissions in dispute. There is nothing in the evidence which would serve to notify the defendant that he was dealing with Paul A. Bennett as anyone other than Paul A. Bennett, an individual. The plaintiff corporation failed to introduce any evidence of a contract, either express or implied, between it and the defendant Hoots. "A plaintiff must make out his case *secundum allegata. Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898. There can be no recovery except on the case made by his pleading. *Collas v. Regan,* 240 N.C. 472, 82 S.E. 2d 215. Proof without allegation is no better than allegation without proof. *Messick v. Turnage,* 240 N.C. 625, 83 S.E. 2d 654. When there is a material variance between allegation and proof, motion for judgment of nonsuit will be allowed. *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470." *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786 (1955). See also *Noland v. Brown,* 258 N.C. 778, 129 S.E. 2d 477 (1963); *Lucas v. White,* 248 N.C. 38, 102 S.E. 2d 387 (1958). Whether a variance is material must be determined in light of the facts of each case. *Spaugh v. Winston-Salem,* 249 N.C. 194, 105 S.E. 2d 610 (1958). We believe that in the present case there was a material variance between the allegations and the proof and that the nonsuit was proper; therefore, the judgment of the District Court is affirmed.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE LEE KIRBY

No. 7020SC91

(Filed 25 February 1970)

1. Criminal Law §§ 46, 114— flight of defendant — instructions — expression of opinion

Trial court's instruction that the voluntary flight of a defendant immediately after he is accused of a crime is not a circumstance sufficient in itself to establish his guilt, *held* not to constitute an expression of opinion on the theory that the court implied to the jury that defendant had been formally charged with crime at the time of his flight from a deputy sheriff's car when in fact the deputy had merely told defendant that he wanted to talk to him concerning a robbery. G.S. 1-180.

2. Criminal Law § 46— flight of an accused — circumstance of guilt

Flight of a person after a crime has been committed is a circumstance to be considered with the other circumstances of the case in determining his guilt or innocence.

3. Criminal Law § 46— flight of accused — jury issue

Where at the time of his flight from a deputy sheriff's car the defendant had not yet been formally charged with crime, but defendant knew he was a prime suspect and had heard the sheriff tell the deputy over the car radio to "lock him up," it was proper for the jury to consider the flight of defendant in the light of all the other evidence in determining the probability of guilt or innocence.

4. Criminal Law § 166— the brief — abandonment of exceptions

Exceptions in the record not set out in defendant's brief nor supported by argument or citation of authority will be taken as abandoned by defendant. Rule of Practice in the Court of Appeals No. 28.

ON *Certiorari* to review judgment of Exum, J., 9 June 1969 Criminal Session of ANSON Superior Court.

Defendant was indicted for common-law robbery. He pleaded not guilty. The jury found defendant guilty and judgment was entered on the verdict sentencing defendant to prison as a committed youthful offender. Subsequently this Court granted defendant's petition for *certiorari* to perfect a late appeal.

Attorney General Robert Morgan and Staff Attorney James L. Blackburn for the State.

R. E. Little, III, for defendant appellant.

PARKER, J.

In this case the State offered evidence tending to show that on the night of 11 September 1968 the defendant, in company with

others, assaulted one Tyler Stewart and took from Stewart his pocketbooks and money and a .32 Colt automatic pistol; that on the same night the defendant was seen in possession of the pistol; and that a few days thereafter defendant had pawned the pistol. A deputy sheriff, testifying for the State, testified that on 14 or 15 September 1968 he had seen the defendant and told him he wanted to talk to him concerning the robbery of Tyler Stewart; that the defendant had then ridden in the patrol car with the deputy to the county jail; that while still in the patrol car the deputy had called the sheriff on the radio and asked his assistance in questioning the defendant; and that the sheriff said "to lock him up and in a few minutes he'd be over there," whereupon defendant had jumped out and run.

[1] In charging the jury, the trial judge said:

> "Now, members of the jury, I instruct you that the voluntary flight of a defendant immediately after he is accused of a crime that has been committed is not a circumstance sufficient in itself to establish his guilt, but it is a circumstance which, if proved by the State beyond a reasonable doubt, you may consider in the light of all the other evidence in the case in determining the probability of the defendant's guilt or innocence. You and you alone must determine whether the evidence of flight shows a conscious guilt and the significance of such evidence in this case, if you find that there was flight and find that beyond a reasonable doubt."

Defendant's sole exception and assignment of error brought forward in his brief is directed to this portion of the trial court's charge to the jury. In this assignment of error there is no merit.

[2] It is well settled that flight of a person after a crime has been committed is a circumstance to be considered with the other circumstances of the case in determining his guilt or innocence. 29 Am. Jur. 2d, Evidence, § 280, p. 329; Annotation, 25 A.L.R. 886. North Carolina decisions are in accord. *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Blanks,* 230 N.C. 501, 53 S.E. 2d 452; *State v. Peterson,* 228 N.C. 736, 46 S.E. 2d 852; *State v. Payne,* 213 N.C. 719, 197 S.E. 573; *State v. Hairston,* 182 N.C. 851, 109 S.E. 45; *State v. Malonee,* 154 N.C. 200, 69 S.E. 786. "While the flight of an accused person may be admitted as a circumstance tending to show guilt, '(i)t does not create a presumption of guilt, nor is it sufficient standing alone, but it may be considered in connection with other facts in determining whether

the combined circumstances amount to an admission.'" *State v. Gaines, supra.*

[1-3] Defendant contends that the challenged instruction was nevertheless erroneous and prejudicial in this case in that it assumed that at the time defendant fled he had been accused of the crime, whereas the evidence was that at that time no formal charge had been placed against him and the officer had merely informed defendant that he wanted to talk to him concerning the robbery. Defendant argues that the court thereby implied to the jury that the defendant had in fact been formally charged with the crime and that he had fled for the purpose of avoiding prosecution. Defendant argues that this constituted an expression by the court of its opinion upon the evidence in violation of G.S. 1-180. We do not so understand the charge nor do we believe the jury could have been in any way misled thereby to defendant's prejudice. While at the time he fled the defendant had not yet been formally accused in the sense of being served with a warrant or having a bill of indictment returned against him, the evidence was sufficient to justify a jury finding that the defendant knew, at the time he fled, that he was "accused" of the crime in the sense of being a prime suspect and that he was likely to be arrested and charged with its commission. He had just heard the sheriff tell the deputy on the radio to "lock him up." Under these circumstances it was proper for the jury to consider the flight of the defendant in the light of all the other evidence in determining the probability of defendant's guilt or innocence, and the court properly so charged.

[4] The remaining exceptions in the record are not set out in defendant's brief nor is any reason or argument stated or authority cited to support them. They will therefore be taken as abandoned by him. Rule 28, Rules of Practice in the Court of Appeals.

No error.

CAMPBELL and HEDRICK, JJ., concur.

TIGHTS, INC. v. INDIAN HEAD HOSIERY COMPANY A DIVISION OF JOSEPH BANCROFT & SONS CO.

No. 7018SC76

(Filed 25 February 1970)

Pleadings §§ 29, 32; Courts § 9— judgment sustaining demurrer with leave to amend — dismissal of amended complaint

Where a judge of the superior court sustained the demurrer to the complaint and allowed plaintiff thirty days in which to file an amended complaint, the judge in effect ruled that the original complaint contained a defective statement of a good cause of action, and therefore another superior court judge was without authority to dismiss the amended complaint on the ground that it failed to state a cause of action.

APPEAL from *Collier, J.*, 22 September 1969 Session of GUILFORD Superior Court.

Plaintiff appealed from a judgment sustaining a demurrer to the action and dismissing the action. The only matters involved in the decision of this case are the pleadings and judgments entered thereon.

The plaintiff's action is based on the following alleged facts: The plaintiff is a corporation engaged in the development and promotion of a garment known as ladies panty hose. Prior to 1967 these garments were available to women and were produced by knitting ladies seamless stockings designed to extend to the waist of the wearer, slitting the stocking from the waist to the crotch area, adding additional fabric between the two stockings and then sewing the slit areas together. Joseph G. Walser, Jr., and O. R. York, of High Point, North Carolina, promoters of the plaintiff corporation, developed a process to produce panty hose without the addition of a crotch piece. They took their process to U. S. Industries, Inc., of Grenada, Mississippi, where samples were produced and data accumulated which indicated that their discovery could result in a savings of from fifty to seventy-five cents per dozen of such garments manufactured.

The plaintiff corporation was formed in October 1967 and received from York and Walser an assignment of their unpatented ideas and technical know-how as well as assignments of United States Letters Patent Number RE25, 360, and United States Letters Patent Number 3344621. In November 1967, Walser, as president of the plaintiff corporation, contacted Fred J. Wiley, vice-president of defendant corporation, and discussed his product with him. Later the same month, Walser again called on Wiley and at Wiley's request left with him samples of his product in order that certain tests could be made. A reasonable royalty was to be fixed after these

tests were completed. Shortly after this meeting the defendant began to produce and market panty hose in which the plaintiff corporation's ideas were used and has refused to negotiate with the plaintiff regarding a reasonable royalty.

On 13 March 1969, the defendant filed a demurrer and on 1 May 1969, Judge Lupton signed an order sustaining the demurrer and allowing the plaintiff thirty days within which to file an amended complaint.

The plaintiff filed an amended complaint on 23 May 1969 in which it alleged that the defendant believed it impossible to produce a commercially acceptable garment without the additional crotch piece prior to Walser's disclosure to them and that even though the ideas, information and processes revealed by Walser had been of great benefit to them, they have continued to refuse to pay just compensation, although demand therefor has been made and the parties contemplated such payment at the time of disclosure.

The defendant demurred to the amended complaint on 17 June 1969 and on 30 September 1969, the following order was entered by Collier, J.:

> "THIS CAUSE coming on to be heard before the undersigned Judge presiding at the September 22nd, 1969 session of the General Court of Justice for Guilford County Superior Court Division, at Greensboro, upon the Demurrer of the defendant to the Amended Complaint for that said Amended Complaint fails to state a cause of action and the Court being of the opinion that the Demurrer should be sustained.
>
> "NOW, THEREFORE, it is ORDERED, ADJUDGED, AND DECREED that said Demurrer be, and the same hereby is, sustained and that the action be, and the same hereby is, dismissed."

To the entry of this order the plaintiff excepted and appealed to this Court.

Smith, Moore, Smith, Schell and Hunter, by Jack W. Floyd and Harold N. Bynum, for the plaintiff-appellant.

McLendon, Brim, Brooks, Pierce and Daniels, by C. Allen Foster, and Darby and Darby, by William F. Dudine, Jr., and William Van Wagenen, Jr., for the defendant-appellee.

HEDRICK, J.

The only question before this Court for determination is whether the order entered by Collier, J., sustaining the defendant's demurrer and dismissing the plaintiff's action is proper in light of the effect of the order entered by Lupton, J., earlier in the action. In order to answer this question it is essential that we first determine the effect of the order entered by Judge Lupton on 1 May 1969. Judge Lupton, while sustaining the demurrer of the defendant, allowed the plaintiff corporation thirty days in which it could file an amended complaint. "When a judge of the Superior Court sustains a demurrer to the complaint and grants plaintiff time to file an amended complaint, the order is in effect a ruling that the complaint contains a defective statement of a good cause of action and is subject to amendment, and therefore another Superior Court judge is bound by such ruling even if the ruling is erroneous, since such order cannot be set aside by another Superior Court judge for error of law, nor can it be reviewed on appeal in the absence of an exception thereto." 6 Strong, North Carolina Index 2d, Pleading, § 32; *Burrell v. Transfer Co.*, 244 N.C. 662, 94 S.E. 2d 829 (1956).

In the *Burrell* case, *supra,* Judge (now Justice) Sharp sustained a demurrer *ore tenus* to the original complaint and allowed the plaintiff thirty days in which to file an amended complaint. After the amended complaint was filed, the defendant moved to dismiss the action. Judge Phillips allowed the motion to dismiss stating that he believed the plaintiff had stated a defective cause of action and that therefore Judge Sharp was correct in sustaining the demurrer and that her dismissal of the action was correct. The Supreme Court pointed out that Judge Sharp had not dismissed the action but had instead given the plaintiff time in which to file an amended complaint, and that Judge Phillips had no authority to dismiss the action and reversed his judgment.

In the present case when Judge Lupton sustained the demurrer and allowed the plaintiff thirty days in which to file an amended complaint, he in effect ruled that the original complaint contained a defective statement of a good cause of action. Whether the complaint contained a defective statement of a good cause of action or a statement of a defective cause of action was a question of law and if Judge Lupton's decision thereon was incorrect it was erroneous. *Burrell v. Transfer Co., supra.* Judge Collier was without authority to set aside Judge Lupton's decision on this question; therefore, it was error for him to dismiss the plaintiff's action on the ground that it contained a statement of a defective cause of action. This Court

will not undertake to review the judgment entered in this action by Judge Lupton since no exception was taken thereto at the time it was entered.

For the reasons stated above the judgment of Collier, J., dismissing the action instituted by the plaintiff is

Reversed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ERIC PATRICK BROWN

No. 7018SC148

(Filed 25 February 1970)

1. Criminal Law § 155.5— failure to docket record on appeal in apt time

Where the record on appeal was docketed in the Court of Appeals 237 days after the entry of the judgment appealed from, the appeal is subject to dismissal for failure to docket the record on appeal within the time required by Rule 5.

2. Criminal Law § 112— instructions — necessity for defining "reasonable doubt"

In the absence of a request, the trial judge is not required to define the term "beyond a reasonable doubt" in charging the jury in a criminal case.

3. Robbery § 3— robbery by violence or intimidation — condition of premises where robbery occurred

In this common-law robbery prosecution wherein the State's evidence tended to show that defendant, in company with others, broke into a store, did extensive damage to the interior of the store and to merchandise displayed therein, and then demanded that the proprietor give him certain merchandise, with which demand the proprietor complied, the trial court did not err in the admission of testimony by the investigating police officer as to the condition of the store premises and in the admission for illustrative purposes of photographs of the premises taken by the officer, such testimony being relevant to the State's contention that property had been taken by defendant by violence or intimidation.

4. Criminal Law § 166— abandonment of exceptions and assignments of error

Exceptions and assignments of error for which no reason or argument is stated or authority cited in appellant's brief are deemed abandoned. Court of Appeals Rule 28.

5. Criminal Law §§ 144, 177— remand to have judgment corrected to conform to sentence actually pronounced

Where judgment as contained in the record on appeal from a conviction of common-law robbery imposed a prison sentence upon defendant of "not more than two nor less than six years," but the original transcript taken and certified by the court reporter discloses that the actual sentence pronounced in open court correctly imposed a sentence of "not less than two nor more than six years," the cause is remanded to have the judgment corrected to conform to the sentence actually pronounced in open court.

APPEAL by defendant from *Gambill, J.*, 5 May 1969 Criminal Session of GUILFORD Superior Court.

Defendant was tried on his plea of not guilty to a bill of indictment charging him with the crime of common-law robbery. He was found guilty by the jury, and from judgment imposed on the verdict, defendant appealed.

Attorney General Robert Morgan and Staff Attorney Howard Satisky for the State.

Herman L. Taylor for defendant appellant.

PARKER, J.

[1] The judgment appealed from was entered on 13 May 1969. The record on appeal was docketed in the Court of Appeals on 5 January 1970, which was 237 days after the entry of the judgment appealed from. The rules of this Court require that an appeal be docketed within 90 days after the entry of the judgment appealed from, unless an extension of time not to exceed 60 additional days is obtained from the trial tribunal. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. The record on appeal contains no order of the trial tribunal extending the time for docketing the record on appeal in this case, and in any event the record was docketed more than 150 days after the date of the judgment appealed from. For failure to docket the record on appeal within apt time as required by the rules of this Court, this appeal is subject to dismissal. *Reece v. Reece,* 6 N.C. App. 606, 170 S.E. 2d 546; *Young v. Insurance Co.,* 6 N.C. App. 443, 170 S.E. 2d 90; *State v. Stewart,* 4 N.C. App. 249, 166 S.E. 2d 458; *State v. Farrell,* 3 N.C. App. 196, 164 S.E. 2d 388; *State v. Squires,* 1 N.C. App. 199, 160 S.E. 2d 550.

Nevertheless, in order to determine that justice is done, we have carefully reviewed the record on appeal with respect to all assignments of error brought forward in the appellant's brief.

[2] Defendant assigns as error the failure of the trial judge to

explain the words "reasonable doubt" in his instructions to the jury. The trial judge did not define the term "reasonable doubt," nor did he attempt to do so. However, he did clearly explain to the jury that the burden was upon the State to prove the defendant guilty beyond a reasonable doubt, and that if after weighing all the evidence they had a reasonable doubt as to his guilt, they should give him the benefit of the doubt and acquit him. Defendant made no request to the court to define "reasonable doubt." In the absence of a request, trial judges are not required to define the term "beyond a reasonable doubt" in charging the jury in criminal cases. *State v. Broome,* 268 N.C. 298, 150 S.E. 2d 416; *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295; *State v. Bailiff,* 2 N.C. App. 608, 163 S.E. 2d 398. This assignment of error is overruled.

[3] The only other assignment of error brought forward in appellant's brief relates to the admission in evidence over his objection of testimony of a Greensboro police officer as to the condition of the premises where the crime was committed and admission in evidence of photographs of the premises taken by this police officer. In this assignment of error there is no merit. The State's evidence tended to show that the robbery occurred at approximately 10:30 p.m. on 13 March 1969, and that the defendant, in company with others, had broken into the store premises, had done extensive damage to the interior of the premises and to merchandise displayed therein, and had then demanded that the proprietor give him certain merchandise, with which demand the proprietor had complied. The police arrived in time to see defendant leave the premises. The photographs of the premises were taken at approximately 3:00 a.m. on the following morning, within four and one-half hours of the time the crime was committed. The testimony of the investigating officer as to the condition of the store premises, and the photographs which were admitted for purposes of illustrating that testimony, were properly admitted in evidence. Robbery has been defined as "the felonious taking of money or goods of any value from the person of another, or in his presence, against his will by violence or putting him in fear." *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525; *State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595; *State v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410. Under the circumstances of this case, the testimony of the witness as to the condition of the premises was clearly relevant to the State's contention that property had been taken by the defendant by violence or intimidation.

[4] No reason or argument is stated or authority cited in appellant's brief in support of the remaining exceptions and assignments

of error in the record. Accordingly, these will be taken as abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[5] While not the subject of any exception or assignment of error, we note that the judgment as contained in the record imposed a prison sentence upon the defendant "for the term of not more than two (2) nor less than six (6) years in the State's Prison." The Attorney General has filed with this Court an excerpt from the original transcript, taken and certified to by the court reporter, which discloses that the sentence as actually pronounced by the trial judge in open court correctly imposed a sentence of "not less than two nor more than six years." It is apparent that the judgment as appears in the record was the result of a clerical error. For this error, the cause is remanded to the trial court to have the judgment corrected to conform to the sentence actually pronounced in open court.

Remanded for judgment.

CAMPBELL and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. CARSON LOCKLEAR, JR.

No. 6916SC507

(Filed 25 February 1970)

1. Criminal Law §§ 42, 50, 71; Property § 4— malicious destruction of property — cutting automobile tires — testimony that marks on knife smelled like rubber

In this prosecution for wanton and wilful injury to personal property by cutting automobile tires with a knife, the trial court did not err in the admission of testimony that the blade of a knife, identified as a knife borrowed by defendant and found behind the seat of the car where defendant was riding, had small dark streaks running up and down the blade which smelled like rubber.

2. Criminal Law §§ 89, 169— refusal to strike uncorroborative testimony

Although testimony by a deputy sheriff offered to show prior consistent statements by two State's witnesses with respect to what defendant had told them did not in fact corroborate the testimony of one of the witnesses, the trial court did not commit prejudicial error in refusing to strike the testimony of the deputy sheriff, where the motion to strike was addressed to the entire testimony concerning statements by both witnesses, the court gave proper instructions limiting the jury's consideration of the

testimony to corroborative purposes, and the uncorroborative statement ascribed to one witness was merely cumulative of the testimony of the other witness.

APPEAL by defendant from *Hall, J.*, 7 April 1969 Session, ROBESON Superior Court.

Defendant was charged in a warrant (case number 68-CR-10, 460) with wanton and willful injury to personal property of a value of $100.00; and in a warrant (case number 68-CR-10, 461) with wanton and willful injury to personal property of a value of $200.00. Each of the warrants charged a violation of G.S. 14-160. From conviction upon each warrant in District Court, defendant appealed to Superior Court, where he received a trial *de novo* before a jury upon the two charges which were consolidated for trial.

The State's evidence tends to show that on the night of 11 September 1968 defendant and several other young men went to the Pembroke Fair. They arrived there at about the time the fair was closing for the night. Two automobiles belonging to the Robeson County Sheriff's Department and an automobile belonging to one Jerry L. Soles were parked in a line near the exhibit building.

Defendant borrowed a knife from one of the members of the group of young men, and in a few moments there was a sound of air escaping under pressure. The group left the fairground, returning to the Town of Pembroke, and, according to the testimony of Eric Lyngale, defendant told them ". . . not to say anything about what he told us, said he had cut eight tires, didn't say police cars, or what car. He just told us not to repeat anything, not to say anything, if anything happened."

Two tires on each of the Sheriff's Department's automobiles had been cut and two tires on the automobile belonging to Jerry L. Soles had been cut. The knife which defendant had borrowed was found behind the seat of the automobile where defendant was riding. It had black streaks on the blade which smelled like rubber. The damaged tires on the Sheriff's Department automobiles were valued at $100.00; and the damaged tires on the automobile of Jerry L. Soles were valued at $145.12.

Upon jury verdicts of guilty, the trial judge consolidated the two cases for judgment, and entered judgment that defendant be imprisoned for a term of twelve months in the county jail, to be assigned to work under the supervision of the State Department of Correction. Defendant appealed.

Robert Morgan, Attorney General, by Russell G. Walker, Jr., Staff Attorney, for the State.

J. H. Barrington, Jr., for defendant.

BROCK, J.

[1] Defendant assigns as error that a State's witness was allowed to testify over objection that the blade of the knife, identified as the knife borrowed by defendant and found behind the seat of the car where defendant was riding, had small dark streaks running up and down the blade and the dark streaks smelled like rubber. This assignment of error is overruled.

[2] Defendant assigns as error that a deputy sheriff was allowed to testify as to statements made to him by State's witnesses Jacobs and Lyngale when the officer's testimony was not in fact corroborative.

The witnesses Jacobs and Lyngale, who were with defendant on the night of the alleged offenses, testified for the State and were extensively cross-examined by counsel for defendant. Later the State offered the deputy sheriff's testimony to show prior consistent statements by Jacobs and Lyngale with respect to what defendant had told them.

The witness Lyngale testified that defendant had told them that ". . . he had cut eight tires, didn't say police cars, or what car. He just told us not to repeat anything, not to say anything, if anything happened." The deputy sheriff testified that the witness Lyngale had told him on the day after the offense ". . . that Carson Locklear told them he cut the tires and they better not say anything about it."

The witness Jacobs testified: "Carson Locklear, Jr., said that some tires had been cut at the fairgrounds." The deputy sheriff testified that the witness Jacobs had told him, on the day after the offense, that ". . . Carson told that night, about getting the knife, and said he cut the tires; told them they had better not say anything about it."

Obviously there is a variation between the testimony of the witness Jacobs and the statement ascribed to him by the deputy sheriff. However, the testimony of the witness Lyngale was clearly corroborated by the statement ascribed to him by the deputy sheriff. In each instance before the deputy sheriff was allowed to testify the trial judge gave proper instructions to the jury limiting their consideration of the testimony to corroborative purposes. There was no motion to

strike the testimony of the deputy as to the statement made by Jacobs until after the testimony of the statement made by Lyngale. Then the motion to strike was addressed to the entire testimony concerning both statements. Such a motion was properly overruled by the trial judge because the testimony relating to the statement by Lyngale was clearly corroborative.

We must assume that the jurors were intelligent; that they understood and abided by the trial judge's clear instructions, and that they could tell that a variation existed between the testimony of the witness Jacobs and the statement ascribed to him by the deputy. Also the statement ascribed to Jacobs by the deputy was merely cumulative of the testimony of Lyngale and does not appear to create such prejudice as to warrant a new trial. As stated by Parker, C.J., in *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206, "It is thoroughly established in our decisions that the admission of evidence which is not prejudicial to a defendant does not entitle him to a new trial. To warrant a new trial it should be made to appear by defendant that the admission of the evidence complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued if the evidence had been excluded."

G.S. 14-160, under which defendant was convicted, was amended effective 1 October 1969; but, since defendant's trial, conviction and sentence occurred prior thereto, he is not affected by the amendment.

No error.

BRITT and GRAHAM, JJ., concur.

RUTH MORRIS STEED v. CARSON CLARK CRANFORD

No. 7019SC52

(Filed 25 February 1970)

1. Judgments § 15; Clerks of Court § 2— judgment by default — jurisdiction of clerk — unverified answer

When an unverified answer has been filed to a verified complaint, the clerk of superior court has no authority to enter a judgment by default and inquiry unless and until the unverified answer has been stricken.

2. Judgments § 20— setting aside default judgment — authority of court

A judge of the superior court has the authority to set aside a judg-

ment by default and inquiry that has been entered contrary to the course and practice of the court.

3. Pleadings § 16; Judgments § 20— setting aside default judgment — verification of answer nunc pro tunc — authority of court

A judge of the superior court had authority to set aside a judgment by default and inquiry and to allow defendant to verify *nunc pro tunc* the answer filed to a verified complaint, where the clerk of superior court had entered the default judgment, without notice to defendant or his counsel, on the ground that the answer had not been verified.

APPEAL by plaintiff from an order entered by *Lupton, J.*, in the Superior Court of RANDOLPH County.

On 27 February 1969 plaintiff instituted this action to recover damages to her Chevrolet automobile growing out of a collision between her said Chevrolet automobile and a farm tractor owned and operated by the defendant. At the time of the collision between the Chevrolet automobile belonging to the plaintiff and the farm tractor owned and operated by the defendant, plaintiff's vehicle was being driven by her son, Mark Steven Steed. The collision between the two vehicles was alleged to have occurred on 3 September 1965 under circumstances for which the defendant was liable. The complaint was duly verified and was served, together with summons, on the defendant on 27 February 1969.

On 25 March 1969 the Defendant applied for an extension of time to file pleadings and procured an order to that effect allowing the defendant through 18 April 1969 to file pleadings.

On 18 April 1969 the defendant filed an answer denying the material allegations of the complaint, pleading contributory negligence on the part of Mark Steven Steed, the driver of plaintiff's vehicle, and setting up a counterclaim for property damage to his farm tractor and for personal injuries, all due to the negligence of the said Mark Steven Steed.

This answer was not verified.

On 6 May 1969 the Clerk of Superior Court of Randolph County, on motion of the plaintiff, entered a judgment by default and inquiry for that "no verified answer, demurrer or other pleadings" had been filed by the defendant.

On 8 May 1969 the defendant filed a motion to set aside the judgment by default and inquiry which had been entered on 6 May 1969 and for permission for the defendant to verify the answer.

On 8 May 1969 the defendant served notice on the attorney for

the plaintiff that the motion, a copy of which was attached to the notice, would be presented to the presiding judge at the 9 June 1969 Civil Session of Superior Court of Randolph County.

On 13 June 1969 Judge Lupton entered an order containing the following:

"1. That a judgment designated 'Judgment by Default and Inquiry' was entered by the clerk of Superior Court, Randolph County, North Carolina, in the above styled cause on 6 May, 1969.

2. That at the time of filing the judgment by default and inquiry, the defendant, through counsel, Walker, Bell & Ogburn, had filed an unverified answer on 18 April, 1969, which answer contained a further answer, further defense and counterclaim;

3. That the defendant had obtained through counsel a 20 day extension of time in which to file answer, to and including 18 April, 1969.

4. That at the time of filing the answer on 18 April, 1969, counsel for defendant informed Ottway Burton, attorney for plaintiff, that the defendant was unable, due to illness, to come to counsel's office to verify the answer, and requested a 2 day extension of time in which to file answer so that it could be verified; that this request was made on the afternoon of April 18, 1969, about 2:00 or 3:00 p.m.; that plaintiff's attorney refused to grant this 2 day extension and that counsel for defendant informed the attorney for plaintiff that he was going to file an unverified answer in order to protect his client's (the defendant's) rights;

5. Further, that on 18 April, 1969, an unverified answer was filed by defendant, through counsel, in this cause.

6. Thereafter on 6 May, 1969, a paper writing denominated 'Default and Inquiry Judgment' was entered in this cause;

7. That this default and inquiry judgment was entered without notice to defendant or his counsel; that the defendant nor his counsel of record had any notice of a hearing concerning the entry of said default and inquiry judgment; that neither the defendant nor his counsel had any notice that the default and inquiry judgment was going to be presented; that at no time did either the clerk of Superior Court of Randolph County, North Carolina, or any of his assistants, nor the plaintiff nor plaintiff's counsel, nor any person or persons inform the defend-

ant or his counsel that the default and inquiry judgment would be presented or that there would be a hearing on said default and inquiry nor that a default and inquiry would be requested in this cause;

8. And the court further finds as a fact that defendant has a meritorious defense in the matter and things stated in the complaint and that the ends of justice require that the defendant be allowed to verify his answer nunc pro tunc as of April 18, 1969.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that, in the furtherance of justice and in the discretion of the court, the judgment by default and inquiry, signed by John H. Skeen on May 6, 1969, be stricken and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, in the furtherance of justice and in the discretion of the court, the defendant be and he is hereby allowed to verify his answer filed in the above styled cause nunc pro tunc as of 18 April 1969.

This the 13 day of June, 1969.

HARVEY A. LUPTON
Judge Presiding"

The plaintiff filed exceptions to practically all of the findings of fact contained in the order of Judge Lupton and to the order as a whole, and appealed to the Court of Appeals.

Ottway Burton, for plaintiff appellant.

Walker, Bell and Ogburn by John N. Ogburn, Jr., for defendant appellee.

CAMPBELL, J.

The vehicular collision which is the subject matter of this litigation has given rise to much litigation since its occurrence on 3 September 1965. Another phase of this litigation is contained in the case of *Cranford v. Steed,* 268 N.C. 595, 151 S.E. 2d 206 (1966).

[1] This case presents three questions: (1) Does the Clerk of Superior Court have authority to enter a judgment by default and inquiry in a pending action when there has been filed an unverified answer to a verified complaint? The answer to this is, no. Under such circumstances the Clerk of Superior Court has no authority to enter a judgment until and unless the unverified answer has been stricken.

This exact question was determined in the case of *Rich v. R. R.*, 244 N.C. 175, 92 S.E. 2d 768 (1956) in the following words:

> "When the answer filed 10 September, 1954, by all defendants and raising serious issues of fact, remained on file without challenge until 12 April, 1955, neither the plaintiff nor the clerk was at liberty to ignore it even though deficient in respect of verification by the individual defendants. Plaintiff's remedy was by motion, after due notice to the opposing parties or their counsel, to strike out such answer and then for judgment for want of answer. . . ."

[2] The second question presented is, where a judgment by default and inquiry has been entered contrary to the course and practice of the court, does the Judge of the Superior Court have the authority to set it aside? The answer to this question is, yes. *Rich v. R. R., supra.*

[3] The third question presented is, under the facts and circumstances of this case, did Judge Lupton have the authority to allow the defendant to verify, *nunc pro tunc,* the answer theretofore filed by him? The answer to this question is, yes. *Rich v. R. R., supra.*

The order of Judge Lupton is, in all respects,

Affirmed.

PARKER and HEDRICK, JJ., concur.

MARK STEVEN STEED v. CARSON CLARK CRANFORD

No. 7019SC53

(Filed 25 February 1970)

APPEAL by plaintiff from an order entered by *Lupton, J.*, in the Superior Court of RANDOLPH County.

Ottway Burton for plaintiff appellant.

Walker, Bell and Ogburn by John N. Ogburn, Jr., for defendant appellee.

CAMPBELL, J.

This is a companion case to *"Ruth Morris Steed v. Carson Clark Cranford"* decided this same day.

The facts in this case and in the *Ruth Morris Steed* case are exactly the same insofar as material, the only difference being that in this case, Mark Steven Steed was the driver of the Chevrolet automobile owned by his mother, the plaintiff in the other case, Ruth Morris Steed. In this case Mark Steven Steed seeks to recover damages for personal injuries.

Nothing would be gained by repetition, and on authority of *Ruth Morris Steed v. Carson Clark Cranford* the order of Judge Lupton, in all respects, is

Affirmed.

PARKER and HEDRICK, JJ., concur.

IN RE: DEVIN R. KLUTTZ, LOREE KLUTTZ AND MICHELLE T. KLUTTZ

No. 7019SC95

(Filed 25 February 1970)

1. Constitutional Law § 26— Full Faith and Credit — interlocutory order

The Full Faith and Credit Clause of the U. S. Constitution, Art. IV, § 1, does not conclusively bind the courts of this state 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.

2. Divorce and Alimony § 22— jurisdiction to determine child custody — physical presence in State

The courts of this State have jurisdiction to enter orders providing for the custody of minor children when the children are physically present in this state. G.S. 50-13.5(c)(2)(a).

3. Divorce and Alimony § 22— modification of foreign child-custody decree

When an order for custody has been entered by a court in another state, a court of this state may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order. G.S. 50-13.7(b).

4. Divorce and Alimony § 22— foreign child-custody order — discretion of court to decline jurisdiction

Upon a finding of fact that a court in another state has assumed jurisdiction to determine child custody and that the best interest of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court may, in its discretion, refuse to exercise jurisdiction. G.S. 50-13.5(c)(5).

5. Constitutional Law § 26; Divorce and Alimony § 22— foreign child-custody decree — Full Faith and Credit — jurisdiction of court — refusal to hear evidence

In this habeas corpus proceeding to compel the father and paternal grandparents to return the custody of minor children now physically present in this State to the mother, who had been granted custody of the children by the courts of another state, the trial court erred in refusing to hear evidence offered by the father and paternal grandparents on the ground that Full Faith and Credit prevented him from issuing any order other than one which would require compliance with the foreign decree, since the court had jurisdiction to modify the foreign decree upon a showing of changed circumstances, and it does not appear that the court was exercising the discretion to decline jurisdiction granted him by G.S. 50-13.5(c)(5).

APPEAL by respondents, residents of ROWAN County from an order entered on 3 September 1969 by *Seay, J.*, while presiding at the 25 August 1969 Ordinary Mixed Session of FORSYTH County Superior Court.

Petitioner applied for a writ of *habeas corpus* in Rowan County alleging in pertinent part as follows. She and her husband were residents of California. They separated, and petitioner instituted an action there for separate maintenance. Personal service was had on her husband, Herman E. Kluttz. Both parties were present in the California court, and on 14 May 1969, an interlocutory order was entered awarding petitioner custody of the three minor children of the parties. Subsequently she allowed the children to visit their paternal grandparents in China Grove, North Carolina. The respondents, who are the paternal grandparents and her husband, now refuse to return the children to her custody. Seay, J., issued the writ on 26 August 1969 and ordered the respondents to have the children before him on 3 September 1969 in the Superior Court of Forsyth County. From an order requiring respondents to return the children to the custody of the petitioner, respondents appeal.

Woodson, Hudson & Busby by Max Busby for petitioner appellee.

Johnson, Davis & Horton by James C. Davis and Clarence E. Horton, Jr., for respondent appellants.

VAUGHN, J.

[5] The record on appeal contains petitioner's application, the writ of *habeas corpus*, the order of the California court, a transcript of the colloquy between the court and counsel, and Judge Seay's

order. It appears from the transcript of the colloquy between the court and counsel for respondents that the trial judge took the position that the only issue before him was the legality of the California order and declined to hear testimony in the case. Respondents' attorney requested the court to consider certain affidavits and the testimony of the children. The court declined and stated to respondents' counsel:

> "The thing to do was for him to appeal from this order. I don't see anything other than to say that the full faith and credit clause of the United States Constitution prevents me from doing anything other than issuing whatever order is necessary to give full faith and credit to the California order, and that it be complied with. It's not a matter for me to decide who gets custody, somebody else already decided."

The order from which respondents appeal recites in part:

> "[T]he court finding as a fact that the Superior Court of the State of California for the County of San Bernardino had jurisdiction over the parties and the subject matter and that said order is entitled to full faith and credit and that under said order Sharron R. Kluttz is entitled to custody of the aforementioned minor children."

The learned trial judge erred in declining to hear respondents' evidence on the ground that the Full Faith and Credit Clause of the Constitution prevented him from issuing any order other than one which would require compliance with the order previously entered by the California court.

[1-3] The Full Faith and Credit Clause of the United States Constitution, Article IV, § 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. *Rothman v. Rothman,* 6 N.C. App. 401, 170 S.E. 2d 140. The courts of this State have jurisdiction to enter orders providing for the custody of minor children when the children are physically present in this State. G.S. 50-13.5(c)(2)a. When an order for custody has been entered by a court in another state, a court of this state may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order. G.S. 50-13.7(b); *In Re Marlowe,* 268 N.C. 197, 150 S.E. 2d 204.

[4, 5] This is not to say that jurisdiction must be exercised in every custody proceeding where jurisdiction exists. Upon a finding

of fact that a court in another state has assumed jurisdiction to determine the matter *and* that the best interest of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court may, in its discretion, refuse to exercise jurisdiction. G.S. 50-13.5(c)(5). This statute, however, has no application to this appeal because there was no finding of fact that the best interests of the children and the parties would be served by having the matter disposed of in the California court, and it does not appear that the trial judge was acting in the exercise of the discretion granted him.

The judgment entered below is set aside and the cause is remanded for hearing in compliance with this opinion and applicable rules of law.

Reversed.

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

STATE OF NORTH CAROLINA v. ARTHUR JACKSON, ALIAS HARVEY MILLS

No. 7019SC147

(Filed 25 February 1970)

1. Criminal Law §§ 156, 157— necessary parts of record — order allowing certiorari

Where the record did not contain the order of the Court of Appeals allowing defendant's petition for writ of *certiorari*, or any reference thereto, the case is subject to dismissal.

2. Criminal Law § 178— law of the case — nonsuit issue

Decision of the Supreme Court on a prior appeal of defendant's larceny conviction was conclusive on the issue of nonsuit in his appeal of the retrial to the Court of Appeals.

3. Burglary and Unlawful Breakings § 6; Larceny § 8; Criminal Law § 168— instructions on recent possession — retrial — prejudicial error

Where the trial court in the original larceny and burglary prosecution committed reversible error in its instruction on the presumption of guilt arising from the unexplained possession of recently stolen property, failure of the court on retrial to charge on the presumption could not be prejudicial to defendant, the court having eliminated any possibility of error.

STATE *v.* JACKSON

ON certiorari to the Superior Court of ROWAN County to review trial before *Crissman, J.*, 5 May 1969 Session.

The defendant was charged in a proper two-count bill of indictment with burglary in the first degree and felonious larceny. Upon the call of the case for trial at the 5 May 1969 Criminal Session of Superior Court of Rowan County, the Solicitor on behalf of the State announced that the defendant would not be tried on the capital offense, but would be tried for felonious breaking and entering and larceny. To the charge the defendant entered a plea of not guilty. The case was submitted to a jury on the State's evidence, as the defendant elected to introduce no evidence. The jury returned a verdict of guilty as charged, and the court entered a judgment confining the defendant in the State's Prison for not less than 8 nor more than 10 years on the count of felonious breaking and entering with intent to commit larceny, and not less than 5 nor more than 7 years on the count of larceny.

The defendant appealed for errors alleged to have been committed in the trial.

Attorney General Robert Morgan by Staff Attorney James L. Blackburn for the State.

Herman L. Taylor for defendant appellant.

CAMPBELL, J.

[1] Time for filing the appeal expired, and the defendant duly petitioned this Court for a writ of certiorari, which was allowed. The record fails to contain the order allowing the certiorari or any reference thereto, and for failure to submit the complete record, this case is subject to being dismissed.

The evidence on behalf of the State was substantially the same as in the previous trial of this defendant. The defendant had been tried previously for the same offense at the 1 May 1967 Criminal Session of the Rowan Superior Court; and for error in the charge of the court on that trial, a new trial was granted. *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968). Since the facts are set out in that case, it is unnecessary to repeat the factual situation.

[2] In this trial the defendant asserts that there was error in the failure of the court to sustain the defendant's motion for judgment of nonsuit on the charge of larceny. The decision of the Supreme Court in *State v. Jackson, supra*, is conclusive in regard to this assignment of error when the court stated in that decision:

"The denomination of the bills found on the defendant, and Mr. Steele's evidence with respect to his identity, were sufficient to go to the jury on both counts in the indictment."

This assignment of error is indeed frivolous.

The defendant next asserts that the trial judge committed error in the charge to the jury as to the applicable law pertaining to larceny. We have carefully read the charge of the trial court to the jury, and it was fair and completely adequate as to the law involved in the crime of larceny.

[3] The defendant makes a most novel argument in that he assigns as error the failure of the trial court to charge with regard to the inference of guilt arising from the unexplained possession of recently stolen property. The application of this principle was the error in the previous trial of this defendant as pointed out by the Supreme Court in *State v. Jackson, supra.* This time the trial judge did not charge with regard to any inference of guilt arising from the unexplained possession of recently stolen property and thereby completely avoided any error in this regard. It is novel, to say the least, but certainly unsound, to argue that by thus eliminating a possible error, the defendant has been prejudiced.

We have carefully reviewed the record in this case and find no prejudicial error.

No error.

PARKER and HEDRICK, JJ., concur.

STATE OF TEXAS v. ELBERT RHOADES

No. 7023SC138

(Filed 25 February 1970)

Habeas Corpus § 4; Extradition— legality of restraint — appellate review

No appeal lies from an order entered in a *habeas corpus* hearing that inquired into the legality of defendant's restraint under extradition proceedings instituted by another state; but the remedy, if any, is by petition for writ of *certiorari* addressed to the sound discretion of the appellate court.

ATTEMPTED appeal by defendant from an order of *Gambill, J.*, dated 17 October 1969, denying relief upon a habeas corpus proceeding.

At the November 1967 Term, 175th District Court of Bexar County, Texas, the grand jury returned a true bill of indictment charging Elbert Rhoades with the offense of conversion by a bailee of property of a value of $50.00 and over, under the provisions of Article 1429 of the Penal Code, Vernon's Texas Statutes.

On 27 February 1968, application was made by the District Attorney for the County of Bexar, Texas, to the Governor of the State of Texas requesting issuance of a requisition to the Governor of North Carolina for the apprehension of and the return of Elbert Rhoades to the State of Texas. On 5 March 1968, the Governor of the State of Texas forwarded to the Governor of North Carolina a request for the extradition of Elbert Rhoades in accordance with the Uniform Criminal Extradition Act.

After defendant was granted a hearing before the Chairman of the Board of Paroles, the Governor of North Carolina, on 12 April 1968, issued his warrant for the arrest of defendant in accordance with the Uniform Criminal Extradition Act, G.S. 15-55, *et seq.*

On 17 April 1968, defendant filed an application for a writ of habeas corpus to inquire into the legality of his restraint. The application was filed with Judge Gambill, Resident Judge of the Twenty-third Judicial District, which includes Wilkes County, North Carolina, wherein defendant was confined by the sheriff. On 17 April 1968, Judge Gambill issued a writ of habeas corpus requiring the production before him of the person of the defendant on 17 May 1968. The defendant having been allowed to post an appearance bond, and having duly posted such bond, the hearing on the return to the writ of habeas corpus was postponed from time to time without objection by defendant or the State.

On 17 October 1969, the hearing on the return to the writ was held before Judge Gambill, and by his order dated 17 October 1969, filed 1 November 1969, Judge Gambill found that defendant was in the State of Texas at the time the crime is alleged to have been committed, and he further found that defendant is the person sought by the State of Texas in this extradition proceeding. Judge Gambill thereafter dissolved the writ of habeas corpus and directed that defendant be returned to the State of Texas. Defendant gave notice of appeal and docketed a record on appeal in this Court.

Robert Morgan, Attorney General, by Dale Shepherd, Staff Attorney, for the State.

McElwee, Hall & Herring, by John E. Hall, for defendant appellant.

BROCK, J.

This is an attempted appeal from an order entered at the conclusion of a habeas corpus hearing to inquire into the legality of defendant's restraint under extradition proceedings instituted by the State of Texas.

"Except in cases involving the custody of minor children, G.S. 17-40 [repealed in 1967 but reprovided by G.S. 50-13.5(b)(2)], no appeal lies from a judgment rendered on return to a writ of habeas corpus. *In re Steele,* 220 N.C. 685, 687, 18 S.E. 2d 132, 134, and cases cited; *In re Renfrow, supra* [247 N.C. 55, 59, 100 S.E. 2d 315, 317]. The remedy, if any, is by petition for writ of certiorari, addressed to the sound discretion of the appellate court. *In re Lee Croom,* 175 N.C. 455, 95 S.E. 903." *State v. Lewis,* 274 N.C. 438, 441, 164 S.E. 2d 177. See also, *In re Palmer,* 265 N.C. 485, 144 S.E. 2d 413; *State v. Burnette,* 173 N.C. 734, 739, 91 S.E. 364; *In re Wilson,* 3 N.C. App. 136, 164 S.E. 2d 56; *State v. Green,* 2 N.C. App. 391, 163 S.E. 2d 14; 2 McIntosh, N.C. Practice 2d, § 2464(9). The same rule applies to hearings on return to writs of habeas corpus in extradition proceedings. *In re Malicord,* 211 N.C. 684, 191 S.E. 730; *In re Guerin,* 206 N.C. 824, 175 S.E. 181; *In re Bailey,* 203 N.C. 362, 166 S.E. 165; *In re Hubbard,* 201 N.C. 472, 160 S.E. 569.

As an attempted appeal, the same must be dismissed. However, we have considered the record and brief as a petition for writ of certiorari, and, after reviewing the record, we deny the same.

Appeal dismissed.

Petition denied.

BRITT and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. TRAVIS ALLEN DENNIS

No. 7018SC142

(Filed 25 February 1970)

1. Criminal Law § 76— admissibility of confession — voir dire hearing

When a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, must hear evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements.

2. Criminal Law § 76— admissibility of confession — necessity for findings of fact

If conflicting evidence is offered at a voir dire hearing to determine the admissibility of a confession, the trial judge must make findings of fact to show the basis of his ruling on the admissibility of the confession.

3. Criminal Law § 76— admissibility of confession — sufficiency of findings of fact

Where the findings of fact are not sufficient to support the conclusion that defendant's confession was made voluntarily and understandingly, admission of the confession will not be upheld.

4. Criminal Law § 76— admissibility of confession — failure to find facts

Where defendant testified on *voir dire* that he had been drinking cough syrup just prior to being picked up by the police for questioning and that the cough syrup had made him dizzy and "dope-like," the trial court committed prejudicial error in failing to make findings of fact to support its conclusion that defendant's confession was made freely, voluntarily and understandingly.

ON certiorari to review the trial had before *Bowman, S.J.*, 31 March 1969 Session GUILFORD Superior Court.

The defendant, Travis Allen Dennis, was arrested on 7 November 1968 and charged with the armed robbery of Henry Kellam, a resident of Guilford County, North Carolina. The defendant was incarcerated in the Greensboro, North Carolina, jail where he remained until his trial on 1 April 1969. Defendant, through his court-appointed attorney, made a motion to have his case continued, which motion was denied and trial was had on a valid bill of indictment charging armed robbery. From a verdict of guilty the defendant received a sentence of twenty-five to thirty years from which he gave notice of appeal to this Court. The transcript of the trial was not completed in time for the defendant to perfect his appeal; therefore, petition for certiorari was granted by this Court.

Robert Morgan, Attorney General, Ralph Moody, Deputy Attorney General, and Donald M. Jacobs, Staff Attorney, for the State.

J. C. Barefoot, Jr., Attorney for the defendant appellant.

HEDRICK, J.

[1-3] The defendant contends that the trial court committed error in allowing a purported confession into evidence without first making sufficient findings of fact to support the conclusion that the confession was made voluntarily and understandingly. In North Car-

olina when a statement is offered as evidence and the defendant objects to its admission, the trial judge, in the absence of the jury, must hear evidence of both the State and the defendant upon the question of the voluntariness of the defendant's statements. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, cert den. 386 U.S. 911 (1966). If conflicting evidence is offered at the *voir dire* hearing, the judge must make findings of fact to show the basis of his ruling on the admissibility of the evidence offered. *State v. Moore, supra; State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511 (1968); *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569 (1966); *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851 (1969). Where the findings of fact are not sufficient to support the conclusion that the statements were made voluntarily and with understanding, any admission of the confession will not be upheld. *State v. Williford, supra.* In the present case, Officer R. C. Booth of the Greensboro Police Department, on *voir dire* examination, testified that he interrogated the defendant and secured statements from him which he later prepared in written form but that the defendant has not seen nor signed the written statement. The defendant denied making a confession to Officer Booth and said he was only trying to cooperate with him as he had in the past. He testified that he had been drinking Romoloff Cough Syrup just prior to being picked up by the police for questioning and that the cough syrup made him dizzy and "dope-like".

After hearing the testimony of the police officer and the defendant on *voir dire,* the following adjudication was entered into the record by Judge Bowman:

> "FINDINGS OF FACT AND CONCLUSIONS OF LAW
>
> "COURT: Let the record show that from the evidence heard the Court determines and adjudges that the defendant's statement was freely, understandingly, and voluntarily made and made without undue influence, compulsion or duress and without promise of leniency. All right."

[4] This adjudication contains no findings of fact concerning the circumstances and conditions surrounding the interrogation of the defendant by Officer Booth nor does it contain any findings of fact as to the mental and physical condition of the defendant at the time he made the purported confession. Although the record of the trial is replete with evidence from which Judge Bowman could have made findings of fact to support his conclusion that the statement was made voluntarily and understandingly, his adjudication is completely devoid of any findings of fact. The failure to make requisite findings

of fact and the subsequent admission of the defendant's statements into evidence by Judge Bowman is prejudicial error.

Since there must be a new trial, we do not deem it necessary to discuss the remaining assignments of error as they may not arise on another trial.

For error committed in the trial, the defendant is entitled to a New trial.

CAMPBELL and PARKER, JJ., concur.

STATE v. WAYNE LAMARR YOUNG

No. 7022SC51

(Filed 25 February 1970)

1. Criminal Law § 161— appeal — sufficiency of objections and exceptions

The Court of Appeals ordinarily will not consider questions not properly presented by objections duly made and exceptions duly entered.

2. Criminal Law § 161— appeal — sufficiency of exceptions — review of face of the record

Exceptions which appear nowhere in the record except under the purported assignment of error will not be considered; nevertheless, the appeal itself will be considered as an exception to the judgment presenting the face of the record for review.

3. Criminal Law § 143— revocation of probation — notice and hearing

A convicted defendant released on probation is entitled to notice and a hearing on the issue of whether he has broken the conditions of probation before the probation can be revoked. G.S. 15-200.1.

4. Criminal Law § 143— revocation of probation — probation report — admissibility

In a hearing to revoke defendant's probation, the verified report of the probation officer stating in detail defendant's alleged violations of the conditions of probation is competent evidence.

APPEAL by defendant from *Seay, J.*, 18 August 1969 Mixed Session DAVIDSON Superior Court.

Two criminal cases against the defendant were consolidated for hearing. Both were appeals from orders revoking probation and ef-

fecting sentences of imprisonment. One was a 12-month sentence previously imposed in the Davidson County Court upon his plea of guilty to two counts of issuing worthless checks. The other was a 6-month sentence as a result of his plea of guilty to malicious damage to real property. The defendant appeared in person and was represented by counsel.

The record does not contain a transcript of the proceedings but recites that the court considered the probation officer's report stating the grounds upon which probation was prayed to be revoked and that the court questioned the defendant. The probation officer's report was verified. The trial judge made detailed findings of fact as to the manner in which defendant had violated the terms of his probation by failing to work at suitable employment, failing to remain within a specified area and violating the penal laws of the State.

An active sentence was put into effect in each case. Defendant later gave notice of appeal in the form of an undated written note. On 25 September 1969, May, J., presiding over the Superior Court of Davidson County, made entries of appeal for defendant and appointed counsel to perfect his appeal to this Court.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

Walser, Brinkley, Walser and McGirt by Charles H. McGirt for the defendant appellant.

VAUGHN, J.

[1, 2] There are no exceptions in this record. The Court ordinarily will not consider questions not properly presented by objections duly made and exceptions duly entered. Exceptions which appear nowhere in the record except under the purported assignment of error will not be considered. Nevertheless, the appeal itself will be considered as an exception to the judgment presenting the face of the record for review. 1 Strong, N.C. Index 2d, Appeal and Error, § 24, p. 146.

[3, 4] We have carefully reviewed the record and duly considered the brief filed by defendant's court-appointed attorney. In this State a convicted defendant, released on probation, is entitled to notice and a hearing on the issue of whether he has broken the conditions of probation, before the probation can be revoked. The record discloses that the defendant was duly served with notice as provided by G.S. 15-200.1. Each of Judge Seay's orders revoking probation

recited: "THIS CAUSE coming on to be heard, and being heard . . . the defendant being in court in person, and being represented by counsel, . . ." The judge had before him a verified report of the probation officer stating in detail alleged violations of the conditions of probation by defendant. The report was competent evidence. *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53. The detailed findings of fact by the trial judge clearly support the judgment entered. We hold, therefore, that no error appears on the face of the record before us.

Affirmed.

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

STATE OF NORTH CAROLINA v. LARRY BLIZZARD

No. 708SC81

(Filed 25 February 1970)

1. Criminal Law §§ 156, 157— case on appeal — order allowing writ of certiorari

In all cases which come before the Court of Appeals by *certiorari,* a copy of the order granting the writ should be included as part of the case on appeal.

2. Homicide § 28— failure to instruct on defense of accident

In this second-degree murder prosecution, the trial court did not err in failing to charge the jury on the defense of accident or misadventure, where the State's evidence tended to show that defendant shot deceased three times with a pistol after having robbed him and while holding him captive at gunpoint for two hours, during which time deceased begged for his life and made several attempts to escape, and defendant did not contend that the shooting was accidental but testified that it was the State's witness who shot deceased.

ON *Certiorari* from *Mintz, J.,* June 1969 Session of LENOIR Superior Court.

Defendant was charged by bill of indictment with the crime of first-degree murder. He was tried for murder in the second degree or manslaughter. He pleaded not guilty. The jury found him guilty of murder in the second degree and from judgment of imprisonment imposed thereon, defendant in apt time 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 defendant's petition for *certiorari* to perfect a late appeal.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

Turner & Harrison, by Fred W. Harrison, for defendant appellant.

PARKER, J.

[1] The case on appeal as prepared on behalf of the defendant and filed in this Court makes no reference to the order granting *certiorari*. Failure to include this in the record would make it appear, insofar as the record before us is concerned, that the case comes up on a late appeal which would be subject to dismissal for failure to comply with the Rules of this Court. Therefore, in all cases which come before us by *certiorari* it is important that a copy of the order granting the writ be included as part of the case on appeal.

[2] Defendant's sole assignment of error in this case is that the trial court erred in failing to charge the jury regarding homicide by an accidental shooting. There is no merit to this assignment of error. While it is the duty of the trial judge even without special request to declare and explain the law as to all substantial features of the case arising on the evidence, G.S. 1-180, *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328, *State v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53, the defense of homicide by accident or misadventure did not arise upon the evidence in this case. Without reciting all of the evidence, suffice it to say that the State's evidence, presented principally in the testimony of an eyewitness, tended to show that defendant shot the deceased at least three times with a .22 caliber pistol, after having robbed him and while holding him captive at gunpoint over a period of approximately two hours, during which time the deceased begged for his life and made several attempts to escape. The defendant, who testified in his own defense, never contended that the shooting was accidental. On the contrary, he denied he had shot at all, testifying that it was the State's witness who had done so. From their verdict it is evident the jury believed the State's witness rather than the defendant. In the record before us we find

No error.

CAMPBELL and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM SHERMAN GWYN

No. 7019SC88

(Filed 25 February 1970)

1. Criminal Law § 161— appeal as exception to the judgment

An appeal is an exception to the judgment, presenting the face of the record proper for review.

2. Criminal Law § 157— appeal — necessary parts of record proper — armed robbery

The record proper in this armed robbery prosecution consists of the bill of indictment charging the defendant with armed robbery, the defendant's plea of not guilty, the verdict of the jury, and the judgment imposed.

3. Robbery § 6— sentence — armed robbery conviction

A sentence of imprisonment of not less than fourteen years nor more than eighteen years is not excessive under G.S. 14-87.

APPEAL by defendant from *Lupton, J.*, September 1969 Session of Superior Court held in RANDOLPH County.

Defendant was tried upon a bill of indictment charging him with the felony of armed robbery. The defendant entered a plea of not guilty. The jury returned a verdict of "guilty as charged in the bill of indictment."

From a judgment of imprisonment for not less than fourteen years nor more than eighteen years, the defendant appealed to the Court of Appeals.

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

Coltrane & Gavin by W. E. Gavin for the defendant appellant.

MALLARD, C.J.

The evidence for the State tended to show that in Randolph County on 13 May 1969 between six and seven o'clock p.m. the defendant, using a "sawed-off shotgun," robbed the victim of between twelve and fourteen hundred dollars. The evidence for the defendant tended to show that he was not in Randolph County at any time on the date of 13 May 1969 and did not rob the victim of any money.

[1-3] Defendant makes no assignments of error based on exceptions properly taken. However, an appeal is an exception to the judgment, presenting the face of the record proper for review. *State*

v. Elliott, 269 N.C. 683, 153 S.E. 2d 330 (1967). The record proper in this criminal case consists of the bill of indictment charging the defendant with armed robbery, the defendant's plea of not guilty, the verdict of the jury, and the judgment imposed. *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262 (1965); *State v. Moore,* 6 N.C. App. 596, 170 S.E. 2d 568 (1969). The bill of indictment appears to be proper in form. Upon the defendant's plea of not guilty, the trial was properly by jury. There was no error in the jury's verdict. The sentence to imprisonment for not less than fourteen years nor more than eighteen years is not excessive under the statute, G.S. 14-87, which provides that the punishment for the felony of armed robbery shall be imprisonment for not less than five nor more than thirty years.

In the trial we find

No error.

MORRIS and VAUGHN, JJ., concur.

LONNIE RAYVON SURRATT v. STATE OF NORTH CAROLINA

No. 7022SC144

(Filed 25 February 1970)

Habeas Corpus § 4— appellate review

Except in cases involving the custody of minor children, no appeal lies from a *habeas corpus* judgment, such judgment being reviewable only by way of certiorari if the appellate court, in its discretion, chooses to grant such a writ.

APPEAL by petitioner from *May, S.J.,* 29 September 1969 Session of DAVIDSON Superior Court.

On 17 June 1969 petitioner, with the assistance of court-appointed counsel, filed an amended application for writ of habeas corpus in the Superior Court of Davidson County. In his amended application petitioner alleged: In November 1962 he was indicted by a grand jury in Davidson Superior Court for (1) first-degree murder and (2) breaking and entering and larceny. At the 18 March 1963 Session of Davidson Superior Court, he pleaded guilty to second-degree murder and breaking and entering and larceny. On the murder charge, he was given a prison sentence of not less than 25 nor more than 30 years; on the other charge, he was given a prison sentence of seven

to ten years to begin at expiration of sentence imposed on the murder charge. Petitioner is now serving the sentences imposed but alleges his imprisonment is illegal because of constitutional violations in connection with his arrest and trial.

A hearing was conducted on the application, with petitioner and his counsel present and participating. After hearing the testimony presented by petitioner and his witnesses and considering said testimony and other evidence introduced, Judge May entered judgment in which he found facts, made conclusions of law, adjudged that petitioner was lawfully restrained and imprisoned, and denied petitioner's prayer that he be released from prison. Petitioner attempts to appeal from said judgment.

Attorney General Robert Morgan and Staff Attorney Edward L. Eatman, Jr., for the State.

William H. Steed for petitioner appellant.

BRITT, J.

The attorney general has moved in this Court that the appeal be dismissed for that no appeal lies from a judgment rendered on return of a writ of habeas corpus to obtain freedom from restraint, review being solely by certiorari. The motion is well taken.

It is well established in the Appellate Division of the General Court of Justice of North Carolina that, except in cases involving the custody of minor children, an appeal is not allowed from a judgment entered in a habeas corpus proceeding, such judgment being reviewable by way of certiorari if the court, in its discretion, chooses to grant such a writ. *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177; *In Re Palmer,* 265 N.C. 485, 144 S.E. 2d 413; *In Re Renfrow,* 247 N.C. 55, 100 S.E. 2d 315; *In Re Steele,* 220 N.C. 685, 18 S.E. 2d 132 (cert. den. 316 U.S. 686, 86 L. Ed. 1758, 62 S. Ct. 1275); *In Re Wilson,* 3 N.C. App. 136, 164 S.E. 2d 56. Accordingly, petitioner's appeal is dismissed.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Appeal dismissed.

Certiorari denied.

BROCK and GRAHAM, JJ., concur.

ARTIE W. GOLDMAN v. PARKLAND OF DALLAS, INC.

No. 7018SC42

(Filed 1 April 1970)

1. Process § 14— service of process — nonresident defendant — minimum contacts

A state court may acquire *in personam* jurisdiction over a nonresident defendant where the nonresident defendant has minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

2. Process § 14— service on nonresident — single contract made in this state

A single contract, when it is made or is to be performed in North Carolina, is sufficient to subject the nonresident corporation to suit in this state under G.S. 55-145(a)(1).

3. Appeal and Error § 57— findings of fact — conclusiveness on review

Findings of fact are conclusive if supported by competent evidence, even though there is evidence *contra*.

4. Process § 14— service on nonresident defendant — jurisdiction of state court — contract made in this state

In an action by a salesman, a resident of this state, against a nonresident manufacturer of dresses for breach of contract, the manufacturer is subject to the *in personam* jurisdiction of the courts in this state under the provision of G.S. 55-145(a)(1) giving the courts jurisdiction in any cause of action arising out of a contract made in this state, where there was evidence that the parties entered into preliminary negotiations in another state on the possibility of the salesman's acting as a representative of the manufacturer in the sale of its dresses; that the salesman later received a letter from the manufacturer stating the terms of the contract whereby the salesman was to represent the manufacturer; that the letter provided that "if the above is agreeable, please sign and return the original copy of the letter;" and that the salesman signed the letter in this state and mailed it back to the manufacturer.

5. Process § 14— contract "made" in this state

For a contract to be made in this state, within the purview of G.S. 55-145(a)(1), it must be executed in this state; that is, the final act necessary to make it a binding obligation must be done in this state.

6. Contracts § 2— offer by mail — mode of acceptance

An offer by mail, without more, carries with it an implied invitation to accept or reject the offer by mail.

APPEAL from *Collier, J.*, 8 September 1969 Civil Session of GUILFORD Superior Court.

This action was commenced on 10 March 1969. The plaintiff, in

his complaint, alleged the following facts: Plaintiff is a resident of Guilford County, North Carolina. Defendant is a Texas corporation with its principal office in Dallas and is engaged in the business of manufacturing and selling dresses. Sometime around 4 January 1968, the plaintiff and the defendant entered a written contract under which the plaintiff agreed to act as a manufacturer's representative for the defendant in the sale of defendant's dresses in certain states in the Southeastern region of the United States. The contract between the parties was to be for a period of one year commencing 4 January 1968 and terminating 3 January 1969. Compensation under the contract was to be by a commission on the sales of defendant's merchandise with a minimum "draw" of $250.00 per week. Other terms of the contract were as follows:

"4. Responsibility towards samples.

"A. All samples will be billed to the salesman at one-half (½) the cost price.

"B. After a style is taken out of the line, the salesman does not return the style to the company but sends his check for one-half (½) the cost price (the amount that he has been billed) and at this point the sample becomes the property of the salesman to dispose of as he sees fit.

"C. After you have received your bulletin about a style being taken out of the line, your personal check must be forwarded to the company within a two-week period. If the amount of the samples taken out of the line in one week exceeds $100 at half-price, we will accept a post dated check or several post dated checks if you should happen to be short of funds, but these checks should not be post dated for more than one month from the date of the bulletin. The check must be attached and returned with the out bulletin showing styles removed from the line.

"D. All checks written for payment of samples must be noted with the bulletin date samples are taken out of the line and all checks and correspondence on this should be marked to the attention of Wanda Dantzler.

"E. If a salesman's sample account is not up-to-date at the end of a season or when a new season's samples are ready to ship, the new line will not be sent and we will discontinue the salesman's draw and/or commission overage.

"F. If a salesman leaves our employment or is released by the company, he has the privilege of returning the line or sending his check for one-half the cost price. If these samples are not accounted for within a two-week period from termination date, he is responsible for the samples at full cost price.

"5. We will deduct from your commission checks any direct charges incurred by you, phone calls, buyers gifts, etc., etc. Commissions are payable about ten (10) days after each calendar month, for the preceding month. The rate of commission is seven percent (7%) on all goods delivered into your territory, as hereafter set forth and with the exceptions hereafter mentioned. Commissions will be figured on the gross, that is before discount but after returns and allowances.

"6. We shall have the option of accepting or rejecting any order taken by you, and no commission shall be payable hereunder except on goods shipped by us and received and accepted by the purchaser, provided we guarantee to pay you commission on a minimum of seventy (70%) per cent of accepted orders whether shipped or not.

"7. You will have complete territorial rights in your territory, as hereafter indicated, with the exceptions mentioned below.

"8. You will get no credit on delivery of merchandise in your territory to chain stores, particularly J. C. Penney Company, Inc.; Sears-Roebuck; and Montgomery Ward. Any merchandise you may sell these chains will be specifically subject to refusal by us if we do not consider the business desirable. You will get no credit on close-out special sales to any account unless made by you. Occasionally, we do not pay seven (7%) per cent on certain items in the line. You will be advised specifically about these whenever same are turned over to you for sale. At present the entire line carries a full seven (7%) per cent commission.

"9. You will get credit for merchandise delivered into territory other than your own provided there is no other salesman in the particular territory, and provided you have sold the merchandise involved.

"10. At present we have no New York office, but if we should open one and anything is sold for your territory by our New York office, you will have the right to turn down the order. If

you accept it, you will receive one-half the regular commission on merchandise involved against such order, but will receive full commission on re-orders.

"11. Your territory is as follows: Kentucky, West Virginia, Virginia, North Carolina, South Carolina, Alabama, Georgia, and Florida.

"If the above is agreeable, please sign and return the original copy of this letter.

"Sincerely,

"PARKLAND OF DALLAS, INC.

AGREED AND ACCEPTED

"IRA ORENSTEIN
Ira Orenstein
Vice President"

ARTIE W. GOLDMAN
Artie Goldman

The complaint further alleges that the plaintiff entered the performance of the contract in accordance with its terms but that in June, 1968, the defendant attempted to terminate the contract by letter dated 20 June 1968 as follows: "In view of this, and since sales are still quite discouraging, I know that you will agree to return the line at the end of this month, and will no longer represent us in the Southeast." The plaintiff alleges that he attempted to continue to represent the defendant under the contract but that the defendant made such further representation impossible by refusing to recognize the plaintiff's representation. The plaintiff contends that the termination of the contract by the defendant and its refusal to recognize his performance thereunder constituted a breach of the contract by the defendant and that as a result of the said breach the plaintiff has suffered damages in the amount of $7,000.00.

Service of summons on the defendant was had by service on the Secretary of State of North Carolina in conformance with the provisions of G.S. 55-144 through G.S. 55-146.

On 13 May 1969, the defendant, by a special appearance, filed a motion to dismiss and to quash summons and to set aside the attempted service of summons on the ground that the court had not acquired jurisdiction over the defendant because the defendant was a foreign corporation which was not doing business in North Carolina, the contract out of which the plaintiff's cause of action arises was not made in North Carolina and there was no substantial performance under the contract in North Carolina. Attached to the motion to dismiss was the affidavit of Ira Orenstein, Vice President

of the defendant corporation, in support of the motion. On 19 September 1969, the plaintiff filed affidavits of Artie W. Goldman, Mrs. Artie W. Goldman and Mr. Leonard Smoler dealing with the circumstances surrounding the making of the contract and the business activities of the defendant in North Carolina.

The court considered the verified complaint and the affidavits filed by the parties and made the following findings of fact and conclusions:

"1. That the conversations between the plaintiff and the defendant's agent at the Atlanta Merchandise Mart the latter part of October, 1967, were preliminary negotiations looking toward the entry into a future contract; that the conversations constituted neither an offer nor an acceptance of the terms of the contract attached to the Complaint as Exhibit 'A'.

"2. That the contract, Exhibit 'A', when forwarded by the defendant to the plaintiff in Greensboro for execution, constituted an offer to the plaintiff to enter into a contract upon the terms therein set forth; and that the said offer was accepted by the plaintiff in Greensboro, North Carolina, by his signature thereto, and the same became a binding contract between the parties at the time the accepted offer was placed in the United States mails in Greensboro, North Carolina.

"Upon the foregoing findings of fact the Court concludes that the contract, an alleged breach of which is the subject of this action, was made in North Carolina. And thereupon it is

"ORDERED that the defendant's motion to quash the service of process upon it and to dismiss this action be, and it is hereby denied.

"FURTHER ORDERED that the defendant is allowed 30 days from the date of this order within which to file responsive pleadings.

"At Greensboro on 22nd September, 1969.

"ROBERT A. COLLIER, JR.
"Judge Presiding"

To the order of the court overruling the defendant's motion to dismiss the action for lack of jurisdiction, the defendant excepted and gave notice of appeal to the North Carolina Court of Appeals.

Smith, Moore, Smith, Schell and Hunter, by Harold N. Bynum, Attorneys for the defendant appellant.

John R. Hughes and Harry Rockwell for the plaintiff appellee.

HEDRICK, J.

The only question raised by the appellant on this appeal is whether the court erred in denying appellant's motion to dismiss in that the North Carolina courts do not have jurisdiction over the person of the defendant.

The North Carolina long arm statute, G.S. 55-145(a)(1), under which the appellee obtained service of process on the appellant, is as follows:

> "(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> "(1) Out of any contract made in this State or to be performed in this State; or . . . ."

[1] G.S. 55-145(a) is applicable to foreign corporations which are not transacting business in North Carolina but who come within the purview of any one of the four specific and well-delineated areas listed therein. A State court may acquire *in personam* jurisdiction over a nonresident defendant under principles established by the United States Supreme Court where the nonresident defendant has "minimum contacts" with the State such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *McGee v. International Life Ins. Co.,* 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957). The decision reached by the Supreme Court in *International Shoe, supra,* marked a substantial departure from the prior standards of "consent", "doing business" and "presence" which were used to measure the permissible extent of judicial power over corporations. *McGee, supra.* The highwater mark was reached in the *McGee* case, *supra,* where the United States Supreme Court, in a unanimous decision, held that the tests laid down in *International Shoe, supra,* had been met even though there was but a single transaction which gave rise to the suit. To our knowledge the United States Supreme Court has not decided whether a single act, other than an insurance contract, or a single tort, will be sufficient to render a nonresident corporation subject to the jurisdiction of a State court.

The North Carolina Supreme Court, on the single occasion it has had to consider the statute here involved, stated in *Byham v. National Cibo House Corp.,* 265 N.C. 50, 143 S.E. 2d 225 (1965):

"A number of states have statutes similar to N.C.G.S. 55-145(a)(1). [In the judgment below the court inadvertently referred to this statute as G.S. 55-145(1)]. These statutes generally provide that where the cause of action arises out of a contract with a foreign corporation, made in the forum state or to be performed in whole or in part in such state, an action *in personam* may be maintained in the forum state, upon substituted service of process. In no instance has such statute been declared unconstitutional. (Citations omitted)."

[2] Clearly, this language indicates that our Supreme Court believes that a single contract, where it is made or to be performed, in North Carolina, is sufficient to subject the nonresident corporation to suit in North Carolina under G.S. 55-145(a)(1).

The appellant seeks to distinguish the present case from *Byham, supra,* and from *Bowman v. Curt G. Joa, Inc.,* (4th Cir. 1966), 361 F. 2d 706. It should be pointed out that neither of these cases involved a contract which was made in North Carolina but that in both instances the court found that the contract involved was made in another state. In the *Byham* case, *supra,* the court found that the contract in question was to be performed in North Carolina and, therefore, had a substantial connection with this state. In *Bowman, supra,* however, the Fourth Circuit held that a conditional sales contract was not to be performed in North Carolina and was not within the provisions of G.S. 55-145(a)(1).

The appellant also contends that the contract involved in this case did not have the requisite "minimum contacts" with this state to subject it to *in personam* jurisdiction. The appellant cites the cases of *Erlanger Mills v. Cohoes Fibre Mills,* (4th Cir. 1956), 239 F. 2d 502; *Shepard v. Manufacturing Co.,* 249 N.C. 454, 106 S.E. 2d 704 (1959); *Putnam v. Publications,* 245 N.C. 432, 96 S.E. 2d 445 (1957); and *Golden Belt Manufacturing Co. v. Janler Plastic Mold Corp.,* (M.D.N.C. 1967), 281 F. Supp. 368, aff'd (4th Cir. 1968), 391 F. 2d 267, in support of his contention. The appellant is correct in his statement that these cases stand for the proposition that substantial contacts are required to bring the appellant within G.S. 55-145(a); however, we do not agree that this standard is applicable to the present case. G.S. 55-145(a)(1) confers jurisdiction upon our courts when the contract is made or to be performed in North Carolina; therefore, where it is found that the contract was made in North Carolina or was to be performed in North Carolina, a sufficiently substantial contact to confer jurisdiction on the North Carolina courts has been established.

[3, 4] Thus, the essential question for decision is whether the findings of fact made by Judge Collier support his conclusion that the contract was made in North Carolina. It is established law that findings of fact are conclusive if supported by competent evidence even though there is evidence contra. *Farmer v. Ferris,* 260 N.C. 619, 133 S.E. 2d 492 (1963). Judge Collier heard the appellant's motion upon affidavits offered by the parties. The affidavit of Ira Orenstein was to the effect that the written contract between plaintiff and defendant was made and arranged by the affiant in Atlanta, Georgia, in November, 1967, where he and the plaintiff orally agreed to the terms of the contract and that the written agreement was used merely to confirm the oral agreement, and that upon his return to Dallas, Texas, he prepared a letter agreement which he placed in the mail to be delivered to the plaintiff for his signature. The affidavit further states that the agreement was not to be performed in North Carolina and that the plaintiff was present in Dallas sometime in March, 1968, at which time the parties, by mutual consent, decided they would terminate their agreement as of 30 June 1968.

In response to the affidavit filed by defendant, the plaintiff filed three affidavits. The affidavit of Artie W. Goldman was to the effect that while he was in Atlanta, Georgia, in late October and early November, 1967, as a representative of Smoler Brothers of Chicago, Illinois, he was approached by Orenstein and that Orenstein talked with him regarding the possibility of Goldman undertaking to represent Parkland of Dallas, Inc. His affidavit states that he told Orenstein that he was not very interested in adding another line but that in the event he did decide to represent Parkland he would consider no offer of less than $250.00 per week. His affidavit further states that this was the full extent of his conversation with Orenstein and that nothing was discussed concerning the matters in the contract in paragraph 4, sections A, B, C, D, E, or F, or in paragraphs 5 or 6. He further stated in his affidavit that he received the letter from the defendant sometime later and that the discussion they had had in Atlanta, Georgia, had been completely forgotten by him but that he discussed the offer with Smoler Brothers and decided to accept the defendant's offer and that he signed the letter and mailed it back to the defendant. The affidavits of Mrs. Artie W. Goldman and Leonard Smoler of Smoler Brothers, tended to corroborate and substantiate the affidavit offered by the plaintiff.

[4-6] For a contract to be made in North Carolina, it must be executed in North Carolina, that is, "the final act necessary to make it a binding obligation must be done in the forum state." *Bowman*

v. Curt G. Joa, Inc., supra; Byham v. National Cibo House Corp., supra; Bundy v. Commercial Credit Co., 200 N.C. 511, 157 S.E. 860 (1931). The final act in the present case which was necessary to make the agreement a binding obligation, and therefore, a contract, was the depositing of the letter containing the signature of Artie W. Goldman in the mail. An offer by mail, without more, carries with it an implied invitation to accept or reject the offer by mail. *Board of Education v. Board of Education,* 217 N.C. 90, 6 S.E. 2d 833 (1940). The offer in the present case, however, far exceeded the rule laid down in the *Board of Education* case, *supra.* The letter from Parkland of Dallas, Inc., to Artie W. Goldman contained the following sentence: "If the above is agreeable, please sign and return the original copy of this letter." By its own terms the appellant established the method by which appellee could accept its offer.

The findings of fact, which are supported by competent evidence, support Judge Collier's conclusion of law and his order. We hold that the Superior Court of Guilford County has jurisdiction over Parkland of Dallas, Inc., for the purpose of the maintenance of this suit by virtue of the provisions of G.S. 55-145(a)(1). The order of the court below is

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION, SERVICE TRANSPORTATION CORPORATION, AND M & M TANK LINES, INC., APPLICANTS V. ASSOCIATED PETROLEUM CARRIERS, A. C. WIDENHOUSE, INC., SOUTHERN OIL TRANSPORTATION COMPANY, INC., TERMINAL CITY TRANSPORT, INC., EASTERN OIL TRANSPORT, SCHWERMAN TRUCKING COMPANY, PETROLEUM TRANSPORTATION, INC., AND CAROLINA ASPHALT AND PETROLEUM COMPANY, PROTESTANTS

No. 7010UC37

(Filed 1 April 1970)

1. Carriers § 3; Utilities Commission § 7— transfer of motor carrier certificate — necessity for showing public need

The showing of public need which G.S. 62-262(e)(1) requires of an application for a new motor carrier certificate is not applicable in a transfer proceeding under G.S. 62-111 and was not written into it by G.S. 62-111(a).

2. Carriers § 3; Utilities Commission § 7— transfer of motor carrier certificate — public convenience and necessity

The requirement of "public convenience and necessity" referred to in G.S. 62-111(a), relating to transfer of a public utility franchise, is satisfied by a showing that the authority has been and is being actively applied in satisfaction of the public need which was shown to exist when the authority was originally acquired.

3. Carriers § 3; Utilities Commission § 7— transfer of motor carrier certificate — finding that transfer is in the public interest

Requirement that the Commission find a proposed transfer to be "in the public interest" does not write into the transfer approval procedure the G.S. 62-262(e)(1) new certificate test of public need.

4. Carriers § 3; Utilities Commission § 7— transfer of motor carrier certificate — finding that transfer will not adversely affect service to the public

Requirement of G.S. 62-111(e) that the Commission find that the proposed transfer "will not adversely affect the service to the public under said franchise" is satisfied by a determination that the proposed transferee of the franchise is capable of rendering service equal to that of the proposed transferor, and does not prohibit approval where transfer of the franchise to a more competitive hauler would have an adverse effect on existing carriers.

5. Carriers § 3; Utilities Commission § 7— transfer of motor carrier certificate — ability of purchaser to perform services — effect on service to public — effect on service by other carriers — sufficiency of evidence

In this proceeding to obtain approval of the Utilities Commission for transfer of a common motor carrier franchise for intrastate transportation of liquid asphalt, there was competent, material and substantial evidence to support the Commission's findings that the proposed purchaser is fit, willing and able to perform the service to the public under the franchise, that service to the public under the franchise will not be adversely affected, but that the purchaser will offer greater service to the public under the franchise, and that the transfer will not unlawfully affect the service to the public by other public utilities.

6. Carriers § 3; Utilities Commission § 7— transfer of motor carrier certificate — increased competition — public interest

The possibility that a transfer of a motor carrier franchise to a more competitive carrier will adversely affect other existing carriers does not make such a transfer contrary to "the public interest" under G.S. 62-111(e).

7. Carriers § 3; Utilities Commission § 7— transfer of motor carrier certificate — finding that transfer is in the public interest

In this proceeding to obtain approval of the Utilities Commission for transfer of a common motor carrier asphalt franchise, the record fails to show that increased competition which the purchaser proposes to provide under the franchise would be contrary to "the public interest" as distinguished from the interests of the protestants.

8. Carriers § 3; Utilities Commission § 7— transfer of motor carrier certificate — finding that service under the franchise has been continuously offered

In this proceeding to obtain approval of the Utilities Commission for transfer of a common motor carrier asphalt franchise, there was competent, material and substantial evidence to support the Commission's finding "that the service under said franchise has been continuously offered to the public up to the time of the filing of said application," where the applicant's evidence showed that the proposed transferor has kept an asphalt tariff on file with the Utilities Commission since it was certified as an asphalt carrier, that although the proposed transferor did not actively solicit asphalt business for the 1963-1966 hauling seasons and hauled no asphalt during those seasons, it has never refused to handle any asphalt shipment, and that it hauled four or five loads of asphalt in 1967 and approximately 25 loads in 1968, when the application for the franchise transfer was filed with the Commission.

APPEAL by protestants from an order of the North Carolina Utilities Commission dated 2 July 1969.

This proceeding was initiated by an application filed with the North Carolina Utilities Commission on 4 September 1968 under which M & M Tank Lines, Inc. (M & M) seeks authority to purchase the common carrier operating authority held by Service Transportation Corporation (Service) to transport liquid asphalt in bulk in tank trucks within the State of North Carolina. Within apt time a protest and motion for intervention was filed by eight carriers authorized to transport such asphalt in intrastate commerce in North Carolina.

The matter came on for hearing before Commissioners Williams (presiding), McDevitt and Biggs on 20 November 1968. The Commission made findings of fact and on 2 July 1969 issued its order approving the transfer of operating authority sought in the application. The following is quoted from the order:

FINDINGS OF FACT

"1. That SERVICE is a duly organized corporation, with offices off U.S. 601, Box 51, Salisbury, North Carolina. SERVICE owns and holds Common Carrier Certificate No. C-339 issued by this Commission, which contains, inter alia, the authority sought to be transferred herein, which is more particularly described in Exhibit B hereto attached and incorporated herein by reference.

2. That M & M is the owner and holder of Common Carrier Certificate No. C-198 issued by this Commission and has inter-

state authority issued by the Interstate Commerce Commission. M & M is a substantial hauler of bulk products and had adequate equipment, experience, financial resources and is otherwise fit and able to perform the transportation service authorized by the authority sought to be purchased by it.

3. That SERVICE first acquired the authority sought to be transferred together with its petroleum authority when it was first certificated as a result of the 1947 Truck Act; that SERVICE has owned no equipment for handling asphalt since 1963 and actually hauled no asphalt during the years 1963, 1964, 1965 and 1966. During those years it did not actually solicit any asphalt business although it has remained a party to the asphalt tariff filed with this Commission. During those years, SERVICE was not tendered any shipments. That during the year 1967, SERVICE began soliciting asphalt shipments and hauled by means of lease equipment, 4 or 5 shipments during that season; that again during the year 1968, SERVICE solicited this business and received approximately 25 to 30 loads for shipment, the last shipment being within 10 days of the date of the hearing. These shipments were also made by use of leased equipment.

4. That the transfer of the operating authority, described herein is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, and the purchaser, M & M, is fit, willing and able to perform the service to the public under said franchise and that SERVICE (sic) under said franchise has been continuously offered to the public up to the time of the filing of said application, and that approval of the transfer is justified by the public convenience and necessity and the transfer should be approved."

ORDER

"1. That the application filed in this docket be and it is hereby approved and the applicant, Service Transportation Corporation, is hereby permitted to sell that portion of the authority contained in Common Carrier Certificate No. C-339 as set out on Exhibit B hereto attached to M & M Tank Lines, Inc., and M & M Tank Lines, Inc., is hereby authorized to purchase and operate said authority under that portion of said certificate.

2. That the applicant, M & M Tank Lines, Inc., is hereby granted 30 days from the date of this Order to complete its

transaction with Service Transportation Corporation, to file with this Commission its list of equipment, schedule of minimum rates, evidence of financial security for the protection of the travelling and shipping public and otherwise comply with all rules and regulations of this Commission."

From said order, protestants appealed to this Court.

Commission Attorney Edward B. Hipp and Associate Commission Attorney Larry G. Ford for applicant appellee, North Carolina Utilities Commission.

Bailey, Dixon, Wooten & McDonald by J. Ruffin Bailey and Ralph McDonald for applicant appellees, Service Transportation Corporation and M & M Tank Lines, Inc.

Allen, Steed & Pullen by Thomas W. Steed, Jr., for protestant appellants.

BRITT, J.

The protestants on appeal present the following issue: Is the order of the Utilities Commission in approving the transfer of common carrier franchise authority under the provisions of G.S. 62-111 erroneous as a matter of law and unsupported by competent, material and substantial evidence in view of the entire record? We think not.

The transfer of a carrier operating authority is governed by a comprehensive statutory scheme, which includes the following provisions of G.S. 62-111:

"(a) No franchise now existing or hereafter issued under the provisions of this chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity. Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets.

* * *

(e) The Commission shall approve applications for transfer of motor carrier franchises made under this section upon finding

that said sale, assignment, pledge, transfer, change of control, lease, merger, or combination is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that service under said franchise has been continuously offered to the public up to the time of filing said application or in lieu thereof that any suspension of service exceeding 30 days has been approved by the Commission as provided in G.S. 62-112(b)(5)."

In *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461, the court construed the "public convenience and necessity" test of G.S. 62-111(a), enacted as part of the Public Utilities Act of 1963. The protestants in that case sought a construction of the statute which would provide them protection from competition: "* * * [P]rotestants contended in substance that G.S. 62-111(a) 'required the Commission to consider similar elements upon a transfer of franchise authority as upon the granting of an application for *new* authority,' (our italics) including 'public need for the service, the service already provided by existing carriers, and the effect of the service provided by the transferee on the operations of existing carriers.' "

[1] To grant a *new* authority under G.S. 62-262(e)(1), the Commission must find "that public convenience and necessity require the proposed service in addition to existing authorized transportation service." The court held that the showing of public need which G.S. 62-262(e)(1) required of an application for a *new* authority was not applicable in a transfer proceeding and was not written into it by G.S. 62-111(a). The court observed: "The apprehension of protestants is that Caro-Line will undertake to exercise its franchise rights on a much larger and more varied scale, and in so doing act in competition with protestants and adversely affect their business. The record fails to show that operations by Caro-Line on a larger and more varied scale would be contrary to *the public interest* as distinguished from the interests of protestants."

[2] The decision and language of *Coach Co., supra,* supported the position of the Utilities Commission that "the policy of the State, as declared in the Public Utilities Act of 1963, * * * clearly favors transfers of actively operated motor freight carrier certificates without unreasonable restraint. A policy following protestant's position would diminish the value of existing motor freight franchises

and deprive the holders thereof of valuable rights." *In re Comer Transport Service,* N.C.U.C. Docket No. T-821, Sub. 2, reported in N.C.U.C. Report 1965, p. 266. The Commission in effect interpreted the criteria "if justified by the public convenience and necessity" in G.S. 62-111(a) to be a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in G.S. 62-262(e)(1). Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights "are under no burden to show through shipper witnesses that a demand and need exists." *Comer, supra.* The rationale is that public convenience and necessity was shown to exist when the authority was granted or acquired under the 1947 grandfather clause, and the rebuttable presumption of law is that it continues. Thus, the Commission in *Comer* held that "the statutory requirement referred to [G.S. 62-111(a)] is satisfied by a showing that the authority has been and is being actively applied in satisfaction of the public need theretofore found." The position taken by the Supreme Court in *Coach Co., supra,* supports such an interpretation.

[3] The General Assembly supplemented the general provision of G.S. 62-111(a) that "approval shall be given if justified by the public convenience and necessity," with subsection (e) effective 30 September 1967. The amendment sets out certain specific criteria to be considered in the Commission's determination of whether approval in a given case is justified. It does not, on the other hand, indicate a policy change toward protecting existing certificate holders from lawful competition. Like the subsection (a) "public convenience and necessity" test, the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the G.S. 62-262(e)(1) new certificate test of public need.

[4] Protestants contend that the G.S. 62-111(e) clause requiring the Commission to find that the proposed transfer "will not adversely affect the service to the public under said franchise," prohibits approval where transfer of the franchise to a more competitive hauler would, as they argue, "have a definite adverse effect on the existing carriers." The language "under said franchise," however, indicates that this finding will be satisfied by a Commission determination that the proposed transferee of the franchise is capable of rendering service equal to that of the proposed transferor.

When the matter came on for hearing before the Commission on 20 November 1968, all parties were present and represented by counsel. The record discloses a full hearing at which the exhibits, direct and cross-examinations, and questions presented by the commissioners produced a comprehensive factual basis for the Commission's order. M & M's exhibit included a financial statement, data on employment practices, insurance coverage, safety programs, and rolling equipment. L. J. Steele, coordinator for traffic and sales for M & M, testified as to his company's ability and intention to "haul more product than Service Transportation has under the authority."

[5] There was competent, material and substantial evidence from which the Commission could find not only that "the purchaser, M & M, is fit, willing and able to perform the service to the public under said franchise," but also that M & M could render service equal to that of Service Transportation Corp. The record clearly established that the service to the public under the asphalt franchise will not be adversely affected, but, in fact, the transfer will result in the authority being held by a carrier that will be able to offer greater service to the public under the franchise. Protestants concede the point saying "that M & M Tank Lines, Inc., if it is permitted to acquire this franchise authority will conduct active and vigorous operations in the transportation of asphalt. M & M Tank Lines, Inc., has the financial ability and the equipment to become a major carrier in this product in intrastate commerce in North Carolina." Although the testimony of Carl Helms asserts the protestants' desire for protection, e.g., "We need to have some assurance, and we should have some protection, that someone is going to look after us because we have to put out thousands of dollars to do this," we do not read this clause as a protection against competition. Also, the finding that the transfer "will not unlawfully affect the service to the public by other public utilities," is fully supported; the record fails to disclose any unlawful affect upon the service rendered by the other utilities.

[7] Protestants contend that increased competition such as M & M proposes to provide will not be "in the public interest." Witnesses who were officials of Petroleum Transportation, Inc., Widenhouse, Inc., Schwerman Trucking Company and Carolina Asphalt and Petroleum Company testified as to a general decline in business in 1968. They pointed out that asphalt hauling is a sporadic business in which the shippers and road contractors demand instant service. Carl Helms testified: "Now, asphalt is very much different from the usual line of products because it has to be moved when the carriers

receive a call. We cannot wait a period of four or five days to move that particular product. It has to be moved at once because there are men at various job locations waiting on this product." The contention proceeds along the line that more competition would mean less business for the protestants and less business would result in a diminished capacity to render service to the public. William Thomas Barrow, Vice-President of A. C. Widenhouse, Inc., testified: "Sometimes we cannot give service because we don't have any drivers. The main reason for this is we don't have enough business to maintain 32 drivers." It appears that this is a problem inherent in a seasonal, sporadic business like asphalt hauling. While other carriers had a decline in business in 1968, Service acquired business by offering only an "overflow service." Jarrett testified: "In my solicitation of Chevron and American I asked them to call on us when they had a need for it and did not purport to handle all of their shipments. * * * I was offering to them an overflow service for any overflow that they probably could not get hauled by the regular shipper or haulers. This type of overflow would come when they had so many shipments at one time that their normal arrangements for shipping couldn't handle it at that particular time."

[6, 7] In an earlier "Coach Co." case, *Utilities Commission v. Coach Co.*, 261 N.C. 384, 134 S.E. 2d 689 (1964), the court, through Moore, J., said: "There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition." The possibility that a transfer of authority to a more competitive carrier will adversely affect existing carriers does not make such a transfer contrary to "the public interest" as a matter of law. In G.S. 62-111(e) the General Assembly has empowered the Utilities Commission to find in a proper case that transfer to a more actively competitive carrier might *not* be "in the public interest." In the instant case, however, the record fails to show that operations by M & M would, as Bobbitt, J., expressed it in *Coach Co., supra,* "be contrary to *the public interest* as distinguished from the interests of protestants."

[8] Protestants contend that there is no competent, material and substantial evidence to support the Commission finding "that SERVICE (sic) under said franchise has been continuously offered to the public up to the time of the filing of said application." The record shows that Service was originated in 1939 and certified as an intrastate carrier of petroleum, petroleum products, and asphalt as a result of the 1947 Truck Act. Jarrett's father became principal stockholder in 1950 and Jarrett acquired control upon his father's

death in August 1968. Service has kept a tariff on file with the Utilities Commission and, as Jarrett testified: "I have participated in the petroleum or asphalt tariff section of the North Carolina Motor Carriers publication all the time that our company has held these rights. I think that this publication is circulated to shippers throughout the North Carolina intrastate area. It shows the scope of our company's operations and the territory." Although the company did not actively solicit business for the 1963-1966 asphalt hauling seasons, and no asphalt was hauled during those seasons, Jarrett testified: "Our company has never refused to handle any asphalt or any shipment from any point to any point." Jarrett testified that he had been fairly active in the operations of Service over the past few years, although he primarily operates an oil distributing company. His involvement with Service and his interest in actively soliciting asphalt hauling business grew as his father became sick approximately three years before his death in 1968. Jarrett solicited business from Chevron and American, "who are the only shippers of the product that I knew of at the time I contacted them." These solicitations resulted in Service hauling four or five loads during the 1967 season and approximately twenty-five during the 1968 season; rolling equipment to handle these jobs was obtained through a trip-lease arrangement with Davis Oil Company in 1967 and with M & M in 1968. Service and M & M discussed the proposed transfer during the 1968 season, worked out an agreement in August, and M & M filed its application on 4 September 1968. We hold that the record amply discloses competent, material and substantial evidence to support the Commission's finding.

The order of the Utilities Commission is

Affirmed.

BROCK and GRAHAM, JJ., concur.

IN RE WILL OF A. S. SPINKS, DECEASED

No. 7019SC126

(Filed 1 April 1970)

1. Wills § 9; Clerks of Court § 3— probate jurisdiction of clerk

The authority to probate a will is vested in the clerk of superior court; and in the exercise of his probate jurisdiction, the clerk is an independent tribunal of original jurisdiction. G.S. Ch. 28.

2. Courts § 6— appeal to superior court from clerk — order of probate

Upon appeal from action taken by the clerk of the superior court in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative and the provisions of G.S. 1-276 are not applicable.

3. Wills § 9— motion to vacate probate — burden of proof

The burden of proof on a motion to vacate a probate is on the movants to establish sufficient grounds to set aside the probate.

4. Courts § 6— appeal from probate order of clerk — findings of fact — review by superior court

Where, on appeal from an order of the clerk entered in his probate jurisdiction, there were no specific exceptions to the clerk's findings of fact or to the failure of the clerk to make findings of fact, the superior court was limited to a review of the record for errors of law therein, which included the question whether the clerk's findings of fact sustained his order denying the motion to set aside the probate.

5. Wills § 9; Clerks of Court § 3— vacating probate of will

The power of the clerk to set aside the probate of a will in common form does not extend to grounds which should be raised by caveat.

6. Wills § 9— motion to vacate probate of holographic will — denial

Motion addressed to the clerk of superior court to vacate the probate of a holographic will on the ground that the will was not in the handwriting of the testator *held* properly denied by the clerk, there being no inherent or fatal defect appearing on the face of the will; movants' proper procedure to challenge the probate is by caveat.

7. Wills § 9— probate of will — conclusiveness

Where the clerk of the superior court probates a will in common form and records it properly, the record and probate are conclusive as to the validity of the will until vacated on appeal or declared void by a competent tribunal.

8. Wills § 13— attack on probate — filing of caveat

The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form. G.S. 31-32.

9. Wills § 13— purpose of caveat

The purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded.

10. Wills § 4— holographic will — typewritten words

It is common knowledge that typewritten words are not the "handwriting of a person whose will it purports to be."

APPEAL by Lonnie A. Spinks from *Martin (Robert M.), S.J.*, 30 September 1969 Session of Superior Court held in RANDOLPH County.

The following factual situation revealed by this record appears to be undisputed.

On 20 August 1968 Alvesta Spinks Glover, Jorhetta Robinson Evans, Howard Gurney Strickland, and Helen Strickland Robbins (movants) filed a motion with the Clerk of Superior Court of Randolph County to vacate the probate of the holographic will of A. S. Spinks. This motion was served on Lonnie A. Spinks (respondent) on 27 August 1968.

A. S. Spinks died a resident of Randolph County in February 1956 and owned a tract of land at the time of his death. Surviving him were: his widow, Maggie Cheek Spinks, who died 14 May 1959; a son, Gurney R. Spinks; a daughter, Alvesta Spinks Glover; and another daughter, Henrietta Spinks Robinson Strickland, who predeceased A. S. Spinks leaving three surviving children, to wit: Jorhetta Robinson Evans, Howard Gurney Strickland, and Helen Strickland Robbins.

Gurney R. Spinks died in 1968 leaving a will by the terms of which he devised all of his property to his son, Lonnie A. Spinks. No attack is being made upon the will of Gurney R. Spinks in this proceeding. In their motion to vacate the probate of the A. S. Spinks will, the movants assert that the property devised to Lonnie A. Spinks in this will includes the land owned by A. S. Spinks at the time of his death.

An instrument purporting to be the holographic will of A. S. Spinks was offered for probate by W. R. Maness, the executor therein named. Upon this application and the sworn testimony of three witnesses that the said instrument and every part thereof was in the handwriting of A. S. Spinks, and the sworn testimony of W. R. Maness that the said instrument was found among the valuable papers and effects of the said A. S. Spinks after his death, Carl L. King, Clerk of the Superior Court of Randolph County, on 23 February 1956, entered an order in which it was "adjudged by the court that the said paperwriting and every part thereof is the last will and testament of the said A. S. Spinks and the same is ordered to be recorded and filed."

W. R. Maness, the executor, took the oath as executor of the will of A. S. Spinks on 23 February 1956. On 24 April 1957 W. R. Maness as executor filed what purports to be a final account of his transactions as executor. In this "final account" it is stated that $100 was deposited with the Clerk of the Superior Court for distribution to "Henrietta Strickland Heirs." There is nothing in the record to reveal what disposition was made of this $100.

The only grounds for relief asserted by movants as entitling them to relief, which are categorically denied by respondent, are that the instrument probated as the last will and testament of A. S. Spinks was not in the handwriting of A. S. Spinks and "that this fact is apparent on the face thereof"; and "that the conduct of said Maness and Gurney R. Spinks in obtaining said probate was a fraud on the Court and the Court was imposed upon and misled by such conduct. By reason of such conduct the order of probate of said paper writing was improvidently granted." The motion was verified by Alvesta Spinks Glover on 30 July 1968.

Respondent filed a reply to the motion in which, among other things, he asserts that:

1. The motion to vacate the probate is a direct attack upon the will of A. S. Spinks; that such can be made only by caveat; and that the three years' statute of limitations set out in G.S. 31-32 is a bar to this motion.

2. The ten years' statute of limitations as set out in G.S. 1-56 is a bar to this motion.

3. The movants did not appeal the order of probate and have not proceeded with proper diligence under the circumstances and respondent "pleads the equitable doctrine of estoppel and laches."

A hearing on the motion was held by the clerk of superior court on 11 September 1968, and the pertinent part of an order in the matter entered by said clerk and filed on 13 September 1968, is as follows:

> "The Movants opened their evidence by offering the Will for the purpose of showing that the same was not in the handwriting of the testator. The Court, being of the opinion that this constitutes an attack which can be raised only by a caveat proceeding; and it appearing that more than three years have elapsed since the order of probate was entered.
>
> IT IS THEREFORE ORDERED, that the motion to set aside and vacate the probate be and the same is denied."

From the entry of this order, the movants appealed to the superior court. The cause came on to be heard in the superior court by Judge Robert M. Martin. The order of Judge Martin recites, among other things, that the movants introduced the original instrument, the probate order of 23 February 1956 admitting it to probate as the holographic will of A. S. Spinks, and an affidavit of Alvesta Spinks Glover sworn to on 25 September 1969, which date is subse-

quent to the hearing by the clerk. From the evidence, Judge Martin found as a fact that the instrument admitted to probate on 23 February 1956 is not in the handwriting of A. S. Spinks; that the movants have not been guilty of laches; that the instrument does not constitute a holographic will within the provisions of G.S. 31-3.4; and that the order admitting it to probate "was improvidently entered." The order of Judge Martin, dated 29 September 1969, vacates and sets aside the order of the clerk of the superior court entered 23 February 1956 admitting the instrument to probate as the last will and testament of A. S. Spinks.

Respondent Lonnie A. Spinks appealed to the Court of Appeals.

Miller, Beck & O'Briant by G. E. Miller for respondent appellant.

Hoyle, Hoyle & Boone by T. C. Hoyle, Jr., and Harry Rockwell for movants appellees.

MALLARD, C.J.

Randolph County is in the Nineteenth Judicial District. District courts are to be established in Randolph County on the first Monday in December 1970; therefore, the provisions of G.S. 7A-241, relating to the jurisdiction of the clerks of the superior court, and of G.S. 7A-251, relating to appeals from the clerk of the superior court to the judge of the superior court, are not applicable in this case. G.S. 7A-252.

[1] Under the pertinent provisions of Chapter 28 of the General Statutes, which are applicable in this case, the authority to probate a will is vested in the clerk of the superior court; and in the exercise of his probate jurisdiction, the clerk is an independent tribunal of original jurisdiction. *In re Will of Hine,* 228 N.C. 405, 45 S.E. 2d 526 (1947).

[2] Upon appeal from action taken by the clerk of the superior court, in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and the provisions of G.S. 1-276 are not applicable. In the case of *In re Estate of Lowther,* 271 N.C. 345, 156 S.E. 2d 693 (1967), the Supreme Court said:

> "To say that the Superior Court has jurisdiction to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also re-

views any findings of fact which the appellant has properly challenged by specific exceptions."

[3, 4] In this case, on the appeal by the movants from the order of the clerk of the superior court to the judge of the superior court, there were no specific exceptions taken to a failure to find facts or to the findings of fact that "the movants opened their evidence by offering the will for the purpose of showing that the same was not in the handwriting of the testator" and that "more than three years have elapsed since the order of probate was entered." The burden of proof on a motion to vacate a probate is on the movants to establish sufficient grounds to set aside the probate. In this case the clerk did not find that the probate was improvidently granted or that the court had been imposed upon or that some inherent or fatal defect appeared upon the face of the instrument and did not find sufficient facts to vacate the probate. The evidence, if any other than the will, before the clerk does not appear in this record. Since there was no proper challenge to the findings of fact that were made by the clerk or the failure of the clerk to make findings, the judge of the superior court in this case was limited in his review of the record to a determination of whether there were errors of law therein. *In re Estate of Lowther, supra; In re Sams,* 236 N.C. 228, 72 S.E. 2d 421 (1952). The appeal in this case carried to the judge the question of whether the findings of fact by the clerk sustained the order denying the motion to set aside and vacate the probate. In the absence of other findings of fact, we think that the facts found by the clerk do sustain the order denying the motion to vacate.

[5] It is settled law that the clerk of the superior court has the power to set aside a probate of a will in common form in a proper case. *In re Will of Smith,* 218 N.C. 161, 10 S.E. 2d 676 (1940); *In re Meadows,* 185 N.C. 99, 116 S.E. 257 (1923). In *Meadows* the Court stated that this power could be exercised by the clerk where it is clearly made to appear that the adjudication and orders have been improvidently granted or that the court was imposed upon or misled as to the essential and true conditions existent in a given case. However, this power of the clerk does not extend to the setting aside of the probate of a will in common form upon grounds which should be raised by caveat. *In re Will of Hine, supra.* The question therefore arises in this case as to whether, under the factual situation presented here, the motion to vacate the probate is the proper procedure.

[6] In the case before us the entire instrument is in handwriting. Movants deny that it is in the handwriting of A. S. Spinks. In Feb-

ruary 1956 when the instrument was probated as the last will and testament of A. S. Spinks, and properly recorded, the Clerk of the superior Court of Randolph County had the instrument before him and examined three witnesses as to its validity, all as required by the statute, G.S. 31-18.2. Movants now seek to have the probate set aside by motion in the cause upon a consideration of the instrument and the affidavit of one of the movants, Alvesta Spinks Glover, who also was the only one of the movants who verified the motion in the cause. This affidavit, considered by the judge, could not have been considered by the clerk because it was not sworn to until 25 September 1969, and the hearing before the clerk was held in September 1968. The instrument admitted to probate in the case before us, when considered as of the death of A. S. Spinks, and prior to the death of Maggie Spinks, and when the surplusage therein is disregarded, appears to be in the form of a holographic will as required by G.S. 31-3.4. *In re Cole's Will,* 171 N.C. 74, 87 S.E. 962 (1916).

[6, 7] It is settled law that where the clerk of the superior court probates a will in common form and records it properly, the record and probate are conclusive as to the validity of the will until vacated on appeal or declared void by a competent tribunal. *Yount v. Yount,* 258 N.C. 236, 128 S.E. 2d 613 (1962); *In re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488 (1948); *In re Will of Hine, supra;* G.S. 31-19. In the case before us the statutory procedure for the probate of the will in common form by the clerk of the superior court in 1956 is not challenged. Neither is there a challenge to the validity of the actual recording of this probate. However, the validity of the will itself is challenged by the allegation that it is not in the handwriting of the testator.

[8, 9] The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form. G.S. 31-32. See *In re Will of Charles,* 263 N.C. 411, 139 S.E. 2d 588 (1965). The purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded. *In re Will of Morrow,* 234 N.C. 365, 67 S.E. 2d 279 (1951).

In the case of *In re Will of Puett, supra,* the clerk, in 1945, admitted a paperwriting to probate as the will of the decedent. In 1947 a subsequent paperwriting was offered as the will of the decedent. The clerk adjudged that the 1947 paperwriting was the last will and testament of the decedent and declared that the instrument probated as the will in 1945 was "null and void." Thereafter, upon

motion made to vacate the probate of 1947, the clerk entered an order revoking the 1947 probate. This latter order was appealed. The Court there said that *"(i)t is only by a caveat or proceeding in that nature that the validity of a properly probated will, and one without 'inherent or fatal defect appearing on its face' (Edwards v. White,* 180 N.C., 55, 103 S.E., 901), *may be brought in question.* To hold otherwise would be productive of confusion and uncertainty. *McClure v. Spivey,* 123 N.C., 678, 31 S.E., 857." (Emphasis Added.)

We do not agree with the movants' contention that the factual situation in the case of *In re Will of Smith, supra,* is on all fours with the case before us. In *Smith,* the motion was to set aside a codicil or supplemental will of the decedent. The validity of the original will was not attacked. There was no controversy as to the facts. The purported holographic codicil or supplemental will was partially in handwriting and partially typewritten. The Supreme Court, in holding that the purported holographic codicil or supplemental will was improvidently admitted to probate in common form, said:

> "An examination of the instrument leads us to the conclusion that it was not in form sufficient to be entitled to probate as a holographic will. The words written by J. F. Smith on the typewritten statement of his assets in 1932 are insufficient of themselves to constitute a valid will. The reference to property as 'willed to my wife' apparently related to his will dated 10 October, 1921. The *animus testandi* does not appear."

[10] The Smith will contained an inherent or fatal defect appearing on its face. It is common knowledge that typewritten words are not the "handwriting of a person whose will it purports to be." In the case before us the entire instrument is in handwriting, and we cannot say that there is an inherent or fatal defect appearing on the face of the instrument or the probate record. We think that the lack of controversy as to the factual situation and the fact that in *Smith* portions of the instrument were typewritten distinguish the *Smith* case from the case before us.

In the case of *In re Johnson,* 182 N.C. 522, 109 S.E. 373 (1921), there was a petition to set aside the probate of the will for fraud. In the petition it was alleged that the probate had been procured by fraudulent and perjured testimony. It was held that the motion was properly filed and heard by the clerk of superior court upon affidavits. The clerk found that no fraud had been perpetrated and that the paperwriting was the last will and testament of the decedent. Upon appeal the judge of superior court entered a judgment

fully confirming the clerk. During the same month that the petition to set aside the probate was filed, the petitioner also filed a caveat proceeding which was tried by a jury. The judgment and order of the clerk, and upon appeal, of the judge of the superior court, are compatible with the answers of the jury to the issues submitted to them. The petitioner in the motion, who was the caveator in the caveat proceeding, appealed from the ruling of the court on the motion to vacate as well as the caveat proceeding.

In *Johnson,* the Supreme Court affirmed the judgment of the superior court judge in the motion to vacate the probate and found no error in the jury trial on the caveat proceeding.

Johnson is distinguishable from the case before us in that in *Johnson,* there was both a motion to vacate the probate heard by the clerk, and upon appeal by the judge, and a caveat proceeding in which the question of *devisavit vel non,* as well as the question of the statute of limitations, was decided by the jury. In the case before us, there has been no caveat filed, and the questions of *devisavit vel non* and the statute of limitations have not been decided by the jury as they were in *Johnson.*

For the reasons stated, on this record, the order of the Clerk of the Superior Court of Randolph County denying the motion to vacate the probate is held to be correct, and the judgment of the Superior Court entered herein is

Reversed.

MORRIS and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. ROGER C. W. MILTON AND FERNANDEZ ZAMOT

No. 7012SC85

(Filed 1 April 1970)

1. Criminal Law § 84— search under warrant issued without proper establishment of probable cause — exclusion of evidence

Evidence obtained by virtue of a search warrant issued without a proper establishment of probable cause, as well as other unconstitutionally obtained evidence, must be excluded in state court prosecutions by virtue of the Fourth and Fourteenth Amendments.

2. Searches and Seizures § 3— issuance of state search warrant — establishment of probable cause — affidavit — extrinsic evidence

While the issuing authority must be informed of enough of the underlying circumstances to support a finding of probable cause for issuance of a state search warrant, it is not constitutionally required that all of these underlying circumstances be set forth in the affidavit to obtain the state search warrant.

3. Searches and Seizures § 3— search warrant for narcotics — affidavit — former G.S. 15-25.1

Prior to its repeal effective 19 June 1969 by Ch. 869, 1969 Session Laws, G.S. 15-25.1 required that the affidavit for a search warrant for barbiturate or stimulant drugs establish the grounds for issuing the warrant.

4. Searches and Seizures § 3; Criminal Law § 84— search warrant for narcotics — sufficiency of affidavit — former G.S. 15-25.1

Affidavit of a police officer that he had reliable information and reasonable cause to believe that a named person had in her possession at a specified address a quantity of marihuana and heroin, and that he received such information from a confidential source that in the past had been found to be true and reliable *is held* insufficient to establish the grounds for issuing the warrant under [former] G.S. 15-25.1 in force when the warrant was issued and the search was conducted, and evidence seized by search under the warrant is not admissible.

5. Constitutional Law § 21; Searches and Seizures § 3— standing to object to validity of search warrant

Defendants have standing to object to the validity of a search warrant for narcotics directed to the premises of a third person, where defendants used this same address for purposes of their joint bank account, and defendants were both in the apartment with the seized evidence at the time of the search under the warrant.

GRAHAM, J., concurring by separate opinion.

APPEAL by defendants from *Hobgood, J.*, 22 September 1969 Session, CUMBERLAND Superior Court.

Defendants were jointly tried and convicted upon charges of possession of the narcotic drug marihuana, and of possession of the narcotic drug marihuana for the purpose of sale, barter, exchange, supplying, giving away or otherwise furnishing to others. (G.S. 90-86. et. seq.)

Defendants pleaded not guilty to the charges and moved to suppress the evidence obtained by search and seizure upon the grounds that the affidavit upon which the search warrant was issued was insufficient to support a finding of probable cause to issue the search warrant. The motion to suppress was denied and defendants excepted.

Likewise, on trial defendants aptly objected to introduction of the evidence obtained by the search and their objections were overruled.

From verdicts of guilty and active prison sentences imposed thereon, defendants appealed.

Attorney General Morgan, by Staff Attorney Giles, for the State.

Downing, Downing and David, by Harold D. Downing, for Roger C. W. Milton.

Blackwell, Thompson and Swaringen, by Larry A. Thompson, for Fernandez Zamot.

BROCK, J.

The affidavit attached to the search warrant reads as follows:

> "Det. L. L. Sonberg, Fayetteville City Police Department being duly sworn and examined under oath, *says under oath that he has reliable information and reasonable cause to believe* that BESSIE SMITH has on her premises and or person and under her control a quantity narcotic drugs, to wit: a quantity of marihuana and herion (sic) in violation of the North Carolina Law. These illegally possessed narcotic drugs are located on the premises and or person at 689 Cape Fear Court, Fayetteville, N. C. described as follows: a multi-apartment building, Apartment 689 Cape Fear Court, Fayetteville, N. C. *The facts which establish reasonable grounds for issuance of a search warrant are as follows: received information from a confidential source that in the past has been found to be true and reliable.* That one Bessie Smith C/F has in her possession and under her control a quantity of narcotic drugs and that they are located in the premises of 689 Cape Fear Court. That a search warrant be issued and that all the narcotic drugs found be seized as evidence and brought before the court." (Emphasis added.)

[2] It is defendants' contention that constitutionally the affidavit for issuance of a search warrant is required to contain factual allegations sufficient to support a finding of probable cause by the issuing magistrate. They cite *Aguilar v. Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964), and *Spinelli v. United States,* 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969) as authority for the proposition that the Fourth Amendment to the Constitution requires the affidavit to contain all of the information upon which the magistrate makes a determination that probable cause exists for issuance of the search warrant. We do not agree with defendants' interpretation of the holdings in *Aguilar* and *Spinelli.*

In *Aguilar* the court was reviewing the showing of probable cause for the issuance of a *state* search warrant. In *Spinelli* the court was reviewing the showing of probable cause for the issuance of a *federal* search warrant. This difference in the two cases must be kept in mind.

[1] The Fourth Amendment to the Constitution of the United States provides in part that "no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." In *Weeks v. United States,* 232 U.S. 383, 58 L. Ed. 652, 34 S. Ct. 341 (1914) it was held that evidence seized in violation of the provisions of the Fourth Amendment must be excluded in federal court prosecutions. In *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) it was held that, by virtue of the "due process" clause of the Fourteenth Amendment, the Fourth Amendment was applicable to the states; and that the exclusionary rule of *Weeks* was likewise applicable in state prosecutions. Therefore, since *Mapp,* evidence obtained by virtue of a search warrant issued without a proper establishment of probable cause (as well as other unconstitutionally seized evidence) must be excluded in state court prosecutions. However, the Fourth Amendment does not require that probable cause must appear by affidavit. The constitutional requirement is that "no warrants shall issue but upon probable cause, supported by oath or affirmation." The procedure for the establishment of probable cause is not provided by the constitution, and the United States Supreme Court has not mandated that any particular procedure is constitutionally required. It would therefore appear, in the absence of statute or rule providing the procedure, that a procedure which forthrightly implements the safeguards of the Fourth Amendment is constitutionally sound.

In *Spinelli,* as pointed out above, a federal warrant was involved. There the court, although not specifically pointing it out, was dealing with a search warrant issued under the Federal Rules of Criminal Procedure. Rule 41, which deals with the subject of search and seizure, specifically provides that a warrant shall issue *only on affidavit* sworn to before a judge or commissioner and *establishing the grounds* for issuing the warrant. Therefore, a federal warrant, by rule, must be supported by an affidavit which on its face is sufficient to establish probable cause.

[2] In *Aguilar,* as pointed out above, a Texas state warrant was involved. There the court was dealing with the evidence which was presented to the Justice of the Peace for a finding of probable cause.

The affidavit was meager, and, after quoting it in the opinion, the court by footnote No. 1 stated: "The record does not reveal, nor is it claimed, that any other information was brought to the attention of the Justice of the Peace." Therefore, the court was faced with the proposition of whether the affidavit, standing alone, was sufficient to support a finding of probable cause. The court detailed the necessity that the issuing authority must be informed of enough of the underlying circumstances to support a finding of probable cause, but it did not hold that it was constitutionally required that these underlying circumstances must all be set forth in the affidavit to obtain a state search warrant.

[3] Neither the Attorney General nor the defendants argue, or even mention, the controlling factor in this case; that is, the statutory requirement for the issuance of a search warrant in North Carolina. The provisions of G.S. 15-25.1 as amended by Chap. 453, Session Laws 1961, effective 18 May 1961, provided in part as follows: "A warrant shall issue only *on affidavit* sworn to. . . ., *establishing the grounds* for issuing the warrant." (Emphasis added.) This Article 4 of Chap. 15 of the General Statutes was repealed and completely rewritten by Chap. 869, Session Laws 1969, effective 19 June 1969; but the search warrant in this case was issued and the search conducted on 2 May 1969, over a month before the effective date of the 1969 rewrite. Therefore, since the prior statute is applicable to the warrant and search, we refrain from discussing the effects of the 1969 rewrite. Also, the statute in force at the time of the issuance of the warrant and the search in this case provided in part that "no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action: . . . ." G.S. 15-27.

[4] Therefore, tested by the requirements of the statute (G.S. 15-25.1) in force at the time of the warrant and search, we hold that the affidavit upon which the search warrant in this case was issued did not *establish the grounds* for issuing the warrant, and therefore the evidence seized pursuant to the search under the warrant is not admissible against defendants.

The contention of the Attorney General that evidence could be offered on the suppression hearing to show what facts were before the magistrate (in addition to the averments of the affidavit), and thereby establish that probable cause existed for issuance of the warrant, is unavailing under the mandate of the statute in force at the time in question.

[5] Likewise, we do not agree with the Attorney General's con-

tention that these defendants have no standing to object to the search warrant. See *Jones v. United States,* 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960). The affidavit and the search warrant are directed to the premises of one Bessie Smith, and, although the testimony indicates she was arrested along with the two appealing defendants, the record on appeal does not disclose what charges, if any, were lodged against her, or their disposition. In any event, according to the evidence, the two defendants used this same address for purposes of their joint bank account, and they were both upstairs in the apartment with the seized evidence at the time of the search. There is nothing in the evidence to suggest that defendants illegally gained or retained their presence in the apartment.

From the evidence it seems clear there was illegal possession and use of the narcotic drug marihuana by someone at the premises searched. The search revealed vegetable matter, all of which contained marihuana, in envelopes and boxes, and an old fashioned coffee grinder along with packages of cigarette papers. However, unless the State can proceed without the evidence seized by the search, the apparently guilty parties cannot be successfully prosecuted. Perhaps the statutory requirements were too rigid for compliance by officers in their efforts to apprehend violators of the law; but it is a matter of clear and unambiguous legislation and it is for the legislature, not the courts, to make any needed statutory changes.

For failure of the affidavit to comply with the statutory requirement, it was error to refuse to suppress the evidence seized as a result of the search under the search warrant issued in this cause.

New trial.

BRITT, J., concurs.

GRAHAM, J., concurs by separate opinion.

GRAHAM, J., concurring:

In my opinion the affidavit in question is insufficient under the statute in force at the time because it fails to indicate how the complainant's confidential informant received his information or why the informant's sources were reliable if he came about the information indirectly. This factual information must be established under oath before a warrant may issue. *Spinelli v. United States,* 398 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969). However, as pointed out in the opinion of the majority there is nothing in any of the federal decisions to say that such evidentiary facts must appear in the affi-

davit itself where a *state* warrant is involved. In fact, it may be inferred from certain dicta in *Aguilar v. Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964) that where a state warrant is involved extrinsic evidence may be used to show that the warrant was in fact issued upon the establishment of probable cause. See footnote No. 1 of *Aguilar* which is cited in the majority opinion.

It therefore appears that unless the State statute requires that the affidavit contain all of the grounds necessary to establish probable cause, a procedure for the establishment of the validity of a warrant such as suggested by the Attorney General and referred to in the majority opinion would be sound. I agree with the majority that such procedure is unavailable here because at the time of the search here in question G.S. 15-25.1 required that the grounds for the issuance of the warrant be *established* in the affidavit. This section has now been replaced by G.S. 15-26(b) which was effective 19 June 1969 and which requires only that the affidavit *indicate* the basis for the finding of probable cause.

Because of the wide confusion that now exists with respect to search warrants, I think it important to go further than the majority and express opinion as to the effect of the new statute. In my opinion a warrant, issued pursuant to G.S. 15-26(b) and after its effective date, which contains or has attached to it an affidavit that fails to include *all* of the information necessary to establish a finding of probable cause may nevertheless be shown to be sufficient if the affidavit indicates the basis for such a finding.

In my opinion, the affidavit here in question is sufficient to *indicate the basis* for a finding of probable cause and if the warrant had been issued subsequent to 19 June 1969, I would vote to remand the case for the purpose of allowing the State to present evidence on *voir dire,* if it could, as to what information was presented under oath to the official issuing the warrant. The burden of establishing the validity of the warrant would be on the State and would be met if the trial court found facts based on competent evidence that would support the following necessary conclusions: (1) That at the time the complainant sought the warrant he was in possession of information sufficient to establish probable cause for the issuance of the warrant. (2) That he made this information known under oath or affirmation to the official who issued the warrant. (3) That the issuing official found probable cause for the issuance of the warrant based upon the information given him under oath by the complainant.

The better practice will always be to set forth in the affidavit

the detailed information comprising the grounds for issuing the warrant. However, if a warrant is in fact obtained without violating any constitutional or statutory provisions the State should be permitted to show as much. Such a procedure finds support in the language of G.S. 15-27(b) which also became effective 19 June 1969. There it is provided: "No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required." As pointed out in the majority opinion there is no constitutional provision requiring that all the grounds necessary for a finding of probable cause be set forth in a written affidavit.

MARGARET LOUISE THARPE v. STACY BREWER AND JOY DOWELL SWAIM

No. 7023SC112

(Filed 1 April 1970)

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

In considering a motion for judgment as of nonsuit, all of the evidence must be taken in the light most favorable to the plaintiff.

2. Pleadings § 2— statement of cause of action — necessity for pleading statute relied upon

In order to state a cause of action, it is not necessary to put in the complaint the statute upon which the pleader is relying.

3. Automobiles §§ 43, 50— parking on highway with bright lights facing oncoming traffic — sufficiency of pleadings

In this action by plaintiff guest passenger for personal injuries received in a collision between defendant's automobile and a codefendant's truck, allegations in the complaint that defendant "was negligent in that she parked the 1965 Dodge automobile on the wrong side of the road contra to the law of the State of North Carolina with a portion of the said car situated in the lane for southbound traffic," when considered with the allegations and admissions in defendant's answer to the effect that defendant had driven her automobile onto the left-hand shoulder of the road and as far off the main traveled portion as was practical for the purpose of discharging passengers, and that the automobile was temporarily stopped, *is held* sufficient to support the evidence that defendant violated G.S. 20-161.1 by parking her automobile at night on a highway with its bright lights facing oncoming traffic, and the trial court erred in failing to submit to the jury an issue as to the negligence of defendant in violating the statute.

4. Automobiles § 94— contributory negligence of guest passenger — remaining in illegally parked automobile

In this action for personal injuries received when the automobile in

which plaintiff was a guest passenger was struck by a truck, the trial court erred in submitting to the jury the issue of plaintiff's contributory negligence in remaining in the automobile which was allegedly parked on the highway at nighttime with its lights on bright facing oncoming traffic in violation of G.S. 20-161.1, where all the evidence tends to show that plaintiff was a passenger in the rear seat of a two-door automobile and that the automobile had been parked for only 30 seconds prior to the time the truck was seen approaching from the opposite direction.

5. Automobiles § 72; Negligence § 4— sudden emergency

In the face of a sudden emergency, a person is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence would have made in similar circumstances.

6. Automobiles §§ 72, 90— instructions — sudden emergency

In this action for personal injuries received when the automobile in which plaintiff was a guest passenger was struck by defendant's truck, the trial court erred in failing to instruct the jury with regard to the doctrine of sudden emergency, where defendant's evidence tends to show that he went over the crest of a hill and saw the headlights of the automobile in which plaintiff was a passenger, that the lights blinded him and when he realized that the automobile was in his lane of traffic, he turned his truck to the left and applied his brakes in an attempt to avoid the collision which followed.

APPEAL from *McConnell, J.*, September 1969 Session of WILKES County Superior Court.

Margaret Louise Tharpe, the plaintiff, instituted this action to recover damages for personal injuries allegedly sustained in an automobile accident as the result of the joint and concurrent negligence of the defendants, Joy Dowell Swaim, operator of the automobile in which the plaintiff was a guest passenger, and Stacy Brewer, driver of the truck which struck the Swaim automobile.

The defendant Brewer, answering the complaint, denied that the plaintiff was injured by any negligence on his part, and alleged that any injuries which may have been sustained by the plaintiff were proximately caused by the plaintiff's own negligence or in the event he was held to be negligent, by the plaintiff's contributory negligence.

The defendant Swaim denies any negligence on her part and alleges that if the plaintiff was injured, her injuries were caused solely and proximately by the negligence of the defendant Brewer.

At the close of the plaintiff's evidence, the court denied the motion of the defendant Brewer and granted the motion of the defendant Swaim for judgment as of nonsuit. The defendant Brewer offered his defense and following his evidence renewed his motion for judgment as of nonsuit which was denied. The court submitted the case

to the jury on the issues of the negligence of the defendant Brewer, the contributory negligence of the plaintiff, and damages. From a verdict and judgment in favor of the plaintiff, the defendant Brewer appealed to this Court. From the judgment of nonsuit entered as to the defendant Swaim, the plaintiff appealed.

Franklin Smith for plaintiff appellant-appellee.

Moore and Rousseau, by Julius A. Rousseau, Jr., for defendant, Swaim, appellee.

McElwee, Hall and Herring, by John E. Hall, for defendant, Brewer, appellant.

HEDRICK, J.

Appeal as to Plaintiff Tharpe

The plaintiff's main exception and assignment of error, upon which her appeal turns, is to the judgment of nonsuit entered at the close of the plaintiff's evidence upon the motion of the defendant Swaim.

[1] In considering a motion for judgment as of nonsuit, all of the evidence must be taken in the light most favorable to the plaintiff. *Lienthall v. Glass*, 2 N.C. App. 65, 162 S.E. 2d 596 (1968); *Champion v. Waller*, 268 N.C. 426, 150 S.E. 2d 783 (1966).

The plaintiff, in her complaint, alleged that her injuries were proximately caused by the negligence of the defendant, Joy Dowell Swaim, in the following respects:

> "III. That on the 8th day of November, 1967, at approximately 6:30 p.m., the plaintiff was riding as a guest passenger, sitting in the right-hand side of the rear seat of the 1956 Dodge automobile owned by James Calvin Swaim. That the said automobile was sitting still on the left-hand side and shoulder of Rural Paved Road 2002 with the front of the said automobile directed in a northern direction of Rural Paved Road 2002. That on this occasion, the 1956 Dodge automobile was sitting pointed in a northern direction with the wheels on the left side of the automobile approximately four feet off the edge of the pavement and that the right wheels of the automobile were sitting approximately two feet upon the paved edge of the road. That on this same date and time the defendant, Stacy Brewer, was operating a 1965 green Chevrolet pickup in a southern direction on Rural Paved Road 2002. That when the Chevrolet pickup approached the Dodge automobile, which was parked on the

edge of the road, a portion of the said Dodge was in the lane of traffic in the direction in which the pickup was traveling. The defendant, Stacy Brewer, applied his brakes and when he applied his brakes the pickup skidded out of control and a violent collision occurred between the right rear of the Chevrolet pickup and the front and right side of the 1956 Dodge automobile.

* * *

"VI. That the defendant, Joy Dowell Swaim, was more specifically negligent in the following respects:

* * *

"D. That the defendant, Joy Dowell Swaim, was negligent in that she parked the 1956 Dodge automobile on the wrong side of the road contra to the law of the State of North Carolina with a portion of the said car situated in the lane for the southbound traffic."

In *Lienthall v. Glass, supra,* the Court quoted the following language from *Champion v. Waller, supra:*

"'Facts alleged in the complaint and admitted in the answer are conclusively established by the admission, it not being necessary to introduce such allegations in evidence. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16; Stansbury, North Carolina Evidence, § 177. The same is true of allegations of new matter in a further answer, which new matter is favorable to the plaintiff. In passing upon a motion for judgment of nonsuit, all such allegations in the answer are taken to be true and are to be considered along with the evidence.'"

The defendant Swaim answered the complaint as follows:

"III. That the allegations contained in paragraph III of the complaint are untrue and denied, except as herein admitted. . . . That the operator of said 1956 automobile had driven said automobile onto the left-hand shoulder of said road and as far off the main traveled portion as was practical, for the purpose of discharging passengers. That said automobile was momentarily stopped, with its headlights on low beam."

The pleadings and evidence in this case would permit, but not compel, the jury to find the facts to be as follows: On 8 November 1967, at about 6:30 p.m., the plaintiff, Margaret Louise Tharpe, was riding as a guest passenger in a 1956 Dodge automobile being operated by Joy Dowell Swaim, the defendant. The defendant Swaim drove the automobile from the right-hand lane of the highway and parked it on the left-hand side of the highway with approximately

two feet of the automobile remaining on the pavement. After she parked the automobile, the defendant Swaim left the headlights burning while she opened the door in order to discharge passengers. Within thirty seconds after the automobile was parked on the wrong side of the highway, the defendant Brewer approached from the opposite direction on the same road. Seeing the headlights of the Swaim automobile shining down the road, he applied his brakes forcefully causing his pickup truck to skid and collide with the Swaim vehicle. As a result of the collision, the plaintiff, who was in the rear seat of the two-door automobile, was thrown from the automobile onto the ground.

The main thrust of the defendant Swaim's contention is that the allegations in the complaint are not sufficient to bring into play G.S. 20-161.1 which is as follows:

> *"Regulation of night parking on highways* — No person parking or leaving standing a vehicle at night on a highway or on a side road entering into a highway shall permit the bright lights of said vehicle to continue burning when such lights face oncoming traffic."

[2] It is not necessary for the plaintiff to include the statute upon which she relies in her complaint in order to state a cause of action against the defendant. In *Richardson v. Richardson,* 4 N.C. App. 99, 165 S.E. 2d 678 (1969), this Court stated:

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

[3] We hold that the allegation in the complaint "[t]hat the defendant, Joy Dowell Swaim, was negligent in that she parked the 1956 Dodge automobile on the wrong side of the road contra to the law of the State of North Carolina with a portion of the said car situated in the lane for the southbound traffic", when considered with the allegations and admissions in the answer of the defendant Swaim,

is sufficient to support the evidence that the defendant Swaim violated G.S. 20-161.1. The evidence, when considered in its light most favorable to the plaintiff, is sufficient to warrant the court's submitting an issue to the jury as to the negligence of the defendant Swaim. The judgment of nonsuit as to the defendant Swaim is reversed.

[4] The appellant Tharpe contends that the trial judge committed error in submitting the issue of the appellant's contributory negligence to the jury.

The defendant Brewer, in his second further answer and defense, pleaded that the plaintiff was contributorily negligent in that she remained in the automobile of the defendant Swaim when she, the plaintiff, knew, or by the exercise of ordinary care ought to have known, that she was in a place of danger in that the Swaim automobile was parked and left unattended in the nighttime with its lights burning bright, on the left side of the public highway facing traffic, with a portion of the automobile on the pavement, in violation of G.S. 20-161.1.

> "Contributory negligence must be pleaded and proved by the defendant. G.S. 1-139. *Moore v. Iron Works,* 183 N.C. 438, 111 S.E. 776; *Ramsey v. Furniture Co.,* 209 N.C. 165, 183 S.E. 536. To be sufficient, a plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion. *Watson v. Farmer,* 141 N.C. 452, 54 S.E. 419; *Cogdell v. Railroad Co.,* 132 N.C. 852, p. 855, 44 S.E. 618. One relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason. *Boney v. R. R.,* 155 N.C. 95, 71 S.E. 87; *Farris v. R. R.,* 151 N.C. 483, bot. p. 489, 66 S.E. 457. Evidence which raises a mere conjecture is insufficient for the jury. *White v. R. R.,* 121 N.C. 484, 27 S.E. 1002." *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312 (1951).

All of the evidence tends to show that the plaintiff was riding as a passenger in the rear seat of a two-door automobile, and that said automobile had been parked for only thirty seconds prior to the time the defendant Brewer's automobile was seen approaching from the opposite direction.

Considering all of the evidence, we hold that it was error for the court to submit an issue of contributory negligence to the jury.

Appeal as to Defendant Brewer

[6] The defendant assigns as error the failure of the trial judge to instruct the jury with regard to the doctrine of sudden emergency.

In North Carolina negligence is defined as "the failure to exercise that degree of care that an ordinarily prudent person would exercise under the same or similar circumstances and when charged with like duty." *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727 (1956). The defendant Brewer's evidence regarding the events which occurred on the night of 8 November 1967 was as follows: Sometime after dark on the night of the collision, Brewer was driving his Chevrolet pickup truck south on Rural Paved Road 2002 and as he neared the crest of the hill about 200 feet from the scene of the accident someone backed out onto the highway in front of him. He reduced his speed and the person pulled back into the driveway and let him go by on the highway. Immediately after this he went over the crest of the hill and saw the lights which were shining from the Swaim vehicle. The lights blinded him and when he realized that the other vehicle was in his lane of traffic, Brewer turned his truck to the left and applied his brakes in an attempt to avoid the collision which followed.

[5, 6] The evidence shows that the defendant Brewer was faced with a sudden emergency. In the face of an emergency, a person is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence would have made in similar circumstances. *Williams v. Boulerice,* 268 N.C. 62, 149 S.E. 2d 590 (1966).

The North Carolina Supreme Court, in *Williamson v. Clay, supra,* spoke to the identical question involved in the present case. There, in discussing the duty of the trial judge to charge the jury with regard to the doctrine of sudden emergency, the Court stated:

> "Even in the absence of request for special instructions, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. G.S. 1-180; *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898, and cases cited. In this case, since defendant relied in large measure upon what he contended were circumstances of acute emergency, the failure to comply with G.S. 1-180 by applying the applicable legal principles to defendant's evidence in regard thereto must be regarded as prejudicial. Hence, defendant's assignment of error relating to this feature of the charge is sustained and a new trial awarded."

The appellant Brewer's additional assignments of error have been duly considered in the appellant Tharpe's appeal. For errors committed, we hold there must be a new trial.

New trial.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. MORRIS CURRIE

No. 7015SC137

(Filed 1 April 1970)

1. Homicide § 30— second degree murder — instructions on lesser degree of crime — contradictory instructions

In a prosecution for murder in the second degree, the trial court properly denied defendant's requested instruction that if the jury found that defendant intentionally fired the shot which killed deceased and also found that defendant believed the gun was not loaded, then defendant would be guilty only of involuntary manslaughter.

2. Homicide § 24— instructions — presumption of malice — defendant's testimony that he did not know rifle was loaded

In a prosecution for murder in the second degree committed with a rifle, wherein defendant testified that he was only playing with the deceased and did not know the rifle was loaded, the trial court should have clearly instructed the jury that the presumption of malice would not arise if they believed defendant's testimony; consequently, portion of the court's instructions which would have permitted the jury to consider the presumption of malice had they believed defendant's testimony to be true, *held* reversible error.

3. Homicide § 5— second degree murder — malice

Malice is an essential element of murder in the second degree.

4. Homicide § 14— presumption of malice — requisite intent

Malice, as one of the essential elements of murder in the second degree, is not presumed merely by the pointing of a gun or pistol at another person in fun in violation of G.S. 14-34; in order for this presumption of malice to arise from an assault with a deadly weapon, there must be an intent to inflict a wound with such weapon which produces death.

5. Homicide § 14— presumption of malice — unintentional firing of deadly weapon

An unintentional firing of a deadly weapon, believed to be unloaded, is not such an intentional use thereof as gives rise to the presumption of malice.

APPEAL by defendant from *Brewer, J.*, October 1969 Criminal Session of Superior Court held in ALAMANCE County.

Defendant was tried upon a bill of indictment charging him with murder in the first degree in connection with the death of Banks Wyatt. The record reveals that he was tried upon the charge of murder in the second degree. From a judgment of imprisonment upon a verdict of guilty of murder in the second degree, the defendant appealed to the Court of Appeals.

Attorney General Morgan, Assistant Attorney General Rich, and Staff Attorney Costen for the State.

W. R. Dalton, Jr., for the defendant appellant.

MALLARD, C.J.

The evidence for the State tended to show that Morris Currie (defendant), the deceased, Banks Wyatt (Banks), and Sherman Williams (Sherman) all worked at the same place. On 27 June 1969, after they were paid by their employer, the three of them engaged in gambling with dice. At approximately 7:30 or 8:00 p.m. after the defendant had lost some of his money, he asked Sherman to take him home. The three of them rode in Sherman's car to the defendant's home. After telling them he was going into the house to get some more money and would come back, the defendant got out of the car. Sherman turned the car around, and he and Banks waited. When the defendant came out of the house, he had a 30-30 carbine which he pointed toward the window of the car and told Sherman and Banks that he wanted his money back. (This weapon is referred to by the witnesses as a "gun," "rifle," and "carbine.") Sherman was sitting in the driver's seat of the car and Banks was sitting next to him. Banks was closer to where defendant was standing than Sherman. Sherman started to put his hand in his pocket to get the money, and defendant told him to keep his hands up. Banks told the defendant, who was about twenty feet away at that time, to come on over and talk and that he would give him his money back. The defendant kept the carbine pointed at them and told them to keep their hands up. Sherman started to open the car door, and at that time the defendant shot. The bullet struck Banks just above his right ear, killing him instantly.

Defendant's evidence is summarized, except where quoted, as follows: Sherman and Banks won all of his money in the dice game. At his request, Sherman, together with Banks, took defendant home. He went into the house after telling them he was going there to get some more money. He brought the carbine out of his house intending to sell it to one of them. He went out and "played with the boys, when I walked in the yard I said, 'This is a hold up,' and I didn't know there was anything in the gun * * *. I did point the gun * * * I didn't think there was anything in the gun. I asked them to give me my money back, but I didn't mean it. I said it in a joking way." The carbine went off. Sherman got out and put some money on the hood of the car. When defendant went to the car to see if Banks was shot, Sherman snatched the carbine from him and

struck defendant with it. Defendant then ran away but came back immediately and asked for somebody to call an ambulance and the sheriff.

[1] The defendant, in apt time and in writing, requested that the judge give certain instructions to the jury. This request was denied. The requested instructions read in pertinent part:

> "The Court instructs you that even if you find that the defendant Morris Currie intentionally fired the shot which killed Banks Wyatt, if you also find that the said Morris Currie believed at the time that the gun was not loaded, the defendant will be guilty only of involuntary manslaughter * * *."

While the defendant could have intentionally pointed the gun and intentionally pulled the trigger, believing that the gun was not loaded, he could not have intentionally fired the shot and at the same time believed that the gun was not loaded. The judge, therefore, did not commit error in failing to instruct the jury in the manner requested by the defendant because the instructions as requested are contradictory.

[2] The defendant contends that the court committed error in failing to instruct the jury as to the legal effect of the defendant's testimony that he was playing and did not know that the gun was loaded.

[2, 3] We think defendant's exception to the following portion of the charge is well taken:

> "Now, the intentional killing, to raise the presumption of malice and unlawfulness, does not mean a specific intent to kill someone, but it means an intentional assault with a deadly weapon inflicting wounds thereby causing death of the deceased."

When considered with the charge as a whole and the factual situation presented by the evidence, the meaning of this instruction in this case is not clear. The jury could have inferred from this that the gun, thought to be unloaded, and intentionally pointed at the deceased in fun, which discharged when defendant pulled the trigger thinking that it was unloaded and which resulted in the death of the deceased, raised the presumption of malice. Malice is an essential element of murder in the second degree.

Murder in the second degree and malice are defined in *State v. Benson,* 183 N.C. 795, 111 S.E. 869 (1922), as follows:

"Murder in the second degree is the unlawful killing of a human

being with malice, but without premeditation and deliberation. *S. v. Lipscomb,* 134 N.C. 695; *S. v. Fuller,* 114 N.C. 885.

Malice is not only hatred, ill-will, or spite, as it is ordinarily understood — to be sure that is malice — but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. *S. v. Banks,* 143 N.C. 652. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the killing with a deadly weapon; and a pistol or a gun is a deadly weapon. *S. v. Lane,* 166 N.C. 333.

* * *

When it is admitted or proven that the defendant killed the deceased with a deadly weapon, the law raises two presumptions against him; first, that the killing was unlawful; and second, that it was done with malice; and an unlawful killing with malice is murder in the second degree."

G.S. 14-34 provides that an assault is committed when any person points a gun or pistol at another, either in fun or otherwise. The pertinent part of this statute reads: "If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault * * *." It is, therefore, axiomatic that if the gun or pistol used is in fact a deadly weapon, then such pointing thereof is an assault with a deadly weapon.

[4, 5] Malice, as one of the essential elements of murder in the second degree, is not presumed merely by the pointing of a gun or pistol at another person in fun in violation of G.S. 14-34. In order for this presumption of malice to arise from an assault with a deadly weapon, there must be an intent to inflict a wound with such weapon which produces death. *State v. Williams,* 235 N.C. 752, 71 S.E. 2d 138 (1952). See also *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337 (1965). An unintentional firing of such deadly weapon, believed to be unloaded, is not such an intentional use thereof as gives rise to the presumption of malice. In the case of *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322 (1955), Justice Bobbitt (now Chief Justice), speaking for the Court, said:

"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. . . . 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 or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumption. *S. v. Quick,* 150 N.C. 820, 64 S.E. 168. The presumptions do not arise if an instrument, which is *per se* or may be a deadly weapon, is not intentionally used as a weapon, *e.g.,* from an accidental discharge of a shotgun."

The defendant in his brief says that:

"Since the defendant admitted he pulled the trigger and that the gun did not go off accidentally; since he admitted he pointed the gun in the direction of the deceased, and since the gun did kill the deceased without any further misadventure sufficient to deflect the aim, the jury would no doubt find that the defendant did point the gun at the deceased in violation of G.S. 14-34. And even if he merely pointed in the general direction of the two companions, this would probably be culpable negligence without regard to the statute. Consequently, as a practical matter, the defendant confessed guilt to manslaughter in open court. Thus, the case was reduced to one single point — was the defendant guilty of manslaughter or of murder."

In 40 Am. Jur. 2d, Homicide, § 95, it is said:

"With few exceptions, every unintentional killing of a human being arising from a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is manslaughter. If a person points a pistol at another in sport, as a joke, or to cause fright merely, believing and, perhaps, having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, he is guilty of manslaughter."

In the case of *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963), the evidence tended to show that the defendant and the deceased were playfully "scuffling" with defendant's loaded gun. The Court said:

"It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and

under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter."

In the case of *State v. Stitt,* 146 N.C. 643, 61 S.E. 566 (1908), the State's evidence tended to show that while the defendant and the deceased were "playing" and "projecking," the defendant took a gun and pointed it at deceased. The gun fired, killing him. The defendant stated that he did not know there was a shell in the gun. The court instructed the jury that they could not convict the defendant of murder in the first degree or murder in the second degree and charged the jury, among other things:

"(T)hat if they found from the evidence, beyond a reasonable doubt, that the defendant picked up the gun and intentionally pointed it at the deceased, and cocked it, aiming it at him; and if they further found, beyond a reasonable doubt, that the gun discharged its load and killed deceased, and this was done willfully and intentionally, the defendant would be guilty of manslaughter, and it would be the duty of the jury to return a verdict of guilty of manslaughter."

In finding that there was no error in the *Stitt* case, the Supreme Court said that "if the jury was satisfied beyond a reasonable doubt that defendant intentionally pointed the gun at the deceased, and while so engaged the gun was discharged, killing the deceased, the defendant would be guilty of manslaughter."

In the case of *State v. Turnage,* 138 N.C. 566, 49 S.E. 913 (1905), the defendant's testimony tended to show that he did not intentionally point the gun at anyone and that he did not intend to shoot anyone, but that he and some others were playing and that he got the gun in order "to frolic" with one of them. The Court held that "pointing a gun at another under such circumstances as would not excuse its intentional discharge constitutes, in this and many other States, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter. In this State it is immaterial whether the gun is loaded or not. Laws 1889, ch. 527. At common law, one who leveled a loaded gun at another without intention of discharging it, and the gun goes off accidentally and kills another, is guilty of manslaughter."

In the case of *State v. Limerick,* 146 N.C. 649, 61 S.E. 568 (1908), the evidence tended to show that the defendant and the deceased were friends and were scuffling over the gun when it fired, inflicting the wound from which the deceased died. The Court said:

"Undoubtedly, if the prisoner intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of

which he died, or if the prisoner was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the prisoner would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental."

[2] In this case there was ample evidence from the State's witnesses to show an intentional and unlawful killing with a deadly weapon. Such evidence, if believed, was sufficient to support a verdict of guilty of murder in the second degree. However, the defendant testified that he did not know the gun was loaded; that although he pointed the gun, he did not point it at anyone in particular; and that he was only playing and joking with Sherman and Banks. The *defendant's evidence* fails to show that he killed Banks intentionally or with express or implied malice. Therefore, the judge should have instructed the jury that malice, as an essential element of murder in the second degree, would not be presumed if the defendant, in playing and joking with Sherman and Banks, pointed the gun at the deceased and pulled the trigger, and that at the time he pulled the trigger, he thought the gun was unloaded.

The jury may not believe the defendant's testimony, but he is entitled to have the judge apply the law to his evidence. The able judge who tried this case, in charging the jury and applying the law to the facts, seems to have overlooked the defendant's evidence that he was playing and joking and that he did not know the gun was loaded.

We do not deem it necessary to discuss the defendant's other contentions because, for the reasons stated, the defendant is awarded a new trial.

New trial.

MORRIS and VAUGHN, JJ., concur.

J. HECTOR ATKINS, ADMINISTRATOR OF THE ESTATE OF JAMES LEWIS ATKINS, DECEASED v. DELA A. PARKER, MAX BRYAN AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA

No. 7011SC152

(Filed 1 April 1970)

1. Appeal and Error § 45— the brief — abandonment of assignments

Assignments of error not brought forward in appellant's brief are deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

2. Gifts § 4— gift causa mortis — requisites

To constitute a *donatio causa mortis*, two things are indispensably necessary: an intention to make the gift, and a delivery of the thing given.

3. Gifts § 4— gift causa mortis — sufficiency of findings

Trial court properly concluded that a brother made a gift *causa mortis* of certificates of deposit to his sister, where there were findings, supported by evidence, that the brother had had several heart attacks prior to the gift; that he told his sister that he expected to die from his heart condition and he wanted her to have the certificates if anything happened to him; that the brother subsequently delivered the certificates to his sister's son with instructions that the certificates be turned over to her at his death; and that the brother thereafter died of a heart attack.

4. Gifts §§ 1, 4— completion of gift — delivery

In all cases of gifts, whether *inter vivos* or *causa mortis*, there must be a delivery to complete the gift.

5. Gifts § 1— gift inter vivos — irrevocable

A gift inter vivos is absolute and takes effect *in præsenti.*

6. Gifts § 4— gift causa mortis — revocable

A gift *causa mortis* is revocable and takes effect *in futuro.*

7. Gifts § 4— gift causa mortis — evidence

In an action to establish a gift *causa mortis* in certificates of deposit, evidence that the donor, upon delivery of the certificates to the donee's son, told the son that he would let him know if he, the donor, wanted the certificates back, *held* not to defeat the gift.

APPEAL by plaintiff from *McKinnon, J.*, 6 October 1969 Civil Session, HARNETT Superior Court.

This is a civil action to determine the ownership of funds evidenced by two certificates of deposit. The parties waived trial by jury and agreed that the Presiding Judge should find the facts from the evidence, enter his conclusions of law and render judgment thereon.

The plaintiff offered no evidence, it being determined that the

burden of proof was on defendant, Dela A. Parker, to establish her ownership of the certificates of deposit.

Evidence offered on behalf of the defendants tended to show the following:

Prior to 16 June 1968, James Lewis Atkins owned two certificates of deposit issued by Southern National Bank in his name only. He surrendered these certificates, one on 16 June 1968, and the other on 2 September 1968, and had Southern National Bank issue to him two certificates made out to "MR. J. L. ATKINS, PAY ON DEATH, MRS. DELA A. PARKER." He requested the issuing bank to pay these certificates to his sister upon his death.

Atkins had suffered two or three heart attacks and on several occasions in the summer and fall of 1968 he discussed his health as well as his financial and business affairs with Hoyle Secrest. He told Mr. Secrest his health was very poor and that he feared he was going to die suddenly from a heart attack. He also told Mr. Secrest he was going to fix it so his sister Dela would get some of his money when he died and that he was going to make the certificates of deposit in their joint names.

On the last Sunday in September, 1968, Atkins showed his sister, Dela, the two certificates, handed them to her, and told her he didn't think he was going to live very long and that the certificates of deposit were his gift to her. Dela left the certificates with Atkins. At the time Atkins showed the certificates to Dela, he told her he wanted her to go to Raleigh with him to get a lawyer or banker to look them over and make certain that if anything happened to him she would get the money. The following week Atkins started to Raleigh but was taken ill and returned home.

In the fall of 1968, Max Bryan, Dela's son, went to see Atkins at Atkins' request. At that time, Atkins gave Bryan the certificates of deposit and said he wanted him to keep them. Atkins told Bryan that he wanted to transfer the funds from certificates of deposit, when they matured, to a savings account in Dela's name, and that he would let Bryan know if he wanted them back. He also said he wanted Dela to have the money represented by the certificates and that Bryan was to turn the certificates over to Dela upon Atkins' death. Atkins saw Bryan twice after giving the certificates to him but he never requested that they be returned.

Atkins told Dela on several occasions that he expected to die from his heart condition and that if anything happened to him he

wanted her to have the certificates of deposit and he didn't want anyone else to have them.

Atkins died of a heart attack on 28 December 1968.

The trial judge found facts and concluded as a matter of law that James Lewis Atkins made a gift causa mortis to Dela A. Parker of the certificates of deposit and the funds represented thereby. From judgment in favor of Dela A. Parker, plaintiff appealed.

Edgar R. Bain and Bryan, Jones and Johnson, by Edgar R. Bain, for plaintiff-appellant.

W. A. Johnson for Dela A. Parker, defendant-appellee.

BROCK, J.

[1] Assignments of error Nos. 1 and 4 (exceptions 1 and 13) are not brought forward in plaintiff-appellant's brief so they are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Therefore, only two questions are presented on this appeal. The first is whether there was competent evidence to support the findings of fact made by the trial judge. The second question, being collateral to the first, is whether the facts so found support the trial judge's conclusions of law.

The trial judge found and concluded as follows:

"1. That James Lewis Atkins died testate on or about December 28, 1968, and that the plaintiff is the duly qualified and acting executor of the estate of the said James Lewis Atkins.

"2. That prior to his death James Lewis Atkins purchased from the Southern National Bank of Lillington, North Carolina, the two (2) certificates of deposit referred to and described in the pleadings.

"3. That James Lewis Atkins intended to give and did give said certificates of deposit and the funds represented thereby to the defendant Della A. Parker.

"4. That at the time of said gift the said James Lewis Atkins had the then present interest (sic) to donate said certificates and the proceeds represented thereby to his sister, Della A. Parker, and that said gift was completed by delivery.

"5. That the gift of said certificates of deposit and the funds represented thereby was conditioned to take effect upon the death of the donor.

"6. That at the time of the gift and delivery of the said certificates of deposit James Lewis Atkins was suffering from a severe heart condition of which he had full knowledge and at that time he did not expect to live much longer.

"7. That said certificates of deposit and the funds represented thereby were given to Della A. Parker by the said James Lewis Atkins in contemplation of death and with a view to his death.

"8. That after the gift and delivery of said certificates of deposit the said James Lewis Atkins died of a heart attack; that his death resulted from the condition and illness from which he was suffering at the time of said gift.

"9. That said certificates of deposit remained continuously in the possession of Max Bryan, the son of Della A. Parker, from the date they were delivered to him by James Lewis Atkins until December 29, 1968, at which time the said Max Bryan delivered said certificates of deposit to Della A. Parker in accordance with the instructions given to him by James Lewis Atkins and the said certificates of deposit are now and have been continuously since said date in the possession of the said Della A. Parker.

"10. That Max Bryan claims no interest in said certificates of deposit or the funds represented thereby.

"UPON THE FOREGOING FINDINGS OF FACT THE COURT CONCLUDES AS A MATTER OF LAW:

"1. That James Lewis Atkins made a gift *causa mortis* of said certificates of deposit and the funds represented thereby to his sister, Della A. Parker.

"2. That the said Della A. Parker is now the owner of said certificates of deposit and all funds represented thereby.

"3. That the estate of James Lewis Atkins has no interest whatever in said certificates of deposit or the funds represented by said certificates.

"4. That Max Bryan has no interest in said certification of deposit or the funds represented thereby.

"5. That the said Della A. Parker is entitled to receive from the Southern National Bank payment in full of all funds evidenced and represented by said certificates of deposit upon surrendering and delivering said certificates to said bank."

[2] "To constitute a *donatio causa mortis,* two things are indis-

pensably necessary: an intention to make the gift, and a delivery of the thing given." *Newman v. Bost,* 122 N.C. 524, 29 S.E. 848. See also, *Bynum v. Bank,* 221 N.C. 101, 19 S.E. 2d 121; *Thomas v. Houston,* 181 N.C. 91, 106 S.E. 466.

Appellant contends that the defendant failed to carry the burden of showing the intent of Atkins to divest himself of all right, title and control over the certificates and that he did not intend a final irrevocable disposition of the certificates. To support these contentions, appellant relies on two points: First, the trip to Raleigh Atkins proposed to Dela to have either a banker or a lawyer to check on the certificates to make sure they were safe; and second, the statement by Max Bryan that Atkins told him he would let him know if he wanted the certificates back.

[3] The evidence shows, and the trial judge was correct in finding, a present donative intent on the part of Atkins to give the certificates of deposit to Dela. This was sufficiently illustrated by the delivery of the certificates to Max Bryan with instructions that he wanted Max Bryan's mother (Dela) to have the money represented by the certificates and that he wanted him to turn the certificates over to her upon his (Atkin's) death.

The discussion concerning the trip to Raleigh occurred prior to the delivery of the certificates to Max Bryan, the uncontradicted evidence being that Atkins showed the certificates to Dela at the time the trip was discussed and that Max Bryan had continuous possession of the certificates from the day Atkins gave them to him until Atkins' death. Dela testified that Atkins showed the certificates to her and told her he wanted her to have the certificates if they were safe and, if they were not safe, he wanted to put the money represented by the certificates in a savings account in her name.

[4-7] In all cases of gifts, whether inter vivos or causa mortis, there must be a delivery to complete the gift. *Bynum v. Bank, supra; Newman v. Bost, supra; Adams v. Hayes,* 24 N.C. 361. And, in North Carolina, the law of delivery is the same for gifts inter vivos and gifts causa mortis. *Bynum v. Bank, supra.* However, "[t]he chief distinguishing characteristics between a gift *inter vivos* and one *causa mortis* are that the former is absolute and takes effect *in præsenti,* while the other is revocable, and takes effect *in futuro.*" *Thomas v. Houston, supra.* Therefore, the fact that Atkins told Max Bryan he would let him know if he wanted the certificates back would not defeat the gift causa mortis. There had been a delivery of the gift to Bryan. A gift causa mortis, being defeasible by reclama-

tion, the contingency of survivorship, or deliverance from peril, it is not irrevocable as is a gift inter vivos. *Thomas v. Houston, supra.*

[3] The evidence is sufficient to support the finding of fact by the trial judge that "James Lewis Atkins intended to give and did give said certificates of deposit and the funds represented thereby to the defendant Della A. Parker" and his conclusion that "James Lewis Atkins made a gift *causa mortis* of said certificates of deposit and the funds represented thereby to his sister, Della A. Parker."

The findings of fact by the trial judge were supported by competent evidence. The applicable rule is stated in 1 Strong, N.C. Index 2d, Appeal and Error, Sec. 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, ..."

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 his conclusions of law.

Affirmed.

BRITT and GRAHAM, JJ., concur.

CASE #1 JIMMY V. MARRONE, JR. AND WIFE, ARTHUR MAE MARRONE v. CHARLES E. LONG

— AND —

CASE #2 CHARLES FRANKLIN HELMS AND WIFE, DELANA HELMS v. CHARLES E. LONG

No. 7020SC21

(Filed 1 April 1970)

1. Deeds § 19— restrictive covenants

Restrictive covenants cannot be established except by an instrument of record containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction.

2. Deeds § 20— restrictive covenant — subdivision lots — prior recorded deed from grantor

Where the owners of a 15-acre tract conveyed to plaintiffs a lot therefrom by recorded deed which provided, "This conveyance is made subject

to the following restrictions which shall run with the land, violation of which restrictions shall be exposure to suits for damages by any and all adjoining property owners, who shall be defined as the Grantors herein or any of their subsequent Grantees who might acquire any portion of the original 15 plus acre tract," a subdivision map of the 15-acre tract was thereafter recorded with no restrictive covenants shown thereon, and the owners thereafter conveyed other lots, including defendant's lot, by deeds which contained no restrictive covenants, the restrictions contained in plaintiff's deed *are held* not applicable to defendant's lot, the deed to plaintiff not having expressly imposed any restrictions on the remainder of the 15-acre tract.

MORRIS, J., dissenting.

APPEAL by plaintiffs from *Crissman, J.*, August 1969 Civil Session of UNION County Superior Court.

In each of these cases, which were consolidated both for trial and upon appeal, the plaintiffs contend that defendant's property is subject to restrictive covenants which he has breached. They seek damages and an order requiring defendant to comply with the covenant.

The parties agreed for the case to be heard on the record and stipulations of counsel. The facts as so stipulated may be stated as follows: E. Boyd Aycock and wife (Aycock) owned a fifteen-acre tract of land in Union County. On 22 June 1965 Aycock conveyed a lot from this tract to the plaintiffs Jimmy V. Marrone, Jr. and wife, Arthur Mae Marrone (Marrone). Immediately following the description in the deed there appears the following:

"THIS CONVEYANCE IS MADE SUBJECT TO THE FOLLOWING RESTRICTIONS, WHICH SHALL RUN AS COVENANTS WITH THE LAND, VIOLATIONS OF WHICH RESTRICTIONS SHALL BE EXPOSURE TO SUITS FOR DAMAGES BY ANY AND ALL ADJOINING PROPERTY OWNERS, who shall be defined as the Grantors herein or any of their subsequent Grantees who might acquire any portion of the original 15 plus acre tract:

1. Property shall be restricted to residential uses only, and no residence shall have more than one detached outbuilding.

2. Exterior construction shall be not less than 1,500 square feet of heated living area.

3. Exterior construction shall not have any exposed concrete, cinder or solite block.

4. No more than one dwelling improvement shall be constructed on any one lot, as originally sold by the Grantors herein.

5. No construction improvements shall be erected nearer

than 30 feet to an adjacent street or road right-of-way, no nearer than 8 feet to any other property line.

6. No sign of greater size than 3' x 5' shall be displayed for any purpose."

On some date which does not appear in this record a map of this 15-acre tract was recorded. The map was entitled "Map of Boulevard Park, Monroe Township, Union County, N. C., E. Boyd Aycock—Owner. Surveyed September 27, 1965." Although not so stipulated, lot No. 1 on said map appears to contain the tract previously conveyed to Marrone. The deed to Marrone made no reference to a map or to "Boulevard Park."

By deed dated 5 October 1965 Aycock conveyed four lots to the plaintiff Charles Franklin Helms and wife, Delana Helms. The description in this deed was by metes and bounds and by reference to E. Boyd Aycock's "Boulevard Park" Subdivision recorded in Plat Book 5 at page 133. There were no restrictions or reservations in this deed.

By deed dated 5 October 1965 Aycock conveyed lot No. 5 of the "Boulevard Park" Subdivision to an individual from whom it was acquired by the defendant, Charles E. Long, on 10 December 1968. There were no restrictions or reservations in either of these deeds. The defendant Long has constructed a residence on lot No. 5 which contains only 1,000 square feet of heated living area. The parties agreed that the court, without a jury, should determine the following single issue:

"Do the restrictions contained in the plaintiff Marrone's deed limit and restrict the defendant's use of his lot in Boulevard Park Subdivision?"

It was stipulated that if the restrictions did apply, they had been violated, and the question of damages would be determined by a jury upon a special issue in a subsequent trial. The court answered the issue in the negative and the plaintiffs appeal.

Koy E. Dawkins for plaintiff appellants.

Coble Funderburk for defendant appellee.

VAUGHN, J.

[2] No restrictions appear in the direct chain of title to defendant's lot. The recorded map shows no restrictions. The deed to Marrone was executed prior to the survey of the "Boulevard Park" Sub-

division and makes no reference to such subdivision or any lot therein. The deed to Marrone is the only deed from the common grantor, Aycock, containing restrictions or making any reference thereto. The trial judge correctly concluded that the restrictions contained in the plaintiff Marrone's deed do not limit the defendant's use of his lot.

[1] Restrictive covenants cannot be established except by a instrument of record containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction. *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. If purchasers wish to acquire a right-of-way or other easement over other lands of the grantor, it is very easy to have it so declared in the deed of conveyance. *Milliken v. Denny,* 141 N.C. 224, 53 S.E. 867. "The courts are not inclined to put restrictions in deeds where the parties left them out." *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892. In the last cited case the owner sold all of the lots in his subdivision except one and inserted the following restriction in each deed: "All lots contained in this property known as Wooded Acres shall be used for residential purposes only." His deed to the last lot contained no restriction. The Court held that the last lot, conveyed without restriction, was not subject to restrictions imposed in the earlier deeds.

[2] Here, as in *Church v. Berry,* 2 N.C. App. 617, 163 S.E. 2d 664, the appellant contends that he is entitled to the relief sought by reason of the decision of a divided court in *Reed v. Elmore,* 246 N.C. 221, 90 S.E. 2d 360. The facts in *Church v. Berry, supra,* were very similar to those in the case before us and the decision there is controlling here. The opinion in that case brings forward and reviews pertinent decisions of the Supreme Court prior to its decision in *Reed v. Elmore, supra,* and very carefully distinguishes that case where the grantor conveyed one tract and, in the same instrument, expressly imposed restrictions on other real estate retained by him, from other cases, such as the one at bar, where there have been no express covenants made by the grantor as to the remainder of his property. The following analysis by Parker, J., in *Church v. Berry, supra,* is entirely appropriate for disposition of the case now before us:

> ". . . We do not so interpret *Reed v. Elmore, supra.* It should be noted that the majority opinion of the Court in that case cited both *Turner v. Glenn* and *Hege v. Sellers* and did not expressly overrule either. On the contrary, the Court took care to distinguish *Turner v. Glenn* by pointing out that in that case there had been no *express* covenant made by the common grantor

as to the remainder of his property, whereas in *Reed* there had been a clear *express* application of the restriction to grantor's retained lot #4. While the majority opinion in *Reed* does undoubtedly modify the prior decisions in *Turner* and in *Hege,* as we understand the *Reed* decision it goes no further than to require a purchaser of real property in North Carolina to examine all recorded 'out' conveyances made by prior record title holders during the periods when they respectively held title to the property, to determine if any such owner had *expressly* imposed a restriction upon the use of the property. If no restriction is imposed by clear and *express* language, the purchaser or his title examiner is not required to go further and to speculate at his peril as to whether imposition of some restriction is to be *implied,* either through processes of logical analysis of language employed, or from the fact that a large number of deeds containing uniform restrictions had been given, or from any combination of both.

"If the developer of a real estate subdivision actually intends that all lots therein be restricted, it is simple enough for him to say so. If one of his grantees wants to invest in a restricted lot only if all then unsold lots are similarly restricted, he has but to insist that his grantor expressly say so in the deed by which he acquires title. He has no right to rely on the shaky grounds of implication."

There being no instrument of record which expressly imposes any restrictions on defendant's lot, the decision of the trial court is

Affirmed.

MALLARD, C.J., concurs.

MORRIS, J., dissents.

MORRIS, J., dissenting:

This Court, in the majority opinion in *Church v. Berry,* 2 N.C. App. 617, 163 S.E. 2d 664 (1968), concluded that the opinion in *Reed v. Elmore,* 246 N.C. 221, 98 S.E. 2d 360 (1957), requires a purchaser of real property in this State to examine all recorded conveyances made by prior record title holders during the period of their ownership of the property for the purpose of determining whether any one of them had expressly imposed restrictions on the use of the property. With this interpretation of *Reed v. Elmore, supra,* I agree. In this case, the majority opinion affirms the trial

court because there is "no instrument of record which expressly imposes any restrictions on defendant's lot".

It appears from the record that Aycock owned a fifteen-acre tract. On 22 June 1965, Aycock conveyed a lot from this tract to Marrone. This deed contained restrictions. Subsequent deeds for lots from this fifteen-acre tract contained no restrictions. However, in my opinion, the restrictions in the Marrone deed are sufficiently, clearly and expressly stated to serve as specific notice of their application to other lots in the tract. The restrictions are set out in full in the majority opinion. The paragraph making the conveyance subject to the restrictions states that the restrictions shall run with the land and specifically refers to subsequent grantees of grantors who might acquire any portion of the original fifteen-acre tract. The first restriction limits the use to residential purposes only and provides that "no residence shall have more than one detached outbuilding." The fourth restriction provides that "no more than one dwelling shall be constructed on *any one lot, as originally sold by the Grantors herein.*" (Emphasis supplied.) The fifth restriction requires that "no construction improvements shall be erected nearer than 30 feet *to an adjacent street or road right-of-way, no nearer than 8 feet to any other property line.*" (Emphasis supplied.)

I cannot agree that the restrictions were obviously intended to apply only to the lot then being conveyed. The contrary seems more obvious to me. The deed was recorded as the first deed from Aycock and its recordation was prior to his subsequent conveyances of lots in the tract. It, therefore, constituted notice to subsequent purchasers of lots in the fifteen-acre tract. *Reed v. Elmore, supra.*

For these reasons, I am compelled to vote for reversal.

FLETA T. PEELER v. J. LEE PEELER
No. 7014DC130

(Filed 1 April 1970)

1. Appeal and Error § 6— judgments appealable — award of alimony pendente lite and counsel fees

An order requiring payment of alimony pendente lite and attorney fees affects a substantial right from which an appeal lies as a matter of right.

2. Divorce and Alimony § 18— alimony pendente lite — dependent spouse

In order to be a dependent spouse for the purpose of receiving alimony

pendente lite, one does not have to be unable to exist without the aid of the other spouse, G.S. 50-16.1(3) providing, among other things, that a dependent spouse means a spouse who "is substantially in need of maintenance and support from the other spouse."

3. Divorce and Alimony § 18— alimony pendente lite — needs of dependent spouse

In determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration, including the property, earnings, earning capacity, condition and accustomed standard of living of the parties. G.S. 50-16.5.

4. Divorce and Alimony § 18— alimony pendente lite — sufficiency of evidence

In this action for alimony without divorce, the evidence presented on plaintiff's motion for alimony pendente lite supports the court's findings that the parties are husband and wife, that defendant husband is capable of making payments for the support of plaintiff, that grounds for alimony without divorce exist, and that plaintiff is a dependent spouse in that she is substantially in need of maintenance and support from the defendant.

5. Divorce and Alimony § 18— alimony pendente lite — insufficient means of subsistence — sufficiency of findings

Although the trial court, in making an award of alimony pendente lite to the wife, did not find in the language of G.S. 50-16.3(a)(2) that the wife did not have sufficient means whereon to subsist during the prosecution of this action for alimony without divorce and to defray the necessary expenses thereof, finding by the court that "plaintiff's motion for alimony pendente lite and for counsel fees should be allowed at this time," when considered with all of the other findings, is sufficient to comply with the provisions of G.S. 50-16.3 relating to the requirements for an award of alimony pendente lite.

6. Divorce and Alimony § 18— alimony pendente lite — ownership of property by dependent spouse

Finding that the dependent spouse owned property worth $8,000 and was employed did not preclude the trial court, under the circumstances of this case, from awarding alimony pendente lite, since such award is measured, among other things, by the needs of the dependent spouse and the ability of the supporting spouse, and the dependent spouse need not be impoverished before the court can make such an award.

7. Divorce and Alimony § 18— amount of alimony pendente lite — discretion of court

After consideration of all the elements enumerated in G.S. 50-16.5, the amount to be awarded for alimony pendente lite rests in the sound discretion of the judge, and his determination thereof will not be disturbed in the absence of an abuse of discretion.

8. Divorce and Alimony § 18— amount of alimony pendente lite — abuse of discretion

Trial judge did not abuse his discretion by allowing the sum of $200 as

alimony pendente lite when the needs of the plaintiff wife, the separate income and property of the plaintiff, and the financial circumstances of defendant husband are all considered.

9. Divorce and Alimony § 18— alimony pendente lite — counsel fees

Where plaintiff wife is entitled to alimony pendente lite, she is entitled, upon application, to counsel fees pursuant to G.S. 50-16.4.

APPEAL by defendant from *Lee, District Judge,* 30 September 1969 Session of District Court held in DURHAM County.

Plaintiff alleged that she and defendant are husband and wife. They were married in June 1967 and lived together until 27 August 1968 at which time plaintiff was forced to separate herself from the defendant because the defendant, an excessive user of alcohol, had offered such indignities to her person as to make her condition intolerable and her life burdensome, all without just cause, provocation or fault on the part of the plaintiff. Plaintiff's action is one for alimony without divorce.

On 30 September 1969 the matter was heard on plaintiff's motion for alimony pendente lite and counsel fees. Judge Lee, after hearing the evidence, found in part as follows:

"1. That the plaintiff and defendant were duly married on the 8th day of July, 1967, and no children were born of this union.

* * *

5. That the defendant is 66 years of age and Vice President and Chairman of the Board of J. Lee Peeler and Company, Inc., which he founded in 1946; that the defendant has an annual salary of $15,000 exclusive of bonuses; and the defendant has a net worth of approximately $78,000 exclusive of his interest in J. Lee Peeler and Company, Inc.; that the defendant's interest in J. Lee Peeler and Company, Inc. consists of 961 shares of common stock valued at at least $135.74 per share. And in addition the defendant owns 12 shares of preferred stock of J. Lee Peeler and Company, Inc.

6. That the plaintiff and defendant lived together as husband and wife until about the 27th day of August, 1968, at which time the plaintiff was forced to separate herself from the defendant because of his excessive use of alcohol and his abusive treatment of her; that, for a period of some months immediately preceding the separation of the parties, the defendant, due to his excessive use of alcohol, offered abuse and indignities to the plaintiff so as to render her condition intolerable and her life burdensome.

7. That the plaintiff is employed as a saleslady at Jones & Frazier at a salary of approximately $242.00 per month (after deductions), and has additional miscellaneous income of approximately $40.00 per month, making her monthly income approximately $280.00; and her reasonable monthly expenses amount to approximately $450.00.

8. That the plaintiff has property consisting of some bonds and cash and household furniture and an automobile, all of which is valued at approximately $8,000.00.

(9. That the plaintiff is a dependent spouse within the meaning of the General Statutes of North Carolina, Chapter 50-16.1, in that she is substantially in need of maintenance and support from the defendant.

From all of the above and the record in this case, the Court is of the opinion and so finds that the plaintiff's motion for alimony pendente lite and for counsel fees should be allowed at this time.)

Defendant excepts to foregoing portion of the order in parentheses. This is DEFENDANT'S EXCEPTION #1."

Based upon the findings of fact, the court ordered the defendant to pay to plaintiff the sum of $200 per month as alimony pendente lite and the sum of $750 as counsel fees to plaintiff's attorney.

From this order, the defendant appealed to the Court of Appeals.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant and James B. Maxwell for plaintiff appellee.

Newsom, Graham, Strayhorn & Hedrick by Ralph N. Strayhorn and E. C. Bryson, Jr., for defendant appellant.

MALLARD, C.J.

[1] Plaintiff appellee contends that the appeal should be dismissed because it is from an interlocutory decree and is therefore premature. We do not agree. It is provided by the statute that an "appeal lies of right directly to the Court of Appeals" from any interlocutory order of a superior court or district court in a civil action which affects a substantial right. G.S. 7A-27(d). We hold that an order requiring payment of alimony pendente lite and attorney fees affects a substantial right from which an appeal lies as a matter of right. See also *Kearns v. Kearns,* 6 N.C. App. 319, 170 S.E. 2d 132 (1969).

The statutes relating to alimony and alimony pendente lite were amended in 1967, and became effective 1 October 1967. Prior to the 1967 amendments, it was held that even though the court denied the wife's motion for alimony pendente lite, the court could award counsel fees. *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24 (1963). G.S. 50-16.4 now provides that counsel fees may be awarded, upon application, "at any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3. . . ."

Payments ordered pursuant to statute for the support and maintenance of a dependent spouse are defined in the statute as "alimony" and "alimony pendente lite." G.S. 50-16.1. In the instant case the plaintiff seeks alimony without divorce and uses her complaint as a motion for alimony pendente lite.

The statute, G.S. 50-16.1, defines alimony pendente lite, insofar as it is pertinent to this case, as alimony ordered to be paid pending the final judgment on the merits in an action for alimony without divorce. In G.S. 50-16.1 alimony is defined as "payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce." A final order in a case for alimony without divorce terminates an order for alimony pendente lite. G.S. 50-16.3(b).

In G.S. 50-16.3(a) it is provided that a dependent spouse, who is a party to an action for alimony without divorce, shall be entitled to an order for alimony pendente lite when:

> "(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and
>
> (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

The statute [G.S. 50-16.8(f)] requires that when 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." In the case before us the parties were heard, and the judge made findings of fact.

The defendant in this case does not except to any findings of fact other than the findings that the plaintiff is a dependent spouse and the allowance to plaintiff of alimony pendente lite and counsel fees.

A "dependent spouse" is defined in the statute, G.S. 50-16.1(3), as follows:

> "(3) 'Dependent spouse' means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

[2] Defendant asserts in his brief that we ought to find that to be a dependent spouse, one should not be able to exist without the aid of the other spouse. We do not agree. The statute provides, among other things, that a dependent spouse means a spouse who "is substantially in need of maintenance and support from the other spouse."

[3, 4] In determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration, including the property, earnings, earning capacity, condition and accustomed standard of living of the parties. G.S. 50-16.5. In this case when all the evidence relating to the circumstances is considered, we are of the opinion and so hold that the court did not commit error in finding that the plaintiff was a dependent spouse. The findings that the parties are husband and wife, that the defendant is capable of making payments for the support of plaintiff, that grounds for alimony without divorce exist, and that plaintiff is a dependent spouse in that she is substantially in need of maintenance and support from the defendant are all supported by the evidence. In *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227 (1964), the following appears: "Facts found by the judge are binding upon this court if they are supported by any competent evidence notwithstanding the fact that appellant has offered evidence to the contrary." This rule is applicable in the instant case.

[5] The court also found as follows: "From all of the above and the record in this case, the court is of the opinion and so finds that the plaintiff's motion for alimony pendente lite and for counsel fees should be allowed at this time." The judge did not find in the language of the statute that the wife did not have sufficient means whereon to subsist during the prosecution of this action and to defray the necessary expenses thereof. G.S. 50-16.3(a)(2). However, we are of the opinion and so hold that when effect is given to the finding that the plaintiff's motion for alimony pendente lite and for counsel fees should be allowed, together with all of the other findings, such is sufficient in this case to comply with the provisions of G.S. 50-16.3 relating to the requirements for an award of alimony pendente lite.

[6] Alimony pendente lite is measured, among other things, by the needs of the dependent spouse and the ability of the supporting spouse. The mere fact that the wife has property or means of her own does not prohibit an award of alimony pendente lite. *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218 (1966). The finding that the dependent spouse owned property in the sum of approximately $8,000 and was employed did not preclude the judge, under the circumstances of this case, from awarding alimony pendente lite. We do not think that the law requires that a dependent spouse should be impoverished before the court can make such an award. *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443 (1960).

[7, 8] Defendant also assigns as error the allowance by the court of the sum of $200 as alimony pendente lite asserting that even if the plaintiff is entitled to alimony pendente lite that the sum of $200 is arbitrary and excessive. We do not agree with defendant's contention. After consideration of all the elements enumerated in G.S. 50-16.5, the amount to be awarded for alimony pendente lite rests in the sound discretion of the judge, and his determination thereof will not be disturbed in the absence of an abuse of discretion. *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5 (1968); *Miller v. Miller,* 270 N.C. 140, 153 S.E. 2d 854 (1967). When the needs of the plaintiff, the separate income and property of the plaintiff, and the financial circumstances of the defendant are all considered, we cannot say that the trial judge abused his discretion by allowing the sum of $200 for alimony pendente lite. *Brady v. Brady,* 273 N.C. 299, 160 S.E. 2d 13 (1968).

[9] Defendant contends that the trial court committed error in allowing attorney fees for the plaintiff. In G.S. 50-16.4 it is provided that in actions for alimony when a dependent spouse would be entitled to alimony pendente lite, the court may award reasonable counsel fees, upon application. The determination of what are reasonable counsel fees is within the discretion of the judge. In this case we are of the opinion and so hold that the plaintiff is entitled to alimony pendente lite, and consequently, upon application, is entitled to counsel fees pursuant to the statute. Appellant does not contend that the amount of the counsel fees awarded is excessive.

The order entered in the Superior Court is

Affirmed.

MORRIS and VAUGHN, JJ., concur.

D. R. MOODY, CHAIRMAN OF DEACONS OF SANDY BRANCH BAPTIST CHURCH, LEE EMERSON, HAYWOOD FIELDS, LEROY FIELDS, CURTIS MOODY, CURTIS MOORE, THOMAS MOODY AND EULON KISER, DEACONS OF SANDY BRANCH BAPTIST CHURCH ON BEHALF OF SANDY BRANCH BAPTIST CHURCH AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND OTHER RESIDENTS OF CHATHAM COUNTY SIMILARLY SITUATED v. THE LUNDY PACKING COMPANY, A CORPORATION, AND THE LUNDY SALES CORPORATION, A CORPORATION

No. 7015SC113

(Filed 1 April 1970)

1. Nuisance §§ 1, 3— operation of hog buying station

The operation of a hog buying station is not a nuisance *per se*, although it could become a nuisance *per accidens* when improperly maintained or conducted.

2. Nuisance § 7; Injunctions § 7— enjoining a lawful business enterprise

While a court of equity will enjoin a threatened or anticipated nuisance under proper circumstances, courts are reluctant to enjoin the operation of a legitimate business enterprise; and where the thing complained of is not a nuisance *per se* but may or may not become a nuisance, depending upon circumstances not yet existing, and the injury apprehended is merely contingent or eventual, equity will not interfere.

3. Nuisance §§ 3, 7— action to enjoin operation of hog buying station — sufficiency of allegations

In an action by a rural church to restrain defendants from constructing and operating a hog buying station within 600 feet of the church, allegations that the defendants will have a minimum of 200 hogs daily at the station and that the defendants own and operate other hog buying stations which give off offensive odors and cause annoyance and discomfort to persons residing within 1000 feet of the stations, *held* insufficient to state a cause of action that the proposed station will constitute a nuisance.

APPEAL by plaintiff from *Brewer, J.*, 28 July 1969 Civil Session ALAMANCE Superior Court.

Plaintiffs, who are Deacons of the Sandy Branch Baptist Church, instituted this action to restrain defendants from the construction and operation of a hog buying station on property in Chatham County owned by defendant, Lundy Sales Corporation, which property is in close proximity to the Sandy Branch Baptist Church property.

Certain portions of plaintiff's complaint were stricken on defendant's motion. Although plaintiffs objected and excepted to the entry of the order striking portions of the complaint, they did not bring forward their exceptions and assign them as error. We, there-

fore, consider the complaint as it is after the stricken portions are deleted.

The plaintiffs by their complaint allege, in substance except where quoted verbatim:

Plaintiffs are residents of Chatham County and are the duly elected, qualified and acting deacons of Sandy Branch Baptist Church, Route 2, Bear Creek, North Carolina. Defendant, Lundy Packing Corporation, is a North Carolina corporation with its office and principal place of business located in Clinton, Sampson County, North Carolina. Defendant, Lundy Sales Corporation, is a New York corporation. Defendants are engaged in the operation of hog buying stations. Plaintiffs bring this action as individuals and as deacons of Sandy Branch Baptist Church on behalf of the church and its members, for themselves and other residents of Chatham County similarly situated. The church owns a tract of land in Gulf Township, Chatham County, containing approximately 15 acres, and has an investment in buildings on said lands in excess of $150,000. Upon the lands the church operates a church as a place of worship for its members and the general public, a kindergarten, a parsonage and various other church facilities. The property also contains a cemetery with approximately 800 graves.

Lundy Sales Corporation has purchased a tract of land within 75 feet of the property of the church and within 500 feet of the parsonage. Defendants have established a well on the property and have announced plans to build a hog buying station on said land within 500 feet of the parsonage and within 600 feet of the church.

"That defendants operate hog buying stations near Pine Level, North Carolina and at other locations within the State of North Carolina and plaintiffs are informed and believe that hog buying stations now owned and operated by defendants give off offensive odors which deprive persons residing within 1,000 feet of said stations of the peace, comfort, happiness and enjoyment of their homes, unmolested and free from the harmful, unhealthy, injurious and unpleasantness created and maintained through the operation of the hog buying stations."

Defendants have advised plaintiffs of their plans to construct and operate a hog buying station and that "such operation would be similar to other hog buying stations now operated by the defendants within the State of North Carolina."

The "operation and maintenance of the hog buying station as aforesaid would render Sandy Branch Baptist Church and the homes

of those who reside in the immediate locality within a distance of 1,000 feet unhealthy and undesirable and would deprive the said church members and the public of the peace, comfort, happiness and enjoyment of the church, kindergarten and other church facilities, unmolested and free from the unhealthy, unpleasant conditions which would be created and maintained through the operation of said hog buying station and would create a constant nuisance." Plaintiffs and the people in the immediate locality enjoy wholesome, happy, and sanitary surroundings. Defendant's agents have advised that there will be a minimum of 200 hogs at the station daily, and "plaintiffs are informed and believe conditions created thereby will cause flies and other insects to invade the premises of these plaintiffs and those of their immediate neighbors, with the constant inherent danger of carrying contamination which breeds germs and diseases and making it impossible for children to have access to their normal round of activities in the open air during either day or night."

The "conditions hereinbefore recited" would result in destruction of the church's enjoyment and use of its property and cause unhealthy, unsanitary and unwholesome conditions which would become injurious to the mental and physical well being of its members and the value of the church property would be destroyed.

The "said conditions to be brought about and induced by the conduct and action of the defendants" would result in destruction of all property value in the neighborhood and would amount to a taking of plaintiff's property without due process of law.

Defendants knew at the time of the purchase of their land that the land was in a populated community and knew that Sandy Branch Baptist Church had been operating its church there for almost a century.

Plaintiffs are without an adequate remedy at law.

Plaintiffs pray for the issuance of a temporary restraining order and an order to show cause why the temporary order should not be continued to the final determination of the matter and ask that defendants be permanently enjoined from constructing and maintaining a hog buying station within 1,000 feet of the property of the church or within such further distance as would unreasonably interfere with the use and enjoyment of the church's property.

A temporary restraining order was issued on 17 June 1969, and a show cause hearing was set for 2 July 1969, and thereafter, by consent, continued to 28 July 1969. At the show cause hearing, defendants demurred in writing to the complaint. The demurrer was

overruled, and defendants objected and excepted to the signing and entry of the order overruling the demurrer. Defendants did not appeal but have demurred *ore tenus* in this Court.

After hearing the testimony at the show cause hearing, the court entered an order finding facts and dissolving and vacating the temporary restraining order.

Plaintiffs appealed.

Robert L. Gunn for plaintiff appellants.

Poyner, Geraghty, Hartsfield & Townsend, by N. A. Townsend, Jr., for defendant appellees.

MORRIS, J.

Although plaintiffs excepted to certain of the court's findings of fact and grouped these exceptions as assignments of error Nos. 1 and 2, they did not bring these assignments of error forward and argue them in their brief. They are, therefore, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. The only assignments of error brought forward and argued by plaintiffs are Nos. 3 and 4. No. 3 is directed to the court's conclusion that plaintiffs had failed to establish their entitlement to have the restraining order continued and No. 4 assigns as error the signing and entry of the order dissolving the temporary restraining order. We do not reach either of these assignments of error for discussion, because we are of the opinion that defendant's demurrer should be sustained.

[1] Defendants propose to engage in a lawful business enterprise. The operation of a hog buying station is not a nuisance *per se*. Without doubt, it could become a nuisance *per accidens* when improperly maintained or conducted. *Hall v. Budde,* 293 Ky. 436, 169 S.W. 2d 33 (1943); *Kays v. City of Versailles,* 224 Mo. App. 178, 22 S.W. 2d 182 (1929); *Vana v. Grain Belt Supply Co.,* 143 Neb. 118, 10 N.W. 2d 474 (1943); *Francisco v. Furry,* 82 Neb. 754, 118 N.W. 1102 (1908); *Town of Mt. Pleasant v. Van Tassell,* 166 N.Y.S. 2d 458, 7 Misc. 2d 643 (1957), affd. 177 N.Y.S. 2d 1010 (1958); *Royalty v. Strange,* Tex. Civ. App., 204 S.W. 870 (1918); *State ex rel Tollefson v. Mitchell,* 25 Wash. 2d 476, 171 P. 2d 245 (1946); *Clark v. Wambold,* 165 Wis. 70, 160 N.W. 1039 (1917).

[2] While a court of equity will enjoin a threatened or anticipated nuisance under proper circumstances, courts are reluctant to enjoin the operation of a legitimate business enterprise, and where the

thing complained of is not a nuisance *per se,* but may or may not become a nuisance, depending upon circumstances not yet existing, and the injury apprehended is merely contingent or eventual, equity will not interfere. *Hooks v. Speedways,* 263 N.C. 686, 140 S.E. 2d 387 (1965). In that case the Court, speaking through Moore, J., said [quoting from *Pennsylvania Co. v. Sun Co.,* 138 A. 909, 55 A.L.R. 873 (Pa. 1927)]:

> "Where it is sought to enjoin an anticipated nuisance, it must be shown (a) that the proposed construction or the use to be made of property will be a nuisance *per se;* (b) or that, while it may not amount to a nuisance *per se,* under the circumstances of the case a nuisance must necessarily result from the contemplated act or thing. . . . The injury must be actually threatened, not merely anticipated, it must be practically certain, not merely probable. It must further be shown that the threatened injury will be an irreparable one which cannot be compensated by damages in an action at law."

In *Wilcher v. Sharpe,* 236 N.C. 308, 72 S.E. 2d 662 (1952), plaintiffs sought to enjoin the erection and operation near their residences of a hammer feed mill for processing corn and other grains. A temporary restraining order was issued and, upon a show cause hearing, continued to the hearing. Defendants appealed and, in the Supreme Court, demurred *ore tenus.* In sustaining the demurrer, the Court said:

> "The general rule established in this jurisdiction is that when the owner of property is about to engage in a business enterprise which may or may not become a nuisance according to the manner in which it may be conducted, courts usually will not interfere in advance to restrain such an undertaking, especially when the apprehended injury is 'doubtful, or contingent or eventual.' This is true when the business may be of some benefit to the community and the injury threatened relates to the comfort and convenience of complainants rather than such as imports immediate and serious injury to health or property rights. . . . To justify interference with defendant's right of property it must be made to appear that the proposed mill either *per se* or necessarily in the manner of its operation will become a nuisance. (Citations omitted.)"

[3] Plaintiffs here allege that they are informed and believe that defendants have other hog buying stations which give off offensive odors, that they are advised the proposed station will be similar to the others, that defendants will have 200 hogs daily and plaintiffs

are informed and believe conditions created thereby will cause flies and other insects with the constant inherent danger of disease and germs. Even if it be conceded that the allegations are facts admitted by demurrer, the mere fact that defendants have other hog buying stations which give off offensive odors causing annoyance and discomfort to some people in the neighborhood, is insufficient upon which to base a cause of action that the proposed station will constitute a nuisance when constructed. The allegations of the complaint "relate only to anticipated injuries which at this time are merely conjectural and contingent." *Wilcher v. Sharpe, supra.* No facts are alleged in the complaint which show substantial grounds for anticipating the injuries alleged or that a nuisance will be created.

The demurrer is, therefore, sustained. Plaintiffs are given leave to amend their complaint, if so advised. If they fail to do so, the action stands dismissed.

We do not wish to be understood as holding that plaintiffs may not take further action in the event the hog buying station should be operated in such a manner as to become a nuisance. It is incumbent upon the owners to conduct the same in such a manner that it will not become a nuisance and an annoyance to these plaintiffs and others similarly situated. Failing in this, they may subject themselves to correction and restraint by the courts upon proper application.

The cause is remanded for proceedings not inconsistent with this opinion.

Remanded.

MALLARD, C.J., and VAUGHN, J., concur.

ELDON L. SHOFFNER v. CITY OF RALEIGH

No. 7010SC192

(Filed 1 April 1970)

1. Negligence § 1— negligence defined

Negligence is the failure to exercise proper care in the performance of a legal duty which defendant owed the plaintiff under the circumstances surrounding them; the breach of duty may be by negligent act or negligent failure to act.

2. Negligence § 5— dangerous machinery — degree of care

Persons having possession and control over dangerous substances, machinery, and instrumentalities are under a duty to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others.

3. Negligence § 8— proximate cause

For defendant's negligence to be actionable, it is necessary for the evidence to show that such negligence was a proximate cause of plaintiff's injury.

4. Municipal Corporations § 14; Negligence § 29— injury from salt spreader on municipal truck — sufficiency of evidence of negligence

In this action for personal injuries received in an accident involving defendant municipality's dump truck, plaintiff's evidence was sufficient to require submission of the issue of defendant's negligence to the jury, where it tended to show that, during a heavy snow, plaintiff pushed a car from the road so that a municipal dump truck which was spreading salt could pass, that as plaintiff shut the door of the car he lost his footing and fell, that one of his fingers went into the chain and sprocket drive which was part of the salt spreader mechanism mounted on the dump truck, that plaintiff's finger was injured and part of the finger was later amputated, that when this type of salt spreader comes from the factory it is equipped with a metal hood that covers the chain and sprockets, and that there was no guard or metal hood covering the sprocket or chain drive mechanism when plaintiff was injured.

5. Municipal Corporations § 14; Negligence § 34— injury from salt spreader on municipal truck — contributory negligence

In this action for personal injuries received when plaintiff slipped on snow and fell and his finger went into an uncovered chain drive which was part of a salt spreader mechanism on defendant municipality's dump truck, plaintiff's evidence does not establish contributory negligence as a matter of law where it tends to show that, prior to his injury, plaintiff was not aware of the salt spreader mechanism attached to the dump truck, since plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves.

APPEAL from *Bone, J.*, 27 October 1969 Session, WAKE Superior Court.

This is a civil action involving personal injuries to plaintiff. At the close of plaintiff's evidence, judgment of involuntary nonsuit was entered. Plaintiff appeals.

Plaintiff's evidence tended to show the following:

On 9 February 1967, the date of the injury, plaintiff, a construction worker, was thirty-two years old, had never had any injuries to his right hand and his right hand was normal. That on 9 February 1967 plaintiff shut down his job early because it was snowing and

left in his pickup truck to go home. When he arrived at the Cabarrus Street and Western Boulevard intersection his lane of travel was blocked by cars stalled in the snow. It was then 5:00 p.m. with darkness rapidly approaching. There had been four or five inches of snow accumulation and it was still snowing. Plaintiff then pulled over, stopped, got out, and proceeded to help push some cars up the hill to get traffic moving so he could proceed to his home.

While plaintiff and a patrolman were trying to get the traffic moving, plaintiff noticed a city dump truck about half a block up Cabarrus Street. Assuming the truck was trying to spread salt or sand, plaintiff went down to the truck to get the driver to put something on the hill so the traffic on Western Boulevard could start moving.

While plaintiff was gone some cars had come down Western Boulevard on the wrong side of the street and had narrowed the roadway so the truck could not get through. One car was left abandoned in the road. Plaintiff opened a door of the abandoned car and proceeded to push the car off the hard surface so the truck could get through. When he finished he got out of the car and shut the door. As he shut the door he lost his footing and, in trying to regain his balance, he threw out his hands. At this time the truck had pulled up alongside the plaintiff and, as the plaintiff fell, the middle finger of his right hand went into the chain drive which was part of a mechanism attached to the back of the truck. Both plaintiff and the highway patrolman hollered "whoa" and the driver stopped the truck after plaintiff's finger had gone about halfway to the bottom of the chain drive. After the mechanism was stopped it was taken out of gear and then, using a tire tool, they backed it up so plaintiff's finger would be released.

At the time of the injury it was dark and plaintiff had not previously seen the mechanism attached to the tailgate of the truck. The stalled car plaintiff had pushed was headed in the same direction as the truck and, although plaintiff knew the truck was coming he did not know it was so close. The truck passed within four to five feet of the car. The chain mechanism was just above the bottom of the truck, about three and one half or four feet from the ground, and it protruded from the tailgate of the truck.

After the injury plaintiff attempted to drive his truck to the hospital but when he had traveled about one block he realized there was too much congestion so he abandoned his truck. He then used a handkerchief to put a tourniquet on his finger and proceeded to walk six or eight blocks to Dorothea Dix Hospital. At Dorothea Dix,

they cleaned his finger and, about nine thirty, plaintiff was carried to Rex Hospital where a doctor sewed the end of his finger back on his hand and put his finger in a cast. He then went home and returned to work the following Monday, the injury having occurred on a Thursday.

A month later the doctor determined that the tissue was not going to grow back and he then amputated part of the plaintiff's finger, resulting in a two centimeter shortening of the finger.

Mr. Paul Hughes, a general foreman for the City of Raleigh, testified concerning the salt spreader mechanism used on the truck at the time of the injury. The type with which this case is concerned is mounted on the tailgate of the truck and is gear driven by an auger which feeds the materials into the hopper where the blade turns to distribute it. It has a chain and sprocket drive driven by a power take-off which is mounted under the truck from the transmission. The truck engine turns the transmission and the power take-off is in turn run by the transmission. When this type of salt spreader comes from the factory it is equipped with a metal hood that covers the chain and sprockets. When the metal hood is attached the outside part of the mechanism is completely closed.

The evidence further disclosed that at the time of the injury to plaintiff there was no guard or metal hood covering the sprocket or chain drive mechanism.

The court determined that a prima facie case of negligence on the part of the defendant had not been made out and granted defendant's motion for involuntary nonsuit. Plaintiff appealed.

John V. Hunter, III, for plaintiff-appellant.

Teague, Johnson, Patterson, Dilthey and Clay, by Robert M. Clay, for defendant-appellee.

BROCK, J.

There are two questions raised by this appeal. First, does plaintiff's evidence, when considered in the light most favorable to him, make out a prima facie case of negligence on the part of the defendant? And second, does plaintiff's evidence establish that the plaintiff was contributorily negligent as a matter of law?

[1-3] "Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. (Citation omitted.) The breach of duty may be by negligent act or a negligent failure to act.

(Citations omitted.)" *Dunning v. Warehouse Co.*, 272 N.C. 723, 158 S.E. 2d 893. And "[p]ersons having possession and control over dangerous substances, machinery, and instrumentalities are under a duty to use a high degree of care commensurate with the dangerous character of the article, to prevent injury to others." 6 Strong, N.C. Index 2d, Negligence, § 5, p. 10, 11. From the evidence in this case the jury would be justified in finding defendant negligent for failing to have the metal hood in place to cover the chain and sprocket mechanism. However, for defendant's negligence to be actionable, it is necessary for the evidence to show that such negligence was a proximate cause of plaintiff's injury.

> "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. (Citation omitted.) 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. (Citation omitted.) 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. (Citation omitted.) Although foreseeability of injury is an essential element of proximate cause (citation omitted), 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. (Citation omitted.)" *Grimes v. Gibert*, 6 N.C. App. 304, 170 S.E. 2d 65.

[4] Applying these principles to the case at bar, plaintiff's evidence and the legitimate inferences therefrom is sufficient to justify, but not compel, the jury in finding defendant was negligent and that its negligence was a proximate cause of plaintiff's injury.

Defendant having pleaded plaintiff's contributory negligence, we now consider the second question raised by this appeal.

Plaintiff's evidence, being sufficient to require submission of the issue of defendant's negligence to the jury, the judgment of involuntary nonsuit must be reversed unless plaintiff's evidence discloses that he was guilty of contributory negligence as a matter of law. *Dunning v. Warehouse Co., supra.*

[5] Plaintiff's evidence tends to show that, prior to his injury, he was not aware of the mechanism attached to the tailgate of the truck. The law does not require a person to shape his behaviour by circumstances of which he is justifiably ignorant and a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves. *Clark v. Roberts,* 263 N.C. 336, 139 S.E. 2d 593. Had plaintiff slipped and fallen under the wheel of the truck, thereby sustaining injury, such may present a different case. But plaintiff's injury was due to his finger being caught in a chain and sprocket the existence of which he was unaware and which was not covered by the metal hood specifically designed to enclose the mechanism from the outside.

In our view plaintiff's evidence does not establish contributory negligence as a matter of law. The nonsuit was improvidently granted.

Reversed.

BRITT and GRAHAM, JJ., concur.

ALTON PARKER TAYLOR, JR. v. JOE W. GARRETT, COMMISSIONER OF THE NORTH CAROLINA MOTOR VEHICLES DEPARTMENT

No. 7010SC194

(Filed 1 April 1970)

1. Automobiles § 2— revocation of driver's license — review

Trial court properly concluded that it had no jurisdiction to grant a petitioner relief from an order of the Commissioner of Motor Vehicles permanently revoking the petitioner's driver's license pursuant to G.S. 20-28.1.

2. Automobiles § 2— reinstatement of license following suspension — driving while license suspended

The purported filing of a SR-22 insurance certificate with the Commis-

sioner of Motor Vehicles by a petitioner whose driver's license had been suspended for 60 days did not automatically reinstate the petitioner's license, and the license remained in a state of suspension following the expiration of the 60-day period, G.S. 20-279.17; and where petitioner was convicted of a number of driving offenses during the continued suspension, the Commissioner was authorized to revoke permanently petitioner's license pursuant to G.S. 20-28.1.

APPEAL by petitioner from *Bailey, J.*, 5 January 1970 Civil Session, WAKE Superior Court.

On 28 November 1969 petitioner filed a petition in the office of the Clerk of the Superior Court of Wake County allegedly pursuant to G.S. 20-25 asking the court to rescind an order of respondent permanently revoking petitioner's operator's license. Allegations of the petition are summarized as follows: Prior to 21 July 1964, petitioner was issued a North Carolina driver's license. On said date his privilege to drive was suspended by the North Carolina Department of Motor Vehicles (DMV) pursuant to G.S. 20-16 for 60 days as a result of two offenses of speeding over 55 m.p.h. within a one-year period. After said 60-day period expired, petitioner sent to DMV a SR-22 insurance certificate as provided for in G.S. 20-279.17; after 21 September 1964, petitioner received no communication from DMV that his license had been suspended or revoked. On 28 June 1965, petitioner was convicted in the Winston-Salem Municipal Court of speeding 50 m.p.h. in a 35 m.p.h. zone. On 31 November 1965, he was convicted in a J.P. Court in Troy, North Carolina, of driving on the wrong side of the road. On 7 October 1966, he pled guilty and was convicted in Recorders Court in Trenton, North Carolina, of speeding 70 m.p.h. in a 60 m.p.h. zone. Respondent has notified petitioner that his operator's license has been permanently revoked, respondent contending that DMV never received a SR-22 insurance certificate. Petitioner complied with G.S. 20-279.17 by duly filing said certificate and respondent is not justified in permanently revoking petitioner's license.

In his answer, respondent admitted the suspension of petitioner's license on 21 July 1964, the convictions of petitioner, the permanent revocation of petitioner's license and his notification thereof, but denied that DMV ever received the SR-22 insurance certificate. Respondent further alleged that petitioner's driving privilege was revoked for the reason that petitioner was convicted of three motor vehicle moving violations committed during a period of license suspension.

The judgment entered is summarized as follows: After considering the pleadings, exhibits presented consisting of a certified driver's

license record (six pages) and an expired North Carolina driver's license, admissions of counsel made in open court and argument of counsel, the court finds: That by order dated 27 October 1966, petitioner's driving privilege was permanently revoked under G.S. 20-28.1 on the basis of the three convictions admitted in paragraph IV of the petition; that petitioner learned of said revocation early in 1968; that subsequently petitioner was convicted of the following traffic offenses: driving with no operator's license on 30 September 1968, driving with no operator's license and speeding 58 m.p.h. in a 45 zone on 5 March 1969, and driving with no operator's license on 25 May 1969. On 22 November 1968, a second order permanently revoking petitioner's driving privilege was issued pursuant to G.S. 20-28.1. The court concludes that petitioner's driving privilege was permanently revoked on 27 October 1966 and 22 November 1968 under the mandatory provisions of G.S. 20-28.1; that petitioner by his admission had personal knowledge early in 1968 of the permanent revocation of his driving privilege; that permanent revocation under G.S. 20-28.1 of petitioner's driving privilege by respondent is justified in law and fact upon the convictions aforesaid; and that the superior court has no jurisdiction to grant the relief sought in the petition for that the actions of respondent were mandatory in nature. The action of respondent is affirmed and this action is dismissed at the cost of petitioner.

Petitioner appeals from the judgment, assigning error.

William T. McCuiston for petitioner appellant.

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

BRITT, J.

[1] The conclusion of the superior court that it had no jurisdiction to grant the relief sought in the petition is fully supported by the opinion of our Supreme Court in *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (reversing the decision of this Court appearing in 1 N.C. App. 560). We quote from that opinion:

> "Plaintiff instituted this proceeding under G.S. 20-25 seeking judicial review of the facts surrounding the revocation of his operator's license and a determination that he is entitled to its return. Under that statute, any person who has been denied a driver's license or whose license has been cancelled, suspended,

or revoked, *except mandatory cancellations, suspensions and revocations,* has a right to file a petition in the superior court of the county wherein he resides; and said court is vested with jurisdiction and charged with the duty 'to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this article.' G.S. 20-25. Discretionary revocations and suspensions may be reviewed by the court under this statute, while mandatory revocations and suspensions may not. * * *"

[2] Petitioner contends that following the 60-day suspension period, which terminated on 21 September 1964, he sent to DMV a SR-22 insurance certificate as provided by G.S. 20-279.17; that he "timely filed" said certificate; that because thereof DMV was not justified in permanently revoking petitioner's license.

G.S. 20-279.17 was enacted in 1953, was amended in 1955 and was repealed by Chapter 866 of the 1967 Session Laws. At times relevant to this appeal, subsection (a) thereof provided in pertinent part as follows: "Whenever the Commissioner suspends or revokes the license of any person under the provisions of article 2 of this chapter such license shall remain suspended or revoked and shall not at any time thereafter be *reinstated* nor shall any license be thereafter *issued* to such person, until permitted under the Motor Vehicle Laws of this State and not then unless and until he shall give and thereafter maintain, for the period provided by law, proof of financial responsibility * * *." (Emphasis ours)

Petitioner's contention has the effect of saying that if he "sent to" or "filed with" the DMV immediately following 21 September 1964 a "SR-22 insurance certificate," his driving privilege was automatically reinstated and the moving violations thereafter occurring in June and November 1965 and October 1966 did not occur during a period of suspension or revocation so as to justify mandatory revocation under G.S. 20-28.1. We do not agree with this contention. G.S. 20-279.17 clearly provided for the positive action of *reinstatement* of an operator's license following the period of suspension or revocation and provided that such license would remain suspended or revoked until *reinstated.* Although furnishing DMV with proof of financial responsibility was a prerequisite to reinstatement of a suspended or revoked license by the Commissioner, filing of a SR-22 insurance certificate would not automatically reinstate the license.

The trial judge had before him petitioner's driver's license record from DMV, duly certified pursuant to G.S. 8-35 and admissible in

evidence, *State v. Mercer*, 249 N.C. 371, 106 S.E. 2d 866, which record disclosed: On 21 July 1964, petitioner's license was suspended pursuant to G.S. 20-16(a)-9 following two convictions of speeding over 55 m.p.h. on 3 and 25 June 1964. On 20 July 1965, his license was revoked pursuant to G.S. 20-28.1 for one year because of conviction of a moving violation (Winston-Salem Municipal Court, speeding 50 m.p.h. in a 35 m.p.h. zone) on 28 June 1965 while license suspended or revoked. On 3 May 1966, his license was revoked pursuant to G.S. 20-28.1 for two years because of conviction of a second moving violation (Troy J.P. Court, driving on wrong side of road) on 13 November 1965 while license suspended or revoked; on 27 October 1966 his license was revoked permanently pursuant to G.S. 20-28.1 because of conviction of third moving violation (Recorders Court, Trenton, N. C., speeding 70 m.p.h. in a 60 m.p.h. zone) on 7 October 1966 while license suspended or revoked; on 22 November 1968 his license was permanently revoked again because of conviction of additional moving violation (Recorders Court, Kinston, N. C., driving without operator's license) on 30 September 1968. The record also shows that petitioner forfeited a bond in a South Carolina Magistrate's Court for speeding 72 m.p.h. in a 60 m.p.h. zone on 24 April 1967. The record further reveals the following convictions of petitioner after the second permanent revocation of his license on 22 November 1968: District Court, Raleigh, N. C., 10 June 1969, driving without license; District Court, Raleigh, N. C., 10 June 1969, speeding 58 m.p.h. in a 45 m.p.h. zone; and District Court, Kinston, N. C., 26 August 1969, driving without license.

The judgment of the superior court is fully supported by the conclusions of law and findings of fact, which findings are fully supported by the evidence.

Affirmed.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. MACK MCCLAM, JR.

No. 7010SC35

(Filed 1 April 1970)

1. Criminal Law § 161— appeal — exception to the judgment

The appeal itself is an exception to the judgment and an assignment of error as to matters appearing on the face of the record.

2. Bills and Notes § 22— issuing worthless checks — misdemeanor — excessive sentence

Sentence of 12 months' imprisonment imposed upon defendant's plea of guilty to the offense of issuing worthless checks in the sums of $30.00 and $26.77, *held* in excess of that authorized by G.S. 14-107.

3. Constitutional Law § 32— right to counsel — misdemeanor amounting to serious offense

A defendant charged with a serious offense has a constitutional right to the assistance of counsel during his trial in the superior court; a serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine.

4. Constitutional Law § 32— right to counsel — serious misdemeanor — duty of court

Where defendant is charged with a misdemeanor amounting to a serious offense, the trial court must determine whether lack of counsel results from indigency or choice; if the result is indigency, the court must appoint counsel to represent defendant unless counsel is knowingly and understandingly waived.

5. Criminal Law § 32— waiver of counsel

The record must show that an indigent accused appearing without counsel and charged with a serious offense was offered counsel but intelligently and understandingly rejected the offer; anything less is not waiver.

6. Criminal Law § 177— disposition after appeal — remand for proper sentence

Ordinarily where the sentence imposed in the trial court exceeds that permitted by law, the Court of Appeals will order the judgment vacated and the cause remanded to the superior court for judgment imposing a proper sentence.

7. Criminal Law § 177— disposition after appeal — excessive sentence — new trial

Where sentence imposed upon the defendant's plea of guilty to the misdemeanor of issuing worthless checks exceeded the statutory maximum, and where the defendant, an indigent, entered a plea of guilty to the felony of issuing worthless checks without a finding by the trial court that he intelligently and understandingly waived counsel, the Court of Appeals vacated the judgment and granted the defendant a new trial.

8. Criminal Law § 138; Bills and Notes § 22— statutory mitigation of crime — new trial — benefit to defendant

A defendant granted a new trial for the offense of issuing worthless checks in violation of G.S. 14-107 is entitled to the benefit of the amendment to G.S. 14-107, enacted subsequent to his original trial, which limited the quantum of punishment, in cases where the amount of the check exceeded $50, to six months' imprisonment or $500 fine or both.

9. Criminal Law § 23— judgment upon plea of guilty — finding as to voluntariness of plea

Judgment imposed upon defendant's plea of guilty to the felonies of

breaking and entering and of larceny *held* affirmed, where defendant was represented by counsel and the court accepted defendant's plea after a proper finding that it was freely and voluntarily made, and the sentences imposed were well within the maximum.

10. Criminal Law § 140— consecutive sentences — invalidity of the first

Where the first of three consecutive sentences is set aside for invalidity, the second sentence commences as of the first day of the term when it was imposed.

APPEAL by defendant from *Carr, J.*, 3 June 1969 Session of WAKE Superior Court.

One of the judgments from which defendant appeals was signed by Judge Carr on 13 June 1969. This judgment strikes a judgment entered in the same cases on 2 June 1969 and then recites in part as follows:

"69-CR-8220; 69-CR-15969 and 69-CR-15790."

* * *

"Having entered a plea of guilty of the offenses of giving worthless checks as charged in each of the warrants in the above numbered cases which are violations of the law and of the grade of misdemeanor

"It is ADJUDGED that these cases be consolidated for Judgment and the defendant be imprisoned for the term of twelve (12) months in the Wake County Jail to be assigned to work under the supervision of the North Carolina Department of Correction."

The defendant also appeals from judgment signed by the trial judge on 2 June 1969 in cases numbered 69-CR-16620 through 69-CR-16627 inclusive. This judgment recites in pertinent part:

"Having entered a plea of guilty of the offenses of breaking and entering and larceny as charged in each of the above numbered cases which are violations of the law and of the grade of felony.

"It is ADJUDGED that these cases be consolidated for Judgment and the defendant be imprisoned for the term of not less than seven (7) years nor more than ten (10) years in the State Prison to be assigned to work under the supervision of the North Carolina Department of Correction. This sentence to begin at the expiration of the sentence imposed this date in cases 69-CR-8220, 69-CR-15969 and 69-CR-15970 consolidated on the charges of giving worthless checks."

As indicated, the judgment referred to as having been imposed "this date" in the worthless check cases was amended and signed on 13 June 1969.

The third judgment from which the defendant appeals was signed by Judge Carr on 13 June 1969 and, after striking an earlier judgment entered in the same cases on 2 June 1969, provides in pertinent part:

> "Having entered a plea of guilty of the offenses of breaking and entering and larceny as charged in cases 69-CR-16628 through 69-CR-16632 inclusive and breaking and entering in cases 69-CR-16633 and 69-CR-16648 which are violations of the law and of the grade of felony.
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> "It is ADJUDGED that these cases be consolidated for Judgment and the defendant be imprisoned for the term of not less than four (4) years nor more than six (6) years in the State Prison to be assigned to work under the supervision of the North Carolina Department of Correction. This sentence to begin at the expiration of the 7 to 10 year sentence imposed on June 2, 1969 by this Court in cases 69-CR-16620 through 69-CR-16627 consolidated."

The defendant gave notice of appeal in the form of a letter to the court. On 12 August 1969 Judge Carr entered an order allowing defendant to appeal as an indigent and appointing counsel to prosecute the appeal to this Court.

Attorney General Robert Morgan by Staff Attorney Edward L. Eatman, Jr., for the State.

Garland B. Daniel for defendant appellant.

VAUGHN, J.

[1] The appellant's brief recites that counsel for defendant has carefully examined the record and can find no prejudicial error therein. Although there are no exceptions in the record and no assignment of error brought forward and argued in defendant's brief, the appeal in itself is an exception to the judgment and an assignment of error as to matters appearing on the face of the record.

[2] We first direct our attention to the judgment wherein three cases of issuing worthless checks were consolidated for judgment. For some reason not apparent to this Court, fourteen warrants, each charging the defendant with issuing a worthless check, appear in the record (the index to the record on appeal recites that there are 12).

Despite a time consuming voyage through the record, we can identify with certainty only one as being a warrant on which the defendant was sentenced in the judgment appealed from, this one being the warrant in Case No. 69-CR-15969 in which it is charged that the defendant, did on 1 December 1969 [sic] issue a worthless check to Arlan's Department Store in the amount of $30.00. The face of the warrant indicates that it was signed by Robert Royster, complainant and issued by M. E. Williams, Magistrate, on 31 January 1969. The maximum sentence for this offense, as charged in the warrant before us, cannot exceed a fine of fifty dollars ($50.00) or imprisonment for thirty days. G.S. 14-107. The sentence of 12 months, if based on this warrant, therefore, is in excess of that allowed by statute.

Presumably we are to assume that warrant No. 08220 is the warrant on which the defendant was sentenced in case No. 69-CR-8220, for it is the only one in the fourteen with which it can reasonably be identified. In warrant No. 08220 it is charged that defendant did, "on the 28 day of Oct. 1968 . . . issue a check on First Citz. Bk., in the sum of $26.77 and deliver said check to the said A & P knowing at the time of issuing said check that he did not have sufficient funds or credits with said bank with which to pay the same upon presentation, violation Chapter 62, Public Laws of 1927, as amended . . . ." The punishment upon conviction under this warrant cannot exceed a fine of fifty dollars ($50.00) or imprisonment for thirty (30) days. Assuming, therefore, that this is one of the cases consolidated for judgment, the sentence is in excess of that authorized by statute.

[3, 4] Case No. 69-CR-15790 was one of the three worthless check cases consolidated in the judgment imposing a twelve-month sentence. We do not find any warrant, among the fourteen we were compelled to examine, which we can determine to be the warrant upon which the judgment was based. We find ten warrants without numbers or other identification relating them to the trial in the superior court or to this appeal. In each of these ten warrants it is charged that the defendant issued a worthless check for an amount less than fifty dollars ($50.00). If one or more of these cases were among those consolidated for judgment, then the sentence of 12 months is in excess of that authorized by statute. The two remaining warrants which we find in the record involving worthless checks bear numbers 69-CR-15969 and 69-CR-15970. In warrant No. 69-CR-15969, it is charged that the defendant issued a worthless check in the amount of $113.35 and in number 69-CR-15970 the amount is alleged to be $68.07. There is nothing in the record to indicate that these cases were acted on in the superior court or have any con-

nection with the appeal. At the time the judgment appealed from was signed, the maximum punishment for issuing a worthless check for an amount in excess of $50.00 was imprisonment for two years. G.S. 14-107. A defendant who is charged with a serious offense has a constitutional right to the assistance of counsel during his trial in the superior court. A serious offense is one for which the authorized punishment exceeds six months imprisonment and a $500.00 fine. In such cases it is incumbent upon the trial judge to determine whether lack of counsel results from indigency or choice. If lack of counsel is the result of indigency, the court must appoint counsel to represent the defendant unless counsel is knowingly and understandingly waived. These findings and determination should appear of record. *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245.

[5] It is obvious, therefore, that if the State did undertake to try the defendant on either 69-CR-15969 or 69-CR-15970, the defendant, if indigent, was entitled to court-appointed counsel. In the judgment consolidating three worthless check cases there appears the following: ". . . [T]he defendant appeared without counsel on June 2, 1969 and thereupon entered a plea of guilty of giving worthless checks as charged in each of the warrants in each of the above numbered cases." The record in this case does not show that counsel was waived. The record must show, or there must be an allegation and evidence which shows, that an indigent accused appearing without counsel and charged with a serious offense was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. *State v. Morris, supra.* There is also no showing, in the record before us, that the defendant's plea of guilty, in the three worthless check cases consolidated for judgment, was freely, understandingly and voluntarily made.

[6-8] Ordinarily in cases where the sentence imposed in the trial court exceeds that permitted by law, this Court will order the judgment vacated and the cause remanded to the superior court for judgment imposing a proper sentence. *State v. Thompson*, 268 N.C. 447, 150 S.E. 2d 781. Here, however, for the reasons discussed, we feel that justice can best be served by ordering that the defendant's plea of guilty in the worthless check cases be stricken and that he be granted a new trial. The judgment involving cases "Nos. 69-CR-8220, 69-CR-15969 and 69-CR-15790" is hereby reversed and the defendant is granted a new trial. Subsequent to the trial of the defendant, the General Assembly amended G.S. 14-107 so as to limit the punishment for a violation thereof, where the amount of the worthless check exceeds $50.00, to a fine of not more than five

hundred dollars or imprisonment for not more than six (6) months, or both. If the State elects to proceed in these cases or on other worthless check cases which may be pending against him, the defendant is entitled to the benefit of the reduction in the maximum sentence. *State v. Parker*, 272 N.C. 72, 157 S.E. 2d 698.

[9] We now reach the cases of felonious breaking and entering and larceny. Competent legal counsel was appointed by the court on 2 May 1969 and represented defendant at his trial on 2 June 1969. The defendant was charged in 15 valid bills of indictment each charging him with the felonies of breaking and entering and larceny. The defendant pleaded guilty. The court accepted defendant's plea of guilty after due inquiry and a proper finding that the plea was freely and understandingly made, and was made without undue influence, compulsion or duress and without promise of leniency. The sentences imposed were well within the limit provided by law. Each of the judgments in these cases is affirmed.

[10] The judgment in the worthless check cases (69-CR-8220, 69-CR-15969 and 69-CR-15790) having been reversed, the sentence imposed in cases 69-CR-16620 through 69-CR-16627 is ordered to have commenced as of the first day of the term when it was imposed, to wit: 2 June 1969. *Potter v. State*, 263 N.C. 114, 139 S.E. 2d 4. The sentence of not less than four nor more than six years in cases numbered 69-CR-16628 through 69-CR-16633 inclusive and 69-CR-16648 is to be served as provided therein.

Affirmed in part.

Reversed in part.

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

BECK DISTRIBUTING CORPORATION v. IMPORTED PARTS, INCORPORATED

No. 7010SC195

(Filed 1 April 1970)

1. Accounts § 1; Sales § 10; Set-offs— action for goods sold on open account — nonsuit of counterclaim and setoff based on exclusive distributorship agreement

In this action to recover an amount allegedly owed by defendant for the purchase of merchandise on open account, the trial court did not err in nonsuiting defendant's counterclaim based upon breach of a purported exclusive distributorship agreement, and in nonsuiting defendant's set-off

based on the purported distributorship agreement for parts in its inventory supplied by plaintiff, where the evidence admitted by the court, together with evidence excluded by the court but placed in the record by defendant, is insufficient to show that an exclusive distributorship agreement was ever entered into by the parties either orally or in writing.

2. Contracts §§ 7, 26; Principal and Agent § 1— exclusive distributorship agreement — conduct of the parties

No special distributorship relationship arose by implication out of the conduct of the parties where a formal written distributorship agreement tendered by plaintiff on several occasions was never executed by defendant, but plaintiff nevertheless continued to sell parts to defendant on open account and allowed certain discounts and other privileges that were enjoyed by companies that had executed a distributorship agreement, defendant having been under no legal obligation to purchase parts exclusively from plaintiff or to fulfill any of the other obligations required by plaintiff of a distributor.

3. Principal and Agent § 3; Contracts § 17— distributorship contract — termination — action for amount owed on account — notice

A distributorship contract for an indefinite period of time is terminable at the will of either party upon reasonable notice, and what constitutes reasonable notice depends upon the facts and circumstances of each case; where a defendant fails and refuses to make payment for goods furnished under such an agreement, it does not follow that plaintiff has to give notice before bringing suit on the account or attaching defendant's property if adequate grounds for attachment exists.

4. Accounts § 1; Set-offs— set-off for return of merchandise in inventory — sufficiency of evidence

In this action to recover an amount allegedly owed by defendant for the purchase of merchandise on open account, defendant's allegations that it was entitled to return its inventory of merchandise supplied by plaintiff and receive full credit for its cost plus freight charges was negated, not supported, by defendant's evidence that an attorney who was a fiduciary of defendant's president had written letters to plaintiff that he would guarantee defendant's account if merchandise could be returned for credit at invoice price less 20%, and the letters, if they establish any right to return merchandise, show that the right would be that of the attorney fiduciary and not that of defendant.

5. Trial § 31— peremptory instructions

Where, in an action to recover an amount allegedly owed by defendant for the purchase of merchandise on open account, the trial court properly nonsuited defendant's counterclaim and set-off, and the parties stipulated the amount of the account between plaintiff and defendant, the trial court properly gave the jury peremptory instructions in favor of plaintiff, the only thing to be determined by the jury being the credibility of the evidence which included the stipulation.

APPEAL by defendant from *Bailey, J.,* 17 November 1969 Regular Civil Session of WAKE County Superior Court.

Plaintiff, a New York corporation, is engaged in the business of importing and selling parts for foreign automobiles. Defendant corporation sells and distributes such parts in North Carolina and is a former customer of plaintiff. On 19 July 1967 plaintiff instituted this action seeking to recover $15,610.74 allegedly owed by defendant for the purchase of parts and merchandise on open account. Proceedings for attachment were instituted ancillary to the action and on the same date. In an amended answer defendant did not deny that it had an account with plaintiff but alleged that it was entitled to have set-off against the account credit for certain parts that had been returned to plaintiff. A second set-off was claimed for the costs of all parts supplied by plaintiff and in defendant's inventory at the time this action was brought.

Defendant also asserted two counterclaims, alleging in the first that plaintiff had breached an exclusive distributorship agreement and in the second that plaintiff had caused defendant's property to be wrongfully attached. The counterclaim for wrongful attachment was stricken by the court upon motion of the plaintiff and defendant did not except.

When the case came on for trial the parties disposed of defendant's first set-off by stipulating that defendant was entitled to all credits claimed for parts and merchandise returned before suit was filed. The parties also stipulated and agreed "that the amount of the account between the plaintiff and defendant amounts to $12,425.64."

At the conclusion of defendant's evidence the court allowed plaintiff's motion for nonsuit of defendant's remaining counterclaim and set-off and gave to the jury peremptory instructions on the issue of the amount owed plaintiff by defendant. The jury answered the issue as instructed and from judgment imposed on the verdict defendant appealed.

Boyce, Mitchell, Burns and Smith by Robert E. Smith for plaintiff appellee.

Everett & Creech by Robinson O. Everett for defendant appellant.

GRAHAM, J.

Defendant challenges the court's action in nonsuiting defendant's counterclaim and set-off and giving peremptory instructions in favor of plaintiff. The form of the peremptory instructions is not questioned.

[1] In its amended answer defendant alleged that automobile parts and merchandise were supplied to it by plaintiff ". . . pursuant to an agreement and understanding between the parties, whereby the defendant was granted an exclusive right to sell these parts supplied by the plaintiff within a territory agreed upon by the parties." Defendant's counterclaim was for the breach of this alleged agreement. The agreement also furnished the basis for the set-off because defendant alleged that pursuant to the agreement plaintiff was obligated to accept return of merchandise in defendant's inventory and to reimburse defendant for the costs of the merchandise plus freight charges. No rights to affirmative relief were alleged by defendant other than those allegedly arising out of the "exclusive distributorship agreement." Thus, unless defendant could establish the existence of such an agreement, the only question in the law suit was the amount of the account.

The trial court, relying on the provisions of G.S. 75-4, ruled that any exclusive distributorship agreement not in writing and signed by plaintiff was unenforceable and refused to permit defendant to attempt to show the existence of such an oral agreement. G.S. 75-4 provides as follows:

> "No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: . . ."

Defendant assigns this ruling by the court as error contending that G.S. 75-4 does not apply because defendant does not seek to limit the right of plaintiff or anyone else to do business in the State of North Carolina but seeks to recover for plaintiff's refusal under the terms of its distributory agreement to do further business with defendant or to permit defendant to return and receive credit for the inventory on hand.

[1] In our opinion it is not necessary in this case to determine whether or not G.S. 75-4 is applicable where as here a party attempts to enforce provisions of an oral exclusive distributorship agreement other than those provisions of the agreement which limit a party's right to do business anywhere within the State of North Carolina. Defendant placed the evidence excluded by the court in the record and it is now before us. Considering this evidence, along with all other evidence, in the light most favorable to defendant we think it insufficient to show that an agreement such as alleged by defendant was ever entered by the parties either orally or in writing.

[2] Defendant contends that a special distributorship relationship arose by implication out of the conduct between the parties and entitled defendant to reasonable notice before plaintiff terminated the relationship by bringing this suit and having defendant's property attached. We do not agree. Defendant concedes that a formal written distributorship agreement was tendered by plaintiff on several occasions. The proposed agreement was never executed by defendant although plaintiff repeatedly requested that it do so. Plaintiff nevertheless continued to sell parts to defendant on open account and allowed certain discounts and other privileges that were enjoyed by companies that had executed a distributorship agreement. However, this evidence, standing alone, does not show that defendant's relationship with plaintiff was other than that of a customer who purchased merchandise from plaintiff on open account. Defendant was under no legal obligation to purchase parts exclusively from plaintiff or to fulfill any of the other obligations required by plaintiff of a distributor. Not having assumed the burdens of a distributor, defendant is not now entitled to claim the benefits.

[3] Even if there had been a distributorship relationship defendant would not have been entitled to special notice before plaintiff filed suit. The evidence is uncontroverted that plaintiff had made repeated attempts to collect defendant's overdue account over a considerable period of time, and that immediately before plaintiff instituted this action defendant executed a note to its president and sole shareholder and secured the note with a chattel mortgage on all of its property. A distributorship contract for an indefinite period of time is terminable at the will of either party upon reasonable notice and what constitutes reasonable notice depends upon facts and circumstances of each case. *Rubber Co. v. Distributors*, 253 N.C. 459, 117 S.E. 2d 479. However, where a defendant fails and refuses to make payment for goods furnished under such an agreement, it does not follow that the plaintiff has to give notice before bringing suit on the account or attaching defendant's property if adequate grounds for attachment exist.

[4] In support of its alleged set-off defendant offered evidence tending to show that when defendant first started business in 1959 an invoice for the first merchandise ordered by defendant from plaintiff was forwarded to an attorney who was a fiduciary of William Wheeler, president of defendant. The attorney forwarded to plaintiff a deposit for the order and wrote that he would guarantee the payment of the balance on the condition the goods described in the invoice or future invoices could be returned for credit at invoice

price less 20%. In April of 1960 the attorney forwarded to plaintiff a check for payment of defendant's outstanding account and wrote:

> "It is understood, however, that in the event of the liquidation, cessation, bankruptcy or receivership of the business, our arrangement whereby you have agreed to take back any or all of the merchandise sold, at cost less twenty percent, remains in full force and effect."

The above correspondence, which was offered by defendant, tends to negate rather than to establish allegations that defendant was entitled to return the inventory of merchandise supplied by plaintiff and receive full credit for its cost plus freight charges. Furthermore, if the letter establishes any right at all to return the merchandise, the right would be that of the attorney fiduciary who sought to guarantee the account and not that of defendant.

[5] We are of the opinion and so hold that the trial court properly nonsuited the counterclaim and set-off. The only issue that then remained was the amount, if any, in which defendant was indebted to plaintiff. Defendant had stipulated to this amount and no controversy remained concerning it. The only thing to be determined by the jury was the credibility of the evidence which included the stipulation. A peremptory instruction was therefore proper.

No error.

BROCK and BRITT, JJ., concur.

DORETHA BAHADUR AND HUSBAND, JOHN S. BAHADUR v. CHARLES A. McLEAN

No. 6915SC21

(Filed 1 April 1970)

1. Mortgages and Deeds of Trust §§ 34, 40; Trusts § 19— setting aside trustee's deed — parol trust — agreement to purchase note and extend time for payment — sufficiency of evidence

In this action to set aside a trustee's deed given on foreclosure of a deed of trust or, in the alternative, to impress a parol trust upon defendant purchaser's title, plaintiff's evidence is insufficient to support a finding that defendant had agreed to purchase the note secured by the deed of trust and to grant plaintiffs additional time to pay their indebtedness.

2. Mortgages and Deeds of Trust § 34; Trusts § 13— parol agreement to purchase at foreclosure sale and reconvey to debtor — resulting trust

A parol agreement to purchase at a foreclosure or judicial sale and hold the title for the debtor, and to reconvey the legal title to the debtor upon repayment of the amount advanced, creates a resulting trust, provided the agreement is made at or before the legal estate passes; such an agreement need not be supported by consideration, but may be enforced against a mere volunteer.

3. Mortgages and Deeds of Trust § 34; Trusts § 19— purchase at foreclosure sale — resulting trust — sufficiency of evidence

In this action to impress a resulting trust on property purchased by defendant upon foreclosure of a deed of trust given by plaintiffs, plaintiffs' evidence is insufficient to support a jury finding that defendant had made an express agreement to acquire and hold title for plaintiffs' benefit as would be required to give rise to a resulting trust.

4. Mortgages and Deeds of Trust § 34; Trusts § 13— purchase at foreclosure sale — agreement to give debtors option to repurchase — resulting trust

Alleged agreement by the purchaser at a foreclosure sale, prior to taking title, to convey to the debtors an option to repurchase the property is insufficient to charge the purchaser as trustee or to impress a trust upon his title.

5. Mortgages and Deeds of Trust § 34; Trusts § 13— parol trust — necessary agreement

To create a parol trust there must be an agreement amounting to an undertaking to act as agent in the purchase and constituting a covenant to stand seized to the use or benefit of another.

APPEAL by plaintiffs from *Thornburg, J.*, July 1968 Session of ALAMANCE Superior Court.

This is a civil action to set aside a trustee's deed given on foreclosure of a deed of trust or, in the alternative, to impress a parol trust upon defendant's title. Defendant is the purchaser at the foreclosure sale. From judgment of nonsuit entered at the close of plaintiffs' evidence, plaintiffs appeal.

John D. Xanthos for plaintiff appellants.

Richard C. Erwin for defendant appellee.

PARKER, J.

On 13 May 1964 plaintiffs executed a deed of trust conveying their real property in Alamance County to Oliver T. Denning, as trustee, to secure their note in the sum of $3,935.98 payable on 10

April 1965. The note was not paid when due, and in February 1966 the trustee commenced foreclosure proceedings. At the foreclosure sale held on 22 March 1966 defendant made the highest bid in the amount of $6,000.00. Thereafter a sister of the feme plaintiff placed an upset bid, and the trustee resold the property. At the resale, defendant again became the highest bidder with a bid of $10,000.00. Pursuant to the resale the trustee executed the deed to defendant which plaintiffs now seek to set aside.

Plaintiffs do not attack their deed of trust nor do they contend there was any irregularity in the foreclosure proceedings or in the deed to defendant given pursuant thereto. While the allegations of the complaint are not altogether clear, from a liberal construction it appears that plaintiffs seek to proceed in this case upon either of two grounds: (1) That defendant breached an agreement, which plaintiffs allege was made by the trustee in the deed of trust acting as defendant's agent, by which defendant was to purchase the note secured by the deed of trust and give plaintiffs additional time to pay the remaining indebtedness, if plaintiffs would make an immediate payment of $1,000.00 to be applied on the accrued foreclosure expenses and in reduction of the debt; and (2) that prior to taking title, defendant agreed with plaintiffs "to convey to them an option" to purchase the real property involved. The complaint also contains an allegation that "the defendant thereafter failed and refused to comply with his agreement and the plaintiffs refrained, in consideration of said agreement, to take any further action with regard to the aforesaid foreclosure proceedings solely upon the representations of the defendant and his agent" and "the defendant and his said agent have fraudulently deprived these plaintiffs of their property." At the close of plaintiffs' evidence the trial judge entered judgment of nonsuit, finding the evidence insufficient to submit to the jury under any theory of the case embraced within the allegations of the complaint. We agree.

[1] Plaintiffs' evidence, even when considered in the light most favorable to them, as we are required to do in passing upon motion for nonsuit, is insufficient to support a finding that defendant had agreed to purchase the note and grant plaintiffs additional time to pay their indebtedness. Indeed, plaintiffs' evidence more nearly negatives any such agreement. Plaintiffs do not contend, and nothing in their evidence indicates, that there was any connection whatsoever between defendant and the owner of the note which was secured by the deed of trust. Plaintiffs admit that the note was past due and unpaid. The male plaintiff testified that the trustee in the deed of trust got in touch with plaintiffs and demanded that they "settle the

mortgage or it would be put up for sale." He further testified that the trustee had discussed a proposal for development of the property on a participating basis with the owner of the indebtedness, which proposal the plaintiffs had found unacceptable. The male plaintiff then testified:

> "At that time he [referring to Mr. Denning, the trustee in the deed of trust] did not immediately mention anything about Mr. McLean being in this. As a matter of fact I was placed in the position of begging this man for my property and giving me enough time to pay it off, but he said, 'I have another proposition', and discussed a gentleman by the name of Charles McLean, I never met the man before. I met him in the courtroom today. I think he was talking about the defendant Charles A. McLean, I can't positively identify him. With regard to what he said about the Charles A. McLean transaction, he said, 'I am representing Mr. McLean, or will be in the near future'. I said, 'Now, I would like to define in the near future, now, tomorrow, next week or when'. He said, 'A few days', and I said, 'What is the proposition'. He said, 'Maybe I can get it if you send a thousand dollars, I will allow you a certain time to pay it off, but one thousand dollars must get here by a certain date', it was some time in March. I went to the Bank and borrowed the money — I have a record here and mailed it to Mr. Denning. Yes, this Plaintiffs' Exhibit No. 1 is the check I signed and sent after I talked to Mr. Denning. I mailed it registered mail. I wrote a letter. My wife signed the letter. Yes, that letter that is marked Defendant's Exhibit for identification No. 1 is the letter. Yes, in that letter I told him we were sending him the check. The check was to get a new mortgage written up with this one thousand dollars as a down payment. That check had to do with this property in Burlington. He said for me to send the thousand dollars and he would have them call off the sale. Yes, the purpose then was to call off the sale for one thousand dollars. The thousand dollars was sent to me ten or twelve days later with a letter stating that he could not get Mr. McLean to go through with the deal. After that time I retained a counsel in New York by the name of William C. Rains and asked him whether he could stop the sale of the property until we could come down here and borrow some money and re-write a new mortgage. On the confidence of the attorney, nothing occurred, the property was sold."

This testimony completely negatives, rather than supports, the first theory of plaintiffs' case as alleged in their complaint.

[2, 3] In their brief on this appeal plaintiffs lay primary stress upon their contention that a resulting trust for their benefit was created when defendant purchased at the foreclosure sale. It is true that, as stated in 7 Strong, N.C. Index 2d, Trusts, § 13, p. 422, "[a] parol agreement to purchase at a foreclosure or judicial sale and hold the title for the debtor, and to reconvey the legal title to the debtor upon repayment of the amount advanced, creates a resulting trust, provided the agreement is made at or before the time the legal estate passes. Such an agreement need not be supported by a consideration, but may be enforced against a mere volunteer." However, plaintiffs' proof, again viewed in the light most favorable to them, fails to furnish any basis to support a jury finding that any such agreement existed between them and defendant. The male plaintiff testified:

> "True, I had knowledge that the property was going to be sold at the courthouse door. I had knowledge it was to be sold the first time. I don't recall the second time. Yes, after the first sale I talked to Mrs. Clayton, my wife's sister, after my attorney in New York said that the only way we could get the property back was to have someone place an upset bid. I said, 'Now, wait a minute, I have an agreement, why this upset bid', and the sister said, 'Now look, I will do what I can to save you, I will go ahead on my own and place this bid', and she went ahead. I want to get this clear, the attorney was working in this matter and I placed confidence in this attorney. Yes, the attorney informed me that my sister-in-law upset the bid. No, after the bid was upset, I did not know this land would be sold again and the date it would be sold. I didn't know it would be sold the second time until some time later. My understanding after an upset bid was placed on the land was that the attorney Rains would come down and give sufficient time to get the money from Greensboro and pay off the indebtedness on the property."

[3-5] Plaintiffs' evidence completely fails to furnish any proper basis for establishing a resulting trust in their favor in this case. Indeed, plaintiffs did not allege that defendant had made any such express agreement to acquire and hold title for their benefit as would be required to give rise to a resulting trust. They alleged merely that he agreed "to convey to them an option" to repurchase. This would be insufficient to charge defendant as trustee or to impress a trust upon his title. *Gunter v. Gunter,* 230 N.C. 662, 55 S.E. 2d 81. "To create a parol trust there must be an agreement amounting to an undertaking to act as agent in the purchase and constituting a covenant to stand seized to the use or benefit of another." *Wolfe v. Land Bank,* 219 N.C. 313, 13 S.E. 2d 533. Plaintiffs' evidence in this

case, rather than tending to establish, actually tends to negative any such agreement. Defendant was the successful bidder at both sales; if there had been any agreement that he was acting in order to acquire and hold title for plaintiffs' benefit, no upset bid to cause a second sale would have been necessary. Defendant's motion for nonsuit was properly allowed.

Appellants' remaining assignments of error relate to the trial court's rulings excluding certain evidence. Several of these relate to conversations between the feme plaintiff and defendant which the witness testified occurred long prior to the commencement of the foreclosure proceedings. None of the excluded evidence was relevant to any issue in this case, and no prejudicial error was committed in excluding it.

Affirmed.

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

STATE OF NORTH CAROLINA v. WALTER LEE LOCKLEAR

No. 7016SC166

(Filed 1 April 1970)

1. Homicide § 21— cause of death — sufficiency of proof

To warrant conviction in a homicide case, it is necessary that the State produce evidence sufficient to establish beyond a reasonable doubt that the death of deceased proximately resulted from defendant's unlawful act.

2. Criminal Law §§ 104, 106— nonsuit — consideration of evidence — sufficiency of evidence

In passing upon a motion to nonsuit in a criminal case, the court must consider the evidence in the light most favorable to the State and give the State benefit of every reasonable inference which may be legitimately drawn therefrom; and if when so considered there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied.

3. Homicide § 21; Automobiles § 113— manslaughter — automobile wreck — proximate cause of death — sufficiency of evidence

In a manslaughter prosecution arising out of an automobile wreck, the State's evidence permitted a legitimate inference that the deceased died from injuries received in the wreck, where there was testimony that prior to the wreck the deceased was a normal and healthy person and had not received any type of injury, that he received no injury during the six

and one-half hours which intervened between the wreck and his death, and that an autopsy of deceased revealed that he died from multiple rib fractures with subsequent internal hemorrhage.

4. Automobiles § 113— manslaughter — sufficiency of evidence

In a manslaughter prosecution arising out of an automobile wreck, the State's evidence *held* sufficient to support a jury finding that the wreck was caused by defendant's culpable negligence in driving at a high rate of speed and while intoxicated.

5. Criminal Law § 77; Automobiles § 112— manslaughter — identity of driver of car — competency of evidence — prejudice to defendant

In a manslaughter prosecution arising out of an automobile wreck, testimony by deceased's brother that he told the investigating officer, while he and defendant were sitting in the officer's car at the scene of the wreck, that defendant was the driver of the car in which the deceased received his fatal injuries, *held* admissible and not prejudicial to defendant, there being no merit to defendant's contention that the jury might consider his lack of response to the brother's statement as an implied admission.

APPEAL by defendant from *Clark, J.*, September 1969 Session of ROBESON Superior Court.

Defendant was indicted for manslaughter in connection with the death of James Dallie Sampson from injuries sustained in a single-car automobile wreck. The wreck occurred at approximately 2:30 p.m. on 16 November 1968 on a rural paved road three miles west of Lumberton. When the investigating officers arrived, they found the automobile registered in the name of defendant overturned and lying on its top off of a curve on the right side of the road at an angle to a road ditch and about nine feet from the paved portion of the highway. Uninterrupted skid marks led for a distance of 168 feet from the left side of the road in the curve over to the right side, and deep cuts in the shoulder of the road led from these skid marks an additional 30 feet directly to the overturned car. The officers found James Dallie Sampson lying face down in the ditch beside the car, not moving or making any sound. A bottle of non-tax-paid whiskey was found under his body.

Defendant was lying in some weeds 25 or 30 feet from the car. The officers smelled the odor of some intoxicating beverage about his person. When defendant attempted to walk, he was unsteady on his feet and fell down twice. His eyes were red and glassy, his face was flushed, his speech was slurred, and in the opinion of the officers defendant was highly intoxicated.

The officers also observed two other men at the scene. One of these, Romulus Sampson, a brother of James Dallie Sampson, testi-

fied at the trial that the four men, together with another who had left the scene before the officers arrived, had been together, riding in defendant's car, from 10 o'clock in the morning until the time of the wreck; that during this time the occupants of the car had drunk about three pints of white whiskey; that defendant was driving the car, traveling about sixty or sixty-five, when it entered the curve on which it left the road and turned over. Counsel for defendant stipulated that a breathalyzer test administered to defendant on 16 November 1968 after the fatal accident, by a licensed operator according to rules and regulations promulgated by the North Carolina Department of Health, produced a reading of .30 percent of alcohol in defendant's blood.

James Dallie Sampson was taken by ambulance from the scene of the wreck to the hospital at Lumberton, where he was examined by a doctor. After the doctor had advised that nothing was wrong and that he should be taken to jail to sober up, he was taken by patrol car to the county jail and was charged with public drunkenness. He was laid on his back on the cell floor and did not move. About 6:30 p.m. an ambulance was called, and James Dallie Sampson was returned to the hospital, where he was admitted to the emergency room and again examined by a doctor. The doctor told members of his family to take him home. They took him by automobile approximately six and one-half miles to his home, arriving at 9:15 p.m. It was then discovered that he was dead.

The pathologist who performed an autopsy on the following day testified that in his opinion the deceased died from multiple rib fractures with subsequent internal hemorrhage. The deceased's brother testified that prior to the collision he was a normal and healthy person and had not received any type of injury. The ambulance driver, officers, jailer, and other witnesses who had been with him between the time of the collision and the time of his death testified that the deceased had received no injury during that period.

Defendant was found guilty of involuntary manslaughter. From judgment imposing prison sentence of not less than four nor more than six years, defendant appealed.

Attorney General Robert Morgan and Staff Attorney T. Buie Costen for the State.

J. H. Barrington, Jr., for defendant appellant.

PARKER, J.

Defendant contends his motion for nonsuit should have been allowed because the State failed to show any causal connection be-

tween the wreck and the injuries which caused the death of the deceased. We find no merit in this contention.

[1, 2] To warrant conviction in a homicide case it is, of course, necessary that the State produce evidence sufficient to establish beyond a reasonable doubt that the death of the deceased proximately resulted from the defendant's unlawful act. *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844. It is equally well established, however, that in passing upon a motion for nonsuit in a criminal case, the court must consider the evidence in the light most favorable to the State and give the State benefit of every reasonable inference which may be legitimately drawn therefrom. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. If when so considered there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

[3, 4] In the present case there was no direct evidence that the deceased received any injuries as a result of the wreck. Two doctors who examined him after the wreck and before his death failed to discover his injuries, which were only revealed by the autopsy made on the following day. There was, however, testimony that prior to the wreck he was a normal and healthy person and had not received any type of injury. There was also testimony that he received no injury during the six and one-half hours which intervened between the wreck and his death. From this evidence a legitimate inference may be reasonably drawn that the deceased received the injuries which caused his death as a result of the automobile wreck. Indeed, on the evidence in this case it would strain credulity to find otherwise. There was ample evidence to support a jury finding that the wreck was caused by defendant's culpable negligence in driving at a high rate of speed and while intoxicated. *State v. Lindsey,* 264 N.C. 588, 142 S.E. 2d 355. There was no error in overruling the motion for nonsuit.

[5] At the trial Romulus Sampson, a brother of the deceased, testified that while he and defendant were seated in the patrol car at the scene of the wreck and while the officers were still investigating the accident, he had told an officer that defendant was the driver. Prior to giving this testimony, the witness had already testified at some length concerning the events leading up to the wreck, in the course of which he had unequivocally stated from the witness stand that defendant was the driver. On cross-examination he repeated this

testimony. Under the circumstances we find no prejudicial error in allowing him to testify on direct examination to his prior consistent statement made to the officer shortly after the wreck occurred. Nothing in the record suggests that any contention or argument was made to the jury that, because defendant was present in the patrol car when the statement was made, they might consider his lack of response as an implied admission.

Defendant's remaining assignments of error brought forward in his brief relate to the court's charge to the jury. We have examined these carefully and are of opinion that, considering the charge as a whole and contextually, the court properly and adequately declared and explained the law arising on the evidence in this case and properly complied with the requirements of G.S. 1-180.

In the trial we find

No error.

CAMPBELL and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. VIRGIE HORTON

No. 7010SC70

(Filed 1 April 1970)

1. Criminal Law § 149; Constitutional Law § 30— dismissal of prosecution for denial of speedy trial — right of State to appeal

The State has no right to appeal from an order dismissing a prosecution for carnal knowledge of a female between the ages of twelve and sixteen years on the ground that defendant had been denied his constitutional right to a speedy trial. G.S. 15-179.

2. Criminal Law § 149— motion to dismiss prosecution for denial of speedy trial — demurrer — motion to quash — right of State to appeal

Defendant's motion to dismiss a prosecution on the ground that he had been denied his constitutional right to a speedy trial is neither a demurrer nor a motion to quash within the meaning of G.S. 15-179.

ATTEMPTED appeal by the State from *Bailey, J.*, 6 October 1969 Session of WAKE Superior Court.

The following judgment was entered in this action:

"This cause coming on to be heard and being heard by the

undersigned Judge Presiding upon a motion heretofore filed on the 30th of July 1969, on behalf of the defendant by his Attorney, W. W. Merriman, III; and it appearing to the undersigned Judge Presiding, from said motion and from statements of the Solicitor and of the attorney for the defendant, that the defendant, Virgie Horton, was charged in a warrant sworn to by the prosecuting witness, Constance R. Hodge, on the 18th day of May 1969, alleging that the defendant Horton did on the 14th day of February 1966 carnally know and abuse the prosecuting witness, the prosecuting witness at such time being a female person over the age of twelve years and under the age of sixteen years; and it being alleged that said prosecuting witness had never before had sexual intercourse with any person; And it further appearing to the undersigned Judge Presiding that a true bill was returned by the Grand Jury of Wake County at the 2nd June 1969 Regular Session, charging said defendant with carnally knowing and abusing a female child over the age of twelve years and under the age of sixteen years, said female child never before having had sexual intercourse with any other person; said alleged offense occurring on the 14th day of February 1966;

And it further appearing to the undersigned Judge Presiding that the defendant has since the date of said alleged offense, served a six-month sentence, commencing October 23, 1967; and a later nine-month sentence, commencing June 13, 1968; said second sentence being for assualt on the prosecuting witness in this case;

And it further appearing to the undersigned that the prosecuting witness has arbitrarily delayed the signing of a warrant or making any complaint, and that said delay is to the prejudice of the defendant; and that the defendant's rights to a speedy trial have been denied him by the arbitrary act of the prosecuting witness in delaying the signing of said warrant or the making of any complaint;

And it further appearing to the Court that the bill of indictment herein at issue, alleges a first occurrence; and it appearing further that the State of North Carolina contends that the said defendant has engaged in continuous actual intercourse with the prosecuting witness since that date, the Court being of the opinion that the subsequent acts do not constitute a crime nor evidence of a crime;

NOW, THEREFORE, be it and it is hereby, ORDERED AND

DECREED that the motion of the defendant that the charges against him be dismissed, is hereby granted.

This the 6th day of October 1969.

s/ JAMES H. POU BAILEY
JUDGE PRESIDING"

To the signing and entry of the above judgment the solicitor for the State in apt time objected and excepted and gave notice of appeal to this Court.

Attorney General Robert Morgan by Staff Attorney Mrs. Christine Y. Denson for the State.

William W. Merriman, III, for defendant appellee.

BRITT, J.

[1] Is an appeal by the State in the instant case permissible? A review of pertinent statutes and other authorities impels us to answer in the negative.

G.S. 15-179 provides as follows:

"An appeal to the appellate division or superior court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant —

(1) Upon a special verdict.

(2) Upon a demurrer.

(3) Upon a motion to quash.

(4) Upon arrest of judgment.

(5) Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.

(6) Upon declaring a statute unconstitutional."

In *State v. Vaughan*, 268 N.C. 105, 150 S.E. 2d 31, in an opinion by Bobbitt, J. (now C.J.), we find the following:

"In 4 Am. Jur. 2d, Appeal and Error § 268, these statements appear: 'As a general rule the prosecution cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case, in the absence of a statute clearly conferring that right.' Again: 'Statutes authorizing an appeal by the prosecution will be strictly construed.' In 24 C.J.S., Criminal Law § 1659(a), pp. 1028-1029, this statement appears: 'While there is authority holding that statutes granting the

state a right of review should be liberally construed, it is generally held that, being in derogation of the common law, they should be strictly construed, and that the authority conferred thereby should not be enlarged by construction.' "

Although the record on appeal does not contain the text of the written motion filed by defendant, by appropriate order we have obtained a certified copy of the motion from the Clerk of the Superior Court of Wake County and it is summarized as follows: Defendant moves for an order dismissing the case for the reason that his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution has been denied. The warrant against defendant was issued on 18 May 1969 charging an offense on 14 February 1966. Defendant denies ever having intercourse with the prosecuting witness and is now unable to recall where he was on 14 February 1966 or reconstruct the events of that day. Since the date of the alleged crime, defendant has served a six months' prison sentence (beginning 23 October 1967) for an assault on his wife and a nine months' prison sentence (beginning 13 June 1968) for an assault on the prosecuting witness. The issuance of a warrant or indictment in this case has been arbitrarily delayed due to the willfulness of the prosecuting witness and due to no fault of defendant who has not waived his constitutional right to a speedy trial. Several specific reasons why his rights had been prejudiced by the denial of a speedy trial are set forth.

[2] Clearly, G.S. 15-179 does not list "[u]pon a motion to dismiss" as one of the instances in which the State can appeal from an adverse judgment. In his brief the attorney general suggests that defendant's motion in this case was treated by the trial court as a demurrer or motion to quash, therefore, appeal by the State is permissible. We cannot agree with this contention.

In *State v. Moody,* 150 N.C. 847, 64 S.E. 431, our Supreme Court defined "demurrer" as used in what is now G.S. 15-179 as follows: "The word is used in the statute in its usual and ordinary significance, as understood and defined in criminal pleading. In criminal law 'A demurrer is a pleading by which the legality of the last preceding pleading is denied and put in issue, and the issue is then determined by the court. A demurrer is pleaded either to the indictment or to a special plea.' 1 Archbold Crim. Prac. and Pldg., 354." Defendant's motion was obviously more than a pleading to test the legality of the indictment, "the last preceding pleading," but pleaded allegations of violations of constitutional rights and asked for dismissal on that ground.

In like manner, a motion to quash is designed to test the validity of a warrant or bill of indictment. 4 Strong, N.C. Index 2d, Indictment and Warrant, § 14, pp. 359-362. As stated above, defendant's motion in the case at bar did much more than that.

In his motion and in his brief, defendant cites the recent case of *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274, in which the court discussed at length the constitutional right to a speedy trial raised on a motion to dismiss. We quote the following from that opinion:

> "We here hold that when there has been an atypical delay in issuing a warrant or in securing an indictment and the defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State; and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed."

The procedure followed by defendant in this case is supported by *State v. Johnson, supra.* We do not pass upon the propriety of the procedure followed by the trial judge in hearing and considering defendant's motion to dismiss or the sufficiency of the evidence to justify his judgment. We only hold that an appeal by the State in this case is not authorized by the statute.

Appeal dismissed.

BROCK and GRAHAM, JJ., concur.

CAPITAL OUTDOOR ADVERTISING, INC. v. ROBERT HARPER

No. 7010SC6

(Filed 1 April 1970)

1. Landlord and Tenant § 2— lease for term of years — personalty

A lease for a term of years is personal property and is governed by the rules of law applicable to personal property, not by the requirements of law for the conveyance of real property.

2. Frauds, Statute of § 8; Landlord and Tenant § 2; Estoppel § 4— insufficiency of description of leased premises — possession in lessee — estoppel to assert invalidity of lease

A lessee is estopped to assert the invalidity of a lease because of ir-

regularity or insufficiency of the description of the premises where he has gone into possession of the premises under the lease and has paid the stipulated rent or otherwise exercised control of the premises.

3. Landlord and Tenant § 19— executed contract — possession in lessee — estoppel to assert invalidity of lease for uncertainty of description

In this action for breach of a contract for the lease of two highway signs for a period of nine years, the trial court properly overruled defendant's demurrer to the complaint on the ground that the lease was void because of insufficiency of the description of the real estate upon which the signs were to be located, where the contract has been fully executed by plaintiff lessor by construction of the signs in accordance with the terms of the lease, and defendant has paid seven months rental under the terms of the lease and has accepted the benefits of the signs.

APPEAL from *Carr, J.*, May 1969 Regular Civil Session of WAKE Superior Court.

Plaintiff instituted this action to recover damages from the defendant for breach of contract. The plaintiff alleged that on 23 July 1965 a contract was entered between Capital Sign Service, Inc. (Capital), assignor of the plaintiff Capital Outdoor Advertising, Inc., and the defendant Robert Harper (Harper), whereby Capital was to lease to the defendant two highway signs eight feet high by thirty-six feet wide to be located on highway #70 east of Raleigh, North Carolina. The highway signs, which were the subject of the lease, were to be illuminated with fluorescent fixtures and the defendant was to be given his choice of the color of the lettering to be used on the signs, the color of the background and the color of the borders. The lease stated that the lessee (Harper) had approved and accepted a sketch of the signs to be erected and that all matters not covered by the lease were to be left to the sole judgment and discretion of the lessor (Capital). The term of the lease was to be nine years commencing 1 September 1965 at a monthly rental of one hundred seventy-two and no/100 ($172.00) dollars plus three percent North Carolina sales tax for sixty months and eighty-six and no/100 ($86.00) dollars for the remaining forty-eight months. In addition to the above rents, the defendant was to pay Capital three hundred forty-four and no/100 ($344.00) dollars upon the execution of the contract.

The plaintiff, in his complaint, further alleged that the signs were made and constructed by Capital at the defendant's request and according to drawings which had been approved by the defendant and showing defendant's trademark and trade name. Upon execution of the contract the defendant paid Capital three hundred fifty-four and

32/100 ($354.32) dollars and has subsequently paid eight hundred eighty-five and 80/100 ($885.80) dollars in monthly rental and sales tax for five months through January 1966.

On 20 April 1966 the plaintiff became the assignee of the lease. The plaintiff alleged that demands have been made on the defendant Harper but that the defendant has failed and refused to make any further payments since 10 February 1966 when he made payment for the January 1966 rental.

Following defendant's answer to the original complaint denying the plaintiff's allegations, the plaintiff filed an amendment to its complaint. On 25 September 1968 the defendant answered this amendment and on 28 May 1969 he filed a demurrer *ore tenus* to the complaint on the ground that it did not state a cause of action against the defendant in that:

> "1. The Complaint alleges and sets forth a certain lease agreement as a basis for its cause of action against the defendant, purporting to lease certain personal property to be located on land during said lease, but that the description of said personal property and the land upon which it purports to be located is so vague, uncertain and indefinite as to be not susceptible of identification or determination and is not sufficient to either identify or locate such property or land, and that said alleged lease agreement is therefore void upon its face and unenforceable."

The defendant's demurrer was overruled and the court allowed the plaintiff to make a second amendment to the complaint whereby he made more specific the description of the real estate upon which the highway signs had been located. At the trial of the cause, the jury returned a verdict in which it found that the plaintiff had performed its obligations under the lease agreement, that the defendant had breached the lease agreement and allowed the plaintiff to recover damages in the amount of $3,500.00.

From the overruling of the demurrer and the signing of the judgment, the defendant appealed.

Sanford, Cannon, Adams and McCullough, by J. Allen Adams, for the plaintiff appellee.

Crisp and Twiggs, by Howard F. Twiggs, for the defendant appellant.

HEDRICK, J.

The plaintiff seeks to recover damages for the breach of a contract for the lease of two highway signs for a period of nine years.

[1] "A lease for a term of years is personal property, and is governed by the rules of law applicable to personal property and not by the requirements of law for the conveyance of real property." 5 Strong, North Carolina Index 2d, Landlord and Tenant, § 2; *Moche v. Leno,* 227 N.C. 159, 41 S.E. 2d 369 (1947).

The appellant contends that the alleged lease in this case is void because the description of the real estate upon which the signs were to be located was too vague, uncertain and indefinite to constitute a valid agreement and that the trial judge erred in overruling his demurrer to the complaint. The appellant, in his brief, cites numerous North Carolina cases which deal with the sufficiency of descriptions. In each of the cases cited the Court was concerned with the construction of executory contracts for the conveyance of real property. In *Farmer v. Batts,* 83 N.C. 387 (1880), cited by the appellant, there was an action to enforce the specific performance of an executory contract for the sale of land. The description of the property was ". . . one tract of land containing one hundred and ninety three acres, more or less, it being the interest in two shares adjoining the lands of James Barnes, Eli Robbins and others." At the trial the defendant objected to evidence which was offered by the plaintiff to identify the property. When the objection was sustained and the evidence excluded, the plaintiff submitted to a nonsuit and appealed. After a thorough review of the cases which involved descriptions, the court held that the description of the property which was the subject of the contract was not so fatally defective as to be so declared by the court and withdrawn from the jury and that the nonsuit was not proper.

"Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done. . . . An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties." *Farrington v. Tennessee,* 95 U.S. 683, 24 L. Ed. 558 (1878).

[3] In the present case it is apparent that the plaintiff had performed all of its obligations. The highway signs, approved and accepted by the defendant, have been constructed and erected, the defendant has paid seven months rental under the terms of the lease and has received benefits from the signs. In addition, the plaintiff

continued to light these two highway signs under the terms of the lease agreement for at least twenty months after the defendant ceased paying rent and until a successor restaurant complained about the lighting of these signs. The plaintiff has continued to carry insurance on these signs, pay the electric bill, land rents and sales tax to the State of North Carolina for the rental of the signs and in all ways has offered and stands ready to perform the obligations and duties of its assignor under the terms of the lease agreement.

[2] There have been few cases decided which involve the issue raised by the appellant; however, it is settled law in North Carolina that a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement. *Shuford v. Oil Co.*, 243 N.C. 636, 91 S.E. 2d 903 (1956). In 32 Am. Jur., Landlord and Tenant, § 40, we find the following:

> "In the few cases in which the question has been raised, it has uniformly been held or recognized, though not always in precise terminology, that a lessee is estopped to assert the invalidity of a lease because of irregularity or insufficiency of the description of the premises where he has gone into possession of the premises under the lease and has paid the stipulated rent, or otherwise exercised control over the premises."

[3] In *Beckett v. Paris Dry Goods Co.*, 14 Cal. 2d 633, 96 P. 2d 122 (1939), the Court said that while a lease must include a definite description of the property leased, where a person goes into possession under a contract containing an ambiguous or uncertain description of the property and pays the agreed rent, it will be enforced as a lease just as if the parties had acted upon it as relating to particular premises. See also 84 A.L.R. 2d 922. In the present case the appellant, Harper, has paid the stipulated rent and has been, in effect, placed in possession of the premises by the plaintiff's assignor. The contract has been fully and wholly executed by the lessor by constructing and erecting the highway signs according to the terms of the lease and the defendant, having accepted the benefits of these signs, will not now be heard to repudiate the validity of the lease for any uncertainty in the description of the premises.

We hold that the court below did not commit error in overruling the appellant's demurrer and that the judgment should be

Affirmed.

CAMPBELL and PARKER, JJ., concur.

ARCHIBALD W. ROZIER v. WAYNE ARNOLD LANCASTER AND EDWARD CULLOM LANCASTER

No. 709SC8

(Filed 1 April 1970)

1. Automobiles § 57— intersection accident — defendant's excessive speed

Plaintiff's evidence, which included testimony that defendant approached the intersection from the dominant street at a speed of 70 mph, *held* sufficient to be submitted to the jury on the issue of defendant's negligence in colliding with plaintiff's automobile which had just entered the intersection from the servient street.

2. Automobiles § 79— intersection accident — plaintiff's contributory negligence

Plaintiff's evidence that he stopped before entering an intersection from a servient street, that he looked in both directions and did not see any approaching traffic, that he drove into the intersection and was struck by defendant's car which was traveling on the dominant highway in a direction from which the car could not have been seen by plaintiff until it was 150 to 200 feet from the intersection, and that defendant was traveling at a speed of 70 mph in a 35 mph zone, *held* not to disclose plaintiff's contributory negligence as a matter of law.

3. Automobiles § 33— speed at intersection — anticipation by motorist on servient street

A plaintiff entering an intersection from a servient street is not required to anticipate that a car would be approaching on the dominant street from his left at a rate of speed twice the lawful limit for the area.

APPEAL from *Godwin, S.J.*, June 1969 Civil Session of VANCE Superior Court.

Plaintiff instituted this action on 7 March 1968 to recover for injuries and property damage allegedly sustained when the Ford station wagon he was operating collided with a 1961 Chevrolet automobile owned by defendant Edward Cullom Lancaster and being operated by his son, defendant Wayne Arnold Lancaster.

The collision occurred in Henderson, North Carolina, about 7 p.m. on 12 March 1966 at the intersection of Dorsey Avenue and "old" Raleigh Road (also U.S. Highway No. 1). Raleigh Road is approximately 30 feet wide and runs generally north and south. Dorsey Avenue runs generally northwest and southeast and intersects Raleigh Road from the west at "somewhat of an angle." At the time of the collision a stop sign was located at the intersection and faced traffic moving southeast along Dorsey Avenue. Plaintiff was driving southeast along Dorsey Avenue and the defendants' Chevrolet was

approaching the intersection along Raleigh Road from plaintiff's left. Plaintiff testified that when he reached the intersection he stopped at the edge of Raleigh Road. He looked first to the left, then to the right, and a second time to the left and saw no approaching traffic. He then drove into the intersection. Plaintiff estimated that because of a curve in Raleigh Road he could see only 150 feet to his left when he stopped at the intersection.

The police officer who investigated the collision noted that there was debris in the southbound lane of Raleigh Road, close to the centerline, and directly in front of Dorsey Avenue. There were no skid marks approaching the debris although there were tire scuff marks where the vehicles had been knocked around. Plaintiff's station wagon was damaged extensively on the left side. Defendants' Chevrolet was damaged about the front. The driver of the Chevrolet admitted to the officer that at the time of the collision "he was possibly getting on it a little bit." The lawful speed limit in the area was 35 miles per hour. The officer further testified that because of a curve in Raleigh Road and also because of certain obstructions, a driver traveling on Dorsey Avenue in the direction plaintiff was traveling could only see 150 to 200 feet to his left along Raleigh Road when stopped at the edge of the intersection.

Joseph Kester Bowen testified for plaintiff that on the night of the collision he was at a service station located at the intersection of Raleigh Road and Dorsey Avenue. He stated that he observed defendants' car traveling at a high rate of speed toward the intersection immediately before the collision. The witness testified without objection as follows:

> "The sound that I heard coming from the automobile when I first saw it, it sounded very much as if it was winding out in its gears, coming up No. 1, headed toward Raleigh, and that was my reason for stepping out of the service station, due to the noise of the automobile. As I stepped out of the door, I would say that the car was from 35 feet to 60 feet from me. It was to my left as I stepped out of the building. I looked to my left and followed it up. In my opinion the speed of the automobile at the time was 70 miles per hour."

Defendants stipulated that the Chevrolet automobile was being operated with the knowledge, consent and approval of the owner and that the owner would be responsible in law for the negligence, if any, of the driver.

At the conclusion of the plaintiff's evidence defendants' motion for judgment as of nonsuit was allowed and plaintiff appealed.

Robert S. Hight; Perry, Kittrell, Blackburn & Blackburn by Charles F. Blackburn for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by C. Woodrow Teague for defendant appellees.

GRAHAM, J.

[1] In our opinion the evidence is unquestionably sufficient to be submitted to the jury on the issue of defendants' negligence as a proximate cause of plaintiff's injuries and damages. The more difficult question is whether the plaintiff's evidence, taken in the light most favorable to him, together with all inferences favorable to him which may reasonably be drawn therefrom, so clearly establishes his own negligence as a proximate cause of his injuries and damages that no other conclusion can reasonably be drawn. *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; *Ford v. Smith,* 6 N.C. App. 539, 170 S.E. 2d 548.

In the case of *Smith v. Jones,* 263 N.C. 245, 139 S.E. 2d 205, the plaintiff's evidence indicated that she stopped at the intersection and looked in both directions. She could see approximately 145 to 150 feet to her right. She entered the street without seeing any traffic and was struck by defendants' car which was approaching from her right. In a *per curiam* opinion the court stated:

> "We concede this is a very close case. Even so, in view of the fact that a motor vehicle approaching the intersection involved from the north of Rockford Street cannot be seen until it arrives at or near the crest of the hill, approximately 145 to 150 feet from the intersection, we think the evidence of the plaintiff, when considered in the light most favorable to her, as it must be on a motion for nonsuit, is sufficient to carry the case to the jury."

[2, 3] We fail to find any substantial difference between the *Smith* case and the case at hand. There the plaintiff traveled slightly further before being struck, as the front of her car had reached the opposite edge of the intersecting street. But here we have evidence that defendants' vehicle was moving toward the intersection at 70 miles per hour in a 35 miles per hour speed zone. A lack of tire marks indicates that brakes were never applied. If this evidence is believed, less than one and one-half seconds elapsed from the time defendants' vehicle reached a point where it could be seen by a motorist stopped at the intersection until it reached the intersection.

Under such circumstances we cannot say as a matter of law that defendants' vehicle would have been within the scope of plaintiff's vision and should have been seen by him before he entered the intersection. Plaintiff was not required to anticipate, before entering the intersection, that a car would be approaching from his left at a rate of speed twice the lawful limit for the area. See *Bobbitt v. Haynes*, 231 N.C. 373, 57 S.E. 2d 361, and cases therein cited.

We have carefully examined the various cases cited by the defendants. The only conclusion that may be drawn from the facts in each of these cases is that if the plaintiff had looked before entering the intersection he would or should have seen the vehicle approaching along the dominant highway. In the instant case, when the evidence is considered in the light most favorable to plaintiff, inferences arise which would support a contrary conclusion. It is therefore our opinion that the case should have been submitted to the jury.

Reversed.

BROCK and BRITT, JJ., concur.

MARGARET L. CALHOUN v. BYRON C. CALHOUN

No. 7018DC140

(Filed 1 April 1970)

1. Husband and Wife § 12— modification of separation agreement — allegation that wife was under sedation — representation by counsel

Allegation by plaintiff wife that she was under sedation at the time she executed a separation agreement is insufficient to state a cause of action to modify or set aside the agreement where the wife admits that she was represented by counsel when the agreement was executed, since the presence of counsel negatives the inference or contention that she was incompetent to understand the arrangement and was ignorant of its terms and did not know what she was doing.

2. Husband and Wife § 12; Pleadings § 19— demurrer — conclusions of pleader

Allegation that a separation agreement is not fair, adequate or equitable is a conclusion of the pleader and not admitted by demurrer.

3. Appeal and Error §§ 42, 45— inclusion of separation agreement as "appendix" to brief

In this appeal from the allowance of defendant's demurrer in an action to modify a separation agreement, wherein the separation agreement was

not made a part of the record on appeal, defendant's inclusion of the separation agreement in his brief as an "appendix" thereto is not approved, and the Court will not consider defendant's argument that the deed of separation conforms to the requirements of G.S. 52-6.

4. Divorce and Alimony § 23; Husband and Wife § 12— increase in child support payments — recovery of expenditures for child — sufficiency of allegations

Allegations that the portion of a separation agreement relating to payments to plaintiff's child should be set aside and that plaintiff should recover of defendant at least $4500 expended by her for the child's support are insufficient to state a cause of action to modify the child support or to recover expenditures made for the child, where the complaint is silent as to any change in conditions necessitating increased support, and there are no facts alleged to support the necessity of any expenditures by plaintiff.

5. Divorce and Alimony § 23; Husband and Wife § 11— separation agreement — inherent authority of courts to protect interests of minor children — record shows child has reached majority

In this action to modify or set aside portions of a separation agreement, the principle that no agreement between the husband and wife will deprive the court of its inherent authority to protect the interests and provide for the welfare of minor children is of no avail to plaintiff where the record shows that the only child of the marriage was 23 years of age at the time the action was instituted.

APPEAL by plaintiff from *Kuykendall, J.*, 7 November 1969 Session of the General Court of Justice, District Court Division of GUILFORD County.

On 27 June 1969 plaintiff instituted an action by which she sought to have set aside that portion of a separation agreement providing for payments to her son who was a minor at the time of the separation, to modify that portion of the agreement providing for payments to her, and to recover at least $4500 expended by her for the son.

Her complaint alleged that she and defendant were married in 1936 and separated in 1959; that in 1962 they entered into a separation agreement; that at that time David Calhoun, their son, was 16 years of age; that the plaintiff "was not able to work at the time the deed of separation was signed, was in very poor health, nervous and was taking medicine regularly"; that the defendant was earning from $15,000 to $20,000 per year and that his salary has been increased considerably since that time; that the deed of separation provided that the defendant pay to plaintiff $300 per month, keep up the mortgage payments on the home owned by them as tenants by the entirety, and contained certain provisions with respect to life insur-

ance; that the deed of separation contained no provisions for payments to plaintiff for support of the minor son but required defendant to pay to the son $50 per month until he was 18 or until he entered college if he entered prior to becoming 18; that plaintiff was not advised by her counsel nor defendant's counsel that payments should be made to her and not to the son; that there has been no divorce between the parties; that even if the monthly payments to the son had been made to plaintiff, it would have been inadequate support; that "at the very time the deed of separation was executed, she (plaintiff) was in bad physical condition and was actually under sedation, and did not understand what she was signing; that her condition should have been observed by counsel for the plaintiff and counsel for the defendant"; "That the plaintiff has spent on behalf of their son, David Lee Calhoun, an average of $75.00 per month for a period of approximately five years which would amount to Four Thousand, Five Hundred and No/100 ($4,500.00) Dollars."

Defendant demurred to the complaint. Upon hearing on the demurrer and plaintiff's answer thereto, the court entered judgment sustaining the demurrer and dismissing the action. Plaintiff appeals to this Court, assigning as error the entry and signing of the judgment.

William E. Comer for plaintiff appellant.

Block, Meyland and Lloyd, by A. L. Meyland, for defendant appellee.

MORRIS, J.

[1] Plaintiff alleges that she was under sedation at the time she executed the agreement and did not understand what she was signing. Even if this were sufficient allegation of incompetency, it is admitted by her that she was represented by counsel. This is said in *Van Every v. Van Every,* 265 N.C. 506, 144 S.E. 2d 603 (1965), and approved in *McLeod v. McLeod,* 266 N.C. 144, 146 S.E. 2d 65 (1966):

> " 'The presence of able counsel for the wife at the conference resulting in a separation agreement, and at the time she executes and acknowledges a deed of separation, "negatives the inference or contention that she was incompetent to understand the arrangements, and was ignorant of its terms and did not know what she was doing, (citing authorities). . . ." ' *Joyner v. Joyner,* 264 N.C. 27, 140 S.E. 2d 714."

[2] It is true that one of the requisites of a valid separation agreement is that it be reasonable, just, and fair to the wife — due regard being given to the condition and circumstances of the parties at the time. *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148 (1945). Plaintiff urges that she alleges in her complaint that the deed of separation is "neither adequate, fair nor equitable" and that the demurrer admits all of the allegations of the complaint. " 'The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of the *facts* contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom are also admitted, but the principle does not extend to the admissions of conclusions or inferences of law.' " (Citations omitted.) (Emphasis supplied.) *Smith v. Smith, supra.* The assertion that the agreement is not fair, adequate, or equitable is a conclusion of the pleader and not admitted by the demurrer.

[3] The agreement itself is not a part of the record before us. Defendant has included it in his brief as an "appendix" thereto. This is not approved, nor do we consider defendant's argument that the deed of separation conforms to the requirements of G.S. 52-6. We have before us on this record only the complaint, the demurrer, and the answer thereto. The deed of separation is not made a part of any pleading. Plaintiff does not allege that it did not comply with the provisions of G.S. 52-6. Plaintiff does admit that the deed of separation was signed by the parties and is in effect until set aside or modified and that defendant has complied with its terms.

[4] Plaintiff further contends that that portion of the agreement relating to payments to the son should be set aside and that she should recover of the defendant at least $4500 expended by her for the son's support. The complaint is silent as to any change in conditions necessitating increased support nor is there any allegation of facts to support the necessity of any expenditures by the plaintiff. In *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963), the Supreme Court, speaking through Denny, C.J., said:

> "However, we hold that where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. We further hold that the court upon motion for an increase in such allowance, is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase

is awarded solely on the ground that the father's income has increased, therefore, he is able to pay a larger amount."

[5] We note that at the time of the execution of the deed of separation, the minor son was 16 years of age. The terms of the agreement were that payments to him would continue until he reached 18 years of age or entered college, whichever event occurred first. Simple mathematics indicate that the son would be 23 years of age at the time of the institution of this action. Under these circumstances, the principle enunciated in *Thomas v. Thomas,* 248 N.C. 269, 103 S.E. 2d 371 (1958), that no agreement or contract between husband and wife will serve to deprive the court of its inherent authority to protect the interests and provide for the welfare of the minor children of the marriage — is of no avail to this plaintiff. We assume no action was brought on behalf of the son, during his minority, for support.

We conclude that the plaintiff has not stated a cause of action and the court's action in allowing the demurrer and dismissing the action was entirely proper.

Affirmed.

MALLARD, C.J., and VAUGHN, J., concur.

RUSSELL WILDER v. CECIL EARL EDWARDS

No. 709SC111

(Filed 1 April 1970)

1. Evidence § 14; Appeal and Error § 48— pedestrian accident — evidence of pedestrian's intoxication — hospital record

In a pedestrian's action to recover damages for injuries sustained when struck by an automobile, testimony that an entry on the hospital record made by the pedestrian's examining physician following the collision disclosed that the pedestrian's breath smelled heavily of alcohol, *held* not prejudicial to the pedestrian even though the testimony was admitted without a finding by the trial court that it was necessary to a proper administration of justice, G.S. 8-53, since both plaintiff and his only witness had previously testified that plaintiff had consumed a quantity of beer shortly before the accident.

2. Appeal and Error § 48— admission of evidence — prejudicial error

In order to obtain a new trial for error in the admission of evidence,

the appellant must show that the evidence was prejudicial to his cause of action or defense.

3. Automobiles § 90; Appeal and Error § 50— instructions on contributory negligence — prejudicial error

Possible error in the instructions on the issue of plaintiff's contributory negligence in an automobile accident case was not prejudicial to plaintiff, since the jury did not reach the issue of contributory negligence.

4. Automobiles § 90— pedestrian accident — instructions — defendant's careless and reckless driving

In plaintiff pedestrian's action to recover damages for injuries sustained when struck by an automobile, plaintiff's evidence *is held* insufficient to justify an instruction on careless and reckless driving by the defendant.

APPEAL by plaintiff from *Hall, J.*, September 1969 Civil Session, Superior Court of FRANKLIN County.

Plaintiff filed complaint on 18 August 1966 seeking recovery for damages resulting from injuries allegedly sustained when he was struck by an automobile being driven by defendant. Plaintiff alleged that he was walking on the shoulder of the highway, facing the automobile approaching him, and "as the automobile came within a few feet of plaintiff, the defendant suddenly, unlawfully and negligently drove said automobile onto the south dirt shoulder of the road striking plaintiff and throwing him into the air with such great force and violence that plaintiff's head hit the right portion of the windshield of defendant's automobile and that plaintiff was dragged a distance of eighteen (18) feet before falling from the automobile" as a result of which the plaintiff received the injuries complained of.

Defendant answered, denying any negligence on his part, and, as a further answer and defense, averred that any injuries sustained by plaintiff were the direct and proximate result of plaintiff's own negligence. Defendant averred that he was driving on his right side of the road, with his headlights on dim as he was about to pass an approaching vehicle; that "as he was approximately passing" the vehicle, he saw a person, whom he later learned to be the plaintiff, walking near the center of his lane of traffic; that he immediately applied his brakes and turned his automobile to the left in an effort to avoid colliding with plaintiff but a portion of the right front fender of his automobile came in contact with the plaintiff who thereafter hit the right portion of the automobile windshield and a part of the right side of the automobile; that at the time the plaintiff had consumed a quantity of some intoxicating beverage and was under the influence thereof.

In addition to pleading the negligence of plaintiff as the sole

proximate cause of his injuries, defendant also set up the plea of contributory negligence.

The jury answered the first issue as to defendant's negligence in favor of the defendant and, therefore, did not reach the issues as to contributory negligence and damages.

Plaintiff appealed.

Hubert H. Senter, for plaintiff appellant.

Spears, Spears, Barnes and Baker, by Marshall T. Spears, Jr., for defendant appellee.

MORRIS, J.

[1] Defendant called as a witness the administrator of the hospital to which plaintiff was taken immediately after the collision. He testified, after being properly qualified, that Dr. John Lloyd practiced at the hospital at the time plaintiff was admitted but had died prior to the trial of this matter; that according to the records, Dr. Lloyd had treated and served the plaintiff on the night of the accident. The record discloses the following immediately thereafter:

"Q. I will direct your attention to part of your record relating to the investigation or information obtained when Russell Wilder was brought into the Hospital on that evening, would you please read the entries concerning what was found when he was first brought in?

PLAINTIFF OBJECTS OVERRULED BY THE COURT (EXCEPTION #3)

Q. You may answer.

A. 'General appearance, extremely rigid adult colored male in profound shock, heavy alcohol odor to breath, not oriented or at all cooperative.'

Q. Did it go on in that record to show in a summary other things that were done for him on that evening by Dr. Lloyd?

A. Yes, the treatment.

Q. I have no further questions."

[1, 2] Plaintiff earnestly contends that the court committed error in allowing the evidence to be heard by the jury and bases his assignment of error on the ground that this constituted a privileged communication within the purview of G.S. 8-53. Conceding, without deciding, that the evidence was not properly admissible without a

finding by the trial court that it was necessary to a proper administration of justice, plaintiff made no motion to strike the answer [see *Carpenter, Solicitor v. Boyles,* 213 N.C. 432, 196 S.E. 850 (1938)], nor has plaintiff shown how the admission of the testimony was prejudicial. It appears that both plaintiff and his only witness had testified that a short time prior to the collision the plaintiff had consumed a quantity of beer. There was also evidence from the patrolman who investigated the accident and from the defendant that plaintiff's companion and witness had stated that the plaintiff was "drinking plenty". All of this evidence came in without objection prior to the evidence, the admission of which plaintiff now assigns as error, and disclosed the identical information sought to be elicited from the hospital record. Hence the ruling of the trial judge with respect to the testimony from the record cannot be held for prejudicial error. *Sawyer v. Weskett,* 201 N.C. 500, 160 S.E. 575 (1931). It is elementary that in order to obtain a new trial for error of the trial judge in admitting evidence, the appellant must show that the evidence was prejudicial to his cause of action or defense. *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326 (1953). This the appellant has failed to do. This assignment of error is, therefore, overruled.

[3] Appellant next contends that in its instructions to the jury, the court expressed an opinion. The portion of the charge to which plaintiff excepts is as follows: "The plaintiff, on the other hand, contends that you ought not to be satisfied by the greater weight of the evidence that he was negligent, or that his negligence in any way contributed to his injuries, and he contends that you ought to answer it 'no'." This was a portion of the charge on the second issue. We do not agree that the portion of the charge constitutes an expression of opinion, but even if it did, the plaintiff has again failed to show prejudice. The jury did not reach the second issue and plaintiff could not have been prejudiced by the statement plaintiff contends was the expression of an opinion. This assignment of error is without merit.

[4] The remaining assignment of error is that the court failed to charge the jury on careless and reckless driving as alleged in plaintiff's complaint and testified to by plaintiff at trial. It is true that plaintiff does allege in his complaint that defendant drove his car "carelessly and heedlessly in wilful and wanton disregard of the rights and safety of others and without due caution and circumspection and at a speed and in a manner so as to endanger or be likely to endanger the plaintiff and other persons and property upon said highway, in violation of North Carolina G.S. 20-140." The only evidence of plaintiff as to how the accident occurred came from the

plaintiff himself. He testified that he was walking on the shoulder of the road about eight feet from the paved portion. "I saw the car coming from towards Franklinton as I was walking along the highway. I had on a grey overcoat, a cap and high top shoes. I saw the car coming towards me and stepped over to the side because you are supposed to. I saw the car coming towards me; it didn't do anything and I was hit; that is all I know." Even if plaintiff's pleadings are sufficient to allege reckless driving, we do not believe that plaintiff's evidence is sufficient to show a wilful or wanton disregard for the rights or safety of others nor operation at a speed or in a manner so as to endanger or be likely to endanger other persons. From plaintiff's evidence, it can be inferred only that defendant's car left the highway and went on the shoulder of the road where plaintiff was walking. Defendant's evidence was that the paved portion of the road was 18 feet wide and that the shoulders were eight and one-half feet wide. He was driving at a speed of about 45 or 50 miles per hour because he was not accustomed to the road. He was meeting a car and his headlights were on low beam. He could not see anything in front of him very far but when the other car got close enough so that its headlights were out of defendant's eyes, he saw a man about 10 or 15 yards in front of him almost in the center of his lane. He applied his brakes and swerved toward the car he was meeting "but it wasn't far enough." Under the evidence in this case, we consider a charge on reckless driving unnecessary. Nor did plaintiff at trial request additional instructions. See *Miller v. Henry,* 270 N.C. 97, 153 S.E. 2d 798 (1967).

The jury found that plaintiff had failed to prove his claim. We find no real substance in plaintiff's contentions on appeal and hold that the trial was free from prejudicial error.

No error.

MALLARD, C.J., and VAUGHN, J., concur.

RANDALL SHEPPARD AND W. H. ANDERSON v. W. H. ANDREWS AND WIFE, NELLIE B. ANDREWS

No. 7018SC33

(Filed 1 April 1970)

1. Vendor and Purchaser § 1— option contracts — construction

Options, being unilateral in nature and imposing no obligation to buy, are to be construed strictly in favor of the optionee.

2. Vendor and Purchaser § 2— duration of option contract — performance of conditions imposed by the contract

It is generally held that time is of the essence in an option agreement, and conditions imposed in the agreement must be strictly performed in order to convert the optionee's right to buy into a contract for sale.

3. Husband and Wife § 3— agency of husband for wife

No presumption that the husband is acting as agent for the wife arises from the mere fact of the marital relationship.

4. Husband and Wife § 5; Vendor and Purchaser § 2— action for breach of option contract by husband and wife — nonsuit as to wife — failure to show tender of payment to wife

In this action against defendants, husband and wife, for breach of an option contract to convey land, the trial court properly allowed motion for nonsuit as to the femme defendant, where plaintiff's evidence failed to show any tender of payment made to the femme defendant within the time required by the option, and no evidence was offered from which the jury could have found that the husband-defendant was his wife's agent for the purpose of receiving tender of payment or waiving timely tender of payment on her behalf.

5. Trial § 45— unanimity of verdict — comment by juror — acceptance of verdict

In this action for breach of an option contract, the trial court did not err in accepting the jury's verdict which answered issues of tender of payment and waiver of tender against plaintiffs after one juror, upon poll of the jury, answered that he agreed with the verdict "with the understanding that tender means money not offer," where the record shows that upon further questioning the juror expressed unequivocal agreement with the verdict.

6. Frauds, Statute of § 2— contract to sell or convey land — sufficiency of description of the land

A contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, G.S. 22-2, must contain a description of the land which is the subject matter of the contract which is either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers.

7. Vendor and Purchaser § 3; Boundaries § 10— option contract — description of land — sufficiency of extrinsic evidence

In this action for breach of an option contract to convey land, defendants' plea in bar that the option agreement did not comply with the statute of frauds should have been allowed at the close of plaintiffs' evidence, where the option described the tract as "4 acres of land fronting on Clover Leaf of Mt. Hope Church and NC-85 Highway and Kivett Road," the parties stipulated that defendants owned 40.77 acres, of which the 4 acres referred to in the option were a part, but plaintiffs' evidence failed specifically to identify and locate the 4-acre tract intended to be covered by the option.

APPEAL by plaintiffs from *Olive, J.*, 16 June 1969 Session of GUILFORD Superior Court.

This is a civil action in which plaintiffs seek damages for breach of an option contract to convey land. Plaintiffs alleged that on 5 May 1966 defendants signed a written agreement by which, in consideration of $200.00, defendants contracted to sell and convey to plaintiffs "all of that certain tract or parcel of land lying and being in Jefferson Township, Guilford County, North Carolina described as follows:

> "4 acres of land fronting on Clover Leaf of Mt. Hope Church and NC-85 and Kivett Road. This is exclusive of N.C. Highway right-of-way."

This written agreement specified the price and terms, provided that the sale was to be made at the option of plaintiffs on or before 8 August 1966 and that if the plaintiffs should not demand deed and tender payment on or before 8 August 1966, the agreement was to become null and void. Plaintiffs alleged timely demand for deed and tender of payment, refusal by defendants, and that on 9 August 1966 defendants had conveyed "almost the identical property" to third parties. Plaintiffs asked for damages in the amount of the difference between the alleged fair market value of the property on 8 August 1966 and the price specified in the option contract.

Defendants admitted execution of the option agreement but denied plaintiffs' allegations as to timely tender of payment. In a further answer defendants pleaded as a defense that the option agreement did not comply with the statute of frauds, G.S. 22-2.

By written stipulation dated and filed on 16 June 1969 the parties agreed that at all times between 1 May 1966 and 8 August 1966, inclusive, defendants were the owners in fee simple of a tract of land containing 40.77 acres more or less, located in Jefferson Township, Guilford County, North Carolina, described with particularity in a certain recorded deed dated 19 November 1946, copy of which was attached to the stipulation, and that the tract of land described as "4 acres of land fronting on Clover Leaf of Mt. Hope Church and NC-85 Highway and Kivett Road" in the option agreement is a portion of said 40.77-acre tract.

At the trial defendants' motion for judgment on the pleadings was overruled. Plaintiffs then offered in evidence a map showing the location of the 40.77-acre tract, which shows Interstate 85 and the ramp leading therefrom to Mt. Hope Church Road crossing the southern portion of the tract in a generally east-west direction, shows

Kivett Dairy Road intersecting into the north margin of the ramp at a point within and near the eastern boundary line of the tract, and shows that all of the 40.77-acre tract, except the small portion thereof covered by the highway right-of-way, lies north and west of the intersection formed by Kivett Dairy Road and the ramp. Plaintiffs also offered in evidence maps prepared from surveys which plaintiffs had caused to be made in late July and on 8 August 1966 in attempts to locate the 4-acre tract covered by the option. Plaintiffs also testified concerning certain payments, and tender of payment, made by them to the male defendant prior to 8 August 1966.

At the conclusion of plaintiffs' evidence, defendants' motion for nonsuit was allowed as to the feme defendant but overruled as to the male defendant. The male defendant then offered evidence in contradiction of plaintiffs' evidence relative to timely tender of payment. At the conclusion of all the evidence, the male defendant again moved for nonsuit. His motion was again denied, and the case was submitted to the jury, which answered issues of tender and waiver of tender against the plaintiffs. Upon poll of the jury, one of the jurors answered that he agreed with the verdict "with the understanding that tender means money not offer." The trial judge then explained to the juror that he could not accept the verdict with any conditions. After further discussion, the juror responded that he had agreed upon the verdict and had answered both issues "no" and that he still assented thereto.

From judgment of nonsuit as to the defendant Nellie B. Andrews and from judgment on the verdict that plaintiffs recover nothing from the defendant W. H. Andrews, plaintiffs appealed.

Jordan, Wright, Nichols, Caffrey & Hill, by Luke Wright and Edward L. Murrelle for plaintiff appellants.

Holt, McNairy & Harris, by R. Kennedy Harris and R. Walton McNairy, Jr., and McLendon, Brim, Brooks, Pierce & Daniels, by W. Erwin Fuller, Jr., for defendant appellees.

PARKER, J.

[1-4] Appellants assign as error the allowance of the motion for nonsuit as to the feme defendant. In this we find no error. Options, being unilateral in nature and imposing upon the optionee no obligation to buy, are to be construed strictly in favor of the optionor. Accordingly, it is generally held that time is of the essence in such agreements, and conditions imposed therein must be strictly per-

formed in order to convert the optionee's right to buy into a contract for sale. *Ferguson v. Phillips,* 268 N.C. 353, 150 S.E. 2d 518. The option agreement in the case before us expressly provided that it was to become void if plaintiffs failed to tender payment within the time specified. Plaintiffs' evidence fails to show any tender of payment made to the feme defendant within the time required by the option. No presumption that the husband is acting as agent for the wife arises from the mere fact of the marital relationship, *Norburn v. Mackie,* 262 N.C. 16, 136 S.E. 2d 279, and no evidence was offered in this case from which the jury might find that the husband-defendant was his wife's agent for the purpose of receiving tender of payment or waiving timely tender of payment on her behalf. Therefore, the motion for nonsuit was properly allowed as to the feme defendant for the reason that plaintiffs' evidence would not support a jury finding of timely tender of payment or of waiver of tender insofar as she was concerned.

[5] Appellants urge error in the trial court's action in accepting the verdict and entering the judgment pursuant thereto that plaintiffs take nothing of the male defendant. In this regard appellants contend that the verdict was not unanimous because of the statement made by one of the jurors when the jury was polled. The record indicates, however, that upon further questioning the juror expressed unequivocal agreement with the verdict, and we find no error in the court's action in accepting the verdict. *Trantham v. Furniture Co.,* 194 N.C. 615, 140 S.E. 300; *State v. Godwin,* 27 N.C. 401.

[6, 7] Even if the jury had not found in defendant's favor upon the issues of tender and waiver of tender, in our opinion the plea in bar should have been sustained at the close of plaintiffs' evidence and the action dismissed because plaintiffs' evidence failed to identify the 4-acre tract which was the subject matter of the option. A contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, G.S. 22-2, must contain a description of the land which is the subject matter of the contract which is either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269; *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593; *Timber Co. v. Yarborough,* 179 N.C. 335, 102 S.E. 630. While the description employed in plaintiffs' option was sufficient to permit introduction of extrinsic evidence to identify and locate the 4-acre tract intended to be covered thereby, plaintiffs' proof failed to accomplish that purpose. The parties stipulated the defendants owned 40.77 acres, of which the 4 acres referred to in the option

were a part. There was no evidence that any particular 4-acre tract ever existed separate and apart from the larger tract. There is an infinite variety of ways in which 4 acres can be carved out of the larger tract so as to front on "Clover Leaf of Mt. Hope Church and NC-85 and Kivett Road."

No error.

CAMPBELL and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT KENNETH ZIMMERMAN

No. 7010SC122

(Filed 1 April 1970)

1. Automobiles § 117— speeding prosecution — sufficiency of evidence

In a prosecution for speeding 75 mph in a 35 mph speed zone in violation of a municipal ordinance, evidence on the issue of defendant's guilt was properly submitted to the jury, notwithstanding the evidence was substantially weakened on cross-examination, where a police officer testified that both his own observation and the radar unit which he was operating disclosed defendant's speed as 75 mph; that he pursued the defendant to a store parking lot, where he saw defendant get out of the car and enter the store; and that he arrested the defendant when he came out of the store.

2. Criminal Law § 104— nonsuit — consideration of evidence

Upon motion for nonsuit in a criminal case, the evidence must be interpreted in the light most favorable to the State, contradictions and discrepancies being for the jury to resolve.

3. Automobiles § 117; Criminal Law § 177— speeding prosecution — punishment — remand for proper sentence

Violation of a municipal speeding ordinance is punishable by fine not to exceed $50 or prison sentence not to exceed 30 days, G.S. 20-141(f1); G.S. 20-176(b); where the judgment of the court exceeded the statutory maximum, the judgment is stricken and the cause remanded for proper judgment.

4. Criminal Law § 142— suspension of judgment — consent by defendant

The execution of a judgment in a criminal case may be suspended upon prescribed conditions only with the defendant's consent, express or implied.

APPEAL by defendant from *Copeland, J.*, 29 September 1969 Special Criminal Session of WAKE Superior Court.

Defendant was tried for the offense of speeding 75 miles per hour in a 35 mile per hour speed zone in violation of an ordinance of the City of Raleigh. In the District Court of Wake County he pleaded not guilty, was found guilty, and was sentenced to 30 days in jail, suspended on payment of a $25.00 fine and court costs. On appeal to the Superior Court, defendant again pleaded not guilty, was found guilty by the jury, and was sentenced to 60 days in jail. Execution of this sentence was suspended and defendant placed on probation for four years, upon condition that he pay a fine of $100.00 and costs and that he not operate a motor vehicle in North Carolina for two years. From this judgment, defendant appealed.

Attorney General Robert Morgan, and Staff Attorney T. Buie Costen for the State.

Vaughan S. Winborne for defendant appellant.

PARKER, J.

[1] Appellant's primary contention is that the evidence was not sufficient to warrant submission of the case to the jury. In this we find no merit. At the trial the solicitor introduced in evidence a copy of the section of the Code of the City of Raleigh which provided that it should be unlawful to operate any motor vehicle in excess of 35 miles per hour on the street and at the location referred to in the warrant. Defendant's counsel also stipulated the applicable speed limit was 35 miles per hour. A Raleigh police officer testified: While engaged with other officers in operating a radar unit on the street in question, he observed defendant driving a 1965 Ford; both the radar, which he had personally tested and found to be accurate, and his own observation indicated defendant's speed as 75 miles per hour; he gave chase and followed defendant into a store parking lot, where he saw defendant step from his car and enter the store; he waited outside until defendant came out of the store, and then arrested him. On cross-examination the officer admitted these events occurred at night, the car was traveling at such speed he was unable to identify the driver, he did not know whether the driver was a man or a woman, and it had been necessary for him to turn his patrol car around before giving chase. Defendant's evidence tended to show that his was not the car which had come through the radar screen and the police car had arrived at the store parking lot only after defendant had been in the store shopping for several minutes.

[1, 2] Upon motion for nonsuit in a criminal case, the evidence must be interpreted in the light most favorable to the State, contra-

dictions and discrepancies being for the jury to resolve. 2 Strong, N.C. Index 2d, Criminal Law, § 104. While here the State's case was substantially weakened by the cross-examination of the officer, it was sufficient to withstand defendant's motion for nonsuit. The weight and credibility of the evidence was for the jury.

We have carefully examined defendant's assignment of error directed to the court's charge to the jury, and find it also to be without merit. Only one exception was noted to the charge, and the portion excepted to consisted of a clear, concise, and correct summary of the ultimate question to be determined by the jury.

[3] While we find no error in the conduct of the trial or in submission of the case to the jury, appellant's assignment of error directed to the judgment must be sustained. G.S. 20-141(f1), under authority of which the Raleigh ordinance here involved was enacted, provides in part as follows:

> "A violation of any ordinance adopted pursuant to the provisions of this subsection shall constitute a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or a prison sentence of not more than thirty days."

By inadvertence the trial judge failed to note the limitation imposed by the above-quoted language upon the penalty otherwise authorized by G.S. 20-176(b) and G.S. 20-180. This latter section provides that every person convicted of violating G.S. 20-141 shall be guilty of a misdemeanor, and shall be punished as prescribed in G.S. 20-176(b). In turn, G.S. 20-176(b) provides that "[*u*]*nless another penalty is in this article or by the laws of this State provided,* every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than one hundred dollars ($100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment." (Emphasis added.) G.S. 20-141(f1), which is applicable in this case, did expressly provide "another penalty," to-wit, "a fine not to exceed fifty dollars ($50.00) or a prison sentence of not more than thirty days."

[3, 4] Because the sentence imposed in this case was in excess of the limit authorized by G.S. 20-141(f1), the judgment entered must be stricken and the cause remanded for imposition of proper judgment. For that reason it is not necessary that we pass upon defendant's contention that he had withdrawn consent to the conditions imposed by the court in suspending the sentence. Upon remand, the court shall pronounce judgment as by law provided; execution of

such judgment may be suspended upon prescribed conditions only with defendant's consent, express or implied. *State v. Cole,* 241 N.C. 576, 86 S.E. 2d 203.

Remanded for judgment.

CAMPBELL and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. BRYON BRANTLEY NEWSOME

No. 7010SC47

(Filed 1 April 1970)

1. Automobiles § 129— drunken driving prosecution — instructions — defendant's contentions

In a prosecution for driving under the influence of intoxicating liquor, the trial court's charge on the contentions of defendant *held* not to constitute an expression of opinion on the evidence.

2. Criminal Law § 163— objections to the charge — contentions

Objections to the statement of contentions are waived unless they are made before the jury retires.

3. Automobiles § 129— drunken driving — instructions

In a prosecution for drunken driving, the charge of trial court, when read as a whole and when due consideration is given to the fact that all of defendant's evidence tended to show that defendant was not under the influence of intoxicating liquor, *held* to have properly explained the effect of all the evidence and presented the question of defendant's guilt or innocence to the jury.

4. Automobiles § 129; Criminal Law § 112— instructions — burden of proof — reasonable doubt

In a prosecution for drunken driving, the charge of the trial court, when read in context, properly placed the burden of proof upon the State to satisfy the jury of defendant's guilt beyond a reasonable doubt.

5. Criminal Law § 163— exception to the charge — appropriate time

The appropriate time for taking an exception to the charge of the court is within the time allowed for the preparation of the case on appeal.

6. Criminal Law § 163— exceptions to the charge — necessity

Only such exceptions to the charge as appear in the record on appeal can be made the basis for appellate relief.

7. Criminal Law § 99— conduct of trial court — examination of witnesses

The trial court may ask a witness questions designed to obtain a proper

understanding and clarification of the witness' testimony or to bring out some fact overlooked.

APPEAL by defendant from *Carr, J.*, 4 August 1969 ("B") Session of Superior Court held in WAKE County.

Defendant was charged in a warrant with the offense of operating a motor vehicle upon the public highways while under the influence of intoxicating liquor in violation of G.S. 20-138. Defendant, upon his trial in the district court, was found guilty and appealed to the superior court. From a verdict of guilty and the judgment entered in the superior court, 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.

Tharrington & Smith by Roger W. Smith, and Carl C. Churchill, Jr., for the defendant appellant.

MALLARD, C.J.

Defendant contends that the trial judge committed error in stating the contentions of the defendant. The defendant contends that the court expressed an opinion and assumed the truth of facts at issue when giving the following instructions relating to defendant's contentions:

"He relies upon the testimony of Mrs. Lorbacher and Mr. Collins and himself to show that he was not under the influence of intoxicants, contending that although he had drunk some intoxicant that afternoon and may have had the intoxicant on his breath when the officer stopped him; that he had drunk nothing further of an intoxicating nature and that any effect that the intoxicant may have had upon him that afternoon had passed off and that he was not under the influence at the time the officer stopped him . . . . He contends that he has offered evidence from which he contends the jury should find that any abnormal operation of his car or any abnormal action on his part after he got out of the car, if he did do any staggering, was due to the gout and that the operation of the car was due to some defective mechanism about the front of the car and he contends that you should be satisfied that any intoxicants that he had drunk had passed away; that is the effects of it; the odor may not have passed away but the effects that would have made him

under the influence had passed off to the extent that he was not under the influence. . . ."

Two State's witnesses testified that the defendant had a strong odor of some intoxicating beverage on his breath when he was arrested at about 11:00 p.m. One of the witnesses for the State testified that the defendant told him that he had been drinking bourbon whiskey that evening at about 10:30 p.m., and had "stopped at 11:00 P.M." The defendant, on direct examination, testified that he had several drinks between the hours of 1:00 and 4:00 in the afternoon, but had not had anything to drink after that, and that he had not had anything to eat since breakfast. Defendant also testified that he had the gout and that because of that, he was sometimes unsteady on his feet. The defendant also testified on direct examination that the front end of the automobile he was driving had been repaired after he was arrested.

[1, 2] In view of the evidence in this case, we are of the opinion and so hold that the trial judge, in stating the contentions of the defendant, did not express an opinion or assume the truth of facts in issue. Moreover, the defendant made no objection to the judge's statement of his contentions until after the verdict. It is the general rule that objections to the statement of contentions are waived unless they are made before the jury retires. *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198 (1966); *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876 (1957).

[3] Defendant contends that the trial judge committed error in that he did not explain the effect of defendant's evidence and in failing to instruct the jury "to the effect that if, upon a consideration of all the evidence, that offered by the defendant as well as that offered by the State, they were not satisfied of the defendant's guilt beyond a reasonable doubt, it would be their duty to return a verdict of not guilty." The trial judge did not instruct the jury in this exact language; however, when the charge is read as a whole, and due consideration is given to the fact that all of the defendant's evidence tended to show that the defendant was *not* under the influence of intoxicating liquor, we think the charge properly explained the effect of all the evidence and presented the question of the guilt or innocence of the defendant to the jury.

[4] We do not agree with the defendant's contention that the trial judge committed error in the following instructions given to the jury:

"[I]f the State has failed to so satisfy you of those facts beyond a reasonable doubt, it would be your duty to return a verdict of not guilty."

"[B]ut if the State has failed to so satisfy you of those facts beyond a reasonable doubt, it would be your duty to return a verdict of not guilty."

When the charge is read in context, we think the trial judge properly placed the burden of proof upon the State to satisfy the jury of the defendant's guilt beyond a reasonable doubt before the jury could return a verdict of guilty.

[5, 6] Defendant contends that the instruction of the court relating to what is a "reasonable doubt" is insufficient. However, this contention is not presented on this record by proper exception and assignment of error. The appropriate time for taking an exception to the charge of the court is within the time allowed for the preparation of the case on appeal. No exception was taken in this case to the court's definition of the term "reasonable doubt." Only such exceptions to the charge as appear in the record on appeal can be made the basis for appellate relief. *Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912 (1960); *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322 (1955). However, we have examined the entire charge and do not find that it was unfair or prejudicial to the defendant.

[7] Defendant contends that the court committed error by asking questions of the State's witnesses and the defendant's witnesses. The rule with respect to the judge asking questions is set out in 2 Strong, N.C. Index 2d, Criminal Law, § 99, p. 634, as follows:

"The court may ask a witness questions designed to obtain a proper understanding and clarification of the witness' testimony or to bring out some fact overlooked. But the court may not ask defendant or a witness questions tending to impeach him or to cast doubt on his credibility, or which intimate that a fact has been established."

Applying the foregoing rule to the questions asked by the judge in this case, we are of the opinion and so hold that they were clarifying questions and no prejudicial error is made to appear.

In the trial we find no prejudicial error.

No error.

MORRIS and VAUGHN, JJ., concur.

THE WICKES CORPORATION v. GLENN I. HODGE AND IDA N. HODGE
No. 7010SC114

(Filed 1 April 1970)

1. Rules of Civil Procedure § 85— effective date — pending litigation

The new Rules of Civil Procedure became effective on 1 January 1970 and apply to actions and proceedings pending on that date. Ch. 803, Session Laws of 1969.

2. Pleadings § 25; Rules of Civil Procedure § 18— denial of demurrer for misjoinder of causes under former statute — complaint complies with new Rules — harmless error

In this action on nine separate promissory notes allegedly executed and delivered by defendants to plaintiff for value on seven different dates, defendants were not prejudiced by error, if any, in the denial of their demurrer interposed on the ground that the complaint did not comply with [former] G.S. 1-123 in that it improperly united several causes of action in contract without stating them separately, where the complaint complies with the new Rules of Civil Procedure, G.S. 1A-1, Rule 18(a), since the action was pending on 1 January 1970 and would be dealt with under the new rules if remanded to the superior court.

3. Corporations § 1— proof of corporate existence — notes naming plaintiff as corporation

In this action on nine promissory notes wherein defendants denied the corporate existence of plaintiff, copies of the notes introduced in evidence in which plaintiff payee was named as a corporation provided sufficient evidence to support a finding that plaintiff was a corporation.

APPEAL by defendants from *Bailey, J.*, 20 October 1969 Regular Civil Session of WAKE Superior Court; also order overruling demurrers entered by Canaday, J., on 13 November 1968.

Alleging itself to be a Michigan corporation, plaintiff sued defendants on nine separate promissory notes aggregating $12,524.92 allegedly executed and delivered by defendants to plaintiff for value on seven different dates. Defendants demurred on the ground that the complaint improperly united several causes of action in contract without stating them separately. Order overruling the demurrers was entered by Canaday, J., on 13 November 1968.

Defendants answered, admitting the execution and delivery of the notes for value but denying on information and belief the corporate existence of plaintiff and whether plaintiff remained the owner and holder of the notes. Jury trial was waived and the parties stipulated evidence establishing all the allegations of the complaint except the corporate existence of plaintiff.

Judgment was rendered in favor of plaintiff for the amount prayed and defendants appealed from the judgment.

Holleman & Savage by Carl P. Holleman for plaintiff appellee.

John V. Hunter, III, for defendant appellants.

BRITT, J.

[2] First, defendants contend that the superior court erred in overruling their demurrers interposed because of improper joinder of causes of action; that although plaintiff sued on nine separate promissory notes, executed and delivered on seven separate dates, it did not state its several causes of action separately in the complaint.

Paragraph III of the complaint is as follows:

"III. That on October 5, 1966, for value received the defendants executed and delivered to the plaintiff a promissory note bearing said date, in the sum of $603.89, payable on demand, with interest from October 5, 1966, at the rate of 6% per annum. A copy of said note is attached hereto as 'Exhibit A' and asked to be taken as a part of this complaint."

In the succeeding eight paragraphs, plaintiff similarly pleads the other eight notes. In paragraph XII, plaintiff alleges that it remains the owner and holder of all of said notes, that it has made demand on defendants for payment but no payment has been made, and then proceeds to allege the amount due plaintiff on each note.

Defendants argue that the complaint did not comply with G.S. 1-123. Conceding, *arguendo,* the correctness of defendants' argument and that the court erred in overruling the demurrers, we do not think the error was prejudicial to defendants who have the burden not only to show error but that the alleged error is prejudicial. *Arant v. Ransom,* 4 N.C. App. 89, 165 S.E. 2d 671.

[1] The 1967 General Assembly, by Chapter 954 of the 1967 Session Laws, enacted a new code of civil procedure; section 10 of the act provides that it shall be in full force and effect on and after 1 July 1969 "and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date." The 1969 General Assembly, by Chapter 803 of the 1969 Session Laws, postponed the effective date of the act to 1 January 1970; section 1 of said Chapter 803 provides as follows:

"Section 10 of Chapter 954 of the Session Laws of 1967 is rewritten to read as follows:

'Sec. 10. This Act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings

pending on that date as well as to actions and proceedings commenced on and after that date.' "

[2] G.S. 1-123 was specifically repealed by Chapter 954 of the 1967 Session Laws and from and after 1 January 1970 the proposition under discussion is covered by G.S. 1A-1, Rule 18(a). Plaintiff's complaint clearly would comply with the new rule. The order overruling the demurrers was entered 13 November 1968 and this action was tried in October 1969 at which times the new rules were not applicable; however, the action was *pending* on 1 January 1970, became subject to the new rules on that date, and if remanded to the superior court would be dealt with under the new rules. For that reason, we cannot perceive that defendants have been prejudiced.

[3] In their brief defendants contend that the trial court erred in overruling defendants' motion for nonsuit for that in their answer defendants denied the corporate existence of plaintiff and the court improperly admitted in evidence, over defendants' objection, a certificate of the Secretary of State of North Carolina with respect to plaintiff's corporate existence. However, defendants' counsel in his oral argument to this Court conceded that there is no merit in this contention in the light of the opinion of our Supreme Court in *Elevator Co. v. Hotel Co.*, 172 N.C. 319, 90 S.E. 253, cited in plaintiff's brief wherein it was held that where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. In the instant case, defendants admitted execution of the notes upon which suit was brought, which notes named Wickes Corporation as payee; at trial, pursuant to stipulation, photographed copies of the notes in lieu of the originals were introduced in evidence by plaintiff. Without passing upon the admissibility of the Secretary of State's certificate, we hold that the notes, or copies thereof, provided sufficient evidence to support the court's finding that plaintiff is a corporation.

The judgment of the superior court is

Affirmed.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. EUNICE LYNN MARTIN

No. 7010SC71

(Filed 1 April 1970)

1. Criminal Law § 1; Fish and Fisheries— validity of regulation — unlawful to "snag" fish

A regulation of the Wildlife Resources Commission making it unlawful "to snag fish," with no definition of the term "snag," is void for vagueness and uncertainty.

2. Criminal Law § 1; Statutes § 10— definition of crime — certainty of statutory words

Few words possess the precision of mathematical symbols, and no more than a reasonable degree of certainty in a statute or regulation making an act a criminal offense can be demanded.

3. Statutes §§ 5, 10— statutory construction — use of dictionaries

Courts may, and often do, resort to dictionaries for assistance in determining the common and ordinary meaning of words and phrases.

4. Statutes § 10— strict construction of criminal statutes

Criminal provisions must be strictly construed against the State and liberally construed in favor of a defendant, with all conflicts resolved in favor of the defendant.

APPEAL by the State from *Godwin, S.J.*, 13 October 1969 Session of WAKE County Superior Court.

Defendant was brought to trial in the District Court of Wake County on a warrant charging that:

> ". . . on or about the 4th day of April, 1968, the defendant named above did unlawfully, wilfully, and [sic] take in public waters of North Carolina migratory fish to wit: Gizzard shad by unlawful method, to wit: did snag fish contrary to General Statutes of North Carolina 113-292 and 1968 North Carolina Fishing Regulations 1-68-J."

Defendant's motion to quash the warrant was denied and upon trial he was convicted and ordered to pay a fine of $25 plus costs of court. He appealed to Superior Court where he again moved to quash the warrant. The motion to quash was allowed and the State appealed pursuant to G.S. 15-179(3).

Robert Morgan, Attorney General, by Millard R. Rich, Jr., Assistant Attorney General, and James L. Blackburn, Staff Attorney, for the State.

No appearance for defendant appellee.

GRAHAM, J.

G.S. 113-292 provides in part as follows:

"(a) The Commission [State Wildlife Resources Commission] is authorized to authorize, license, regulate, prohibit, prescribe, or restrict all fishing in inland fishing waters, and the taking of inland game fish in coastal fishing waters, with respect to:

(1) Time, place, character, or dimensions of any methods or equipment that may be employed in taking fish; . . ."

[1] Regulation 1-68, subsection J, adopted by the Commission pursuant to the authority vested in it under the provisions of G.S. 113-292 provides: "It shall be unlawful to snag fish." No definition of the term "snag" as used in the regulation is set forth. The question is therefore whether the term "snag," without further legislative definition, and as used in the regulation, is sufficiently definite to give notice to a citizen of ordinary understanding as to what is prohibited, to enable the court to apply the provisions of the regulation, and to enable a defendant to formulate his defense. 2 Strong, N.C. Index 2d, Criminal Law, § 1.

The State concedes that the term "snag" has no legal or technical meaning. However, it is argued that the word as used in the regulation has a common and ordinary meaning as evidenced by the fact that one of the definitions of "snag" set forth in *Webster's Third New International Dictionary* (1968) is ". . . to hook (a fish) in the body rather than in the mouth f: to hook (a fish) with a snagline. . ."

[1-3] We are aware that few words possess the precision of mathematical symbols and that no more than a reasonable degree of certainty in a statute or regulation making an act a criminal offense can be demanded. *Boyce Motor Lines v. U. S.*, 342 U.S. 337, 96 L. Ed. 367, 72 S. Ct. 329; *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768. Also, courts may, and often do, resort to dictionaries for assistance in determining the common and ordinary meaning of words and phrases. 22 C.J.S., Criminal Law, § 24(2); *State v. Schriber*, 185 Or. 615, 205 P. 2d 149. We nevertheless agree with the trial court that the regulation as written is too vague and uncertain to withstand proper attack.

A literal application of the dictionary definition cited by the State would make it an unlawful act if a person, fishing with a baited hook in a lawful manner, had the good fortune of hooking a fish in the tail fin, rather than in the mouth, as he raised his hook

from the water. (We have heard stranger "fish tales"). On the other hand, the regulation would not apply to a person who used a snagline for the purpose of taking or attempting to take fish unless it could be shown that he actually "snagged" a fish, because nowhere in the regulations is it made unlawful to use a "snagline." (Compare regulations which prohibit under certain circumstances the use of trot lines, set-hooks, and other named and *described* special devices for the purpose of taking or *attempting* to take fish).

We further note that *Webster's Third New International Dictionary* (1968) gives as one definition of "snag" the following: ". . . to catch or obtain by quick, decisive, and often more or less irregular action. . ." Under this definition most fishermen would be guilty of "fish snagging" based on their own admission.

[4] The Commission has undoubtedly sought to prohibit by regulation and in the public interest a reprehensible method of taking or attempting to take fish. This they have the authority to do, but only if they use language which specifically defines and describes the act or equipment they seek to prohibit. Perhaps, as the State argues, fishermen generally understand the language of the regulation as written. But it is also necessary that judges understand it, for their duty is to apply the regulation. And all judges are not fishermen. Criminal provisions must be strictly construed against the State and liberally construed in favor of a defendant with all conflicts resolved in favor of the defendant. *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596; *State v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97. In our opinion the warrant was properly quashed and the judgment of the trial court is affirmed.

Affirmed.

BROCK and BRITT, JJ., concur.

W. C. GIBSON, JR. v. ROSE MARIE JONES, ADMINISTRATRIX OF THE ESTATE OF FRANK E. JONES, AND ROSE MARIE JONES, INDIVIDUALLY

No. 7010DC72

(Filed 1 April 1970)

1. Pleadings § 19— demurrer — construction of pleadings

Upon a demurrer, including a demurrer *ore tenus,* interposed at the outset of a hearing of a case, the pleadings are liberally construed so as to give plaintiff the benefit of every reasonable intendment in his favor.

2. Payment § 4; Pleadings §§ 10, 19; Bills and Notes § 18— action on promissory note — demurrer — payment as affirmative defense

In this action to recover upon a promissory note for $1800, the trial court properly overruled defendants' demurrer *ore tenus* where the complaint and note pleaded therein evidence a debt, a promise to pay, failure to pay, refusal to pay after demand therefor, and notations on the instrument which appear to show payments of $2000 by parties unknown on a debt of $6800, it not being clear that the notations on the instrument represent acknowledgment of payment on the instant debt by the obligors, and payment being an affirmative defense which may not be raised by demurrer.

3. Trial § 58— waiver of jury trial — judgment of court — necessity for separate findings and conclusions

When jury trial is waived in the district court, separate findings of fact and conclusions of law must be entered by the trial judge in support of a judgment entered by him. G.S. 1-185.

4. Trial § 58— trial by court without jury — verdict upon issues answered by court disapproved

The entry of a verdict by the district court, sitting without a jury, based on issues of fact answered by the court is disapproved.

APPEAL by defendants from *Barnette, District Judge,* Tenth District, 18 September 1969 Session of WAKE County General Court of Justice, District Court Division.

W. C. Gibson, Jr., seeks in this action to recover the sum of $1,800.00 from the defendants. This sum is the amount allegedly due on a note to W. C. Gibson, Jr., signed by Frank E. Jones and Mrs. Rose Marie Jones and executed 20 November 1968. Payment of the note was due on 20 December 1968. Frank Jones died on 23 December 1968. The following notations appear at the end of the note, below the signatures of the obligors:

"11-25-68	5,000.00	TOTAL —	6800.00	WCG
12-12-68	1,000.00 Pd.		5800.00	WCG
12-20-68	1,000.00 Pd.		4800.00	WCG"

In answering, the defendants denied the material allegations of the complaint and admitted that the demands of the plaintiff for payment had been refused. The defendants demurred *ore tenus* to the complaint. The demurrer was overruled. Jury trial was waived. The trial judge posed and answered the following issues:

"1. Did Frank E. Jones execute the note referred to in the Complaint?

ANSWER: Yes.

2. Did Rose Marie Jones execute the note referred to in the Complaint?

ANSWER: Yes.

3. What amount is now due and payable on the note referred to in the Complaint?

ANSWER: $1800.

4. From what date is the above amount due and payable?

ANSWER: Dec. 20, 1968."

Based on thise issues, the trial judge entered the following judgment:

"*JUDGMENT* of BARNETTE, J. (Filed 9/18/69)

This cause coming on to be heard before the undersigned Judge presiding at the September Civil Session of the District Court Division of the General Court of Justice of Wake County, and the Court having answered the issues as set out in the record;

It is therefore ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendants the sum of EIGHTEEN HUNDRED DOLLARS ($1800.00) plus interest from December 20, 1968, and that the cost of this action be taxed by the Clerk against the defendants.

This 18th day of September, 1969.

HENRY V. BARNETTE, JR.
Judge Presiding"

The defendant, in her individual and representative capacities, appealed to this court, assigning as error the refusal of the trial judge to sustain the demurrer *ore tenus* entered by her, and his failure to make adequate findings of fact.

Boyce, Mitchell, Burns & Smith by F. Kent Burns for defendant appellants.

Hollowell and Ragsdale by William L. Ragsdale for plaintiff appellee.

CAMPBELL, J.

[1, 2] Upon a demurrer, including a demurrer *ore tenus,* interposed at the outset of a hearing of a case, the pleadings are liberally construed so as to give the plaintiff the benefit of every reasonable intendment in his favor. G.S. 1-151. *Sutton v. Duke,* 7 N.C. App. 100,

171 S.E. 2d 343 (1969). Seen in such light, the complaint and the note pleaded herein evidence a debt, a promise to pay, failure to pay, refusal to pay after demand therefor, and notations on the instrument which appear to show payments, by parties unknown, to "WCG" on a debt of $6,800. The recitations on the note deal with amounts greatly in excess of the face value of the note. It is not clear, thus, that the notations on the instrument represent acknowledgment by the obligee of payment of the instant debt by the obligors. Payment is an affirmative defense and was not specially pleaded by the defendant. 6 Strong, N.C. Index, 2d, Payment § 4. An affirmative defense may not be raised by demurrer. *Leach v. Page,* 211 N.C. 622, 191 S.E. 349 (1937). The demurrer was properly overruled.

[3, 4] The contention of the defendant that the trial judge did not make proper findings of fact is well taken. Findings of fact and conclusions of law must be entered by a trial judge in support of a judgment entered by him, in compliance with G.S. 1-185. The conclusions of law arising upon the facts must be stated separately from the findings of fact. *Cutts v. Casey,* 275 N.C. 599, 170 S.E. 2d 598 (1969). The entry of a verdict by the trial court, sitting without a jury, based on issues of fact answered by the court is not approved. *Anderson v. Cashion,* 265 N.C. 555, 144 S.E. 2d 583 (1965); *Sherrill v. Boyce,* 265 N.C. 560, 144 S.E. 2d 596 (1965); *Wynne v. Allen,* 245 N.C. 421, 96 S.E. 2d 422 (1954).

The judgment in the instant case does not meet the exception stated in *Harrelson v. Insurance Co.,* 272 N.C. 603, 158 S.E. 2d 812 (1968). There it was determined that it could be ascertained from the judgment what facts the court found and what conclusions of law it drew therefrom, since these were stated *separately* in the judgment. We do not approve of the posing and answering of issues by the court when it sits without a jury, and we reiterate the court's duty, under G.S. 1-185 (now, see G.S. 1A-1, Rule 52), to enter *separate* findings of fact and conclusions of law in its judgment.

For error in law there must be a new trial.

New trial.

PARKER and HEDRICK, JJ., concur.

IRENE H. FARMER v. WELLONS VILLAGE SHOPPING CENTER DRUG CORPORATION

No. 7014SC205

(Filed 1 April 1970)

1. Negligence §§ 5.1, 52— invitee — store customer

A customer who enters a store during business hours has the status of an invitee of the storeowner.

2. Negligence §§ 5.1, 53— storeowner's liability to invitee

A storeowner is not an insurer of the safety of its invitee, and it would be liable for the invitee's injuries only if those injuries resulted from the actionable negligence of the storeowner.

3. Negligence §§ 5.1, 53— storeowner — duty to invitee

A storeowner owes to his customers the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or of unsafe conditions insofar as they are known, or should be known, by reasonable inspection.

4. Negligence §§ 5.1, 57— fall of invitee — *res ipsa loquitur* inapplicable

No inference of negligence on the part of a storeowner arises from the mere fact of a customer's fall on the floor of its store during business hours, the doctrine of *res ipsa loquitur* having no application.

5. Negligence §§ 5.1, 57— fall by invitee on store rug — sufficiency of evidence

In an action for personal injuries sustained when plaintiff, an elderly woman, stumbled and fell over a rug which had been placed at the entrance of defendant's drugstore, judgment of nonsuit was proper where plaintiff's evidence tended to show (1) that she had been in the drugstore just prior to the occasion in which she suffered the fall, (2) that as she re-entered the store she looked at a clerk, who had set aside a can of hair spray for her, and then stumbled on the rug and fell, and (3) that she had seen a rug on the floor on previous visits to the store but had not seen it at the time of her fall.

6. Negligence §§ 5.1, 53— storeowner — duty to warn invitee of obvious conditions

A storeowner has no duty to warn an invitee of an obvious condition of which the invitee has equal or superior knowledge.

7. Negligence §§ 5.1, 53— liability of storeowner — entrance rug

The mere presence of a rug at the entrance of a store does not constitute actionable negligence by the storeowner.

APPEAL by plaintiff from *Braswell, J.*, 10 November 1969 Session of DURHAM County Superior Court.

This is an action to recover for injuries sustained when plaintiff, an

elderly woman, allegedly stumbled and fell over a rug which was placed at the front entrance to defendant's premises. In her complaint it is alleged, *inter alia,* that defendant had failed to provide a safe entranceway into the store; that the entrance "was narrow and did not provide adequate passageway"; that displays and a magazine rack were maintained at the entrance to draw the attention of customers; that defendant was negligent in placing a lightweight "throw rug" at the entrance; that the rug was in a rumpled condition; that the door would not pass over the rug without causing it to wrinkle or become jammed; that the rug was a hazard and that plaintiff's fall and injuries were the proximate result of defendant's negligence. Defendant answered denying any negligence and pleading plaintiff's contributory negligence as a bar to any recovery. At the close of plaintiff's evidence defendant moved for a judgment of nonsuit, which motion was allowed by the court. Plaintiff appealed from the entry of the judgment.

W. Paul Pulley, Jr., for plaintiff appellant.

Spears, Spears, Barnes and Baker, by Marshall T. Spears, Jr., for defendant appellee.

MORRIS, J.

Plaintiff's first assignment of error raises the question of whether the trial court committed reversible error in granting defendant's motion for judgment of nonsuit at the close of plaintiff's evidence.

Plaintiff argues that the rug was partially concealed from the view of entering customers because of a large decal pasted to the lower portion of the door leading into the store; that a magazine rack had been placed to the right of the door, which necessitated a sharp turn to the left after entering the door, and that this design or placement of fixtures, together with the location of the rug, constituted a hazard.

[1-3] Plaintiff had entered defendant's store during business hours. Her status was that of an invitee of defendant. The mere fact that she was an invitee did not make defendant an insurer of her safety while she was on its premises as a customer. Defendant would be liable to plaintiff for injuries sustained by her only if those injuries resulted from its actionable negligence. *Gaskill v. A. & P. Tea Co.,* 6 N.C. App. 690, 171 S.E. 2d 95 (1969). Defendant owed to plaintiff, and all others similarly situated, the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warn-

ing of hidden perils or of unsafe conditions insofar as they are known, or should be known, by reasonable inspection. *Routh v. Hudson-Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1 (1964).

[4] Nor does any inference of negligence on the part of defendant arise from the mere fact of a customer's fall on the floor of its store during business hours, the doctrine of *res ipsa loquitur* having no application. *Gaskill v. A. & P. Tea Co., supra,* and cases there cited.

[5] Viewing plaintiff's evidence in the light of these principles and considering it in the light most favorable to her, as we must do on a judgment of compulsory nonsuit. *Quinn v. Supermarket, Inc.*, 6 N.C. App. 696, 171 S.E. 2d 70 (1969), we are of the opinion that plaintiff's evidence was not sufficient to support a finding of actionable negligence on the part of defendant which was a proximate cause of plaintiff's injuries. Plaintiff's evidence shows that she had been in defendant's store just prior to her fall for the purpose of having a prescription filled. As she was leaving the store with the prescription, she saw a can of hair spray which she wanted to purchase. She had expended all of the cash she had at the time for her prescription; and, since the hair spray she wanted was the last can on display, she asked the clerk to hold it for her while she went to get some money from her daughter who was shopping in a nearby store. When she returned with the money, she looked at the clerk as she entered the door, stumbled on the rug, and fell. She testified that she had seen a rug on the floor on previous occasions when she had been in the store but that she did not see it at the time of her fall.

There is no evidence that her view was blocked by the decal as she alleged. There is no evidence as to the actual condition of the rug at the time of her fall nor is there evidence to substantiate plaintiff's allegations that the entrance passageway was inadequate or that defendant had failed to provide a safe passageway.

[6, 7] Defendant had a duty to keep the aisles and passageways in reasonably safe condition and to give warning of any hidden dangers or unsafe conditions of which it had knowledge or in the exercise of reasonable supervision and inspection should have had knowledge. *Long v. Food Stores,* 262 N.C. 57, 136 S.E. 2d 275 (1964); *Routh v. Hudson-Belk Co., supra.* Defendant, however, has no duty to warn an invitee of an obvious condition or one of which the invitee has equal or superior knowledge. *Wrenn v. Convalescent Home,* 270 N.C. 447, 154 S.E. 2d 483 (1967). There is no evidence that defendant failed to keep the aisles or passageways in a reasonably safe condition, while there is evidence that plaintiff had knowledge that a rug was likely to be in the very place it was when she stumbled

and fell and that plaintiff was familiar with the store from previous visits and had seen a rug on the floor on previous occasions. The mere presence of the rug did not constitute actionable negligence. See 65 C.J.S., Negligence, § 81(10). Even if the evidence were sufficient to support a finding of actionable negligence on the part of defendant, plaintiff's evidence reveals contributory negligence as a matter of law. Plaintiff attempts to repel this by contending that defendant's "successful merchandising technique" had caused her to be attracted by displays and to think about other purchases, thus causing her attention to be diverted and causing her momentarily to forget about the rug. But she testified that "Nothing attracted my attention when I entered the store the second time except looking for the clerk." In looking for the clerk plaintiff was acting of her own volition, and defendant cannot be held accountable for plaintiff's forgetfulness under these circumstances, which are not sufficiently diverting to excuse plaintiff's lapse of memory. See *Dennis v. Albemarle,* 242 N.C. 263, 87 S.E. 2d 561 (1955); reh. den. 243 N.C. 221, 90 S.E. 2d 532 (1955).

Because we are of the opinion that the judgment of nonsuit was proper in this case, we consider it unnecessary to discuss plaintiff's remaining assignments of error.

Affirmed.

MALLARD, C.J., and VAUGHN, J., concur.

STATE OF NORTH CAROLINA v. THOMAS JEFFERSON CAVINESS

No. 709SC40

(Filed 1 April 1970)

1. Automobiles § 126; Criminal Law § 64— breathalyzer test results — prerequisites for admission in evidence

In this prosecution for operating an automobile on the public highways while under the influence of intoxicating liquor, the trial court committed prejudicial error in admitting testimony as to the results of a breathalyzer test where there is no evidence in the record tending to show that chemical analysis of defendant's breath was performed (1) according to methods approved by the State Board of Health, and (2) by an individual possessing a valid permit issued by the State Board of Health. G.S. 20-139.1(b).

2. Automobiles § 126; Criminal Law § 64— breathalyzer test results — qualification of expert — permit issued by State Board of Health

Testimony by a witness that he had been to school, studied and graduated from the "school for breathalyzer operators put on by the Community College in Raleigh," and that he has "a license to administer the breathalyzer" *is held* insufficient to show that the witness has a valid permit issued by the State Board of Health to administer breathalyzer tests.

APPEAL by defendant from *Hall, J.*, July 1969 Criminal Session of Superior Court held in GRANVILLE County.

Defendant was tried upon a warrant charging him with operating an automobile upon the public highways while under the influence of intoxicating liquor in violation of G.S. 20-138. The defendant appealed to the superior court from the verdict and judgment imposed in the district court. Upon his plea of not guilty in the superior court, the trial was by jury. From the judgment imposed upon the verdict of the jury that the defendant was guilty as charged, he appeals to the Court of Appeals, assigning error.

Attorney General Robert Morgan and Staff Attorney T. Buie Costen for the State.

Blackwell M. Brogden for the defendant appellant.

MALLARD, C.J.

Defendant's fourth assignment of error complains of the admission of the testimony of the witness Evans relating to the result of a breathalyzer test. The exceptions upon which this assignment of error are based arose under the following circumstances: R. E. Evans, the only witness for the State testifying as to a breathalyzer test, testified and the following occurred:

"I am R. E. Evans, member of the State Highway Patrol and have been for twelve years and I am presently assigned to Granville County; I have been to special schools; I have studied the breathalyzer. I went to the school for breathalyzer operators put on by the Community College in Raleigh. I did graduate and I have a license to administer the breathalyzer. Here is the license and my name appears on the certificate.

Q What was the result of that breathalyzer examination?

DEFENDANT OBJECTS. OVERRULED.

MR. BROGDEN: If your Honor, please, I would like to be heard on that.

THE COURT: Would the jury step to your room and I will send for you when we need you?

(JURY RETIRES)

MR. BROGDEN: May it please the Court, as I understand Stansbury and our Supreme Court, whenever the State attempts to rely on a scientific device, they have got to lay a foundation to show (1) That the scientific experiment is one that is generally accepted for the purpose for which it was designed. (2) That it was operating properly and was accurate on the day in question, and (3) That the man performing the test is qualified. (Argument Continues.)

COURT OVERRULED OBJECTION. (JURY RETURNS) DEFENDANT EXCEPTS. EXCEPTION NO. 7

Q Sgt. Evans, at the time you administered the breathalyzer test to this defendant, did you personally ascertain as to whether or not the breathalyzer was in proper order?

DEFENDANT OBJECTS TO FORM OF THE QUESTION. OVERRULED.

A I did.

DEFENDANT EXCEPTS. EXCEPTION NO. 8

Q Sir?

A I did.

Q And was it operating and functioning properly?

OBJECTION. OVERRULED.

A It operated properly.

DEFENDANT EXCEPTS. EXCEPTION NO. 9

Q Did you administer the breathalyzer test to the defendant?

A I did.

Q What was the result?

OBJECTION. OVERRULED.

A Point fourteen.

DEFENDANT EXCEPTS. EXCEPTION NO. 10"

G.S. 20-139.1 is applicable here. This statute in pertinent part provides that the quantity of alcohol in a person's blood at the time

alleged, as shown by chemical analysis of the person's breath is admissible in evidence against such person when charged with operating an automobile under the influence of intoxicating liquor in violation of G.S. 20-138, and shall give rise to the following presumptions:

"If there was at that time 0.10 per cent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

This statute, G.S. 20-139.1(b) as applicable here, also provides tions:

> "Chemical analyses of the person's breath, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Board of Health and by an individual possessing a valid permit issued by the State Board of Health for this purpose. 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; provided that in no case shall the arresting officer or officers administer said test."

(The above section of the statute was re-enacted in 1969, effective 1 September 1969, with the addition of the words "or blood" in the first line thereof after the word "breath.")

[1] This section of the statute requires two things before a chemical analysis of a person's breath can be considered valid. First, it requires that such analysis shall have been performed according to methods approved by the State Board of Health. Second, it requires that such analysis shall have been made by an individual possessing a valid permit issued by the State Board of Health for this purpose.

There is no evidence in this record tending to show that a chemical analysis of the defendant's breath was performed according to methods approved by the State Board of Health.

[1, 2] Neither is there evidence in this record tending to show that the chemical analysis of the defendant's breath was performed by an individual possessing a valid permit issued by the State Board of Health for this purpose. The testimony of the witness R. E. Evans that he had been to school, studied and graduated from the "school for breathalyzer operators put on by the Community College in Raleigh" is not sufficient to satisfy the requirements of the statute that he possess a valid permit issued by the State Board of Health.

Neither was his testimony that he has "a license to administer the breathalyzer" sufficient to satisfy the requirement of the statute, that to be considered valid, the analysis must be performed by an individual possessing a valid permit issued by the State Board of Health for this purpose. *State v. Mobley,* 273 N.C. 471, 160 S.E. 2d 334 (1968); *State v. Cummings,* 267 N.C. 300, 148 S.E. 2d 97 (1966); *State v. Powell,* 264 N.C. 73, 140 S.E. 2d 705 (1965). The witness Evans may be qualified under the statute to administer and testify as to the results of the breathalyzer test, but if so, his qualifications do not appear in this record.

We are of the opinion and so hold that in this case on this record the court committed prejudicial error in admitting the testimony of the witness Evans as to the result of a breathalyzer test.

Defendant has other exceptions and assignments of error; however, since these may not recur on a new trial, we do not deem it necessary to discuss them.

For the reason stated, the defendant is entitled to a new trial.

New trial.

MORRIS and VAUGHN, JJ., concur.

FRANK O. GUNTER v. NOLL CONSTRUCTION COMPANY
No. 6914DC3

(Filed 1 April 1970)

Highways and Cartways § 7— action against road contractor — repair work — damage to plaintiff's truck — sufficiency of evidence

In plaintiff's action to recover damages caused when its truck struck a hole in the road on which the defendant construction company was allegedly doing repair work, plaintiff's evidence *is held* insufficient to support a finding that defendant was connected with the excavation that resulted in plaintiff's damages, where there was only (1) testimony by a resident on the road that "according to the names on the equipment" defendant was doing the work and (2) an admission by defendant that the road in question was one of the roads on which it "was working," and where plaintiff's own evidence disclosed that persons other than the defendant had performed work on the road.

APPEAL by defendant from *Moore, District Judge,* September 1968 Civil Session, District Court, DURHAM Division of the General Court of Justice.

This is a civil action in which plaintiff seeks to recover for damages caused when his truck, while being driven by his employee on Riddle Road in the City of Durham, hit a hole in the road and turned over. Plaintiff alleged that defendant had done some excavation work on the road and had negligently failed to repair it or to post warnings of the dangerous condition of the road. Defendant answered and admitted that on the date of the accident and for several months preceding that date the defendant was doing "certain construction work on roads and streets in and about the City of Durham," and that one of the streets upon which defendant was working was Riddle Road within the City. Defendant denied all other material allegations of the complaint, and as a further defense pleaded contributory negligence on the part of plaintiff's driver in speeding and failing to keep a proper lookout for the condition of the road ahead of him.

The parties waived a jury. After hearing evidence, the court made findings of fact and conclusions of law, finding defendant negligent in failing to take reasonable steps to correct or to warn others of a dangerous condition created by it, and finding plaintiff's driver not contributorily negligent. From judgment for plaintiff entered on these findings and conclusions, defendant appealed, assigning errors.

Hofler, Mount & White, for plaintiff appellee.

Spears, Spears, Barnes & Baker, for defendant appellant.

PARKER, J.

Defendant challenges the sufficiency of plaintiff's evidence to support certain of the court's findings of fact. Among these were the findings that several weeks prior to the accident defendant had laid a sewer line across Riddle Road; that in order to do so it had removed a large section of pavement; that upon completion of the line defendant had partially filled the ditch, which it had cut across the road, with sand and gravel, but had not completely brought the ditch up to the normal level of the road and had not resurfaced the road; and that on the date of the accident and for many weeks prior thereto there existed a sizeable declivity in the road which was created by defendant in its undertaking to lay the pipe across the road. We think the challenge is well taken.

The only evidence which in any way connects defendant with the hole which plaintiff contends caused his truck to overturn was contained in the testimony of plaintiff's witness, W. H. Watkins.

This witness testified that he resided on Riddle Road and that his front porch was right in front of the hole. He was then asked:

> Question: "Do you know whether or not Noll Construction Company was doing work there in front of your house?"
>
> Answer: "Well, according to the names on the equipment they was doing it."

There was no evidence to indicate what equipment was referred to or what names were on it. Nothing indicates whether the equipment referred to was used for digging the ditch, laying the sewer pipe, refilling the ditch, or for some other purpose. Other than defendant's corporate name and its admission that it was doing "certain construction work on roads and streets in and about the City of Durham," there is no evidence to indicate the nature of defendant's business. There was no evidence of any contract or agreement between defendant and the City of Durham or anyone else to dig a ditch, lay a sewer pipe, restore the broken pavement, or do anything else. Defendant's admission that Riddle Road was one of the streets upon which it "was working," was not sufficient to connect defendant with the hole which caused plaintiff's damages, particularly in view of defendant's denial of plaintiff's allegation that it had done "some excavation work on the said Riddle Road and had failed to completely repair said road." Plaintiff's own evidence disclosed that persons other than the defendant company had performed work on Riddle Road. Plaintiff's witness J. E. Marks, after describing the hole in question, in response to a question from plaintiff's counsel, testified as follows:

> Question: "All right, sir, now, do you know approximately how long the road has been in this condition?"
>
> Answer: "No, I'll be afraid to say, for they kept the road tore up practically all the time. *If it won't the state, it was one outfit, and then somebody else. Just like all the rest of the City.*" (Emphasis added.)

The rule announced in *Knight v. Associated Transport,* 255 N.C. 462, 122 S.E. 2d 64, is not applicable to the present case. In that case the Court said: ". . . we have come to the conclusion that where common carriers of freight are operating tractor-trailer units, on public highways, and such equipment bears the insignia or name of such carrier, and the motor vehicle is involved in a collision or inflicts injury upon another, evidence that the name of the defendant was painted or inscribed on the motor vehicle which inflicted the injury constitutes *prima facie* evidence that the defendant whose

name or identifying insignia appears thereon was the owner of such vehicle and that the driver thereof was operating it for and on behalf of the defendant." Even if it should be held that the quoted rule applies to others than "common carriers of freight . . . operating tractor-trailer units, on public highways," which the Court in *Freeman v. Biggers Brothers, Inc.*, 260 N.C. 300, 132 S.E. 2d 626, found it unnecessary to decide, the rule is at least limited to cases in which the name of the defendant was inscribed on the very motor vehicle which inflicted the injury. The opinion in *Knight v. Associated Transport, supra,* made reference to the large number of the defendant's tractors and trailers in operation on the public highways, and the rule was adopted as "a just one, and well-nigh necessary if those who happened to be injured by the negligent operation of such equipment are to have the protection to which they are justly entitled." No such necessity appears in the present case, and we see no legitimate reason to stretch the rule to the extent which we would be required to do in order to make good the deficiencies in plaintiff's proof in the present case.

For failure of the evidence to support crucial findings of fact, there must be a

New trial.

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

STATE OF NORTH CAROLINA v. WILLIAM ALEXANDER WALKER

No. 7014SC49

(Filed 1 April 1970)

1. Criminal Law § 138— credit on prison sentence — confinement awaiting trial

Defendant is not entitled to credit on his sentence for time spent in custody in lieu of bond while awaiting trial.

2. Criminal Law § 138— credit on prison sentence — confinement for mental evaluation

Defendant is not entitled to credit on his sentence for time spent in custody during a sixty day commitment to a state hospital for mental evaluation prior to trial.

3. Criminal Law § 138— credit on prison sentence — confinement pending appeal

Defendant is not entitled to credit on his sentence for time spent in

custody pending appeal prior to 22 April 1969, the effective date of Ch. 266, Session Laws of 1969.

4. Criminal Law § 177— remand of cause for correction of judgment

Where defendant was indicted for the felony of assault with intent to commit rape, and the judgment recites that defendant entered a plea of nolo contendere "as charged," but on prior appeal the Court of Appeals nonsuited the felony charge and directed that defendant could only be tried upon the lesser included misdemeanor offense of assault on a female, and the sentence imposed by the trial judge reflects that he was considering only the misdemeanor charge, the cause is remanded to the superior court for correction of the judgment to show that defendant entered a plea of nolo contendere to a charge of assault on a female.

APPEAL by defendant from *Bowman, J.*, 1 September 1969 Session, DURHAM Superior Court.

Defendant was originally arrested 22 April 1968 on a warrant charging assault with intent to commit rape. Defendant was immediately released on bond until his preliminary hearing on 7 May 1968. At the preliminary hearing probable cause was found and defendant was bound over to superior court to await grand jury action. New bond was set and defendant was held in custody from 7 May 1968 until 13 June 1968, at which time he was able to post the required appearance bond.

On 14 June 1968, the superior court, *ex mero motu,* committed defendant to Cherry Hospital for a period of sixty days for mental evaluation, after which he was again released on the appearance bond which had been posted.

On 20 November 1968 defendant was tried and convicted of the charge of assault with intent to commit rape, and was sentenced to a term of five to seven years in prison. Defendant gave notice of appeal and perfected his appeal to this court. Appearance bond was again set but defendant remained in custody from 20 November 1968 until 4 February 1969 at which time he posted the required appearance bond.

By opinion of this court filed on 30 April 1969 (*State v. Walker,* 4 N.C. App. 478, 167 S.E. 2d 18) defendant's conviction was reversed and a new trial ordered on the lesser included offense of assault on a female by a male person over the age of eighteen years.

On 2 September 1969 defendant entered a plea of nolo contendere in superior court to the charge of assault on a female, he being a male person (G.S. 14-33 as amended in 1969); and upon his plea was sentenced to a jail term of not less than three nor more than six months. Defendant moved the trial judge to allow him credit,

on the sentence imposed, for the time previously spent in custody in this prosecution. The motion was denied and defendant appealed.

Attorney General Morgan, by Staff Attorney Shepherd, for the State.

John C. Randall for defendant.

BROCK, J.

The Solicitor has stipulated with defendant as follows:

"1. That the Defendant-Appellant in this case was in custody from May 7, 1968 until June 13, 1968 in lieu of bond.

"2. That the Defendant-Appellant in this case was in custody from June 14, 1968 until August 14, 1968 under an order for mental and psychiatric observation.

"3. That the Defendant-Appellant in this case was in custody from November 20, 1968, the date of his first trial, until February 4, 1969, in lieu of bond pending his appeal."

Defendant argues and contends, therefore, that he is entitled to have his sentence credited with a total of 174 days represented by the time he has spent in custody in this prosecution.

[1] The time spent in custody, as represented by stipulations 1 and 2, involve time in custody before defendant's first trial; that is, time spent in custody awaiting trial. It seems that the opinion in *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28, filed 30 January 1970, clearly disposes of defendant's contention. In *Virgil* Justice Huskins discussed *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633, and thereafter held: "Thus North Carolina requires that credit be given for *time served* under a previous sentence for the same conduct but holds that a defendant is not entitled to credit for time spent in custody while awaiting trial."

[2] Defendant argues that nevertheless he is entitled to credit for the time spent in custody, without privilege of bond, during his sixty day commitment to Cherry Hospital for mental evaluation. We perceive no reason why defendant is entitled to credit for time under such commitment any more than a defendant confined, without privilege of bond, on a capital felony charge; such was the situation in *Virgil.* Defendant has cited to us the case of *Cephus v. United States* decided in 1967 by the U. S. Court of Appeals for the District of Columbia (389 F. 2d 317), as supporting his contention that he is entitled to credit for time spent under commitment for

mental evaluation. If it should be conceded that the federal court grounded its order on what it conceived to be a constitutional requirement, nevertheless we adhere to the reasoning and holding of the Supreme Court of North Carolina.

[3] Defendant's contention with respect to the time spent in custody pending the appeal of his first conviction, as reflected by the third stipulation set out above, is likewise disposed of by the holding in *Virgil, supra.* Defendant was in custody from 20 November 1968, the date of his first conviction, until 4 February 1969, at which time he was able to post the required appearance bond. The only statutory requirement in North Carolina that a defendant be given credit for time spent in custody pending appeal was first ratified 22 April 1969. Chap. 266, Session Laws 1969. None of the time in custody claimed by defendant occurred after 4 February 1969. "Recent enactments designed to require credit on a prison sentence for all time spent in custody *pending appeal* are not retroactive . . . ." *State v. Virgil, supra.*

For the reasons stated it was not error for the trial judge to refuse to give defendant credit on the sentence.

[4] However, we note that the judgment entered upon defendant's second trial recites that ". . . defendant, through his attorney and in his own proper person, tenders a plea of Nolo Contendere as charged . . . ." This obviously was an oversight on the part of the trial judge, because the only record charge against defendant was by indictment charging him with the felony of assault with intent to commit rape. This Court, by its opinion upon defendant's first appeal, effectively directed a nonsuit of the felony as charged in the bill of indictment, and directed that defendant could only be tried upon the lesser included misdemeanor offense. Also, the sentence imposed by the trial judge reflects that he was considering only the lesser included misdemeanor offense. Nevertheless, in order that the judgment entered may recite the correct charge to which the plea was entered, this cause is remanded to the Superior Court of Durham County with instructions that the judgment entered in this case on 2 September 1969 be amended to show that the defendant tendered a plea of nolo contendere to a charge of assault on a female, he being a male person. (G.S. 14-33(b)(4)).

Remanded for correction of recitations in the judgment.

No error in the judgment imposing sentence.

BRITT and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. JIM HAITH

— AND —

STATE OF NORTH CAROLINA v. JERRY MILES

No. 7015SC57

(Filed 1 April 1970)

1. **Criminal Law § 92— consolidation of cases for trial — discretion of court**

Trial court had the discretion to allow a motion to consolidate for trial charges of felonious assault against two defendants.

2. **Criminal Law § 86— impeachment of defendant — prior convictions**

For the purpose of impeaching defendant's credibility as a witness, the solicitor may cross-examine him as to collateral matters, including other criminal offenses and degrading actions, provided the questions are based on information and are asked in good faith.

3. **Assault and Battery § 14— *intent to* kill — serious bodily injury — sufficiency of evidence**

In this prosecution for felonious assault, the trial court properly denied defendants' motion to dismiss "insofar as the intent to kill or resulting in serious bodily injuries."

4. **Assault and Battery § 15— felonious assault — instructions**

In this prosecution for felonious assault, the trial court did not fail to instruct the jury in accordance with G.S. 1-180.

5. **Assault and Battery § 17— assault with a deadly weapon — punishment**

Sentence of imprisonment of not less than 18 nor more than 24 months for assault with a deadly weapon is within the limits set by G.S. 14-33 and is not excessive.

APPEAL by defendants from *Brewer, J.*, August 1969 Session of ALAMANCE County Superior Court.

Jim Haith was tried on a bill of indictment, in proper form, charging him with felonious assault on Clifton Sellars. Jerry Miles was similarly charged with felonious assault on Roosevelt Sellars. The cases were consolidated for trial. Both defendants were represented at their trial by the same privately employed counsel who represents them on this appeal.

Evidence for the State, in pertinent part, tended to show the following: On 26 May 1969 Clifton and Roosevelt Sellars were at "Mrs. Moody's Dance Hall" in Alamance County. Subsequently, the defendants, Jerry Miles and Jim Haith arrived in a black Oldsmobile. Around midnight Miles and Haith came up to where Clifton and Roosevelt were sitting. Both defendants opened up and displayed

"hookbill knives." Haith announced, "We are going to have a curfew on tonight." Miles then struck Clifton and Roosevelt with his fist. Clifton started running and was pursued by Haith who grabbed him by the shoulder and cut him from the right shoulder down to the middle of his back. Clifton continued to run and got away. Haith yelled, "I tried to kill him, I tried to kill him." Clifton was later taken to the hospital where about 77 stitches were taken to sew up his wounds. While Haith was thus occupied with Clifton, Miles cut Roosevelt on the arm, neck and "on the back of his head down to his ear." Roosevelt ran away and was later treated at the hospital where seven stitches were taken to sew up his arm and eleven to close the lacerations on his head. There were knife scratches on his neck. Roosevelt testified that he had known Haith for about four years but knew Miles only as a member of a gang that Miles runs around with which is known as the "Rawhut Street Gang." Clifton and Roosevelt Sellars are brothers and live on a farm in Caswell County.

The defendant, Jerry Miles, testified on direct examination, in part, as follows: He lives in Burlington and has been "tried of breaking, entering, interfering with the police and one traffic violation." He was in the dance hall when Clifton and Roosevelt Sellars were cut but he did not participate in the fight or cutting. He saw one George Miles cut both Clifton and Roosevelt Sellars. Jim Haith was not present when this took place.

Jim Haith testified, in part, as follows: He and his girl friend left the dance hall between 11:00 and 11:30 p.m. They first went to his mother's house and then to the home of his girl friend where he remained for about an hour. He did not return to the dance hall. During the time he was there he did not see Clifton or Roosevelt Sellars. The reason his girl friend was not in court was that her child was sick.

Garland Crisp, a witness for the defendants, testified that he saw the cuttings but did not see either of the defendants at the dance hall at the time of the fight. He saw George Miles cut both of the prosecuting witnesses. Bobby Isley, another witness for the defendants, testified: that he lives on Rawhut Street in Burlington and was present when the cuttings took place; that Jerry Miles was present and Jim Haith was not present and that he saw George Miles cut both of the prosecuting witnesses. The final defense witness was Mr. James Robinson who testified that he had known Jerry Miles for about six years; that he had coached Miles in football and supervised his work in the Neighborhood Youth Corps and that, although

he had heard that Miles served a prison sentence for breaking and entering, he considered him to be a person of good character.

Clifton Sellars was recalled by the State and testified that he knew George Miles but that George Miles did not cut him and that he did not recall his being present when he was cut.

The jury found defendants guilty of assault with a deadly weapon. A judgment imposing a prison sentence of not less than eighteen (18) or more than twenty-four (24) months was entered as to each defendant. Both defendants appealed.

Attorney General Robert Morgan by Trial Attorney Charles M. Hensey for the State.

John D. Xanthos for defendant appellant.

VAUGHN, J.

[1] The defendants bring forward twenty-five assignments of error. All are found to be without merit. The first assignment of error is to the allowance of the motion to consolidate the cases for trial. In the present case this was a matter so clearly within the discretion of the trial judge that we do not deem it necessary to discuss the exception. *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128. Assignment of Error No. 1 is overruled.

[2] It is equally well settled that, for the purpose of impeaching defendant's credibility as a witness, the solicitor may cross-examine him as to collateral matters, including 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. The defendants' Assignments of Error Nos. 2 and 3, based on such cross-examination of the defendant Miles, are overruled. We have also considered defendants' Assignments of Error Nos. 4, 5 and 6 and find them to be without merit.

[3] At the conclusion of all the evidence, the defendants' attorney made the following motion: "On the charge of assault with intent to kill resulting in serious bodily injuries, we ask the Court to allow motion to dismiss insofar as the intent to kill or resulting in serious bodily injuries." The defendants' seventh assignment of error is that the court denied this motion. Suffice to say that, even from the summary of the evidence set out in this opinion, it is readily apparent that the motion was properly denied. This assignment of error is overruled.

[4] Assignments of Error numbered 8 through 24 inclusive, all re-

late to the defendants' contention that the trial judge failed to instruct the jury properly as required by G.S. 1-180. Typical of these is Assignment of Error No. 9 which is directed to the following instruction by the court: "Your duty is to find the facts from the evidence and apply to those facts the law as given to you in these instructions." It is difficult to perceive how the defendants contend this to be prejudicial. At any rate, we do not deem it so. Assignments of error 8 through 24 are overruled.

[5] The defendants, in their final assignment of error assert "that the prison sentence was excessive and not authorized by law. This is indeed one of the vital questions presented by this appeal." The answer to defendants' question may be found in G.S. 14-33 which provides, among other things, that assault with a deadly weapon is punishable "by a fine in the discretion of the court, imprisonment not to exceed two (2) years, or both such fine and imprisonment." The prison sentence of not less than eighteen (18) or more than twenty-four (24) months, which was imposed on each defendant, is within the limits of this statute. We have reviewed the entire record and find no prejudicial error.

No error.

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

BARBARA W. ALLEN v. MILTON B. ALLEN

No. 7014DC129

(Filed 1 April 1970)

1. Divorce and Alimony § 22— modification of child custody or support order

A court order affecting the custody or support of a minor child may be modified or vacated at any time upon motion in the cause and a showing of changed circumstances by either party or anyone interested. G.S. 50-13.7(a).

2. Divorce and Alimony § 23— modification of child support — burden of proof

The original decree ordering the payment of money for child support is an adjudication by the court as to what was reasonable and proper at the time it was made, and the party requesting modification of such decree has the burden of proving, by preponderance of the evidence, that a material change of circumstances has occurred.

3. Appeal and Error § 57— appellate review of findings of fact

The trial court's findings of fact are conclusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed on appeal.

4. Appeal and Error § 57— sufficiency of findings to support judgment — immaterial findings unsupported by evidence

Ordinarily, when the findings which are supported by competent evidence are sufficient to support the judgment, the judgment will not be disturbed because another finding which does not affect the conclusions is not supported by the evidence.

5. Divorce and Alimony § 23— amount of child support — discretion of court

The amount which a father should pay for the support of his child is a matter for the trial judge's determination, reviewable only in case of an abuse of discretion.

6. Divorce and Alimony § 23— denial of increase in child support — material finding of fact unsupported by evidence

Where trial court's order denying motion of plaintiff mother for an increase in defendant father's payments for child support was based in part on a finding of fact that the mother has a net income of $1100 each month in addition to money paid by defendant, which finding was unsupported by the evidence, the cause must be remanded for proper findings and determination thereon as to whether the child support payments should be increased.

APPEAL by plaintiff from *Moore, District Judge,* 29 September 1969 Session of DURHAM County District Court.

Plaintiff and defendant were married on 4 August 1956. One child was born of this marriage. The parties were subsequently divorced. Plaintiff thereafter married and was subsequently divorced from Dan K. Edwards. One child was born of this later marriage. Both children are in the custody of the plaintiff who lives in Alexandria, Virginia. A judgment entered in the Durham County Civil Court on 7 October 1959 provided, among other things, that defendant was to pay $22.50 each week for the benefit and support of the minor child born of the marriage of the parties.

On 16 September 1969 plaintiff filed a motion in the cause alleging that the defendant was several hundred dollars in arrears; that defendant's income had substantially increased and that the amount necessary to support the child had substantially increased. Plaintiff asked that the defendant be required to show cause; (1) why he should not be held in contempt for failure to comply with the court order, (2) why the payments theretofore ordered should not be in-

creased and (3) why the court should not make an allowance to plaintiff's attorney for the prosecution of the matter.

The motion was heard in the district court on 29 September 1969. Both parties were represented by counsel and presented evidence. The district judge entered an order which required the defendant to pay four hundred ($400.00) dollars before 1 November 1969 and after that date to continue to make weekly payments of twenty-two and 50/100 ($22.50) dollars pursuant to the judgment entered 7 October 1959 in Durham Civil Court. The judge denied plaintiff's prayer for counsel fees. Plaintiff appeals.

Newsom, Graham, Strayhorn & Hedrick by Ralph N. Strayhorn and E. C. Bryson, Jr., for plaintiff appellant.

Norman E. Williams for defendant appellee.

VAUGHN, J.

[1, 2] A court order affecting the custody or support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. G.S. 50-13.7(a). The original decree ordering the payment of money is an adjudication of the court as to what was reasonable and proper at the time it was made. The burden of proving, by preponderance of the evidence, that a material change in the circumstances has occurred, is upon the party requesting the modification. 2 Lee, N. C. Family Law, § 153, p. 230.

[3, 6] The court's findings of fact are conclusive if supported by any competent evidence and a judgment supported by such findings will be affirmed. 1 Strong, N. C. Index 2d, Appeal and Error, § 57, p. 223. Plaintiff contends that so much of the following finding of fact as appears in brackets is not supported by the evidence.

> "3. That the defendant, Milton B. Allen, has an income of about Sixty-One Hundred ($6,100.00) Dollars per year after deductions and [the Court concludes that the Twenty-Two and 50/100 ($22.50) Dollars per week payment will be a fair and equitable amount to allot for the support of his minor child, Anna Maria Allen, and at the time will not increase the amount of weekly support in that plaintiff in this action has an income of approximately Eleven Hundred and no/100 ($1,100.00) Dollars each month after deductions over and above any money paid in by Milton B. Allen, the defendant];"

Insofar as the exception relates to the income of the plaintiff, it is

well taken. The only evidence relating to funds received by the plaintiff, other than those paid by defendant, tends to show: that from a gross $140.00 per week, her weekly take home pay is $105.83; that she receives $300.00 per month from Dan K. Edwards and that she receives between four and five hundred dollars each year from her father. It is evident, therefore, that the finding, ". . . that plaintiff . . . has an income of approximately Eleven Hundred and no/100 ($1,100.00) Dollars each month after deductions over and above any money paid by the defendant . . ." is not supported by evidence.

[4] Ordinarily, when the findings which are supported by competent evidence are sufficient to support the judgment, the judgment will not be disturbed because another finding which does not affect the conclusions is not supported by the evidence. *King v. Insurance Company,* 258 N.C. 432, 128 S.E. 2d 849. Here, however, we cannot say that the erroneous calculation did not affect the actions of the trial judge when he declined to increase the weekly payments of the defendant.

All the other findings of fact, properly excepted to, are supported by competent evidence and will not be disturbed. Plaintiff's remaining assignments of error are overruled.

[5, 6] We do not suggest that the trial judge should have ordered or abused his discretion when he declined to order, an increase in defendant's payments, especially in view of defendant's earnings. It is well settled that the amount which a father should pay for the support of his child is a matter for the trial judge's determination, reviewable only in case of an abuse of discretion. *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649. Here, however, the exercise of such discretion was based in part on a material finding of fact not supported by the evidence. The order appealed from is vacated and the cause is remanded for proper findings and determination pursuant to law.

Vacated and remanded.

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

STATE OF NORTH CAROLINA v. CLYDE ROYAL

No. 7023SC132

(Filed 1 April 1970)

1. Criminal Law §§ 102, 170— argument to jury outside the record — instructions — harmless error

While arguments to the jury should be based on the evidence or on that which may be properly inferred from the case, the argument of counsel outside the record ordinarily will be cured by the court's action promptly sustaining objection to the argument and cautioning the jury not to consider it.

2. Automobiles § 128; Criminal Law §§ 99, 170— drunken driving — argument to jury — breathalyzer results in other cases — comment by court — expression of opinion

In this prosecution for drunken driving wherein the State introduced evidence of the results of a breathalyzer test showing that defendant's blood contained .15% alcohol, and defense counsel improperly argued to the jury that in other cases tried the same week the breathalyzer indicated .29 or .30, the trial court erred in commenting that his own recollection was that breathalyzer results introduced in other cases indicated .18 and .19 instead of instructing the jury to disregard the improper argument, since the court's statement may have intimated to the jury that in the court's opinion the State's breathalyzer evidence was strong when compared with similar evidence in unrelated cases.

3. Automobiles § 128; Criminal Law §§ 102, 170— improper argument of solicitor and counsel — instructions to jury

In this prosecution for drunken driving, the jury should have been instructed unequivocally not to consider the argument of defense counsel or the solicitor as to what the evidence was in other drunken driving cases, how successful the officers had been in similar cases, or how other defendants had pleaded to similar charges.

4. Automobiles § 126; Criminal Law § 88; Witnesses § 8— drunken driving — cross-examination of arresting officer — statements by defendant at time of arrest

In this prosecution for drunken driving, the trial court erred in ruling that the arresting officer could not be questioned on cross-examination regarding any statement made by defendant at the time of arrest unless defendant first took the stand and testified, since defendant should have been permitted to cross-examine the officer regarding statements made by defendant at the time of arrest, if for no other purpose than to attempt to show that defendant talked intelligently and was in control of his mental faculties.

APPEAL by defendant from *McConnell, J.*, September 1969 Session of ALLEGHANY Superior Court.

Defendant was tried upon a bill of indictment charging him with having operated a motor vehicle upon the public highways of Alle-

ghany County on 18 February 1969 while under the influence of intoxicating liquor. Substantial evidence in support of the charge was offered by the State, including the results of a breathalyzer test which indicated that defendant's blood contained 0.15% alcohol at the time the test was administered shortly after defendant was arrested. The jury returned a verdict of guilty and from judgment imposed thereon defendant appealed.

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

Arnold L. Young and Franklin Smith for defendant appellant.

GRAHAM, J.

The record indicates that during the solicitor's argument to the jury the following transpired:

> "MR. SMITH: [Defense counsel] I object to Mr. Moore's argument in that he is arguing to the jury that the fact that the other people have come into court and pled guilty this week is an indication that the officers do a good job, with — — —
>
> BY THE COURT: — — — I believe you all brought that out in your own argument. OVERRULED. EXCEPTION.
>
> MR. MOORE: [The Solicitor] I will just withdraw it.
>
> BY THE COURT: Let the record show that the defendant's attorney in the argument to the jury argued that all the other cases which have been tried this week it was brought out that the breathalyzer indicated a greater amount than the present case, in fact they argued that they were all .29, .30, when in fact some were .18 and .19, as I recall .19, and that was not objected to by the State. Proceed with the argument, Mr. Moore."

[1] Although the jury arguments of counsel are not set forth in the record, the above colloquy indicates that both the solicitor and counsel for defendant argued to the jury about matters outside the record. "Arguments to a jury should be fair and based on the evidence or on that which may be properly inferred from the case." *State v. Miller,* 271 N.C. 646, 659, 157 S.E. 2d 335; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802. Ordinarily, the argument of counsel outside the record will be cured by the court's action promptly sustaining objection to the argument and cautioning the jury not to consider it. *Highway Commission v. Pearce,* 261 N.C. 760, 136 S.E. 2d 71; 7 Strong, N.C. Index 2d, Trial, § 11.

[2] Here it appears the court sought to cure the transgression of defense counsel by refuting his improper argument rather than by charging the jury not to consider it. In commenting that his own recollection was that breathalyzer results introduced in other cases indicated .18 and .19, rather than higher as argued by defendant, the court inadvertently made an argument for the State. "The slightest intimation from a judge as to the strength of the evidence . . . will always have great weight with a jury, . . ." *State v. Ownby,* 146 N.C. 677, 678, 61 S.E. 630. The court's statement could very well have intimated to the jury that in the court's opinion the State's breathalyzer evidence was strong when compared with similar evidence in other unrelated cases. This was error. The jury should not have been encouraged in any way to compare the extent of defendant's intoxication with that of other defendants who had been tried earlier in the court session.

[3] Evidence that had been introduced in other cases was irrelevant and incompetent and the jury should have been instructed unequivocally not to consider the arguments of defense counsel or the solicitor as to what the evidence was in other cases, how successful the officers had been in similar cases, or how other defendants had pleaded to similar charges. See *Highway Commission v. Pearce, supra,* wherein an improper argument to the jury about the success of an appraiser for the Highway Commission in other cases, which was not in evidence, was held cured by prompt objection and jury instruction not to consider said argument.

[4] Defendant strenuously contends that he was unduly restricted in his cross-examination of the arresting officer. The record indicates that the trial judge ruled that the officer could not be questioned on cross-examination regarding *any* statement made by defendant at the time of the arrest unless the defendant first took the stand and testified. The court stated: "Nothing that the defendant said is admissible in evidence at this time, and I don't want any further questioning about it." We agree that such a general ruling by the trial court was too restrictive. Testimony of the arresting officer on direct examination tended to show that defendant's mental and physical faculties were substantially impaired. Defendant should have been permitted to cross-examine the officer regarding statements made by the defendant at the time of the arrest, if for no other purpose than to attempt to show that defendant talked intelligently and was in control of his mental faculties.

New trial.

BROCK and BRITT, JJ., concur.

GENEVIEVE HATCHER v. BRUCE Y. HATCHER

No. 7010DC110

(Filed 1 April 1970)

1. Divorce and Alimony § 18— alimony pendente lite — necessity for and sufficiency of findings of fact

G.S. 50-16.8(f) requires the trial judge to make findings of fact upon an application for alimony *pendente lite;* although the judge need not make findings as to each allegation and evidentiary fact, it is necessary for him to make findings from which it can be determined on appellate review that an award of alimony *pendente lite* is justified.

2. Divorce and Alimony § 18— alimony pendente lite — order — insufficiency of findings

Order of the trial court directing the husband to pay alimony *pendente lite* to the wife and counsel fees to her attorney, *held* erroneous where there were no findings of fact that the husband abandoned the wife and that he was capable of making the required payments. G.S. 50-16.8(f), G.S. 50-16.3(a)(1), G.S. 50-16.5(a).

3. Rules of Civil Procedure § 52; Divorce and Alimony § 18— alimony pendente lite — necessity for findings — Rule 52(a)(2)

The provision of Rule 52(a)(2) that the trial judge is not required to make findings of fact unless requested to do so by a party does not abrogate the specific requirement of G.S. 50-16.8(f) that the trial judge shall make findings of fact upon an application for alimony *pendente lite.*

4. Rules of Civil Procedure § 1— scope of rules — general application

The Rules of Civil Procedure are of general application and do not abrogate the requirements of a statute of more specificity.

APPEAL by defendant from *Barnette, District Judge,* 1 November 1969 Session, WAKE District Court.

This is an action for alimony without divorce brought by plaintiff-wife alleging constructive abandonment by the defendant-husband. In her complaint plaintiff alleged: That the parties were married on 26 October 1968 and lived together as man and wife until 1 June 1969; that on 31 May 1969 defendant threatened plaintiff with violence and ordered her out of their house; that the plaintiff, pursuant to defendant's order to "get out" and fearing for her safety, took her two children by a previous marriage and left the home she had shared with the defendant; that the above acts were not provoked by the plaintiff; that no children were born to this marriage; that the plaintiff is forty eight years old and unable to obtain gainful employment; and that defendant has failed and refused to provide support for plaintiff, and still refuses even though he has sufficient income to do so.

Defendant answered, alleging as a defense: that at no time during the marriage had he abused or threatened the plaintiff; that she left the home voluntarily; that he offered to provide support for the plaintiff if she would live in his home; and that he has never refused to support her. Defendant also offered affidavits concerning his past life, his general character and reputation in the community, and his financial condition.

After a hearing set for determination of plaintiff's motion for alimony *pendente lite* and reasonable attorney's fees, the district judge entered an order dated 12 November 1969 which provides in pertinent part as follows:

> ". . . it appearing to the court from the pleadings and affidavits submitted and from the oral testimony introduced by both the plaintiff and the defendant that the plaintiff is a dependent spouse without the means with which to support herself and is entitled to the relief demanded and that the plaintiff has not sufficient means to defray the proper and necessary expenses of this action, including reasonable attorney's fees; . . ."

Defendant appealed.

T. Yates Dobson, Jr., for defendant appellant.

McDaniel and Fogel, by L. Bruce McDaniel, for plaintiff appellee.

BROCK, J.

The only question presented by this appeal is whether the order appealed from contains sufficient findings of fact to support an award of alimony *pendente lite* and counsel fees.

[1] G.S. 50-16.8(f), which is applicable to this case, provides: "When 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.) As pointed out by Parker, J., in *Blake v. Blake,* 6 N.C. App. 410, 170 S.E. 2d 87, the present statutory requirement for findings of fact by the trial judge in *pendente lite* awards of alimony is a departure from the practice as it existed prior to 1 October 1967.

[2] If it can be said that the trial judge has sufficiently found that the plaintiff is a dependent spouse (50-16.3(a)), and that he has sufficiently found that the plaintiff does not have sufficient means

whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof (50-16.3(a)(2)); nevertheless the order as entered is devoid of a finding that defendant abandoned plaintiff so as to entitle her to relief in her action for alimony without divorce and to alimony *pendente lite* upon this motion (50-16.3(a)(1)). Also the order is devoid of a finding that the defendant is capable of making the payments required (50-16.5(a)).

[1] We do not interpret G.S. 50-16.8(f) to require the trial judge to make findings as to each allegation and evidentiary fact presented. *Blake v. Blake, supra.* However, it is necessary for the trial judge to make findings from which it can be determined, upon appellate review, that an award of alimony *pendente lite* is justified and appropriate in the case.

[3, 4] Plaintiff-appellee contends that Rule 52(a)(2) of the Rules of Civil Procedure (G.S. Chap. 1A), which became effective January 1, 1970, is controlling in this case and that the judge was not required to make findings of fact unless requested to do so by a party. We do not agree. The Rules of Civil Procedure are of general application and would not abrogate the requirements of a statute of more specificity. Therefore, since G.S. 50-16.8(f) refers specifically to an application for alimony *pendente lite,* it would control in the case before us.

This case is remanded for rehearing on plaintiff's motion for alimony *pendente lite* and attorney's fees.

Error and remanded.

BRITT and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. ALLEN SHANKLE

No. 7020SC94

(Filed 1 April 1970)

1. Assault and Battery § 14— "serious injury" — sufficiency of evidence

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the State's evidence that the prosecuting witness was shot in the right wrist and required medical treatment *is held* sufficient for the jury on the question of serious injury.

2. Assault and Battery § 14— felonious assault — sufficiency of evidence

In a prosecution of defendant, together with two co-defendants, for assaulting the prosecuting witness with a rifle with intent to kill inflicting serious injury, defendant was not entitled to a directed verdict on the ground that the State's evidence showed that he did not fire a shot at the witness, since there was sufficient evidence that defendant went to the witness' home in the company of the co-defendants and left with them, and that defendant brought the rifle to the co-defendants who fired the shots resulting in serious injury.

APPEAL by defendant from *Crissman, J.*, 10 October 1969 Session of RICHMOND Superior Court.

Allen Shankle, defendant herein, was charged with assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death. Defendant was represented by court-appointed counsel, was tried on the indictment and convicted. He appealed from the judgment entered on the verdict.

The evidence for the State tends to show that the defendant, his brother Richard Shankle, and Horace Strickland came to the trailer home of William Napier around 11:20 p.m. on 12 May 1969 to get a carburetor which Strickland had purchased from Napier. Napier got the carburetor and handed it to Strickland, at which time Allen Shankle approached with a rifle and handed it to Strickland. Strickland then pointed the rifle at Napier and said "I'm good mind to just kill you.", to which Napier replied that they were drunk and should go home and come back when they got straightened out. Strickland then fired two shots into the trailer and, at Richard's request, handed the rifle to Richard who fired three more shots into the trailer. Napier, who had been standing in his doorway, moved back into the trailer to escape injury but was hit in the right wrist by one of the bullets. Allen Shankle did not fire the rifle and the three men left after the fifth shot was fired. As a result of the wound, Napier went to the doctor, who administered medication and bandaged it. Napier went to the doctor a second time as a result of the wound and a scar still remains on his wrist. Napier testified that he was not drunk or drinking at the time in question.

Napier's testimony was substantially corroborated, without conflict, by his father and by Deputy Sheriff Robert Taylor.

Defendant's evidence, based on the testimony of Richard Shankle, tends to agree in substance with the State's evidence insofar as placing the three men at Napier's home at the time in question. However, Richard testified that though the three men had been drinking,

Napier also was "high" and was the one who actually fired all of the shots.

Attorney General Robert Morgan by Assistant Attorney General Millard R. Rich and Staff Attorney T. Buie Costen for the State.

James H. Pittman for defendant appellant.

MORRIS, J.

By his first assignment of error defendant contends that the warrant charged defendant with a misdemeanor, that the indictment charged a felony and the court erred in allowing the defendant to be tried on the indictment since he was entitled to a preliminary hearing on the felony charge. Defendant cites no authority for this position. He candidly admits that the bill of indictment is completely proper and concedes, in his argument, that this assignment of error is without merit.

[1] By assignment of error No. 2 defendant contends that he should not have been convicted of inflicting a serious injury when there was no evidence of any serious injury, only the injury to Napier's wrist. Whether that injury was serious is a jury question and is to be determined by the particular facts disclosed by the evidence. *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964). The jury found Napier's injury to be serious. Assignment of error No. 2 is overruled.

[2] Defendant, in assignment of error No. 3, contends that the court should have directed a verdict of not guilty as to Allen Shankle since there was no evidence that the three men were acting in concert or that Allen Shankle harmed or attempted to harm Napier. Defendant cites no authority for this position. The record contains no motion for dismissal as to this defendant at any stage of the trial. In any event, there is sufficient evidence in the record to warrant the court's sending the case to the jury. There is evidence that Allen Shankle rode in the same car with the other two men to Napier's home, that he brought the rifle to Horace Strickland and that he left with them. Assignment of error No. 3 is overruled.

For the reasons stated herein we find

No error.

MALLARD, C.J., and VAUGHN, J., concur.

BLAIR AUTO COMPANY, INC. v. OSCAR McLAIN AND WIFE, NORA McLAIN

No. 7012DC55

(Filed 1 April 1970)

1. Process § 1— service of process — jurisdiction

Service of process, unless waived, is a jurisdictional requirement.

2. Judgments §§ 14, 20— setting aside default judgment — nonservice of process

Where the summons and complaint were not served on defendant, the default judgment entered in the action was void, and the proper procedure to attack it was by motion in the cause.

3. Trial § 18; Judgments § 34— setting aside judgment — motion in the cause — questions of fact

A motion in the cause to set aside a judgment presents questions of fact and not issues of fact; and it is for the court to hear the evidence, find the facts, and render judgment.

4. Judgments § 34— setting aside default judgment — motion in the cause — sufficiency of evidence

On motion in the cause to set aside a default judgment on the ground that the summons had never been served on the movant, trial court's finding that the movant had been properly served with process *held* supported by the evidence.

APPEAL by defendant, Nora McLain, from *Herring, District Judge,* at the 25 August 1969 Session of CUMBERLAND County District Court.

On 26 January 1967 plaintiff instituted suit against Oscar McLain and wife, Nora McLain to recover a sum alleged to be due on an account. The sheriff's return on the summons shows that personal service was made on Oscar McLain and Nora McLain on 27 January 1967. On 11 April 1967 judgment by default final was entered against the defendants, the court finding that personal service had been made on the defendants on 27 January 1967 and that no answer or other pleadings had been filed by the defendants.

On 9 June 1969 Nora McLain filed a motion in the cause in which she alleged that the summons had never been served on her. She asked that the judgment against her be set aside and that she be allowed a reasonable time to file answer. It appears that Oscar McLain died on 13 September 1968.

A hearing on this motion was held in the District Court of Cumberland County on 25 August 1969. The parties offered evidence to support their respective contentions relating to whether Nora Mc-

Lain was served with process. From an order determining that there was legal service of process of Nora McLain on 27 January 1967 and denying her motion to set aside the judgment, the defendant appeals.

Williford, Person and Canady by N. H. Person for plaintiff appellee.

Anderson, Nimocks & Broadfoot by Henry L. Anderson, Jr., for defendant appellant.

VAUGHN, J.

[1-3] Service of process, unless waived, is a jurisdictional requirement. If the summons and complaint were not served on defendant, the default judgment dated 11 April 1967 is void, and the proper procedure to attack it was by motion in the cause. *Kleinfeldt v. Shoney's, Inc.,* 257 N.C. 791, 127 S.E. 2d 573. A motion in the cause to set aside a judgment presents questions of fact and not issues of fact, and it is for the court to hear the evidence, find the facts, and render judgment. 7 Strong, N.C. Index 2d, Trial, § 18, p. 286. The facts found when supported by competent evidence, are conclusive. *Coker v. Coker,* 224 N.C. 450, 31 S.E. 2d 364. The following language from *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239 is pertinent here:

> "When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. *Downing v. White,* 211 N.C. 40, 188 S.E. 815; *Smathers v. Sprouse,* 144 N.C. 637, 57 S.E. 392. Upon hearing such motion, the burden of proof is upon the party who seeks to set aside the officer's return or the judgment based thereon to establish nonservice as a fact; and, notwithstanding positive evidence of nonservice, *the officer's return is* evidence upon which the court *may* base a finding that service was made as shown by the return. *Downing v. White, supra; Long v. Rockingham,* 187 N.C. 199, 121 S.E. 461; G.S. 1-592.
>
> "Service of process, and the return thereof, are serious matters; and the return of a sworn authorized officer should not 'be lightly set aside.' *Burlinghan v. Canady,* 156 N.C. 177, 72 S.E. 324; *Mason v. Miles,* 63 N.C. 564; *Hunter v. Kirk,* 11 N.C. 277."

[4] The evidence in the present case was contradictory. There is evidence in the record which would have sustained a finding that

Nora McLain was not served with process. On the other hand, there is competent evidence in the record on which the judge could properly base each of his separately numbered findings of fact and his determination that she was served with process. The credibility of the witnesses and the weight of the evidence was for determination by the trial judge in discharging his duty to find the facts. *Harrington v. Rice, supra.* The facts found are sufficient to sustain the order entered.

Affirmed.

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

MARGARET H. RADFORD v. BRUCE P. RADFORD

No. 7010DC117

(Filed 1 April 1970)

1. Divorce and Alimony § 16— right to alimony — abandonment by husband — cruel treatment of wife and daughter — fear of safety

Plaintiff wife's right to alimony was established by the trial court's findings, supported by competent evidence, that defendant husband without provocation assaulted and threatened to kill plaintiff and their minor daughter and through his cruel treatment compelled them to leave the home for fear of their safety, and the findings are binding on appeal.

2. Divorce and Alimony § 16— dependent spouse — right to alimony — separate income

Findings that plaintiff wife worked and had a separate income did not preclude the trial court from determining that plaintiff was a dependent spouse and that defendant was a supporting spouse, where there was plenary evidence to show that she was substantially dependent upon defendant and in substantial need of his support. G.S. 50-16.1(3).

APPEAL from *Barnette, District Judge,* 22 September 1969 Session of WAKE County District Court.

Plaintiff instituted this action for alimony, custody and support on 12 October 1967 in the Superior Court of Wake County. On 2 December 1968 the cause was transferred by proper order to the District Court Division pursuant to G.S. 7A-259. The case was thereafter regularly calendared for trial on the merits and was heard by Judge Henry V. Barnette, Jr. without a jury at the regular August 1969 Civil Session of Wake County District Court. Both parties

presented evidence from which the court made findings and conclusions adverse to the defendant and entered final judgment awarding permanent alimony in the sum of $50 a month and counsel fees of $100 for plaintiff's attorney. Defendant appealed.

Jacob W. Todd for plaintiff appellee.

Alton W. Kornegay for defendant appellant.

GRAHAM, J.

Defendant does not challenge the sufficiency of the court's findings but contends that they are not supported by competent evidence.

[1] The complaint alleged and the plaintiff offered evidence tending to show that on 18 August 1967 defendant without provocation assaulted and threatened to kill plaintiff and their minor daughter and through his cruel conduct compelled them to leave the home in fear for their safety. This evidence, if found to be true by the court sitting without a jury, established plaintiff's right to alimony. *Gaskins v. Gaskins,* 273 N.C. 133, 159 S.E. 2d 318. Defendant denied in his answer and in his testimony at the trial any misconduct toward his family. However, the court accepted plaintiff's version and made findings which are supported by the evidence and which entitle plaintiff to the relief granted. The findings are therefore conclusive on appeal. *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649; *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871.

[2] Defendant argues that the court erred in determining that plaintiff was a dependent spouse and that defendant was a supporting spouse in view of findings that plaintiff worked and had a separate income. This contention is without merit. G.S. 50-16.1(3) describes a dependent spouse as a husband or wife "who is actually *substantially* dependent upon the other spouse for his or her maintenance and support or is *substantially* in need of maintenance and support from the other spouse." (Emphasis added). A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife. G.S. 50-16.1(4). Even though plaintiff had a small separate income there was plenary evidence to show that she was substantially dependent upon defendant and in substantial need of his support.

We have carefully examined each of defendant's assignments of error, and in the entire trial we find no error.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. ELIJAH FREEMAN AND LEO FREEMAN

No. 7013SC154

(Filed 1 April 1970)

Criminal Law § 76— in-custody statements — determination of admissibility

In a prosecution for felonious larceny and storebreaking, defendant's in-custody statements to an officer were properly admitted in evidence, where the trial court, upon objection by defendant, conducted a *voir dire* hearing in the absence of the jury to determine the voluntariness of the statements, and the court found and concluded that defendant's statements were voluntarily and understandingly made after defendant had been advised of his constitutional rights.

APPEAL by defendant Elijah Freeman from *Canaday, J.*, September 1969 Criminal Session of COLUMBUS Superior Court.

In an indictment proper in form, defendant and his co-defendant were charged with (1) storebreaking and (2) larceny of personal property of the value of more than $200.00. The appealing defendant, Elijah Freeman, pleaded not guilty, was found guilty as charged by a jury and, from judgment imposing active prison sentence of not less than six years nor more than eight years, he appealed.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

R. H. Burns, Jr., for defendant appellant, Elijah Freeman.

BRITT, J.

Defendant assigns as error the denial of his motion to suppress the testimony of Deputy Sheriff Horace Long with respect to conversations Mr. Long had with defendant.

Since the rendition by the Supreme Court of the United States of its decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974, numerous opinions have been written by various courts, state and federal, on the question of admissibility into evidence of in-custody statements made by defendants. The Supreme Court of North Carolina in the recent case of *State v. Catrett*, 276 N.C. 86, in an opinion written by Bobbitt, C.J., reviewed many of the decisions and then clearly and succinctly declared the test of admissibility as follows:

"We are of the opinion, and so hold, that in-custody statements attributed to a defendant, when offered by the State and ob-

jected to by the defendant, are inadmissible *for any purpose* unless, after a *voir dire* hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights. * * *"

In the instant case the record discloses that when defendant's counsel objected to Deputy Sheriff Long's testimony regarding alleged statements made by defendant, the trial judge excused the jury and proceeded to conduct a *voir dire* hearing relative to the proffered evidence. Following an examination of Mr. Long by the solicitor and cross-examination by defense counsel, defendant having offered no evidence on the *voir dire*, the trial judge found and concluded that defendant's statements were voluntarily and understandingly made after defendant had been fully advised of his constitutional rights. The findings and conclusions were fully supported by the evidence presented at the hearing. We hold that the test declared in *Catrett* was met in this case.

Defendant contends that the evidence was not sufficient to survive his motions of nonsuit. We deem it unnecessary to recapitulate the evidence here but hold that the evidence was sufficient to withstand the motions.

Finally, defendant contends that the trial court erred in its instructions to the jury. We have carefully considered the charge, with particular reference to the portions referred to in defendant's brief, but find that it was free from prejudicial error.

The defendant received a fair trial and the sentence imposed was within the limits prescribed by statute.

No error.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES ROGERS

No. 7012SC41

(Filed 1 April 1970)

1. Criminal Law § 161— appeal as an exception to judgment

An appeal itself is an exception to the judgment and presents the face of the record proper for review.

2. Escape § 1; Constitutional Law § 32— prosecution — waiver of counsel — plea of guilty

In a prosecution under G.S. 148-45 for felonious escape, it appeared from the record that the defendant knowingly, understandingly and intelligently waived his right to counsel and entered a plea of guilty.

APPEAL by defendant from *Bickett, J.,* 12 August 1969 Session of CUMBERLAND County Superior Court.

Defendant was serving a sentence for the larceny of an automobile at North Carolina Correctional Institution No. 3530 when, on 6 July 1969, he effected an escape. He was indicted and tried on 12 August 1969 on a plea of guilty to felonious escape under G.S. 148-45. The court certified that defendant elected in open court to waive appointment of counsel and that such waiver was executed after its meaning and effect had been fully explained to him. The court further "ascertains, determines and adjudges that the plea of guilty by the defendant is freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency." Defendant was sentenced to serve six months, which is the statutory minimum under G.S. 148-45(a), beginning at the expiration of any and all sentences imposed before the date of escape.

Attorney General Robert Morgan by Staff Attorney Edward L. Eatman, Jr., for the State.

J. A. Bouknight for defendant appellant.

MORRIS, J.

On 4 September 1969 counsel for defendant was appointed due to defendant's indigency. Counsel then certified an appeal to this Court. No briefs were filed by either party and the State moved to dismiss the appeal for that reason under Rules 16, 27 and 28 of the Rules of Practice in the Court of Appeals of North Carolina and for the reason that defendant has withdrawn his appeal. Nevertheless, we shall decide the case on its merits.

[1] An appeal itself is an exception to the judgment and presents the face of the record proper for review. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967). Defendant lists three assignments of error in the record. He contends that his waiver of counsel was not "willingly and intelligently" made because he did not understand his rights, that he did not "willingly and intelligently" plead guilty

because he did not understand the specific charges against him and that he was convicted of a specific crime that he did not commit.

It is said in *State v. Elliott, supra:*

> "It appears positively and affirmatively and beyond a reasonable doubt from the record before us that defendant intentionally, understandingly, and voluntarily waived, relinquished, or abandoned his known right to have court-appointed counsel. *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 146 A.L.R. 357. It also appears positively and affirmatively and beyond a reasonable doubt from the record that the defendant, after having been informed in open court of the charges against him, the nature thereof, and the statutory punishment therefor, intentionally, understandingly, and voluntarily entered a plea of guilty in this case."

This language is applicable to the case at bar.

[2] It appears from the record that the defendant knowingly, understandingly and intelligently waived his right to counsel and knowingly, understandingly and intelligently entered a plea of guilty. The indictment is valid and the sentence within the statutory limits. No error appears in the record.

No error.

MALLARD, C.J., and VAUGHN, J., concur.

STATE OF NORTH CAROLINA v. EDDIE JOHNSON, JR.

No. 7011SC68

(Filed 1 April 1970)

1. Criminal Law § 161— appeal as an exception to judgment

Although no assignments of error or exceptions were contained in the record or in defendant's brief, the Court of Appeals nevertheless considered the appeal, since the appeal itself was an exception to the judgment and presented the face of the record proper for review.

2. Rape § 18— assault with intent to commit rape — indictment — age of defendant

It is not necessary in order to sustain a conviction of assault with intent to commit rape that the indictment allege that defendant was over 18 years of age at the time the crime was committed.

STATE *v.* JOHNSON

APPEAL by defendant from *McKinnon, J.,* 20 August 1969 Criminal Session of JOHNSTON County Superior Court.

Defendant was tried before a jury and convicted of assault with intent to commit rape. He was sentenced to serve not less than 10 nor more than 15 years in the State Prison. Defendant in open court gave notice of appeal and counsel was appointed, by reason of defendant's indigency, to perfect the appeal.

Attorney General Robert Morgan by Staff Attorney James L. Blackburn for the State.

C. C. Canaday, Jr., for defendant appellant.

MORRIS, J.

[1] No assignments of error or exceptions are contained in the record or defendant's brief. Nevertheless, we will consider the appeal since that in itself is an exception to the judgment and presents the face of the record proper for review. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967).

The attorneys for both parties have candidly admitted that the record contains no errors. We take note, however, that the record contains a motion by the State to amend the indictment to allege that the defendant was over 18 years of age at the time the crime was committed. There is nothing in the record to indicate whether the court ruled on the motion.

[2] The indictment appearing in the record, certified by the clerk as the bill of indictment returned by the grand jury, is valid and proper in form. It alleges that defendant is a male over 18 years of age, but this allegation is not necessary to support the charge against the defendant.

In the record before us, we find

No error.

MALLARD, C.J., and VAUGHN, J., concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, LEE TELEPHONE COMPANY (APPLICANT), AND COMMISSION STAFF (INTERVENOR), APPELLEES *v.* ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA (INTERVENOR IN BEHALF OF THE USING AND CONSUMING PUBLIC OF NORTH CAROLINA), AND WALKERTOWN TELEPHONE EXCHANGE COMMITTEE (PROTESTANT), APPELLANTS

No. 7010UC103

(*Filed 6 May 1970*)

1. Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rate increase — poor service by utility

In a hearing upon application by a telephone company for a rate increase in its franchise area, the Utilities Commission was authorized to grant the company an increase in the rates charged to its customers notwithstanding a finding by the Commission that the quality of service rendered by the company was poor and substandard.

2. Utilities Commission § 6— rate determination — quality of service

The Utilities Commission is authorized to consider quality of service as a factor in determining what constitutes just and reasonable rates to be charged by a utility. G.S. 62-133.

3. Utilities Commission §§ 6, 9— rate determination — prerogative of the Commission

It is the prerogative of the Utilities Commission, and not the appellate court, to decide the question as to what constitutes fair and reasonable rates that may be charged by a utility.

4. Utilities Commission § 6— appeal from order of rate increase — contention that test period was unrepresentative

On appeal from an order of the Utilities Commission granting a rate increase to a telephone company, there is no merit to the Attorney General's contention that the test period used by the Commission was unrepresentative in that more substantial investments were made in plant and equipment during this twelve-month period than in any of the preceding twelve-month periods.

5. Utilities Commission § 6— rate determination — value of plant and service — end of test period

In fixing the rate for a public utility, the value of the utility's plant and service must be determined as of the end of the test period used in the hearing. G.S. 62-133(c).

6. Utilities Commission § 6; Telephone and Telegraph Companies § 1— rate determination — plant under construction — interest during construction

In fixing the rate for a telephone company, it was proper for the Utilities Commission (1) to include in the rate base the value of the company's telephone plant under construction but not yet in operation and (2) to credit the interest during construction to the company's operating income.

7. Utilities Commission § 6— determination of rate base — factors considered

It is the duty of the Utilities Commission to arrive at an independent rate base upon consideration of all factors, including original cost, replacement and trended cost; and the Commission must exercise its independent judgment in doing so.

8. Utilities Commission § 6; Telephone and Telegraph Companies § 1— transaction between utility and supplier — reasonableness of profits — inquiry by Commission

In fixing the rates for a telephone company owned by a parent holding company, the Utilities Commission was acting within its discretion in postponing an investigation into the reasonableness of profits earned on materials sold to the telephone company by a supply company that was also owned by the parent company, where (1) the supply company had been operating for only a year at the time of the rate hearing and (2) the Commission, in its findings of fact, expressly took notice of the relationship between the telephone company and its supplier and reserved for future consideration any investigation into the reasonableness of profits.

9. Utilities Commission § 6— rate determination — transaction between utility and unregulated supplier

It is the duty of the regulatory commission to look closely at transactions between utility operating companies and affiliated supply companies to be sure that the public is not required to pay rates based on excessive costs resulting from excessive profits earned by an unregulated supplier.

10. Utilities Commission § 6; Telephone and Telegraph Companies § 1 — determination of working capital — advance payments by customers

In fixing the rates for a telephone company, the Utilities Commission was not required as a matter of law to credit to the company's working capital requirements the amounts paid by its customers in advance of monthly services rendered.

11. Utilities Commission § 6; Telephone and Telegraph Companies § 1 — rate determination — finding that existing rates were inadequate

In fixing the rate for a telephone company, the Commission's finding that the new rate represented a fair rate of return on the fair value of the company's utility property was tantamount to a finding that the existing rates were inadequate.

12. Utilities Commission § 9— appeal from rate increase — abandonment of exceptions

On appeal by the Attorney General from an order of the Utilities Commission granting a rate increase to a telephone company, exceptions to the Commission's findings and conclusions are deemed abandoned where no argument or citation of authority is brought forward in their support. Rule of Practice in the Court of Appeals No. 28.

APPEAL by Attorney General from order of Utilities Commission dated 28 July 1969.

On 2 October 1968, Lee Telephone Company (Lee) applied to the North Carolina Utilities Commission for authority to increase its monthly rates for telephone service in its franchise area of North Carolina lying in the counties of Rockingham, Stokes and Forsyth, and serving exchanges at Danbury, Madison, Stoneville, Walkertown, Walnut Cove, Quaker Gap, and Sandy Ridge. The total increase sought was $239,973. No increase was sought for toll rates.

On 16 December the Attorney General of North Carolina intervened on behalf of "the using and consuming public," and protested the proposed rate increase. Thereafter, a committee of applicant's customers who are served through the Walkertown exchange also intervened as a party protestant.

On 6 January 1969 the proceeding was enlarged by order of the Commission to include service complaints and investigation in addition to the rate increase inquiry, and hearings were conducted in March of 1969 on both phases of the case.

Lee admitted certain deficiencies and offered evidence that since the system was acquired by Lee's parent company in 1965, aggressive steps have been taken to improve service. There was also evidence tending to show that considerable future improvements are planned and that an increase in rates is needed to attract the investment capital necessary to implement the improvements and upgrade service.

Lee offered further evidence tending to show that at the end of the test period, it had an investment rate base applicable to its North Carolina operations of $5,313,339. The addition of working capital allowance of $118,597 and the subtraction of an applicable reserve for depreciation in the amount of $1,234,290 resulted in a net end-of-the-period rate base of $4,197,646. The evidence of the Commission staff indicated a net rate base of a slightly smaller amount due largely to the staff's deduction of income tax accruals in the amount of $28,469 from working capital requirements. An extensive study consisting of 93 pages was presented by Lee and tended to show that the net trended original cost of its utility plant applicable to North Carolina was $5,009,100. No other evidence was offered with respect to trended costs and it does not appear that Lee's evidence as to this factor was seriously challenged in the hearings before the Commission.

The Commission found the original cost rate base to be in accordance with the staff's evidence and, upon a consideration of this evidence and evidence of the trended original cost, found the fair value

of Lee's property used and useful in providing the service rendered to the public within North Carolina to be $4,500,000. Other findings made by the Commission with respect to costs, present and proposed rates, and rates found to be reasonable are as follows:

"9. The evidence presented by the Staff and the Company tends to show that the Company's annual gross operating revenues at the end of the test period were $847,886, and we so find.

10. The evidence as presented tends to show Company gross operating revenues under the proposed rates, (1) by the Company to be $1,250,001, and (2) by the Staff to be $1,247,971. We find annual gross operating revenues under the rates hereinafter found to be reasonable and if approved would be $1,155,697.

11. We find actual, reasonable and legitimate total operating expenses to be $430,044 from evidence presented by the Company and the Staff tending to show the same to be $434,144 and $430,044 respectively.

12. Annual depreciation expense evidence by the Company shows an expense of $206,014, and the evidence by the Staff shows the same to be $204,837. We find the reasonable annual cost consumed by depreciation is $204,837.

13. The Company and Staff evidence places annual taxes under the present and the proposed rates as follows:

	Present Rates	*Proposed Rates*
By Company	$169,596	$308,926
By Staff	$161,337	$298,160

We find a reasonable and actual annual tax liability to be $161,337 under the present rates and $298,160 under the proposed rates and that under the rates hereinafter found reasonable and approved that the Company's annual tax liability is estimated at $244,037.

14. The Company's evidence tends to show a net operating income for return of $216,900 under present rates and $316,673 under the proposed rates. The Staff shows $233,326 and $333,009, respectively. Allowing for all operating revenue deductions herein found reasonable, the Company would be permitted net operating income for return of $292,500 under the rates hereinafter found reasonable and approved.

15. Capital structure allocated to North Carolina as hereto-

fore found shows total capitalization of $4,139,575, consisting of $1,720,656 long-term debt (41.57%) at interest rates varying from 3% to 6⅜%, equity capital (34.43%) totaling $1,425,319 and comprised of $542,439 in common capital stock, $207,623 in premium on common stock and stock expense, and $675,257 in earned surplus; and short-term debt (24.0%) of $993,600 at 6% and 6½% of which $367,200 is advances from the parent company.

16. Lee's reasonable annual fixed charges are $88,353 for long-term debt and $62,316 for short-term debt, for a total annual actual and reasonable debt service requirement of $150,669.

17. Applicant is earning 5.74% on its common equity attributed to North Carolina operations under present rates. The Company will earn 12.73% on its common equity under the proposed rates and will be permitted to earn 9.89% return on common equity under the rates hereinafter found reasonable and approved.

18. The Company is earning a rate of return on the fair value of its property as herein found of 5.19% under present rates; it would earn 7.40% under the proposed rates, and will be permitted to earn 6.50% under the rates hereinafter found reasonable and approved.

19. Giving full consideration to all the evidence, facts, and circumstances in this case, we find a fair rate of return on the fair value of the Company's utility property is 6.50%.

20. Rates as proposed by the Company would permit the Company to earn, in addition to the reasonable operating revenue deductions herein found, a rate of return of 7.40% on the fair value of the Company's property herein found. To the extent such proposed rates produce, in addition to the reasonable operating revenue deductions herein found, a rate of return in excess of 6.50% on the fair value of the Company's property as herein found (i.e., $4,500,000), such rates are excessive, unjust and unreasonable. Rates charged in accordance with the schedule hereto attached and marked Appendix "A" and made a part hereof, will permit the Company to earn, in addition to the reasonable operating revenue deductions herein found, a fair rate of return on the fair value of its public utility property used and useful in providing the service rendered to the public within this State and constitutes rates that are just and reasonable, both to the Applicant and to the public."

Based on the above findings and other findings and conclusions

hereinafter discussed in the opinion, the Commission, with two members dissenting, entered an order approving an increase in rates in the amount of $142,437 annually or 59% of the increase requested. The Attorney General and the Walkertown Committee gave notice of appeal from the Commission's order but only the Attorney General appeared and filed a brief in this court.

Edward B. Hipp and Larry G. Ford for North Carolina Utilities Commission.

Burns, Long & Wood by Richard G. Long; Ross, Hardies, O'Keefe, Babcock, McDugald & Parsons by Melvin A. Hardies and Donald W. Glaves; and Duane T. Swanson for Lee Telephone Company.

Robert Morgan, Attorney General, by Jean A. Benoy, Deputy Attorney General (Intervenor).

No appearance for Walkertown Telephone Exchange Committee (Protestant).

GRAHAM, J.

The Attorney General, appellant, brings forth and argues ten contentions which are set forth in his brief in the form of questions and which are based on numerous exceptions and assignments of error to the Commission's findings and conclusions.

[1] The first, second and seventh contentions question the authority of the Commission to grant the rate increase in light of the Commission's determination that the service rendered by Lee is substandard. These contentions challenge in particular the Commission's finding of fact No. 21 and its conclusions Nos. 3 and 4 which are as follows:

> "21. The quality of service rendered by Lee Telephone Company in this State is poor. In a measure, the Company conceded the overall justification for these service complaints and stated its plans and intentions for improving its North Carolina facilities in the near future. The inadequate and poor quality telephone service offered by the applicant in this State relates to many factors such as the nature, size and extent of the territory served, the fact that the telephone facilities when acquired by Central Telephone Company in 1965 were engineered in such a way as to engender such service, the plant was inadequate and inefficient and therefore many of their problems were inherited upon purchase. However we find from the nature and extent of the complaints made and from statements and testi-

mony of company representatives that the service being rendered by Lee is substandard, and that such grade of service reflects the failure of the Company to take those steps necessary for the improvement of toll service, local central office service, proper maintenance and the reduction of unsatisfactory multiparty main station service as is economically feasible, as well as its failure to eliminate traffic overloads on toll trunks, extended area service trunks and central office equipment groups, and its failure to take sufficient action to improve transmission and reduce noise levels.

* * *

3. The statutory rate-making formula is controlling in this matter. We have considered the substandard quality of service being rendered by Lee as one element bearing upon the value of its utility investment and the rate it should be permitted to earn, along with other factors, including but not limited to, the nature, size and extent of the territory served, and the condition and level of its telephone facilities when acquired by Central Telephone Company in 1965. We further conclude that it is our responsibility to require the highest standards of service consistent with reasonable rates, and that such responsibility can only be discharged with reasonable regard to all facts and circumstances in each case and within the limits of the statutory ratemaking formula.

4. From the record in this case, we conclude that the telephone service being offered the public in North Carolina by Lee is inadequate and of poor quality particularly in the areas of toll service and local central office' service. Since our last order in June 1968, the Applicant has reduced the high percentage of unsatisfactory multiparty main station service from 38% to 21%. The progress made by the Company in this area is acknowledged, however we conclude that the Company must continue its remedial action in all areas. One necessary factor in obtaining better service in the franchised areas here involved is more abundant and improved equipment. The Commission has two courses of pursuit, it may either ignore the duty imposed upon it by statute to grant a fair rate of return and thereby starve the Company making it impossible for it to improve service, or it can take the approach, which we here adopt, for improved service by fixing just and reasonable rates under our statutory formula. We conclude that it is appropriate to approve fair rates which should be a necessary and integral part of the eventual solution of the service problems, when joined with ap-

propriate remedial action carried out with deliberate dispatch by the Company."

Appellant contends that the Commission is precluded as a matter of law from granting any increase in rates to a utility whose services are determined to be substandard. Lee, on the other hand, argues that the Commission has no authority to consider quality of service in determining fair and just rates and must grant an increase, otherwise found just and reasonable, without taking into consideration the substandard quality of service being provided by the utility. We disagree with both contentions.

[2] After setting forth the various considerations to be made by the Commission in fixing rates, G.S. 62-133 provides in subsection (d) that "[t]he Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates." It is our opinion that this provision authorizes the Commission to consider quality of service as a factor in determining what constitutes just and reasonable rates to be charged by a utility.

It stands to reason that if a utility fails to provide adequate service on account of inefficient management, rates should not be permitted which would require the customer to pay for this inefficiency. The market place regulates the price paid for the service or product of an ordinary business. If the product or service offered is inferior, the customer has the option of purchasing from a competitor who, through efficiency, provides the better product or service. This is not true in the case of a utility which by nature is monopolistic. The price which a customer pays and a utility charges must necessarily be established by an agency charged with the responsibility of fixing rates that are just and reasonable to the public and to the company. To say, as Lee insists, that the quality of service is never to be considered in fixing rates would be to say that the shareholders of a utility are entitled to economic advantages that are never available to the owners of businesses which compete freely in the market place.

The principle that permits the consideration of quality of service in fixing rates is not without supporting authority. See for instance *Kennebec Water District v. Waterville,* 97 Me. 185, 54 A. 6; *United Telephone Company of Florida v. Mayo,* 215 So. 2d 609 (Fla. 1968), appeal dismissed, 394 U.S. 995, 22 L. Ed. 2d 774, 89 S. Ct. 1589 (a Florida statute expressly authorizes the consideration of the quality of service in fixing rates); *Re Middle States Utilities Company,* 72 P.U.R. (n.s.) 17; *Ward v. Limestone Water & Sewer Co.,* 17 P.U.R. (n.s.) 117.

On the other hand, to hold as appellant urges, that the Commission is required as a matter of law to refuse a reasonable rate increase upon a finding of substandard service could lead to strained results. Various reasons may exist for substandard service, including the inability of a utility to attract expansion capital on account of inadequate rates. In *Telephone Co. v. P.U.C.*, 158 Ohio St. 441, 110 N.E. 2d 59, the Ohio Supreme Court considered a case where the Utility Commission of that State had denied a telephone rate increase until certain improvements in service were made. The proposed increase had been found just and reasonable by the Commission. In reversing the Commission the Ohio Supreme Court stated as follows:

> "A utility to survive must receive a fair return on its property. Otherwise capital will not be attracted to furnish the funds for the new equipment needed to meet the demands of increased population and the consequential necessity for increased service. The commission's order as made has the effect of creating serious difficulties for the company. A situation is present where the company needs an increase in rates to attract capital to buy new equipment and to meet increased demands, and the commission says, in effect, 'we will give you the new rates to attract the new capital to purchase new equipment when you show that you have installed the new equipment'. Adoption of such an attitude would hamstring the utility.
>
> A public utility commission may not so act as to confiscate the property of a utility, and where it is determined that adequate rates do not exist, an order granting an increase but suspending the same until such time as certain facilities and improvements are provided does have that effect."

Appellant further argues that if the Commission does have authority to grant reasonable rate increases where there is substandard service, the Commission nevertheless committed error in this case by failing to give sufficient weight to its findings regarding the substandard service of Lee and in failing to conclude that a fair rate of return for Lee should be substantially less than that for a company furnishing more adequate service. No suggestion is made as to what the rate of return should be or as to how much weight should be given to the factor of inferior service. It is elementary that such factors as giving weight and credit to the evidence are outside the province of an appellate court. See *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487.

[3] It is the prerogative of the Commission, and not this court, to

decide the question as to what constitutes fair and reasonable rates that may be charged by a utility. " 'It is an agency composed of men of special knowledge, observation, and experience in their field, and it has at hand a staff trained for this type of work. And the law imposes upon it, not us, the duty to fix the rates.' " *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 456, 130 S.E. 2d 890, quoting from *Utilities Com. v. State and Utilities Com. v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133.

[1] It is clear from the order that the Commission considered and gave weight to the substandard quality of the service being furnished by Lee. It refused, however, to withhold any rate increase as a means of forcing better service. This action was not improper. Chapter 62 of the General Statutes authorizes the imposition by the Commission of numerous sanctions and penalties in order to enforce its rules and orders. It therefore does not follow that in refusing to withhold its approval of *any* rate increase, the Commission surrendered its only means of requiring Lee to provide its customers with adequate service. Indeed, the Commission in its order directed Lee to take comprehensive and specific steps to upgrade its service to acceptable standards. There is nothing in the record to suggest that the Commission will neglect to enforce these provisions of its order.

[4] Appellant's third contention is that the test period used by the Commission was not representative. The test period used was the twelve months ending 31 May 1968. The argument of the appellant is that more substantial investments were made in plant and equipment during this twelve-month period than in any of the preceding twelve-month periods. G.S. 62-133(c) provides:

> "The public utility's property and its fair value shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time."

[5] The value of plant and service must be determined as of a specific date — the end of the test period — and not by averaging a group of periods or months within a period. This principle, which is clearly provided by the statute quoted above, was applied in *Utilities Commission v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469, where one of the grounds for the reversal of a Commission order was that the Commission had erroneously determined the utility rate base by averaging the net investment for the year. It was there stated:

> "Since rates are prospective, the base should have been determined as of the date the rates became effective. Piedmont is a rapidly growing company. Its investment was greatest at the

end of the test year. Hence the investment at that time should be accepted rather than the average for the year."

We hold that the Commission correctly determined the investment base as of the end of the test period.

[6] For his fourth contention appellant asserts that Lee's telephone plant under construction but not in operation should have been excluded from the rate base.

In finding of fact No. 6 the Commission found the net book investment rate in the amount calculated by its staff. In the exhibit reflecting this calculation it appears that $318,052 was included for "telephone plant under construction."

In *Utilities Commission v. Telephone Co.*, 263 N.C. 702, 140 S.E. 2d 319, the Commission found the fair value of the Lee Telephone Company property in North Carolina used and useful in rendering service and producing revenue to be $2,100,000 and denied an application for increased rates. The Supreme Court held this finding to be unsupported by competent, material and substantial evidence which was set forth in part as follows:

"The Company, according to the Commission, did not use average net investment. It determined North Carolina net investment as of the end of the period, including allowance for cash working capital and after accounting and *pro forma* adjustments, which includes $84,124.00 of Virginia property allocated to North Carolina and giving effect to interest which was capitalized *on plant under construction at $2,112,810.00.* The Company offered evidence to the effect that the fair value of the North Carolina property was at least $2,250,000.00.

* * *

Using $410.00 as replacement cost of the Company's 7,610 stations in North Carolina, the current cost of the Company's North Carolina plant would be $3,120,100.00, less depreciation of 28.94% heretofore taken, amounting to a deduction or reserve of $902,957.00, leaving the cost of the North Carolina plant, less depreciation, at $2,217,143.00. *When the additional cost of plant under construction is added* thereto, plus the allocated portion of the properties in Virginia chargeable to the North Carolina operation, the total current cost, according to the Company's evidence, on all properties used and useful in rendering service in North Carolina, is $2,354,174.00." (Emphasis added).

[7] While the propriety of including the cost of plant under con-

struction in the rate base was not directly before the court in the above cited case, we cannot overlook the fact that the inclusion of such evidence for consideration by the Commission was approved, at least by implication. It is the duty of the Commission to arrive at an independent rate base upon consideration of all factors, including cost, replacement and trended cost and it is its duty to exercise its independent judgment in doing so. *Utilities Com. v. State and Utilities Com. v. Telegraph Co., supra.*

[6] Furthermore, it affirmatively appears that in the exhibit forming the basis for the Commission's finding as to the rate base, interest during construction was added to Lee's operating income thus reducing the amount of revenue found to be required by the company. This same type of accounting procedure was followed by other witnesses offering evidence. This practice appears to be generally accepted in rate-making cases. The reason for this is set forth in 1 Priest, Principles of Public Utility Regulation (1969), p. 178, wherein it is stated as follows:

> "Utility property does not spring into miraculous existence when it is needed, but must be constructed over substantial periods of time. Payments for work done are made as that work progresses, but the property under construction cannot begin to earn a return until it is actually in service. The cost of capital required in the construction period is just as actual as expenditures for labor. And provision for that cost has characterictically been made by charging interest to utility plant in the course of its construction.
>
> Under most accounting systems, a bookkeeping entry must be made crediting to the utility's income account, as if it were actual income, the entire amount of interest during construction which is capitalized. The effect of that bookkeeping entry is to offset the charge made to plant account, increasing the company's income for rate-making purposes and therefore limiting the amount of any permissible upward revision of rates."

The procedure followed by the Commission in including "plant under construction" in the rate base while crediting "interest during construction" to Lee's operating income is in accordance with generally accepted practices and does not constitute error.

[8] The next contention made by appellant is that the Commission should have made specific findings with respect to profits earned by an affiliated but unregulated company.

Lee is owned by Central Telephone and Utilities Corporation

(C.T.U.). C.T.U. also controls other telephone operating properties through its controlling interest in various companies comprising the Central Telephone System. In 1967 C.T.U. organized Centel Service Company (Centel) for the purpose of providing the telephone operating companies in the Central Telephone System, including Lee, with a source of supply for materials. Lee urges that the advantage of a service company such as Centel is that operating companies can have material orders immediately filled from the warehouse of the service company. Consequently, the operating companies do not have to maintain as large an inventory as they otherwise would. The operating companies are not bound to purchase solely from Centel and remain free to make purchases from whatever source they see fit. The record does not disclose the extent to which Lee exercises this freedom, but it does show that in 1968 Centel made sales to Lee's North Carolina division in the amount of $542,751. Net profit attributable to those sales was $39,621. This represents a ratio of 7.3% of net profit to sales. The Commission made the following conclusion with respect to Centel:

> "14. The level of profitability of the Centel Service Company on its purchasing and distribution of materials and supplies for its affiliate Lee Telephone Company requires that the Commission take notice of this type of relationship. Such transactions must be consummated within a true arms length environment if their results are to be accepted without adjustment or in-depth scrutiny. The Commission cannot permit parent holding companies to use affiliate companies as a device for transmitting an unreasonable level of profits to such parent holding company from goods or services supplied the operating company by way of an affiliate company (G.S. 62-153). It is the duty of the operating telephone company to prove that the prices it has paid for goods and services received from an affiliate are no greater than would have been paid through true arms-length bargaining, and in fact lower prices should necessarily be the result. In the instant proceeding, the reasonableness of the level of prices charged and paid was not clearly demonstrated and no in-depth study was made by the Commission Staff due to the fact that Centel Service Company had been in operation approximately one year at the time of the hearing. No adjustment is being made to the rate base or in the operating expenses due to these inter-company transactions, and the Commission is not approving or disapproving the level of profitability of the transactions between these two affiliates. We conclude it to be appropriate for this Commission to reserve for future consider-

ation any need for investigation and possible adjustments which may properly arise therefrom in connection with inter-affiliated company transactions."

[8, 9] It appears from the above conclusion that the Commission is well aware of the principles that must govern the relationship between utility operating companies and affiliated supply companies. It is the duty of the regulatory Commission to look closely at transactions between such companies to be sure that the public is not required to pay rates based on excessive costs resulting from excessive profits earned by an unregulated supplier. *Pacific Telephone & Tel. Co. v. Public Utilities Com'n.*, 44 Cal. Rptr. 1, 401 P. 2d 353; *Columbus v. P.U.C.*, 154 Ohio St. 107; 93 N.E. 2d 693. However, the Commission has reserved this phase of the rate inquiry for future consideration and investigation and we must assume that in doing so it has not closed the book on the question of the reasonableness of the profits earned by Centel on material supplied to Lee. In view of the short period of operation of Centel, we conclude that the Commission was acting within its discretion in delaying a determination of this question.

[10] The sixth contention presented by appellant is that the Commission erred in failing to credit to Lee's working capital requirements amounts paid by customers in advance of services rendered.

Cash working capital is one of the ingredients in the net book investment rate base established by the Commission. Lee bills customers at the first of the month for the base rate for that month's service. The contention is made that Lee has the use of funds paid by customers in response to these advance billings. There is no evidence in the record to show at what point during the month the average bill is paid. Appellant argues that it should be assumed that, on the average, customers pay by the middle of the month. If we accept this assumption the fallacy of appellant's argument becomes readily apparent, for by the middle of the month half of the service has been performed and the costs of that service have been incurred without compensation therefor. The equities in such a situation tend to become balanced. We also note that toll charges are always made sometime *after* the service is rendered. Conceding *arguendo* that the Commission could have considered advance payments actually received as available for working capital, it is our opinion that it was not required as a matter of law to do so. See *Columbus v. P.U.C., supra; In Re Diamond State Telephone Co.*, 51 Del. 525, 149 A. 2d 324.

[11] For his tenth contention appellant insists that the Commission was under a duty to make findings as to whether or not the

present rate of return to Lee was insufficient to attract the necessary capital from investors in order to finance needed expansion and improvement of Lee's plant and equipment. The finding that the new rate represented a fair rate of return on the fair value of the company's utility property was tantamount to a finding that the existing rates were inadequate. The assignment of error which is the basis of this contention is overruled.

[12] We have not overlooked the eighth and ninth contentions which are argued in appellant's brief. Under these two contentions, appellant has collected twenty-five exceptions made to the Commission's findings and conclusions. The exceptions challenge virtually all of the essential findings and conclusions made by the Commission and border on being broadside. We admit to difficulty in ferreting out the arguments made regarding some of these exceptions. Many of the arguments are repetitious, having also been made under contentions set forth previously in appellant's brief. At least one of the exceptions is expressly abandoned. Others are deemed abandoned because no argument or citation of authority is brought forward in their support. Rule 28, Rules of Practice in the North Carolina Court of Appeals. Suffice to say we have considered the entire order of the Commission and find substantial evidence in the record to support each finding made and the findings support the conclusions and the order.

Affirmed.

BROCK and BRITT, JJ., concur.

EDWARD E. YAGGY, JR. v. THE B.V.D. COMPANY, INC. AND MONTVALE REALTY CORP.

No. 7015SC9

(Filed 6 May 1970)

1. Frauds, Statute of § 3— pleading the statute — general denial of contract

In this action for specific performance of an alleged contract to convey land, defendant's general denial of the alleged contract invoked the statute of frauds as effectively as if it had been expressly pleaded and thereby

imposed upon plaintiff the burden of showing a written contract sufficient to comply with its requirements.

2. Frauds, Statute of § 3; Trial § 15— evidence of oral contract — failure to object

Failure to object to testimony as to an oral contract does not waive the defense of the statute of frauds.

3. Signatures— definition

The signing of a paper writing or instrument is the affixing of one's name thereto with the purpose or intent to identify the paper or instrument or to give it effect as one's own act.

4. Frauds, Statute of § 2; Vendor and Purchaser § 1; Signatures— printed name on telegram — signature within statute of frauds

In this action for specific performance of an alleged contract to convey land wherein the only written evidence of the contract is a telegram, defendant's name affixed to the telegram in print constitutes a signing of the telegram by defendant within the requirement of the statute of frauds.

5. Frauds, Statute of § 7; Vendor and Purchaser § 3— contract to convey land — sufficiency of description — patent ambiguity — extrinsic evidence

Description in a telegram referring to property to be conveyed as "BVD property in Carrboro NoCar subject to reacquisition from Montvale Realty Corp" is not patently ambiguous, notwithstanding the vendor holds interests in two distinct tracts in Carrboro, N. C., separated by streets of the town, since the reference to property "subject to reacquisition from Montvale" makes it possible to show by extrinsic evidence the exact property intended to be sold.

6. Frauds, Statute of § 6; Vendor and Purchaser § 3— sufficiency of description of land

A written memorandum sufficient to comply with the requirements of the statute of frauds must contain a description of the land either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers.

7. Frauds, Statute of §§ 2, 7; Vendor and Purchaser § 1— memorandum for sale of land — failure to state time for performance

A memorandum of an agreement for the sale of land is not necessarily insufficient to satisfy the requirements of the statute of frauds because the time for performance is not stated therein, since the law will imply that it is to be performed within a reasonable time.

8. Contracts § 2; Vendor and Purchaser § 1— contract to convey land — meeting of the minds — telegram containing essentials of contract — subsequent negotiations for drafting detailed written document

In this action for specific performance of a contract to convey land wherein a telegram sent by defendant accepting plaintiff's offer to purchase the property contained all the essential elements of the contract,

the fact that all the evidence shows that for some time after the telegram was sent the attorneys for the parties were engaged in drafting a written document which was to embody all of the terms agreed upon, including the date of closing and the date possession was to be delivered, and that this instrument was never signed, does not compel the conclusion that the minds of the parties had never met upon those features which were essential to form a binding contract.

9. Frauds, Statute of § 2; Vendor and Purchaser § 1; Principal and Agent § 1— signature by agent — authority of agent

The writing required by the statute of frauds may be signed by an agent, and the agent's authority to do so need not be in writing.

10. Principal and Agent §§ 4, 5; Vendor and Purchaser § 5— contract to convey — authority of agent to accept offer to purchase

In this action for specific performance of a contract to convey land, testimony by alleged agent of corporate defendant that he had actual authority from his superiors, including an executive vice president of defendant, to accept plaintiff's offer to purchase the property is competent to prove agency and the nature and extent of such agency.

11. Vendor and Purchaser § 1; Corporations § 23— sale of corporate real property — approval of board of directors

Contract for the sale of property by a corporation was not invalid because not approved by the corporation's board of directors, there being ample evidence from which the jury could find that the decision to sell the property had been reached at the highest levels of the corporate management, and that the sale to plaintiff by defendant's agent and a telegram confirming the sale, signed by the agent on behalf of the corporation, had been expressly authorized by the same top officials.

12. Corporations § 23— sale of corporate real property — necessity for approval by board of directors — conduct of corporation

While no officer or agent of a corporation has power, by virtue of his office alone, to sell or contract for the sale of corporate real property, the power of such an officer or agent to contract for the sale of corporate lands does not necessarily have to be conferred by a formal resolution of the board of directors but may, as in case of other power, be inferred from the conduct of the corporation in the transaction of its business and the power which the corporation has customarily permitted the officer or agent to exercise.

APPEAL by defendant, The B.V.D. Company, Inc., from *Thornburg, J.*, 9 June 1969 Civil Session of ORANGE Superior Court.

This is a civil action to obtain specific performance of a contract to convey land. Plaintiff alleged: Prior to 1 March 1966 defendant, The B.V.D. Company, Inc. (B.V.D.), which is a Delaware corporation doing business in North Carolina, owned the fee simple title to certain real property in Carrboro, N. C. On that date B.V.D. conveyed said property to the defendant, Montvale Realty Corp. (Mont-

vale), and on the same date by instrument recorded in the Orange County Registry, Montvale leased the property to B.V.D. for a period of 25 years. Under the lease B.V.D. has the right to repurchase the property from Montvale. On 18 July 1968 plaintiff offered to purchase the property from B.V.D. for $250,000.00. On the same date B.V.D. accepted plaintiff's offer and sent to plaintiff the following telegram:

"ACCEPT OFFER OF $250,000 FOR BVD PROPERTY IN CARRBORO NOCAR SUBJECT TO REACQUISITION FROM MONTVALE REALTY CORP

= ALBERT D RADER BVD COMPANY INC"

At all times since 18 July 1968 plaintiff has been ready, willing and able to perform the contract for purchase of the property and so advised B.V.D., but on 21 August 1968 B.V.D. breached its contract and advised plaintiff it would not convey the property to him. Since that date B.V.D. has refused to comply with its contract.

By an exhibit attached to and made part of the complaint, plaintiff described the property which he contends is covered by the contract to convey. In this exhibit, under the heading "Mill No. 1," two tracts are described by metes and bounds descriptions. The "First Tract" is located on the north side of Weaver Street and the east side of Greensboro Street in the town of Carrboro. The "Second Tract" is located at the corner of property of State University Railroad Company and would appear to be contiguous to the "First Tract." Under the heading "Mill No. 2," one tract is described. This tract is located on the south side of Main Street and on the east side of Waco or Railroad Street, the description of this tract also being by exact metes and bounds.

Defendants filed answer in which they admitted their corporate status but denied all other material allegations in the complaint.

Plaintiff's witness E. J. Owens testified in substance as follows: He is a realtor in Chapel Hill. In February 1968 Mr. Al Rader, who he understands is in charge of B.V.D.'s real estate matters, came to Chapel Hill and Owens and Rader visited the property. The B.V.D. property in Carrboro consists of about 8.3 acres located on the north side of Main Street in Carrboro, on which is a two-story building containing 90 to 100,000 square feet of floor space. On the south side of Main Street in Carrboro there is a 25-acre tract with a one-story building containing about 50,000 square feet of floor space. Owens and Rader looked at both facilities. Rader told Owens that the reason for his visit to the South from New Jersey was to inspect a plant in South Carolina, that this Carrboro, N. C. facility would

be moved to the South Carolina operation, and that B.V.D. wanted to sell it. The next contact Owens had with Rader concerning the property was about the first of March. Rader said he had met with his superiors and they had concluded that they wanted to sell the property for $300,000.00 net to B.V.D. Rader sent Owens a letter dated 9 May 1968 as follows:

> "This is to authorize you to sell the Carrboro property at a net price to the BVD Company, Inc. of $300,000. We would appreciate your full attention to this matter in view of the fact that we wish to dispose of this property.
>
> "Your cooperation is appreciated.
>
> "Very truly yours,
>
> "BVD COMPANY, INC.
>
> "Albert D. Rader, Architect"

After unsuccessful negotiations with other prospective purchasers, Owens called Rader in Montvale, N. J., on 18 July 1968 and told him plaintiff was offering $250,000.00 for the B.V.D. property in Carrboro. Rader told Owens: "I think we have a deal, but let me talk with my superiors, and I will call you back." Rader called back in about 20 minutes and said, "We have a deal." Owens asked Rader to send him a wire or memorandum of their agreement and Rader sent Owens the wire set out in the complaint.

On cross-examination Owens testified that during the telephone conversation in which Rader had accepted the offer, Owens told Rader that he would have a memorandum of the offer drawn up, stating the date and time of closing, and would send him the memorandum accompanied by $25,000.00 good faith deposit; and that the $25,000.00 check was never transmitted to B.V.D.

Plaintiff testified that about 18 July 1968 he and Owens inspected the property in Carrboro owned by B.V.D., that he made a firm offer of $250,000.00 for the property and later received a copy of B.V.D.'s telegram confirming in writing their acceptance, and that he was prepared to pay the purchase price as soon as the deed could be provided.

Plaintiff then introduced testimony of Albert D. Rader taken on adverse examination. Rader testified in substance: He was employed by B.V.D. as corporate architect and had been involved in the disposal and purchase of properties by B.V.D. B.V.D. owns two parcels of land in Carrboro, N. C., separated by a road. The parcels consist of approximately 29 acres. A decision was reached in January 1968

to dispose of the Carrboro property, and he came to Carrboro on behalf of B.V.D. and authorized Owens to seek a purchaser for the property. On 18 July 1968 he received the phone call from Owens submitting the $250,000.00 offer. After receiving Owens's telephone call, he discussed the sale with Mr. Galston, Executive Vice-President of B.V.D., who agreed the offer should be accepted. He sent the acceptance telegram on behalf of B.V.D. after discussing the language of the telegram with the B.V.D. legal department. The legal department suggested the telegram contain the language "subject to reacquisition from Montvale Realty Corporation." The property that was being sold was all of the property that B.V.D. owned or leased in Carrboro, N. C., and is the property described in the lease from Montvale to B.V.D.

Plaintiff's witness Gordon Battle, an attorney in Chapel Hill, testified in substance: On 19 July 1968 he was employed to represent plaintiff in connection with examination of title and closing. He had several telephone conversations with an attorney in the legal department of B.V.D. as to the provisions to be included in the memorandum of the contract. He agreed to undertake preparation of the document. He mailed the proposed agreement to the B.V.D. attorney on 25 July 1968, and on 29 July the attorney called him and they discussed various revisions in the language. The B.V.D. attorney told him he would have to get approval from the chief counsel for B.V.D. on the language of the document. Battle had further telephone conversations with the B.V.D. attorney concerning the language of the document on 31 July and on 5, 13 and 19 August. On 19 August Battle talked by phone to the chief counsel of B.V.D., who was also Secretary of the corporation. In this conversation the B.V.D. chief counsel told him he was working on a presentation on the sale to be made to his Board of Directors which was meeting soon. In this phone conversation the B.V.D. chief counsel also inquired about the $25,000.00 check, and Battle informed him that he and the B.V.D. attorney had agreed that the $25,000.00 would be sent with the signed agreement as soon as the exact terms and language had been agreed to between them. On 21 August 1968 the B.V.D. chief counsel phoned Battle and said he had been working on his presentation to the Board of Directors and was unable to justify the sale to the Board. On the same date Battle received a telegram from B.V.D. stating the company could not enter into the contract.

Plaintiff introduced the lease from Montvale to B.V.D., which was recorded in the Orange County Registry. This lease provided that the lessee, if not in default, could elect to purchase the prop-

erty at a price determined by a formula in the lease. The parties stipulated that the property described in the lease is the same identical property as described in plaintiff's complaint and is all of the real property in which the defendants own any interest in Carrboro, N. C.

At the close of plaintiff's evidence, motions for nonsuit were overruled. Defendant B.V.D. offered evidence tending to show that Rader did not have authority to sign a contract on behalf of B.V.D.; that no one had authority to contract for the sale of real estate of the company without approval of the Board of Directors; and that the proposal to sell the B.V.D. property in Carrboro was never submitted to the Board of Directors. On cross-examination defendant's witness Rader testified that Mr. Galston, who was an Executive Vice-President of B.V.D., had sent him to Carrboro to get a sale of the property, and that Mr. Bidomi, who was also an Executive Vice-President of B.V.D., had also instructed him to seek the sale of the property. Rader also testified he had authority of his superiors to accept the offer. Rader testified B.V.D. owns or leases 47 plants, including the Carrboro plant, scattered all over the country. On cross-examination defendant's witnesses admitted that about three weeks after the telegram of 18 July 1968, B.V.D. went through an extensive change in management and adopted new policies which changed the plans of the corporation, and that at about the same time these changes occurred B.V.D. received a higher offer for the property. At the close of all the evidence, motion for nonsuit was allowed as to defendant Montvale and denied as to defendant B.V.D.

By agreement of counsel the case was submitted to the jury on the following single issue:

> "Did the plaintiff, Edward E. Yaggy, Jr. and the defendant, The B.V.D. Company, Inc. enter into a contract for the sale of the B.V.D. property in Carrboro, North Carolina, as alleged in the Complaint?"

The jury answered the issue in the affirmative, and on this verdict judgment was entered decreeing specific performance, directing B.V.D. to take immediate steps to reacquire legal title to the property owned by Montvale in Carrboro, N. C., in accordance with the provisions of its lease, and thereafter to convey title to plaintiff upon payment of the $250,000.00 purchase price. From this judgment, defendant B.V.D. appealed.

Bryant, Lipton, Bryant & Battle, by Victor S. Bryant, Jr., for plaintiff appellee.

Graham & Cheshire, by Lucius M. Cheshire and John T. Manning for defendant appellants.

PARKER, J.

The North Carolina statute of frauds, G.S. 22-2, insofar as pertinent to this appeal, provides:

> "All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

[1, 2] Defendant appellant did not specially plead the statute of frauds but in its answer denied the alleged contract to convey. The general denial invoked the statute as effectively as if it had been expressly pleaded and thereby imposed upon plaintiff the burden of showing a written contract sufficient to comply with its requirements. *Hines v. Tripp,* 263 N.C. 470, 139 S.E. 2d 545; *Hunt v. Hunt,* 261 N.C. 437, 135 S.E. 2d 195; *Pickelsimer v. Pickelsimer,* 257 N.C. 696, 127 S.E. 2d 557; *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561. Moreover, defendant's failure to object to testimony as to an oral contract did not waive the defense of the statute. *Pickelsimer v. Pickelsimer, supra; Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331. "The protection of the statute extends not only to the performance of the contract, but to its discovery as well. [Citation.] To show a parol agreement, when a written one is required, is to fall short of the necessary proof." *Jamerson v. Logan, supra.*

[4] The only evidence in writing of the contract which plaintiff seeks to enforce in this action is the telegram set out in the complaint. The telegram bears defendant's name in print, placed thereon by the same mechanical process employed by the telegraph company in reproducing other portions of the message. The question is presented whether a telegram to which the vendor's name has been so affixed may be considered as having been signed by the vendor within the meaning of our statute of frauds. We hold that it may.

[3] "The signing of a paper-writing or instrument is the affixing of one's name thereto, with the purpose or intent to identify the paper or instrument, or to give it effect as one's act." *McCall v. Institute,* 189 N.C. 775, 128 S.E. 349. This is usually accomplished when a person affixes his name in his own handwriting, in such case the very act clearly evidencing the intent of the signer. Affixing one's handwritten signature, however, is not the only method by which a

paper writing may be considered as being signed within the meaning of the statute of frauds. As long ago as Lord Ellenborough's opinion in *Schneider v. Norris*, 2 M. & S. 286, 105 Eng. Rep. 388, decided in 1814, it has been recognized that a printed name may constitute a sufficient signing under the statute of frauds, provided that it is recognized by the party sought to be charged. The courts of this country have generally recognized the same principle. The Supreme Court of Arizona in *Bishop v. Norell*, 88 Ariz. 148, 353 P. 2d 1022, stated the rule as follows:

> "We are fully satisfied that the general rule is that a writing or memorandum is 'signed' in accordance with the statute of frauds if it is signed by the person to be charged by any of the known modes of impressing a name on paper, namely, by writing, printing, lithographing, or other such mode, provided the same is done with the intention of signing. *City of Gary v. Russell*, 123 Ind. App. 609, 112 N.E. 2d 872; *Cummings v. Landes*, 140 Iowa 80, 117 N.W. 22; *Weiner v. Mullaney*, 59 Cal. App. 2d 620, 140 P. 2d 704; *Irving v. Goodimate Co.*, 320 Mass. 454, 70 N.E. 2d 414, 171 A.L.R. 326; *Potter v. Richardson*, 360 Mo. 661, 230 S.W. 2d 672; *In Re Deep River Nat. Bank*, 73 Conn. 341, 47 A. 675."

Other recent cases in which the typewritten name of the seller has been found to constitute a sufficient signing within the meaning of the statute are *Dubrowin v. Schremp*, 248 Md. 166, 235 A. 2d 722, and *Radke v. Brenon*, 271 Minn. 35, 134 N.W. 2d 887. The same rule has been adopted in the Restatement of the Law of Contracts, § 210, which provides:

> "The signature to a memorandum under the Statute may be written or printed and need not be subscribed at the foot of the memorandum, but must be made or adopted with the declared or apparent intent of authenticating the memorandum as that of the signer."

In *Joseph Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117 (reversed on other grounds upon rehearing in 89 F. Supp. 962), a teletype message was recognized as "signed" by the party to be charged, within the meaning of the California statute of frauds, and in *Hefferman v. Keith* (Fla. Ct. of App. 1961), 127 So. 2d 903, the court answered defendant's contention that a telegram was not sufficient under the statute because it was not a signed copy, by pointing out that the defendant, having admitted the sending of the telegram, thereby admitted the authority of the telegraph company to affix his name thereto. See also 49 Am. Jur., Statute of Frauds, § 326.

[4] In the case presently before us no question has been raised as to the authenticity of the telegram or that it was sent by the witness Rader while purporting to act on behalf of defendant appellant. Under such circumstances we hold that, insofar as Rader's actions in the matter could be binding upon defendant, defendant appellant's name affixed to the telegram constituted a signing of the telegram by defendant within the requirement of the statute of frauds. Before discussing the question raised as to Rader's authority, it is necessary that we deal with certain other contentions made by the appellant.

[5, 6] Appellant contends that in any event the telegram fails to meet the requirements of the statute of frauds in that there is a patent ambiguity in the description of the property to be conveyed. In support of this contention appellant points out that it holds interests in two distinct tracts of land in Carrboro, N. C., separated by streets of the town, and from this appellant argues that it is impossible to know from the language of the telegram with certainty whether the parties were contracting with reference to one tract or the other or with reference to both. Had the description in the telegram consisted only of the words "BVD PROPERTY IN CARRBORO, NOCAR," there might be merit in appellant's contention. The telegram, however, is much more explicit. It refers to the "BVD PROPERTY IN CARRBORO NOCAR *SUBJECT TO REACQUISITION FROM MONTVALE REALTY CORP*" (emphasis added), and it is possible to ascertain with absolute certainty exactly what "BVD property in Carrboro" is "subject to reacquisition from Montvale." This is the property formerly owned by B.V.D., conveyed by it to Montvale, and which by recorded lease it has a right to reacquire from Montvale. The recorded lease describes by exact metes and bounds the property which is thus subject to the reacquisition rights. Therefore, in this case the public record itself discloses the exact property to which the telegram refers. The parties have stipulated that this is the same property as described in plaintiff's complaint. A written memorandum sufficient to comply with the requirements of the statute of frauds "must contain a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. . . . If the description is sufficiently definite for the court, with the aid of extrinsic evidence, to apply the description to the exact property intended to be sold, it is enough." *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269. In the case before us the reference to property "subject to reacquisition from Montvale" makes it possible to apply the description to the exact

property intended to be sold. It may well be that the words, "subject to reacquisition from Montvale," were inserted in the telegram for the purpose of protecting B.V.D. in event it should experience difficulties in reacquiring the property; they serve as well to identify exactly what property was intended.

[7, 8] Appellant also contends its motion for nonsuit should have been allowed because plaintiff's evidence disclosed that there was never a meeting of the minds of the parties, that the "offer" which appellant's telegram purported to accept was to be a written memorandum to be signed by the purchaser and accompanied by a good faith deposit of $25,000.00, and that these were never sent. While it is true that all of the evidence shows that for some time after the telegram was sent the attorneys for the parties were engaged in drafting a written document which was to embody all of the terms agreed upon, including such matters as the date of closing and the date possession of the property was to be delivered, and that this instrument was never signed, we do not agree that such evidence must compel a judgment of nonsuit. The statute of frauds does, of course, require that all essential elements of the contract be reduced to writing. The telegram in this case does clearly identify the vendor, the vendee, the purchase price, and, so we have held, the property sold. These are the essential elements of the contract. "A memorandum of an agreement for the sale of land is not necessarily insufficient to satisfy the requirements of the statute of frauds because the time for performance is not stated therein. In case of an executory contract of sale, where the time for the execution of the conveyance or transfer is not limited, the law implies that it is to be done within a reasonable time, and the failure to incorporate in the memorandum such a statement does not render it insufficient." 49 Am. Jur., Statute of Frauds, § 356, p. 667. The fact that in the present case the attorneys for the parties were engaged in drafting and were attempting to agree upon the language of an instrument which would spell out in detail not only the essential but also the subordinate features of the agreement, does not compel the conclusion that the minds of the parties had never met upon those features which were essential to form a binding contract. Upon all of the evidence in this case, whether the parties had a meeting of the minds on the terms of a valid contract was a question for the jury. The jury has answered the issue in favor of the plaintiff.

[9, 10] Finally, appellant questions Rader's authority to bind B.V.D. by the telegram of 18 July 1968. This is not a problem relating to the statute of frauds, since the statute expressly recognizes that the writing which it requires may be signed by an agent, and

it has long been established that the authority of the agent to do so need not be in writing. *Johnson v. Sikes,* 49 N.C. 70; 37 C.J.S., Frauds, Statute of, § 212, p. 706. Rader himself testified that he had actual authority from his superiors, including an Executive Vice-President of B.V.D., to accept plaintiff's offer. Such direct testimony by the agent is competent to prove agency, as well as to prove its nature and extent. *Sealy v. Insurance Co.,* 253 N.C. 774, 117 S.E. 2d 744.

[11] We do not consider the contract for sale invalid because not approved by B.V.D.'s Board of Directors. There was ample evidence from which the jury could find that the decision had been reached at the highest levels of the B.V.D. corporate management to sell the Carrboro property, which was only one of many properties belonging to the corporation throughout the country; that this decision had been consistently adhered to for many months; that Rader, whose duties normally included dealing with corporate real properties, had been expressly authorized by top management officials to seek a sale of the property; that the sale to plaintiff and the telegram confirming it were expressly authorized by the same top officials; that before the telegram was sent its exact language was cleared with the corporation's legal department; that nothing in the negotiations leading up to sending the telegram or in the telegram itself suggested that the deal was being made conditioned upon obtaining a future approval of the B.V.D. Board of Directors; and that no mention of the need to obtain Board approval was made until after B.V.D. had received a higher offer for the property. Indeed, it is clear that it was not the Board of Directors, but the same top management officials who authorized making the contract with plaintiff, who decided to repudiate it.

[12] While it is true that no officer or agent of a corporation has power, by virtue of his office alone, to sell or contract for the sale of corporate real property, "[n]evertheless, the power of a corporate officer or agent to contract for the sale of the corporate lands does not necessarily have to be conferred by a formal resolution of the board of directors, but may, as in case of other power, be inferred from the conduct of the corporation in the transaction of its business and the power which the corporation has customarily permitted the officer or agent to exercise." 19 Am. Jur. 2d, Corporations, § 1227, at p. 640. As stated by Barnhill, J., speaking for the Court in *Tuttle v. Building Corp.,* 228 N.C. 507, @ 512, 46 S.E. 2d 313, 317:

> "The rule limiting the authority of officers in respect to the sale of real property is not, however, inflexible. . . . In de-

termining whether the rule must be applied, the business in which the corporation is engaged, the duties necessary to be performed by its officers, the relation of the property dealt with to the business and to its other property, the surrounding circumstances and the principle that corporate officers have 'the implied power, in the absence of express limitations, to do all acts on behalf of the corporation that may be necessary or proper in performing' their duties must be considered."

Under all of the circumstances, Rader's authority to act on behalf of B.V.D. in sending the telegram was essentially a question of fact for the jury and they have answered under instruction free from prejudicial error.

We have also examined appellant's remaining assignments of error, and in the entire trial find

No error.

CAMPBELL and HEDRICK, JJ., concur.

CLARENCE M. ALLRED, JUNE ALLRED, J. LAWRENCE APPLE, ELLA APPLE, LAWRENCE E. BACH, UNITA BACH, PHILIP BLANK, JR., MARY ALICE BLANK, GLENN W. BOWERS, FLORA LEE BOWERS, BENJAMIN E. BRITT, JOY BRITT, ROBERT S. BRYAN, GERALDINE BRYAN, JOHN A. CARBONE, JEAN CARBONE, BRUCE K. CHESTER, MARGARET CHESTER, ELLIS COWLING, BETSY COWLING, LAWRENCE E. CRABTREE, VIRGINIA CRABTREE, RALPH E. FORREST, LULA D. FORREST, L. C. HANSBROUGH, FREDA HANSBROUGH, WARREN HANSON, HARRIETT HANSON, SOLOMON P. HERSH, ROSALIE HERSH, Z. ZIMMERMAN HUGUS, NANCY HUGUS, JOHN E. JOHNSON, LOIS JOHNSON, MAX LEVINE, PHYLLIS LEVINE, CARL LOWENDICK, MARY LOWENDICK, JAMES B. LYLE, SHIRLEY LYLE, HERBERT MARTIN, MARY MARTIN, EDMUND MENDELL, LOIS MENDELL, LATHAM L. MILLER, FRANCES MILLER, FLOYD MORGAN, ANN MORGAN, WILLIAM D. PAGE, PEGGY PAGE, LEE PERSON, HELEN PERSON, NORMAN PLINER, ROSALYN PLINER, THOMAS H. REGAN, NANCY REGAN, JAMES R. REID, MARJORIE REID, ROBERT T. ROSS, MARTHA ROSS, SAMUEL C. SCHLITZKUS, BOBBIE M. SCHLITZKUS, BERNIE SILVERMAN, FAYE SILVERMAN, W. B. SLOOP, VONNIE SMITH, SYLVIA SMITH, JOHN W. STONE, BETSY STONE, ROBERT WAHL, GERALDINE WAHL, LEWIS P. WATSON, MIRANDA WATSON, J. C. WILLIAMSON, JR., SALLIE JOE WILLIAMSON, CHARLES C. WOOTEN, AND RUTH WOOTEN, ON BEHALF OF THEMSELVES AND OTHER NEARBY PROP-

ERTY OWNERS, PLAINTIFFS v. THE CITY OF RALEIGH, NORTH CAROLINA, TRAVIS H. TOMLINSON, MAYOR AND MEMBER OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA, AND GEORGE B. CHERRY, SEBY B. JONES, WILLIAM M. LAW, CLARENCE E. LIGHTNER, ALTON L. STRICKLAND, AND WILLIAM H. WORTH, MEMBERS OF THE CITY COUNCIL OF RALEIGH, NORTH CAROLINA, AND BLUE RIDGE GARDENS, INC., DEFENDANTS AND SEBY B. JONES, MAYOR OF THE CITY OF RALEIGH, NORTH CAROLINA, AND JESSE O. SANDERSON, THOMAS W. BRADSHAW, JR., AND ROBERT W. SHOFFNER, MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA, ADDITIONAL DEFENDANTS

No. 7010SC191
(Filed 6 May 1970)

1. Municipal Corporations § 30— power to zone — limitations

Through the provisions of Art. 14, G.S. Ch. 160, cities and towns of this State have been delegated the authority to zone property within their boundaries and to restrict to specified purposes the uses of private property within each zone, such authority being limited by provisions of the enabling statute and by constitutional provisions forbidding arbitrary and unduly discriminatory interference with the rights of property owners.

2. Municipal Corporations § 30— zoning — comprehensive plan

No extrinsic written plan, such as a master plan based upon a comprehensive study, is required to have zoning in accordance with a "comprehensive plan," and the ordinance itself may show that the zoning is comprehensive in nature.

3. Municipal Corporations § 30— zoning — comprehensive plan

A comprehensive plan is simply a plan which zones an entire city or town, as opposed to a limited portion thereof arbitrarily selected for zoning, in a manner which is calculated to achieve the statutory purposes set forth in G.S. 160-174.

4. Municipal Corporations § 30— amendment to zoning ordinance — comprehensive plan

When a zoning ordinance is changed by amendment, it does not necessarily mean that the zoning plan ceases to be comprehensive.

5. Municipal Corporations § 30— amendment to zoning ordinance — comprehensive plan

If an amendment to a zoning ordinance is within the legislative power of the city, the area rezoned becomes a legitimate part of the original comprehensive zoning plan of the city.

6. Municipal Corporations § 30— spot zoning

Spot zoning arises where a small area, usually a single lot or a few lots, surrounded by other property of similar nature, is placed arbitrarily in a different use zone from that to which the surrounding property is made subject.

7. Municipal Corporations § 30— spot zoning — reclassification — type of use unchanged — change in density of residents

The fact that the use permitted in a rezoned area has not been changed from residential but only permits a more dense concentration of residents

in the area must be given weight in determining whether the reclassification constitutes spot zoning.

8. Municipal Corporations § 30— spot zoning — findings by trial court

In this action seeking to declare invalid an ordinance which changed the zoning classification of 9.26 acres from single family residential to a residential classification permitting apartments and other non-single family residence uses, the ordinance *is held* not to constitute "spot zoning," where the trial court found upon competent evidence that the rezoned property is separated from plaintiffs' property by a limited access four-lane highway lying on the east side of the property, that the north side of the property fronts on a collector street which is designated as a loop thoroughfare in the city thoroughfare plan, that property lying to the south is zoned and is being developed as a planned unit development with condominiums, that south of such area are areas zoned for apartments, a shopping center, and office and institutional use, that the rezoned property is bounded on the west by the city limits, that the change in zoning is primarily of density only and does not constitute a change in zoning character, and that a school has just been built in the area.

9. Municipal Corporations § 30— spot zoning — size of area

While the size of an area is not solely determinative of whether an ordinance constitutes spot zoning, it is a factor for the court to consider.

10. Municipal Corporations § 30— municipal zoning policy — statements by city councilmen

Statements by individual city councilmen, in passing on several zoning applications, that they objected to proposed zoning changes because the property involved was located on the beltline but not near an interchange did not establish an inflexible rule that is binding on the council when considering future zoning applications.

11. Municipal Corporations § 30— validity of zoning ordinance — consideration of specific use of property — violation of city council resolution

In this action seeking to declare invalid an ordinance changing the zoning classification of certain property, the evidence does not compel a finding that a specific plan for use of the property in question was relied upon by the city council in violation of a council resolution stating that it would not rely on specific use or plan proposals in its determination of zoning matters, although such a plan was presented to the council by the applicant for the zoning change.

12. Municipal Corporations § 30— zoning ordinance — validity — evidence of long-range thoroughfare plan

In this action seeking to declare invalid an ordinance changing the zoning classification of certain property, the trial court did not err in the admission of defendant's evidence of a long-range plan for construction of streets and thoroughfares in the area and in making findings of fact based on this evidence, plaintiffs having themselves introduced in evidence the thoroughfare map, and findings as to such plans being relevant to the design of zoning regulations to prevent and relieve traffic congestion.

13. Municipal Corporations § 30— zoning ordinance — validity — testimony that street has small amount of traffic

In this action seeking to declare invalid an ordinance which rezoned certain property, the trial court did not err in the exclusion of testimony by one plaintiff that there was a small amount of traffic on a street in the area in question, since if traffic is in fact lighter in plaintiff's neighborhood than in other areas of the city, they have even less cause to complain that it may be increased as a result of the rezoning.

14. Municipal Corporations § 30— zoning ordinance — validity — exclusion of purported zoning criteria

In this action seeking to declare invalid a municipal ordinance which rezoned certain property, the trial court did not err in excluding a paper writing purporting to establish zoning criteria for the municipality, where plaintiffs' witness in attempting to identify the document testified that he did not know its origin but understood that it was a list of areas for discussion between the city planning commission and city council, meeting some time ago, and that the document was prepared after the property in question had been rezoned.

15. Municipal Corporations §§ 8, 30— validity of zoning ordinance — motives of city officials

In this action seeking to invalidate a municipal ordinance which rezoned certain property, the trial court did not err in the denial of plaintiffs' motion to compel the mayor and three city councilmen to answer questions asked them on adverse examination which constituted an inquiry into their motives in passing the ordinance, since neither the motives of the members of a municipal legislative body nor the influences under which they act can be shown to nullify an ordinance duly passed in legal form within the scope of their powers.

16. Municipal Corporations § 31— zoning — discretion of legislative body — appellate review

How a city or town shall be zoned or rezoned and how various properties shall be classified or reclassified rests with the municipal legislative body, and its judgment is presumed to be reasonable and valid and beyond judicial interference unless shown to be arbitrary, unreasonable or capricious.

BROCK, J., dissents.

APPEAL by plaintiffs from *Bailey, J.*, 19 October 1969 Regular Civil Session of WAKE County Superior Court.

The defendant Blue Ridge Gardens, Inc. (Blue Ridge) is the owner of approximately 9.26 acres of land located at the southwest quadrant of the intersection of the Raleigh "Beltline" and Glen Eden Drive in the City of Raleigh. At the time that Blue Ridge purchased this property, it was zoned R-4 (single family residential). Blue Ridge attempted unsuccessfully in 1965 to have the property rezoned for commercial usages. In 1967 an application was filed with the City seeking a change from R-4 to R-10. R-10 is also a residential classification but is less restrictive in that it permits apartment buildings and certain other non single-family residence usages. This proposed change was unanimously rejected by the Coun-

cil. On 16 December 1968 a second application for a change in zoning classification to R-10 was filed by Blue Ridge. The Raleigh Planning Commission considered plaintiffs' request and recommended that it be denied. However, on 3 March 1969, the City Council rejected the recommendation of the Planning Commission and unanimously adopted an ordinance allowing the requested change.

On 7 March 1969 this action for a declaratory judgment was instituted by various plaintiffs who own property and reside in the vicinity of the rezoned tract. They seek to have the ordinance declared invalid.

By consent the case was heard by the court without a jury. At the conclusion of all of the evidence the court rejected proposed findings of fact tendered by plaintiffs and entered findings proposed by defendants. Based upon these findings the court concluded: (1) The ordinance was validly adopted. (2) The City Council did not act arbitrarily or capriciously in enacting the ordinance but acted in good faith, reasonably and in accordance with the comprehensive zoning plan of the City of Raleigh. (3) The ordinance bears reasonable and substantial relation to the public safety, health, morals, comfort and general welfare and makes adequate provision for transportation without undue concentration of population. (4) The ordinance does not constitute spot zoning. In accordance with its findings and conclusions the court entered judgment declaring the rezoning ordinance valid. Plaintiffs appealed.

John V. Hunter, III, for plaintiff appellants.

Donald L. Smith and Broxie J. Nelson by Broxie J. Nelson for defendant appellee, the City of Raleigh.

Bailey, Dixon, Wooten & McDonald by John N. Fountain, Ruffin Bailey and Wright T. Dixon, Jr., for defendant appellee, Blue Ridge Gardens, Inc.

GRAHAM, J.

Plaintiffs' primary contention is that the evidence conclusively establishes that the ordinance in question is invalid on the grounds that it is inconsistent with the comprehensive zoning plan of the City of Raleigh.

[1] Through the provisions of Article 14 of Chapter 160 of the General Statutes, cities and towns of this State have been delegated the authority to zone property within their boundaries and to restrict to specified purposes the uses of private property within each zone. This authority is limited by the provisions of the enabling statute and also by constitutional provisions which forbid arbitrary

and unduly discriminatory interference with the rights of property owners. *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325; *Schloss v. Jamison,* 262 N.C. 108, 136 S.E. 2d 691; *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706.

G.S. 160-174 provides:

> "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

The Charter and the Code of the City of Raleigh also provide that all zoning regulations must be made in accordance with "a comprehensive plan." The enabling zoning legislation of at least forty-four states include a similar requirement or some slight variation of it. 1 Anderson, American Law of Zoning, § 5.02. Similar language is employed in Section 3 of the Standard State Zoning Enabling Act.

[2] While courts have differed with respect to the definition of a "comprehensive plan," the majority have held that no extrinsic written plan, such as a master plan based upon a comprehensive study, is required. 8 McQuillan, Municipal Corporations, § 25.79, pp. 212, 213 and cases therein cited. The ordinance itself may show that the zoning is comprehensive in nature. *Ward v. Montgomery Tp.,* 28 N.J. 529, 147 A. 2d 248; *Cleaver v. Board of Adjustment,* 414 Pa. 367, 200 A. 2d 408; *Walus v. Millington,* 49 Misc. 2d 104, 266 N.Y.S. 2d 833. "A comprehensive zoning plan is a means by which the character of the community is to be preserved although devoting the land to its most-appropriate uses." *State ex rel. American Oil Co. v. Bessent,* 27 Wis. 2d 537, 135 N.W. 2d 317.

[3] A comprehensive plan is simply a plan which zones an entire town or city, as opposed to a limited portion thereof arbitrarily selected for zoning, in a manner which is calculated to achieve the statutory purposes set forth in G.S. 160-174. See *Shuford v. Waynesville,* 214 N.C. 135, 198 S.E. 585.

[4] The power to amend a comprehensive plan is granted by G.S. 160-176. When the zoning ordinance is changed by amendment it does not necessarily mean that the zoning plan ceases to be comprehensive. In commenting on such a contention the Pennsylvania Supreme Court aptly stated: "It is a matter of common sense and reality that a comprehensive plan is not like the law of the Medes and the Persians; it must be subject to reasonable change from time to time as conditions in an area or a township or a large neighborhood change." *Furniss v. Lower Merion Township,* 412 Pa. 404, 194 A. 2d 926.

[5] The relevant inquiry is always whether the amending ordinance is beyond the legislative power of the city. If it is not, the area rezoned becomes a legitimate part of the original comprehensive zoning plan of the city. In *Walker v. Elkin,* 254 N.C. 85, 89, 118 S.E. 2d 1, it is stated:

> "[T]he basic rule to determine the validity of an amending ordinance is the same rule used to determine the validity of the original ordinance. *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78. The legislative body must act in good faith. It cannot act arbitrarily or capriciously. If the conditions existing at the time of the proposed change are such as would have originally justified the proposed action, the legislative body has the power to act."

Plaintiffs contend that the zoning ordinance in question was beyond the power of the city and in conflict with the comprehensive plan for the following reasons: (1) It constitutes "spot zoning" for the benefit of a single property owner and not for the general public benefit. (2) In enacting the ordinance the Council violated its previously announced policy with respect to standards to be followed in acting on rezoning applications.

[6] In *Zopfi v. City of Wilmington, supra,* Lake, J., speaking for the court, stated as follows with respect to spot zoning:

> "Spot zoning arises where a small area, usually a single lot or a few lots, surrounded by other property of similar nature, is placed arbitrarily in a different use zone from that to which the surrounding property is made subject. Where such small area is subjected to a more burdensome restriction than that applicable to the surrounding property of like kind, the weight of authority is that the owner of the property so subjected to discriminatory regulation, [sic] may successfully attack the validity of the ordinance. See: *Higbee v. Chicago, B. & Q. R. Co.,* 235 Wis. 91, 292 N.W. 320, 128 A.L.R. 734; *Marshall v. Salt*

Lake City, 105 Utah 111, 141 P. 2d 704, 149 A.L.R. 282. The rule denying the validity of spot zoning ordinances has also been applied where a small area previously in a residential zone has been removed, by an amending ordinance, from such zone and reclassified to permit business or commercial use over the objection of adjoining owners of residential property. 58 Am. Jur., Zoning, § 39; 101 C.J.S., Zoning § 91; Yokley, Zoning Law and Practice, § 8-3, 3rd ed."

[7] The ordinance here challenged does not change the type of use permitted in the designated area but it does permit a more dense concentration of residents. We are not prepared to say, as some of the defendants contend, that spot zoning may occur only if the character of the use permitted in the affected territory is changed. However, the fact that the use permitted in the area has not been changed from residential must be given weight. In speaking to this point, the Maryland Supreme Court stated as follows in the case of *Hedin v. Bd. of Co. Commissioners,* 209 Md. 224, 120 A. 2d 663:

"Where the proposed change is, as here, from one residential use to another, and there is already a considerable amount of property either adjoining the subject property or in its immediate vicinity falling within the proposed classification and there is also a considerable amount of other property close by of a lower classification, the proposed reclassification is not 'spot zoning.'"

The trial judge made the following findings that are supported by competent evidence:

"(3) That the Blue Ridge Gardens tract is separated from the plaintiffs' property by a limited access highway of four lanes with a dividing median, as well as additional right-of-way lying to the sides of the throughway, for a total right-of-way width of 260 feet; that this right-of-way is part of the Raleigh Beltline System which carries traffic for U.S. 1, 70, 64 and other highway routes and lies on the east side of the property; that the north side of the property fronts on Glen Eden Drive, at present a collector street and designated a loop thoroughfare in the thoroughfare plan adopted by the City of Raleigh. The property lying to the south is zoned and being developed as a planned unit development which provides for condominium ownership of apartment like structures. The property is bounded by the City Limits of the City of Raleigh on the west.

(4) That prior to the meeting of the City Council of the City of Raleigh on the 3rd day of March, 1969, the Blue Ridge

Gardens tract was zoned R-4 (Residential); that all of the property abutting the 9.26 acres on the west side of the Raleigh Beltline was zoned R-4, except that the property lying immediately on the south, while zoned R-4, has been approved for Planned Unit Development, and construction thereof is partially complete.

* * *

(9) That Glen Eden Drive is presently an 80-foot right-of-way collector street connecting Ridge Road and Blue Ridge Road.

(10) That the 1985 Thoroughfare Plan for the City of Raleigh designates the street, Glen Eden Drive, upon which this property fronts on the north, as a loop thoroughfare. That the connecting link of Glen Eden Drive with Glenwood Avenue is already constructed; that the additional links to the Dixie Trail Thoroughfare, with the Ebenezer Church Road, with U.S. 70 and the Jefferies School Road are as set out in the Raleigh Thoroughfare Plan.

(11) That the change in zoning is that primarily of density only and does not constitute a change in zoning character — from residential to business, office or commercial.

(12) That a school has just been built in the area.

(13) That south of the Planned Unit Development, there are areas zoned R-10 — with apartments — a shopping center and areas zoned for office and institutional use.

(14) That Raleigh is a growing City; that a tremendous interest has been put upon the development of apartments. If the City is to maintain its growth, there will have to be more apartments.

(15) That the proposed location, based on studies of other cities is not contrary to good living, and in fact, it can enhance a neighborhood, if properly executed and properly maintained.

(16) That the zoning at R-10 would make less restrictions and better use of the subject property."

[8, 9] In our opinion the above findings negate plaintiffs' contention that the zoning here constitutes spot zoning. We further note that the 9.26 acres here involved forms a triangle-like area between a heavily traveled beltline system consisting of a right-of-way of 260 feet and a collector street with a right-of-way of 80 feet. (Compare the location of this area with that of the property involved in *Zopfi v. City of Wilmington, supra*). Also, the area here does not consist of a single lot or a few lots but covers 9.26 acres. While the

size of an area is seldom solely determinative of the question of whether an ordinance constitutes spot zoning, it is a factor that few courts are prone to overlook. See Note, Spot Zoning and The Comprehensive Plan, 10 Syracuse L. Rev. 303 (1959).

Plaintiffs counter by pointing to the fact that much of the area surrounding the rezoned property is quiet, orderly, and a "high-class" residential area. They quote at length from the case of *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, where it was noted that apartment development within an area of detached residences may utterly destroy the residential character of the neighborhood and its desirability as a place for detached residences and may come very near to being a nuisance. That landmark case which first recognized municipal planning and regulation of land use as a valid exercise of the police power of the states was decided in 1926. Since that time more and more people have turned to apartments as permanent homes — many by choice. Few, if any, cities today enjoy the luxury of having enough land available to accommodate substantially all of their citizens in detached houses. Consequently, more land often has to be made available for apartments under existing zoning regulations. Many modern and luxurious apartment buildings tend to compliment the area where they are located. We are therefore not persuaded that conditions today are the same as those that prompted the dicta in the *Euclid* case almost half a century ago.

[10, 11] Turning to plaintiffs' second contention, we fail to find that any violation of the City's announced policies respecting zoning has been established. It is true that while passing on several zoning applications in past years individual councilmen have noted as one of their objections to the requested changes that property involved was located on the beltline but not near an interchange. It is undisputed that the property here is not on an interchange. However, we do not regard such informal statements as establishing an inflexible rule that is binding on the Council when considering future zoning applications. Also, on 1 May 1967, the City Council adopted a resolution stating *inter alia* that except under certain circumstances that are not here applicable it would not rely upon specific use or plan proposals in its determination of zoning matters. A specific plan for the use of the property in question was presented to the Council by Blue Ridge. However, the evidence does not compel a finding that the plans were *relied upon* by the Council in making its determination.

[12] Plaintiffs' third assignment of error is to the admission of evidence as to future plans for construction of streets and thoroughfares in the area and findings made by the court which are based on

this evidence. The evidence questioned is a long-range thoroughfare plan for the Raleigh urban area that was prepared in 1967 by a private engineering firm employed by the North Carolina State Highway Department and the City of Raleigh for that purpose. The period of the plan extends through 1985. This plan constitutes the background document for the City Thoroughfare Plan map which was offered in evidence by the plaintiffs as their Exhibit No. 18. Since plaintiffs themselves introduced the Thoroughfare Plan map they are in no position to complain that the document on which the map is based was thereafter admitted into evidence. Plaintiffs' Exhibit No. 18 is, in fact, page 65 of defendants' Exhibit No. 2, which is the thoroughfare plan objected to. Furthermore, we do not find that the court's findings respecting these plans are irrevelant. The plans are not speculative in nature but constitute plans for a thoroughfare system that are now actually being implemented. The matter of zoning is prospective because it in effect constitutes planning as to how a city or town will be developed in the future, and in designing zoning regulations to prevent and relieve traffic congestion it is important that streets and thoroughfares planned for an area be considered as well as those in existence. This assignment of error is overruled.

[13] The trial court sustained a defense objection to a question asked one of the plaintiffs regarding the general volume of traffic on Glen Eden Drive. The witness would have answered that there was a small amount of traffic on Glen Eden. Plaintiffs assign the exclusion of this testimony as error. We do not see how they have been harmed by such a ruling. If the traffic is in fact lighter in their neighborhood than in other areas of the City they have even less cause to complain that it may be increased as a result of the rezoning.

[14] Plaintiffs' Exhibits Nos. 20 and 21 are paper writings purporting to establish certain zoning criteria for the City of Raleigh. Exhibit 20 was admitted into evidence over defendants' objection. The court refused to admit Exhibit 21 and plaintiffs assign this as error. Plaintiffs attempted to identify the document through the testimony of a City planning technician who stated to the court: "I can't personally answer the origin of this. It is my understanding of this document would be that a list of areas for discussion between the Planning Commission and the Council, meeting some time ago." His testimony also indicated the document was prepared after the property in question had been rezoned. Under these circumstances the court properly refused to admit the document into evidence. Both documents appear to be nothing more than general notes set-

ting forth what someone (we know not who) regards as sound zoning practice. This assignment of error is overruled.

[15] Finally plaintiffs complain that the Mayor and three City Councilmen were not ordered to answer certain questions asked them on adverse examination. We do not decide the question raised regarding the right of plaintiffs to adversely examine these City officials in the first place. Suffice to say the questions which form the basis of plaintiffs' assignment of error constituted an inquiry into the motives of these elected officials. We find the following in 5 McQuillin, Municipal Corporations, § 16.90, p. 287:

> "Except as they may be disclosed on the face of the act or are inferrible from its operation, the courts will not inquire into the motives of legislators in passing or doing an act, where the legislators possess the power to pass or do the act and where they exercise that power in a mode prescribed or authorized by the organic law. Therefore, neither the motives of the members of a municipal legislative body nor the influences under which they act can be shown to nullify an ordinance duly passed in legal form, within the scope of their powers. In such case the doctrine is that the legislators are responsible only to the people who elect them."

In our opinion the court properly denied plaintiffs' motion to compel answers to the questions propounded.

[16] This case has been well briefed and strenuously argued by counsel for plaintiffs. However, this court is bound by the well accepted principle that how a city or town shall be zoned or rezoned and how various properties shall be classified or reclassified rests with the municipal legislative body and its judgment is presumed to be reasonable and valid and beyond judicial interference unless shown to be arbitrary, unreasonable or capricious. The burden of establishing such arbitrariness is on the one asserting it. *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600; *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870; *Beverages, Inc. v. City of New Bern,* 6 N.C. App. 632, 171 S.E. 2d 4. The court's findings, which are supported by competent evidence, support the conclusions made and judgment entered.

Affirmed.

BRITT, J., concurs.

BROCK, J., dissents.

HOUSTON D. MEARES, D/B/A DIXIE FIRE & SPRINKLER COMPANY v. NIXON CONSTRUCTION COMPANY

No. 7026SC27

(Filed 6 May 1970)

1. Contracts §§ 21, 28— action for breach of contract — instructions

In an action by a subcontractor against a general contractor to recover damages for breach of contract, the contract *is held* to have contemplated that the contractor, and not the subcontractor, had the responsibility of relaying the subcontractor's monthly estimates of work completed to the owner for its approval before the subcontractor was to be paid; and where the subcontractor's evidence was to the effect that he timely submitted the monthly estimates to the contractor and that the estimates were not paid within thirty days as provided by the contract, the trial court properly instructed the jury that it would be their duty to find that the contractor breached the contract if they found that he failed to pay the estimates within thirty days, the jury not being required also to find that the owner had approved the estimates.

2. Contracts § 12— construction — intention of the parties

The heart of a contract is the intention of the parties, which is to be ascertained from the language used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

3. Contracts § 12— construction

A contract is to be construed as a whole.

4. Contracts §§ 26, 29— breach of contract — damages — lost profits — evidence of anticipated profits

In an action by a subcontractor against a general contractor for breach of contract, the measure of lost profits was the difference between the contract price and the subcontractor's cost to complete the work under the contract; and the admission of the subcontractor's testimony that his anticipated profit was 20% of the contract price was erroneous, since the testimony did not provide an adequate factual basis for the jury to ascertain the measure of damages.

5. Contracts § 29— breach of contract — measure of damages

In a suit for damages arising out of a breach of contract, the party injured by the breach is entitled to be fully compensated for the loss and to be placed as near as may be in the position which he would have occupied had the contract not been breached.

6. Contracts § 29— breach of contract — profits and losses — determination

In an action for damages for breach of a construction contract, the profits and losses must be determined according to the circumstances of the case and the subject matter of the contract.

7. Contracts § 27— breach of contract — evidence

A party seeking to recover for "gains prevented" or "lost profits" must present evidence rather than speculation.

APPEAL by defendant from *Ervin, J.*, 19 May 1969 Schedule "C" Session, MECKLENBURG Superior Court.

This is a civil action arising in contract brought by plaintiff against Nixon Construction Company and D. H. Overmyer Company, Inc. (Overmyer). Before trial plaintiff caused judgment of voluntary nonsuit to be entered as to Overmyer, therefore, Nixon Construction Company will be referred to hereinafter as defendant.

The pleadings and evidence reveal that plaintiff was in the business of installing fire sprinkler systems and defendant was a general contractor constructing warehouses for Overmyer in Charlotte, North Carolina, Birmingham, Alabama, and Cleveland, Ohio. The complaint, filed on 11 January 1968, and amendments to the complaint set forth four causes of action summarized as follows:

(1) On or about 25 October 1965 and on or about 8 April 1966, plaintiff and defendant entered into a contract whereby plaintiff agreed to install an automatic sprinkler system in a warehouse being built by defendant for Overmyer in Charlotte, N. C., the total contract price being $38,803.00. Plaintiff properly performed all of its obligations under said contract and there remains due and owing plaintiff the sum of $15,935.76 after giving credit for all payments. Although plaintiff has made demand on defendant for payment, defendant has failed to pay the balance due.

(2) On or about 8 April 1966, plaintiff and defendant entered into a contract whereby plaintiff agreed to install an automatic sprinkler system in a building being constructed by defendant for Overmyer in Birmingham, Alabama, the total contract price being $32,395.00. Plaintiff began work on said sprinkler system and performed all of the work which could be done as of 30 April 1966 and on that date submitted an invoice for such work in amount of $8,460.00 to defendant. Defendant failed to pay the invoice within thirty days as required by the contract, which failure to pay amounted to a material breach of the contract by defendant. Although plaintiff attempted to complete the contract, in July he was notified by defendant's parent corporation that his contract was terminated. Plaintiff is entitled to recover $10,444.51 from defendant for breach of the Birmingham contract.

(3) On or about 14 April 1966, plaintiff and defendant entered into three contracts whereby plaintiff agreed to install automatic sprinkler systems in warehouses being built by defendant for Overmyer in Cleveland, Ohio, the total contract price being $101,000.01 plus an additional $6,500.00 for substitution of iron pipe. Pursuant to the terms of the contracts, plaintiff began work on said sprinkler

systems, submitting invoices totaling $36,846.00 to defendant for work done to date on 26 May 1966. Defendant paid plaintiff on one of the invoices submitted but failed and refused to pay the other invoices within thirty days after their submission as required by the contracts, which failure to pay amounted to a material breach of the contracts on the part of defendant. Although plaintiff attempted to complete work on the Cleveland contracts, he was notified by defendant on or about 19 July 1966 that his contracts were terminated. Defendant is indebted to plaintiff in the sum of $29,948.49 under said Cleveland contracts and refuses to pay the same although payment has been demanded by plaintiff.

(4) During the latter part of 1965 and early in 1966, defendant requested plaintiff to prepare and furnish to defendant drawings for automatic sprinkler systems which could be utilized by defendant in various warehouses which it proposed to construct. Plaintiff prepared and furnished defendant with said drawings, the reasonable value of the drawings being $2,500.00, but defendant has failed to pay for said drawings although payment has been demanded.

In its original answer, defendant set forth a general denial of the allegations of the complaint, denying that it was indebted to plaintiff in any amount. Immediately before the trial, defendant filed an amendment to its answer and a counterclaim alleging that plaintiff breached the Birmingham and Cleveland contracts, making it necessary for defendant to employ other firms to complete the contracts at sums substantially higher than those contracted by plaintiff; defendant prayed judgment against plaintiff for breach of the Birmingham contract in amount of $4,806.75 and on the Cleveland contracts in amount of $111,110.79.

During the trial the parties entered into a stipulation regarding the Charlotte contract and agreed that the first issue would be answered in favor of plaintiff in amount of $13,738.76.

Plaintiff introduced evidence in support of the allegations of his complaint. His evidence tended to show that although the contracts provided that defendant would make monthly payments on estimate invoices submitted by plaintiff, defendant refused to make said payments; that plaintiff attempted to continue to perform his contracts in Birmingham and Cleveland but was prevented from doing so by defendant or defendant's parent corporation.

By cross-examination of plaintiff and by its own witnesses, defendant's evidence tended to show: Plaintiff completed most of the underground work on the Birmingham contract. By late June of 1966 construction of the building had progressed to the stage that de-

fendant was ready for plaintiff to install the interior portion of the sprinkler system. On 28 June 1966, an official of defendant's parent corporation sent plaintiff a telegram demanding that plaintiff put a crew of at least ten men on the Birmingham job. On 1 July 1966, the same official sent plaintiff another telegram stating, "Since you have not complied with the terms of your contract nor answered my telegram dated June 28, 1966 we are hereby cancelling your contract effective this date." Defendant employed another firm to complete the job at a cost greater than the price contained in the contract between the parties. As to the Cleveland contracts, within a few hours after plaintiff's employees began work they were stopped because of failure to obtain clearance from the labor union. While attempting to work out arrangements with the union, plaintiff subcontracted preliminary work to Cleveland contractors. Plaintiff failed to reach an agreement with the union and continued his efforts to subcontract the work. On 14 July 1966, an official of defendant's parent corporation sent plaintiff a telegram stating, "We require you to start work on the Cleveland job Monday morning July 18, 1966 or we will be forced to invoke paragraph 11 of our contract with you." (Paragraph 11 provides as follows: "The General Contractor shall give the Subcontractor reasonable time to settle any labor disputes, but if the Subcontractor has a work stoppage for a period of over 3 days, for any reason, the General Contractor shall have the right to have said work performed by others at the expense of the Subcontractor.") On 19 July 1966, the same official sent plaintiff a telegram terminating the contracts "because of your failure to fulfill the obligations of your contract." Defendant then arranged for the sprinkler system to be completed by others at a cost considerably higher than the price contracted with plaintiff.

Other pertinent evidence is set forth in the opinion.

Issues were submitted to and answered by the jury as follows:

"1. In what amount is the defendant indebted to the plaintiff on the Charlotte contract?

ANSWER: $13,738.76

2. Did the defendant breach the Birmingham contract, as alleged in the complaint?

ANSWER: Yes

3. If so, what amount, if any, is the plaintiff entitled to recover from the defendant on the Birmingham contract?

ANSWER: $10,444.51

4. Did the plaintiff breach the Birmingham contract, as alleged in the Answer and Counterclaim?

ANSWER: .....

5. If so, what amount, if any, is the defendant entitled to recover from the plaintiff on the Birmingham contract?

ANSWER: .....

6. Did the defendant breach the Cleveland contracts, as alleged in the complaint?

ANSWER: Yes

7. If so, what amount, if any, is the plaintiff entitled to recover from the defendant on the Cleveland contracts?

ANSWER: $11,139.13

8. Did the plaintiff breach the Cleveland contracts, as alleged in the Answer and Counterclaim?

ANSWER: .....

9. If so, what amount, if any, is the defendant entitled to recover from the plaintiff on the Cleveland contracts?

ANSWER: .....

10. Did the plaintiff and the defendant have a contract for the plaintiff to furnish and deliver drawings for automatic sprinkler systems to the defendant in addition to the drawings required by the contracts in controversy, as alleged in the complaint?

ANSWER: No

11. If so, what is the reasonable value of such drawings?

ANSWER: ....."

From judgment in favor of plaintiff predicated on the verdict, defendant appealed.

Fairley, Hamrick, Monteith & Cobb by Laurence A. Cobb for plaintiff appellee.

Ernest S. DeLaney, Jr., for defendant appellant.

BRITT, J.

[1] In its brief defendant states its contention regarding the first assignment of error as follows: "The Court below committed error when it instructed the jury it should find that the defendant breached the contracts by failing to pay the estimates within thirty days without the jury first finding that said estimates had been approved."

A portion of the charge included in this assignment of error is as follows:

> "By way of summary, ladies and gentlemen, with regard to the second issue, 'did the defendant breach the Birmingham contract, as alleged in the complaint?' the court instructs you that if you find from the evidence and by its greater weight, the burden being upon the plaintiff on this issue to so satisfy you, that the defendant, Nixon, failed to pay the invoices submitted to them in accordance with the paragraphs of the contract that I have previously read to you, and that the defendant's delays or refusals to make these payments were not reasonable delays, and that there was no bona fide dispute in existence as to the amounts due at that time or as to the percentage of the work completed, and if you further find from the evidence and by its greater weight that the plaintiff had not at that time previously breached the contract, then and in that event the court instructs you it would be your duty to answer the first issue 'yes.' On the other hand, if you fail to so find, or if after considering all of the evidence, you are unable to say where the truth lies or if you find the evidence evenly balanced, then and in any of these events it would be your duty to answer the second issue 'no.' If, however, the work had not progressed to the point required to permit the submission of the invoices and to require payment thereof, or if you find that under the circumstances the delays in payment, if any, were reasonable, that is, that the defendant had reason to believe that the work had not progressed and was not progressing according to the contract and that the plaintiff was not under the terms of the contract entitled to submit or to have the submitted invoices paid, at the time of their submission in accordance with the provisions of the contract, then it would be your duty to answer the second issue 'no.' "

Later in the charge the trial judge gave a similar instruction regarding the Cleveland contracts. Previous to the instruction above set forth the court quoted paragraphs (A), (B) and (C) of section 6 of the contracts but did not quote the proviso of section 6 preceding paragraph (A). Sections 3, 5 and 6 of the contracts provided as follows:

> "3. The General Contractor agrees to pay to the Subcontractor for the performance of the above described work the sum of [amount specified in each contract] in current funds, subject to additions and deductions for changes as may be agreed upon, and to make payments on account thereof in accordance with Section 6 hereof.

* * *

5. The Subcontractor shall present to the General Contractor a monthly estimate of work completed for the full month; said estimate to be submitted not later than Saturday of the month of the completion of said work.

* * *

6. Provided this agreement has been approved by the Owner, the Owner shall upon approval of said estimate, make payments on account to Subcontractor on behalf of the General Contractor as follows:

(A) The estimates shall show percentages of work completed and, where applicable, amounts requested for payment. Unless otherwise agreed, such requests for payment shall be made only once monthly and submitted for the full month not later than the 5th day of the following month. Such requested amounts, less the retained percentages as specified below, shall be paid within 30 days after the date submitted in New York office.

(B) Prior to receipt of each payment, the Subcontractor shall, upon request of General Contractor or Owner, furnish lien waivers for all work, labor and material performed and furnished through date for which each payment becomes due.

(C) The General Contractor and the Owner shall retain 10% of the amount due on each payment until final payment becomes due."

[2, 3] The gist of defendant's argument is that before plaintiff could justify a termination of his work on the Birmingham and Cleveland contracts for failure of defendant to pay monthly estimates when due, plaintiff had the burden of showing that the owner (Overmyer) approved the estimates. We do not accept this argument. In 2 Strong, N.C. Index 2d, Contracts, § 12, p. 315, is found a concise resume of certain well-settled principles of law with respect to construction of contracts; these include the following: "The heart of a contract is the intention of the parties, which is to be ascertained from the language used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. * * * A contract is to be construed as a whole * * *."

[1] Needless to say, the contract does not clearly state who had the responsibility of relaying the monthly estimates from defendant to the owner and seeking their approval, but considering "the sub-

ject matter, the end in view, the purpose sought, and the situation of the parties," we think the contract contemplated that defendant had this responsibility. The invoices of monthly estimates submitted by plaintiff complied with defendant's requirements as to form; they also complied with "Instructions To Sub-Contractors" provided by defendant's parent corporation (plaintiff's exhibit 14). Evidently, defendant did not expect plaintiff to exercise such responsibility regarding invoice No. 103 for the Cleveland job as the evidence discloses that this invoice, dated 26 May 1966, was paid on 13 July 1966. Plaintiff's evidence discloses that in connection with the Birmingham job he timely submitted to defendant estimate invoices dated 30 April 1966 for $7,614.00 and 30 May 1966 for $6,963.75 and that neither was paid. Plaintiff testified: "I was in contact with the Accounts Payable Department in New York with reference to payment of these invoices. They never gave me a reason why these invoices were not paid." Plaintiff's evidence further discloses that he submitted two estimate invoices to defendant on the Cleveland job and they were not paid.

We think the instructions complained of were fully justified by the pleadings and the evidence; the assignment of error is overruled.

[4] Defendant assigns as error the admission of certain testimony by plaintiff on the question of the amount of damages sustained by plaintiff, and instructions to the jury pertaining thereto.

On direct examination and over defendant's objection, plaintiff testified substantially as follows: His actual net cost on the Birmingham job was $7,668.62 and lost profits amounted to $6,479.00, a total of $14,147.62. The profit figure of $6,479.00 was arrived at "just like we estimate every job, 20%. This includes overhead and profits." Nixon paid American Cast Iron Company $3,703.11 after that firm filed a lien; after giving credit for that payment, plaintiff's "net cost" was $10,444.51 which included a "lost profit" item of $6,479.00. With respect to the Cleveland jobs, over defendant's objection plaintiff testified substantially as follows: At the time he prepared his bid, he calculated an overhead and profit figure of $21,500.00. This was based on 20% of the total. The total amount of plaintiff's cost and loss of profits in connection with the Cleveland jobs was $29,948.49.

Plaintiff presented no evidence as to what it would have cost him to complete the Birmingham and Cleveland jobs. Regarding the Cleveland underground system job, plaintiff testified:

> "For getting about 400 feet of pipe in the ground my company had incurred expenses in excess of what is shown on the contract form. This is the contract that I had signed and if I had been

able to complete the contract I would have incurred costs substantially greater than the amount that appears on the contract."

The amount specified in the Birmingham contract was $32,395.00. Defendant presented evidence tending to show that it paid Charlotte Automatic Sprinkler Company $27,925.00 to complete the Birmingham job and that other payments made thereon brought defendant's total cost to $34,445.36. Defendant's evidence tended to show that the Cleveland underground job cost defendant $83,695.95 as opposed to plaintiff's contract for $40,166.67; that the Cleveland interior jobs cost defendant $54,466.00 for each building as opposed to plaintiff's contract for $33,667.00 for each building.

In his charge to the jury, the trial judge recapitulated plaintiff's evidence regarding loss of profits and later in the charge on the question of damages said:

"Now, applying this rule as the court has attempted to give it to you in this case, the court instructs you that if you answer the third issue and if you consider the third issue, then you should consider as damages the following things: the unpaid balance of the contract price, if any, to which the plaintiff would be entitled; second, lost profits and, as I have previously indicated to you, you would determine that item if you determine it in any amount, by taking the contract price and by subtracting from that contract price what it would have cost the plaintiff in this instance to complete the contract, because the evidence, of course, would indicate that he did not complete this particular contract and that would be an item that would have to be deducted before you could make any determination of lost profits, if you make such a determination."

With respect to the issue on amount of damages on the Cleveland contracts, the court instructed:

"The measure of damages on this issue would be the same as the measure of damages on the third issue I gave you with regard to the Birmingham contracts. I will not repeat those instructions."

The assignment of error is well taken. Defendant's objections to plaintiff's testimony as to how plaintiff estimated his loss of profits should have been sustained. With proper evidence to support them, the court's instructions would have been correct, but this was not the case.

[5-7] In a suit for damages arising out of a breach of contract, the party injured by the breach is entitled to full compensation for

the loss and to be placed as near as may be in the position which he would have occupied had the contract not been breached. *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962). In an action for damages for breach of a construction contract, the profits and losses must be determined according to circumstances of the case and the subject matter of the contract. *Construction Co. v. Crain and Denbo, Inc., supra.* A party seeking to recover for "gains prevented" or "lost profits" must present evidence rather than speculation.

In *Tillis v. Cotton Mills*, 251 N.C. 359, 111 S.E. 2d 606 (1959), the court said "damages must be certain, and this certainty which is required does not refer solely to their amount, but also to the question whether they will result at all from the breach." As the court said in *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963), "For a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed." The measure of lost profits in the instant case is thus the difference between the contract price and what it would have cost plaintiff to complete the work under the contract. It was also said in *Tillis v. Cotton Mills, supra,* "It it incumbent upon the plaintiff to present facts, as to all foreseeable factors involved, that the jury may have a basis for determining damages." The testimony of plaintiff that his *anticipated* profit was 20% of the contract price does not provide an adequate factual basis for the jury to ascertain the measure of damages under the standard of certainty established by the decisions of our Supreme Court.

Although the assignment of error relating to the determination of damages is sustained, we do not think a new trial of all issues is warranted. We think that defendant had a fair trial on all issues except issues No. 3 and No. 7. For that reason the judgment of the superior court is vacated and this cause is remanded for further hearing on the question of damages, if any, due plaintiff on the Birmingham and Cleveland contracts.

Error and remanded.

BROCK and GRAHAM, JJ., concur.

WILLIAM G. CRABTREE v. COATS & BURCHARD COMPANY

No. 7026SC229

(Filed 6 May 1970)

1. Appeal and Error § 28— broadside exception to findings of fact

An exception "to the Findings of Fact for the reason that they are not sufficient to support the conclusions of law and the judgment" is broadside and does not present for review the admissibility of the evidence on which the findings were made or the sufficiency of the evidence to support the findings.

2. Appeal and Error § 57— appellate review of findings of fact

Where there was ample competent evidence to support the findings of fact made by the trial court, they are conclusive.

3. Process § 14— foreign corporation — service on Secretary of State — transaction of business in this State

In this action against a foreign corporation for commissions on sales by plaintiff as defendant's sales representative in this State and nine other states, findings of fact supported by competent evidence are sufficient to support the conclusion that defendant is a foreign corporation transacting appraisal business in this State without a certificate of authority to do so, that a substantial portion of plaintiff's cause of action arose out of business transacted in this State, and that service of process on the Secretary of State under G.S. 55-144 was sufficient to give the court jurisdiction over the person of defendant.

4. Process § 14— foreign corporation — service on Secretary of State — performance of contract in this State

In this action against a foreign corporation for commissions on sales by plaintiff as defendant's sales representative in this State and nine other states, the fact that defendant rented and maintained an office in this State for the use of plaintiff shows that the contract made in another state between plaintiff and defendant was to be substantially performed in this State so as to render defendant amenable to service of process under G.S. 55-145(a)(1) by service on the Secretary of State.

5. Process § 14— foreign corporation — service on Secretary of State — minimum contacts within this State

Defendant foreign corporation had sufficient contacts within this State to support service of summons on it by service on the Secretary of State under G.S. 55-145(a)(1), where defendant's business in this State has been a continuing one, and a substantial portion of plaintiff's alleged cause of action arose out of these substantial contacts within this State.

6. Process § 14— foreign corporation — service on Secretary of State — sufficiency of summons

In this action against a foreign corporation for sales commissions, summons which commands the sheriff to summon "the following named" to appear and answer the complaint, states that the manner of service shall be by delivery of the summons and complaint personally to the Secretary of State, and thereafter names corporate defendant as defendant *is held* sufficient to give the court jurisdiction of defendant, the correct interpre-

tation of the language of the summons being that the sheriff is commanded to summon the defendant named therein by delivering a copy of the summons and complaint to the Secretary of State.

APPEAL by defendant from *Copeland, S.J.,* 15 December 1969 Schedule "D" Non-Jury Session of Superior Court held in MECKLENBURG County.

This is a civil action by plaintiff, a resident of Mecklenburg County, to recover of corporate defendant, an Illinois corporation having its principal office in Chicago, the sum of $25,598.76 allegedly due for commissions on sales by plaintiff as defendant's sales representative of appraisal and annual revision services in North Carolina, South Carolina, Virginia, West Virginia, Tennessee, Alabama, Georgia, Florida, Mississippi and Louisiana.

The action was commenced on 12 May 1969 by the issuance of a summons by the Clerk of Superior Court of Mecklenburg County addressed to the Sheriff of Wake County. The summons was issued in the case of "William G. Crabtree, Plaintiff, against Coats & Burchard Company, Defendant," and it was served by the Sheriff of Wake County on 14 May 1969 by delivering copies of the summons and complaint to Thad Eure, Secretary of State of North Carolina.

On 10 June 1969 defendant entered a special appearance solely for the purposes of its motion and moved to dismiss, asserting that the court had not acquired jurisdiction over the person of the defendant. On 17 December 1969 defendant entered a special appearance solely for the purpose of renewing its motion "that the service of summons be quashed and that this action be dismissed for that the Court has not in this action properly acquired jurisdiction over the person of this Defendant."

After hearing the evidence offered by the parties, Judge Copeland, under date of 17 January 1970, made findings of fact, conclusions of law, and entered the following order:

"1. The Plaintiff is presently a citizen and resident of Mecklenburg County, State of North Carolina.

2. That at all times the Plaintiff was working for the Defendant he was a citizen and resident of Mecklenburg County, State of North Carolina and maintained his home there.

3. Defendant is a corporation organized and existing under the laws of the State of Illinois and having its principal place of business at 4415 North Ravenswood Avenue, Chicago, Illinois. The Defendant has never secured a certificate of authority from the Secretary of State of North Carolina to transact business in the State of North Carolina.

4. The Defendant is in the appraisal business and employs salesmen in various sections of the country. Such salesmen call on customers and prospective customers of the Defendant in the states in their area of responsibility in order to obtain appraisal work.

5. Plaintiff was employed by Defendant at its office in Chicago, Illinois in 1963.

6. Plaintiff was employed as a sales representative for Defendant in a territory which included Virginia, South Carolina, North Carolina, Tennessee, Georgia, Mississippi, Alabama, Louisiana, Florida and West Virginia.

7. Defendant maintained an office in Charlotte during the term of Plaintiff's employment. The office had an answering service and public stenographers were used when the need arose.

8. Plaintiff, the sole user of the aforesaid office, spent no more than 5% of his time in the office.

9. Plaintiff earned on the average $15,000 to $16,000 in commissions annually in his employment with Defendant, of which amount approximately $4,000 to $5,000 arose out of work done by him in North Carolina.

10. Plaintiff's cause of action is based, in the main, on commissions allegedly due from sales made by him during the term of his employment with Defendant. Of the commissions sued for, forty-four (44) arose from sales made outside of North Carolina and twenty-one (21) arose from sales made in North Carolina. In terms of dollar value, the Plaintiff is claiming commissions on gross sales in the amount of $214,552.14, which may be broken down as follows: gross sales in North Carolina — $56,155.00; gross sales in other states — $158,397.14. Put another way, of commissions the Plaintiff is suing for, approximately ¼ to ⅓ arose on sales he made in North Carolina and ⅔ to ¾ on sales he made outside of North Carolina.

11. During the term of Plaintiff's employment with Defendant, and at all times relevant to the matter at issue, Defendant sent field appraisers into North Carolina, which appraisers spent hundreds of man days in the State on Defendant's behalf.

12. During the term of Plaintiff's employment, Defendant billed its North Carolina customers thousands of dollars.

And the Court concludes as a matter of law that:

1. Service on the Defendant corporation was valid under the

provisions of Section 55-144 or Section 55-145(a)(1) of the General Statutes of North Carolina, and that the General Court of Justice, Superior Court Division, Mecklenburg County, properly acquired jurisdiction of the Defendant.

2. The mechanics of service provided for by Section 55-144 and Section 55-145(c) were satisfied by service of the summons on the Secretary of State of the State of North Carolina by the Sheriff of Wake County, North Carolina.

NOW, THEREFORE, IT IS ORDERED that the Defendant's motion to dismiss the action against the Defendant for that the Court has not in this action properly acquired jurisdiction of the person of the Defendant and the Defendant's motion that the service of summons be quashed are denied, and the Defendant is allowed thirty (30) days from the date of this order to file answer or otherwise plead.

Signing of this order out of term and out of the district was consented to in open Court by counsel for the Plaintiff and counsel for the Defendant."

Upon the entry of this order, the defendant assigned error and appealed to the Court of Appeals.

Robert D. Potter for plaintiff appellee.

McLendon, Brim, Brooks, Pierce & Daniels by Claude C. Pierce and James T. Williams, Jr., for defendant appellant.

MALLARD, C.J.

Appellant has only four exceptions and three assignments of error.

[1, 2] Defendant's exception number one is that "(d)efendant objects and excepts to the Findings of Fact for the reason that they are not sufficient to support the conclusions of law and the judgment." There was no exception made to any particular finding of fact. This exception is broadside and does not present for review the admissibility of the evidence on which the findings were made or the sufficiency of the evidence to support the findings. 1 Strong, N.C. Index 2d, Appeal and Error, § 28. However, there was ample competent evidence to support the findings of fact made by Judge Copeland, and they are conclusive. *Equipment Co. v. Equipment Co.*, 263 N.C. 549, 140 S.E. 2d 3 (1965); *Farmer v. Ferris*, 260 N.C. 619, 133 S.E. 2d 492 (1963).

Defendant's exception number two is that "(d)efendant objects and excepts to the Court's first conclusion of law for the reason that it is not supported by the Findings of Fact and is contrary to law."

[3] Defendant contends that plaintiff's cause of action did not arise out of business which defendant transacted in North Carolina. G.S. 55-144 reads in pertinent part:

> "Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State * * * then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served."

Applying the provisions of this statute, G.S. 55-144 to the facts found by the court, we are of the opinion and so hold that the defendant was a foreign corporation transacting business in this State without obtaining a certificate of authority from the Secretary of State to do so, and that a substantial portion of plaintiff's cause of action arose out of such business. *Mills v. Transit Co.*, 268 N.C. 313, 150 S.E. 2d 585 (1966). The defendant was conducting business in this State with the plaintiff and other residents of this State and maintained an office in Charlotte for that purpose. This is not a transitory cause of action arising in another state but is local in nature. *R. R. v. Hunt & Sons, Inc.*, 260 N.C. 717, 133 S.E. 2d 644 (1963).

Defendant was in the appraisal business and was soliciting and performing appraisal work in North Carolina. It was thus transacting and performing in this State the business for which it was created. See *Harrington v. Steel Products, Inc.*, 244 N.C. 675, 94 S.E. 2d 803 (1956), and *Lambert v. Schell*, 235 N.C. 21, 69 S.E. 2d 11 (1952). The findings of fact, interpreted in the light of the evidence in this case, show that the activities of the defendant in North Carolina, have been continuous and systematic for several years beginning in 1963. *Equipment Co. v. Equipment Co., supra.* We do not agree with defendant's contention that under the factual situation here, the provisions of G.S. 55-131 exclude it from the operation of the provisions of G.S. 55-144.

Since the defendant does not contend that it has a process agent in North Carolina, service on the Secretary of State is sufficient to bring the defendant into court. G.S. 55-144; G.S. 55-146; *Babson v. Clairol, Inc.*, 256 N.C. 227, 123 S.E. 2d 508 (1962).

[4] Defendant also contends that it is not amenable to jurisdiction in North Carolina under the provisions of G.S. 55-145(a)(1), which reads as follows:

"(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
(1) Out of any contract made in this State or to be performed in this State; or * * *."

We think that the provisions of G.S. 55-145(a)(1) are also applicable to the factual situation in this case. Even if it should be conceded for the sake of argument that the defendant was not transacting business in this State, the contract made in the State of Illinois between the plaintiff and the defendant was to be substantially performed in the State of North Carolina. The fact that defendant rented and maintained an office for the use of plaintiff is a clear indication that the contract between plaintiff and defendant was to be substantially performed in North Carolina.

[5] The foregoing statute, G.S. 55-145(a)(1), clearly provides a means for bringing the defendant foreign corporation into the courts of this State. We are of the opinion and so hold that the applicability of G.S. 55-145(a)(1) is consistent with the Federal requirements of due process. In this case, the minimum contacts necessary to the jurisdiction of the North Carolina courts do exist. *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L. Ed. 95 (1945). See also *Shepard v. Manufacturing Co.,* 249 N.C. 454, 106 S.E. 2d 704 (1959).

In *Byham v. House Corp.,* 265 N.C. 50, 143 S.E. 2d 225 (1965), the action was for damages for a breach of contract by a foreign corporation, and it was held that the requirements of G.S. 55-145(a)(1), subjecting such corporation to suit in North Carolina, were met. The Court pointed out that the contract not only designated the place of performance but also limited its performance to the Durham area. The Court gave a list of several factors to be considered in determining whether the test of "minimum contacts" and "fair play" had been met in order to obtain *in personam* jurisdiction over a foreign corporation. Applying the rules set out in *Byham,* we are of the opinion that the facts in this case show substantial contacts within this State. The defendant's business was a continuing one. A substantial portion of the plaintiff's alleged cause of action arose out of these substantial contacts within the State. See *Perkins v. Benguet Consol. Min. Co.,* 342 U.S. 437, 96 L. Ed. 485, 72 S. Ct. 413; *International Shoe Co. v. Washington, supra.*

[6] Appellant contends in its third exception that the summons was not sufficient to give the court jurisdiction of defendant, in that, it did not direct the sheriff to summon the defendant. We do not agree. The summons, in pertinent part, reads as follows:

> "To the Sheriff of Wake County, North Carolina—GREETING: YOU ARE COMMANDED TO SUMMON the following named to appear and answer the Complaint of the plaintiff, and the manner of your service shall be the delivery of copies of this Summons and of the Complaint, personally to: Secretary of State, State of North Carolina
>
> | Defendant | Address |
> | --- | --- |
> | Coats & Burchard Company | 4413 Ravenswood Avenue
Chicago, Illinois |
>
> LET EACH DEFENDANT TAKE NOTICE that, within THIRTY DAYS after the service of this Summons, a written Answer to the Complaint must be filed at the office of the undersigned Clerk, or such other defense asserted as the law allows or prescribes, and that if no appropriate response is made within that time, the plaintiff will apply to the Court for relief demanded in the Complaint."

Defendant cites the case of *Distributors v. McAndrews,* 270 N.C. 91, 153 S.E. 2d 770 (1967). *Distributors* is distinguishable from the case before us. In *Distributors* the summons, which was held to fail to give the court jurisdiction of the defendants, in pertinent part required the sheriff to summon the Commissioner of Motor Vehicles of the State of North Carolina "as process agent for" the named defendants and did not command the sheriff to summon the defendants. The case of *Russell v. Manufacturing Co.,* 266 N.C. 531, 146 S.E. 2d 459 (1966), cited by appellant, is also distinguishable from the case before us. In *Russell,* the summons, which was held improper, required the sheriff to summon the "local agent" of the corporate defendant and did not command the sheriff to summon the defendant.

We think a correct interpretation of the language used in the summons in this case is that the sheriff was commanded to summon the defendant named therein, Coats & Burchard Company, by delivering a copy of the summons and complaint to the Secretary of State. Although we do not consider the summons herein to be a model one, we hold that it was sufficient in form and content to comply with the provisions of G.S. 1-89 (the applicable statute in effect at the time of the issuance and service of this summons). G.S. 1-89 was repealed effective 1 January 1970, and statutory authority relating to the

content of a summons is now contained in G.S. 1A-1, Rule 4. The parties stipulated that "the Summons was issued on May 12, 1969, served on the Secretary of State of North Carolina on May 14, 1969, and the Summons and a copy of the Complaint were duly forwarded by the Secretary of State to the Defendant by registered mail." It does not appear that there was a failure to comply with the provisions of G.S. 55-146. Moreover, the defendant received actual notice of the action.

Defendant's fourth exception is to the signing and entry of the order. We fail to find any merit in this exception.

We conclude, therefore, that the summons is valid and that the State court has jurisdiction over the defendant herein under the provisions of G.S. 55-144 and also by virtue of the provisions of G.S. 55-145.

The order of Judge Copeland is

Affirmed.

MORRIS and VAUGHN, JJ., concur.

ROBERT MEEKS v. JOHN C. ATKESON, JR.

No. 693DC254

(Filed 6 May 1970)

1. Automobiles § 56— hitting vehicle stopped on highway — negligence — nonsuit

Plaintiff's evidence that defendant, who was searching for his lost cat, left his unlighted car at night parked across both lanes of a two-lane highway, *held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Automobiles § 76— hitting vehicle stopped on highway — plaintiff's contributory negligence — nonsuit

Plaintiff's evidence *held* insufficient to establish that he was contributorily negligent as a matter of law in striking defendant's unlighted automobile which was parked across both lanes of the highway in the nighttime, where the evidence would support a finding that (1) plaintiff was driving within his proper lane of travel at a speed of 55 mph in a 60 mph zone; (2) the brakes and steering mechanism of his car were in good

order; (3) when he was 250 feet away he first observed defendant's car and applied his brakes; (4) when he was 200 feet away and realized defendant's car was not moving he slammed on his brakes; (5) he attempted to pass to the left of defendant's car, saw that he could not make it, and turned back into his own lane, at which time his car began to skid toward defendant's car.

3. Automobiles § 8— unlighted car stopped on highway — nighttime — sufficiency of lookout

Plaintiff's testimony that he was driving 55 mph on a clear night and that he first observed defendant's unlighted car parked across both lanes of the highway when he was approximately 250 feet away, *held* to negate any inference that he failed to keep a proper lookout.

4. Automobiles § 13— use of lights at nighttime — compliance with statute

Plaintiff's testimony that he was 250 feet away when he first observed defendant's unlighted car parked across both lanes of the highway in the nighttime, *held* sufficient to show that plaintiff complied with G.S. 20-131(a) requiring the use of driving lights sufficient to render clearly discernible a person 200 feet ahead.

5. Automobiles § 12— stopping vehicle within radius of lights

Plaintiff's inability to stop his vehicle within the radius of his lights cannot be considered contributory negligence *per se.* G.S. 20-141(e).

6. Automobiles § 47— skid marks — jury question

It was a question for the jury (1) whether skid marks which ended approximately 50 feet from defendant's stopped automobile were marks made by plaintiff's car and (2) what speed the marks indicated.

APPEAL by plaintiff from *Wheeler, District Judge,* March 1969 Civil Session of PITT District Court.

This is a civil action to recover damages for personal injuries and property damages sustained by plaintiff on 1 March 1966 when his 1961 Oldsmobile automobile collided with defendant's 1950 Ford on U.S. Highway 13 near Buena-Vista in Bertie County, N. C. Plaintiff alleged defendant was negligent in unlawfully parking his automobile upon the paved and traveled portion of the highway at night without lights and in failing to give adequate warning of the hazard thereby created. Defendant denied negligence on his part and pleaded contributory negligence on the part of plaintiff in failing to keep a proper lookout, in driving at excessive speed, and in failing to keep his automobile under control when approaching defendant's stalled automobile, which defendant alleged was fully lighted.

Plaintiff offered evidence tending to show: At the scene of the collision U.S. Highway 13 runs generally north and south through a swampy, wooded area. The highway is paved with smooth asphalt

approximately 22-feet wide and has one lane for northbound and one lane for southbound traffic. About three-tenths of a mile north from the point of collision the highway passes through a crossroads known as Buena-Vista. Proceeding south from Buena-Vista the highway curves to the right and then straightens. The collision occurred on the straight portion of the highway south from the curve. Near the point of collision a small creek runs through a concrete culvert under the highway. The culvert has concrete abutments on each side, but there are no rails along the edge of the highway as it passes over the culvert. There was 22 feet between the two abutments. The posted speed limit is 60 miles per hour.

It had rained prior to the collision and the shoulders of the highway were wet, but the surface of the highway was dry and the weather was clear at the time of the collision. Plaintiff, with one passenger, was driving his car south along the highway. Defendant's automobile was stationary, sitting diagonally across the highway, the front of the car headed in a northeasterly direction and the rear in a southwesterly direction. Defendant was outside of the automobile and was looking for his cat.

On direct examination plaintiff testified:

"I was traveling at a speed of 55 miles per hour. I was near Beuna-Vista which is a small intersection consisting of two service stations, I believe. One on each side. It is simply a crossroads with service stations. I was between there and Windsor, N. C. I first saw the automobile owned by Mr. Atkeson — just as you pass through the intersection, about 50 yards further up, it is a curve. As I rounded that curve and straightened out, I saw this car parked cross-ways the road. It was nighttime. I did not see any lights burning on the vehicle. I first observed this automobile when I was approximately 250 foot from it. As soon as I realized what it was, I tried to stop before I hit it. The automobile was sitting cross-ways the road. The back of his car was more on my side of the road than it was on his. It was more room on the opposite side of the road so at first — I was still moving — I started to change lanes to see if I could go around that way but then I was afraid it would be considered my fault — crossing lanes — so I got back in my lane and tried my best to stop before I hit it. The back of his car was to my right and the front of his car was to my left. A portion of his car was in the left lane as I approached. About one third of the lengths of the car was in the left lane. The front wheels of his vehicle was in my left lane and was in what should have been his lane if he

was coming my way. The back wheels were in my lane. I first went to the left and then cut back in my own lane. After that, I hit his car, a glancing blow, because I skidded into him sideways. Once I hit him I slid back off the shoulder of the road which was wet. It had just been a heavy rain. The road was dry but the shoulder was wet and I went down the hill into a creek right beside a small bridge that didn't have rails. My car went into the water. . . . There were no lights on the car of Mr. Atkeson. There were none burning. There were no actual lights or reflectors on the side of his car as I approached it. His car had headlights and taillights but at the angle I was going — I was going straight into his side and there was no lights on his side. His headlights pointed to my left but they were not on. If he had reflectors, the rear of his car was turned far enough so I couldn't see it. I do not know whether his automobile was running but the motor was not running when I got out of the creek."

On cross-examination plaintiff testified:

"It is a straight road from the curve to where I hit the automobile. I did not see him before I came out of the curve. I don't know if I saw him at the exact moment I came out of the curve but after I rounded the curve I didn't see it until —. Just as I rounded the curve, I saw this vehicle down the road across the highway facing almost perpendicular to me. I don't know if I saw him at the exact moment I come out of the curve or if it was a few seconds after I come out. . . . When I first rounded this curve, I saw the car sitting there. When I saw the car, I applied brakes. I did not slam on the brakes. I eased on the brakes because I didn't — it was no lights on the car. The car was black and I thought it was moving. When I realized it wasn't moving, I slammed on brakes. It was just a second or two from the time I started easing on the brakes until I slammed on the brakes. The car was approximately 200 foot from me when I slammed on the brakes. At the time I started easing on the brakes, I don't know how far the car was from me. I can just guess the foot but my guessing — I could be 100 foot off. I would say it was 250 foot from the time I first saw —. I first attempted to make a left turn but just as my wheels crossed the center line, I saw there wasn't room enough for me to get by on that side either and so I changed back to my lane because I would rather to stay on my side of the road if I couldn't get by. There is a shoulder there. I do not know exactly how wide. I was skidding and could not drive off the paved portion. My brakes

was locked. I had control of the vehicle until I turned to go back in the right lane and then I still had control other than I couldn't stop it. My car went down into an embankment and into a creek."

Plaintiff's passenger, a witness for the plaintiff, testified:

"It was nighttime. The car in the road was black. The pavement was black. There were no lights burning on that automobile in the road.

* * * * *

"After we come around the curve and got straightened out, I could see the automobile. I don't have any idea how far it was when I first saw it. Not too far because — I said it was night and we had to be almost on top of it."

This witness also testified that plaintiff was going 55 or 60 miles an hour and that plaintiff's car had just been inspected a day of two before and had good brakes and steering mechanism.

The highway patrolman who investigated the accident testified in substance: The shoulders of the road were level for approximately six feet on each side of the road. The distance from the point where the curve begins to straighten out to the point where he found the automobiles resting was approximately 1000 feet unobstructed. There were 300 feet of solid heavy black skid marks in the right-hand lane headed south. These marks ended approximately 50 feet north from the point of impact, and "on the south end of these skid marks they started fading out and going over into the left lane — scuff marks into the left lane like the vehicle was skidding sideways — and then they faded out and right up approximately three feet north of the Atkeson vehicle, three or four feet, there was several piles of dirt on the highway." The patrolman also testified that there was "enough room on either side of the highway on the shoulder to drive an automobile but not a whole lot of room to spare."

The operator of the wrecker who retrieved plaintiff's car from the water on the night of the collision testified that the shoulders on each side of the road were "very small," approximately three feet, and "not large enough for an automobile to go on the side of it at that point." He also testified there was not enough room to go around defendant's car and traffic was stopped until the wrecker moved it out of the way.

At close of plaintiff's evidence the court allowed defendant's motion for nonsuit, and plaintiff appealed.

Pritchett, Cooke & Burch, by W. L. Cooke, for plaintiff appellant.

James, Speight, Watson & Brewer, by W. H. Watson, for defendant appellee.

PARKER, J.

[1] Plaintiff's evidence showing defendant left his unlighted car at night parked across both lanes of a two-lane highway, while defendant searched for his lost cat, was clearly sufficient to require submission of an issue as to defendant's actionable negligence. The nonsuit can be sustained, if at all, only on the ground that plaintiff's evidence so clearly establishes his own negligence as one of the proximate causes of his injuries that no other reasonable inference may be drawn therefrom. We do not agree with the trial court's conclusion that it does.

Bobbitt, J. (now C.J.), speaking for the Court in *Brown v. Hale,* 263 N.C. 176, 139 S.E. 2d 210, stated:

> "Judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, and only when, the evidence, when considered in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. This rule, repeatedly restated, is clear. Its application, at times, is difficult. Complete reconciliation of all the decided cases would tax the ingenuity of the most discriminating analyst.
>
> "'. . . no factual formula can be laid down which will determine in every instance the person legally responsible for a rear-end collision on a highway at night between a standing vehicle and one that is moving.' Stacy, C.J., in *Tyson v. Ford,* 228 N.C. 778, 781, 47 S.E. 2d 251. As stated by Seawell, J., in *Cole v. Koonce,* 214 N.C. 188, 191, 198 S.E. 637: 'Practically every case must "stand on its own bottom."'"

[2] Plaintiff's evidence considered in the light most favorable to him would support a finding that: He was driving his car within his proper lane of travel at a speed of 55 miles per hour within a 60 mile per hour speed zone. It was a clear night and the paved surface of the highway was dry. The brakes and the steering mechanism of his car were in good order. He first observed defendant's car when he was approximately 250 feet away. As soon as he saw it he applied but did not "slam on" his brakes, because he thought defendant's car was moving. When he realized it wasn't moving, he slammed on his brakes, at which time defendant's car was approximately 200

feet from him. He first attempted to pass to the left of defendant's car, but just as soon as he crossed the center line he saw there wasn't room enough to get by on that side either and so changed back into his own lane. There was a shoulder but by this time he was skidding and could not drive off the paved portion of the highway. His car skidded sideways into defendant's car, striking it a glancing blow.

[3-5] Such findings would negative defendant's allegations that plaintiff was driving at an excessive speed, failed to keep a proper lookout, or failed to keep his car under control. The jury could find from plaintiff's evidence that he was operating within the posted speed limit and in compliance with the requirements of G.S. 20-141. His testimony as to when he first saw defendant's car negates any inference that he failed to keep a proper lookout. G.S. 20-131(a) required that plaintiff's head lamps under normal atmospheric conditions and on a level road "produce a driving light sufficient to render clearly discernible a person two hundred feet ahead." Plaintiff's lights met this requirement, since he saw defendant's car when it was 250 feet away. Plaintiff's inability to stop his vehicle within the radius of his lights cannot be considered contributory negligence *per se*. G.S. 20-141(e); *Bass v. McLamb*, 268 N.C. 395, 150 S.E. 2d 856.

[6] While the evidence as to the skid marks would indicate plaintiff was driving at a speed greater than either he or his passenger testified to, the evidence would not compel a finding that the skid marks had in fact been made by plaintiff's vehicle. The clear skid marks ended approximately 50 feet from defendant's vehicle, and although a strong inference may arise that the marks were made by plaintiff's car, whether in fact they were and what speed they indicate were questions for the jury. Plaintiff's evidence was also conflicting on whether there was sufficient room on the shoulder of the road for his car to pass defendant's car. Such discrepancies and contradictions in plaintiff's evidence are matters for the jury and not the court to resolve. *Coleman v. Burris*, 265 N.C. 404, 144 S.E. 2d 241; *Beasley v. Williams*, 260 N.C. 561, 133 S.E. 2d 227.

[2] While plaintiff's own evidence would clearly support a jury finding that plaintiff was guilty of contributory negligence, we hold that it did not show that plaintiff was contributorily negligent as a matter of law. In view of this holding we do not deem it necessary to pass upon appellant's remaining assignments of error, which relate to rulings admitting or excluding evidence, since these questions may not recur upon a new trial.

The judgment of nonsuit is

Reversed.

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

CARL PRINCE AND WIFE, GUSSIE PRINCE v. LEON PRINCE AND WIFE, VAMA PRINCE

No. 7013SC121

(Filed 6 May 1970)

1. Appeal and Error § 26— assignment of error to the signing of the judgment — question presented

An assignment of error to the signing and entry of the judgment presents the face of the record for review, and review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found, or admitted, support the conclusions of law and the judgment.

2. Ejectment § 6; Boundaries § 8— action in ejectment — conversion into processioning proceeding

Where, in an action in ejectment, the parties stipulate that they are the owners of the lands conveyed to them by their respective deeds and that the only question in controversy is the location of the boundary lines between their lands, the action is converted into a processioning proceeding.

3. Boundaries § 8— processioning proceeding — burden of proof — issues

The plaintiffs in a processioning proceeding have the burden of proof to establish the true location of the disputed boundary lines; and if the plaintiffs are unable to show by the greater weight of the evidence the location of the true dividing line at a point more favorable to them than the line contended for by defendants, the issue should be answered in favor of defendant's contentions.

4. Appeal and Error § 6; Boundaries § 15— processioning proceeding — judgment — immediate appeal — damages

An immediate appeal lies from a judgment in a processioning proceeding that determined the location of the boundary lines in controversy but reserved the assessment of damages to a subsequent session of court, where the damages were computable by a mathematical formula agreed upon by the parties.

APPEAL by plaintiffs from *Canaday, J.*, 22 September 1969 Session, COLUMBUS Superior Court.

As originally instituted this action was in ejectment, alleging wrongful possession and damages by defendants. Defendants denied wrongful possession, alleging their title to be by deed. The male parties are brothers and claim under a common source of title (their mother), defendants' deed being first in date of execution and recording.

The parties stipulated that male defendant is the owner and entitled to possession of the property conveyed to him by his mother by deed dated 11 July 1963; and that plaintiffs are the owners and entitled to possession of the property conveyed to them by male plaintiff's mother by deed dated 1 January 1964. The parties also stipulated as follows:

> "4. That the only question involved in the controversy now existing between the parties hereto is the location of the boundary lines separating and dividing the land described in and conveyed to Leon Prince by deed of Ella Prince dated July 11, 1963, and recorded in said Office of Register of Deeds in Book 232 at Page 233, from those described in and conveyed to Carl Prince and his wife, Gussie Prince, by deed of Ella S. Prince, dated January 1, 1964 and recorded in said Office of Register of Deeds in Book 237 at Page 238;"

They further stipulated as follows:

> "5. That the issue to be settled in this action is: 'Where is the true and correct boundary line separating and dividing the lands of Carl Prince and his wife, Gussie Prince, from those of Leon Prince?';"

The parties waived jury trial and agreed that the trial judge hear the evidence, make his findings of facts, conclusions of law, and enter judgment thereon. The judge's findings of fact, conclusions of law, and judgment are as follows:

"FINDINGS OF FACT

> "1. That in accordance with the written stipulations entered December 11, 1968, consented to by all the parties herein, and their counsel of record, this action was converted into a processioning proceeding in effect.
>
> "2. That said stipulations are incorporated into this Judgment and form an integral part hereof.
>
> "3. That the only issue presently before the Court is: 'Where is the true and correct boundary line separating and dividing the lands of Carl Prince and wife, Gussie Prince from those of Leon Prince?'

"4. That the parties acquired title to their respective tracts of land from a common source, their mother, Ella Prince, with the deed of defendant Leon Prince being prior in date of execution and in date of recording; that the deed to plaintiffs Carl Prince and wife, Gussie Prince, conveyed to them all lands owned by the grantor, subject to and except for the tract theretofore conveyed to Leon Prince.

"5. That the crucial question for determination in this action is, therefore, the location of the Leon Prince tract referred to in the deed and in the evidence in this cause as a '37½ acre' tract, with the burden of proof being on the plaintiffs.

"6. That the plaintiffs, without particularizing, contend that defendants' tract of land is located somewhere generally within the area shown in green on the Court Map entitled 'Map in the case Leon Prince, def., vs. Carl Prince, plain.' prepared by H. L. Willis, Jr., Reg. Surveyor, Sept. 22, 1969; that this area is within the points 1, 2, 3, 4, 15, 14 and back to 1 on said Map.

"7. That the defendants Leon Prince and wife, Vama Prince contend the Leon Prince tract is located precisely within the Red area on the Court Map, running from Point 'A' to point 'B'; thence to point 'C'; thence to point 'D'; thence to point 'A'.

"8. That the calls in the Leon Prince deed dated July 11. 1963, recorded in Book 232, at Page 233, Columbus County Registry, conform substantially to the calls on the Court Map for the area as contended for and claimed by Leon Prince but do not conform to the area shaded in Green on the Court Map as contended for by plaintiffs and cannot be fitted into said green area on the Map and were not fitted into that area by the plaintiffs' evidence.

"9. That the grantor in the Leon Prince deed recorded in Book 232, Page 233, intended to convey a tract 'adjoining A. H. McCumbee, D. W. Wright, Earl Wright, and Boss Sarvis,' and that the location of the 37½ acre tract within the Green area as contended by plaintiffs would be contrary to the grantor's intent as disclosed by said reference in the deed but the intent of the grantor is shown to conform to the contention of defendants.

"10. That the plaintiffs have failed to prove by the greater weight of evidence that the location of the Leon Prince 37½ acre tract in dispute is in the area on the Court Map as contended by plaintiffs.

"11. That the true and correct lines of the Leon Prince 37½ acre tract are located within the Red area on the Court Map, same running from point 'A' to point 'B'; thence to points 'C', 'D' and back to 'A' and are more fully defined as follows:

Beginning at an old iron shaft by a blazed lightwood tree and 18 foot high stump in a Bay, sometimes referred to as Flat Bay, (point 'A' on the Court Map prepared by H. L. Willis, Jr., Reg. Surveyor, Sept. 22, 1969) and runs thence South 15 degrees 35 minutes West crossing Rural Paved Road 1197.06 feet to an old iron shaft and 2 old marked lightwood stakes in edge of a bay (Point 'B'); runs thence North 58 degrees 15 minutes West 1646.3 feet to an old blazed and marked lightwood tree 25 feet high (Point 'C'); thence recrossing said Rural Paved Road North 48 degrees 35 minutes East 1221 feet to Point 'D' on the Map; thence South 57 degrees 07 minutes East 959.6 feet to the point of beginning.

"12. That the foregoing lines in the Leon Prince 37½ acre tract constitute the true and correct boundary line separating and dividing the lands of Carl Prince and wife, Gussie Prince from those of Leon Prince.

"CONCLUSIONS OF LAW

"1. That plaintiffs have failed to show by the greater weight of evidence the true and correct boundary line between them and defendant, Leon Prince, to be as contended by plaintiffs.

"2. That plaintiffs have failed to show by the greater weight of the evidence the true and correct boundary line to be at a point more favorable to them than the line as contended by the defendants.

"3. The true and correct boundary line between Plaintiffs and defendant, Leon Prince, is that contended by the defendants.

"4. That as a matter of law and fact the true and correct boundary line dividing and separating the lands of plaintiffs and defendant Leon Prince is as follows:

Beginning at an old iron shaft by a blazed lightwood tree and 18 foot high stump in a Bay, sometimes referred to as Flat Bay, (point 'A' on the Court Map prepared by H. L. Willis, Jr., Reg. Surveyor, Sept. 22, 1969) and runs thence South 15 degrees 35 minutes West crossing Rural Paved Road 1197.06 feet to an old iron shaft and 2 old marked lightwood

stakes in edge of a bay (Point 'B'); runs thence North 58 degrees 15 minutes West 1646.3 feet to an old blazed and marked lightwood tree 25 feet high (Point 'C'); thence recrossing said Rural Paved Road North 48 degrees 35 minutes East 1221 feet to Point 'D' on the Map; thence South 57 degrees 07 minutes East 959.6 feet to the point of beginning.

"Now, therefore, it is ORDERED, ADJUDGED and DECREED that the true location of the boundary line separating and dividing the lands of Carl Prince and Wife, Gussie Prince from Leon Prince is as found and concluded above; that Leon Prince is the fee simple owner of that tract of land as shown on the Court Map with outer boundaries shaded in Red, beginning at Point 'A', running thence to Point 'B', thence to Point 'C', thence to Point 'D', and thence to the beginning at Point 'A'; same being described fully in the foregoing Findings and Conclusions; that said Map shall be permanently recorded in the office of the Clerk of Superior Court of Columbus County and the Map is made an integral part of this Judgment.

"It is further ORDERED, ADJUDGED and DECREED that the plaintiffs, Carl Prince and Gussie Prince, and their agents and employees are permanently enjoined and restrained from trespassing or otherwise entering upon the lands designated herein as being owned by Leon Prince;

"It is further ORDERED and ADJUDGED that Leon Prince shall have and recover of plaintiffs, Carl Prince and Gussie Prince as damages for wrongful possession an amount to be determined in accordance with the Stipulations heretofore filed with the papers in this action; that this cause shall remain open to the end that the exact amount of such damages can be determined at a subsequent session of this Court;

"It is further ORDERED and ADJUDGED that plaintiffs, Carl Prince and Gussie Prince, are taxed with costs of Court as assessed by the Clerk, including surveying costs and the allowance to surveyors as witness fees."

From the judgment entered in favor of defendants, plaintiffs appealed, assigning as error the signing and entry of the judgment.

Smith & Spivey, by Jerry L. Spivey, for plaintiffs.

Powell & Powell, by Frank M. Powell, and Powell, Lee & Lee, by J. B. Lee, for defendants.

BROCK, J.

[1] Appellants' sole assignment of error is to the signing and entry of the judgment. Such an assignment of error presents the face of the record for review, and review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found, or admitted, support the conclusions of law and the judgment. But, such an assignment of error does not present for review the findings of fact or the sufficiency of the evidence to support them. 1 Strong, N.C. Index 2d, Appeal and Error, § 26, p. 152.

[2] Appellants argue that the findings of fact do not support the trial court in applying the rules governing processioning proceedings to this case. It seems clear that the stipulations of the parties converted the action into a processioning proceeding by stipulating ownership of each of the parties, and by stipulating that the only question in controversy is the location of the boundary lines between the lands owned by the parties. *Welborn v. Lumber Co.*, 238 N.C. 238, 77 S.E. 2d 612.

Appellants argue that the findings of fact do not support a judgment in accord with defendants' contention as to the location of the dividing lines because defendants offered no evidence and there are therefore no affirmative findings from evidence in support of defendants' contentions.

[3] Defendants had no burden of proof to establish the boundary lines in accordance with their contentions. The burden of proof was upon the plaintiffs to establish the true location of the disputed boundary lines. "If the plaintiffs are unable to show by the greater weight of the evidence the location of the true dividing line at a point more favorable to them than the line as contended by the defendants, the jury should answer the issue in accord with the contentions of the defendants. (citing cases)." *Coley v. Telephone Co.*, 267 N.C. 701, 149 S.E. 2d 14.

[4] In an understandable, but somewhat unusual procedural convolution, appellants argue that their appeal should be dismissed as a fragmentary and premature appeal. They argue that their appeal is fragmentary and premature because the judgment appealed from left the matter of defendants' damages to be assessed at a subsequent session of court. (See next to last paragraph of judgment quoted above in statement of facts).

The parties stipulated as follows:

"That when the boundary lines have been finally determined the ASC shall compute the proportionate tobacco and corn allot-

ments based upon the cleared lands; and that as to allotments of which an offended party has been deprived, such parties shall be entitled to a damage judgment for the years of such wrongful deprivation, computed at the rate of Fifteen Cents ($0.15) per pound per year of tobacco, and Forty Dollars ($40.00) per acre per year for corn allotment; such damages as computed shall terminate the damage aspect of this law suit."

This stipulation supports that portion of the judgment which reserves the assessment of damages to a subsequent session of court. It is in accordance with the agreement of the parties and requires only a mathematical computation to determine the amount of damages. The judgment as entered determines the location of the boundary lines and concludes the ultimate legal rights of the parties, they having already agreed to a method of computing damages. In such a situation the appealability of the judgment must be resolved on the facts of this case. See McIntosh, N. C. Practice 2d, § 1782 (1969 Pocket Part). In our opinion the judgment as entered was immediately appealable and the case is properly before this Court.

Affirmed.

BRITT and GRAHAM, JJ., concur.

DONALD RAY MASON AND RELIANCE INSURANCE COMPANY v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 7014IC182

(Filed 6 May 1970)

1. Judgments § 35— res judicata

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.

2. State § 7; Judgments § 37— tort claim — denial of claim — failure to show negligence of named employee — subsequent claim — allegations of negligence by different employees — res judicata

In this action under the Tort Claims Act for damages allegedly sustained as the result of negligence by two named State Highway Commission employees, the Industrial Commission did not err in sustaining defendant's plea of *res judicata* based upon a superior court judgment which affirmed the Industrial Commission's denial of a previous claim for the same accident filed by plaintiffs against the Highway Commission in which negligence by a different Highway Commission employee was alleged, the Industrial Commission having found in the original action that there was

no evidence of a negligent act on the part of the employee named in the affidavit.

3. State § 5— tort claim — State agency

The only claim authorized by the Tort Claims Act is a claim against a State agency.

4. State § 7— tort claim — naming of negligent employee in affidavit

The reason for requiring the negligent State employee to be named in the affidavit required under the Tort Claims Act is so that the department of the State against which claim is made will not have to investigate all of its employees, but only those alleged to have been negligent.

5. State § 7— tort claim — naming of wrong State employee — motion to amend affidavit

If a claimant mistakenly names a wrong employee, his remedy is to address a motion to amend the affidavit to the sound discretion of the Industrial Commission.

BRITT, J., dissenting.

APPEAL by plaintiffs from order of the North Carolina Industrial Commission filed 14 November 1969.

In August of 1966 plaintiffs filed claims with the North Carolina Industrial Commission under the Tort Claims Act, G.S. 143-291 *et seq.*, alleging that they sustained damages on 14 July 1966 proximately caused by the negligence of an employee of the State Highway Commission. Plaintiff Reliance Insurance Company is a subrogee of plaintiff Donald Ray Mason, having paid him, under the terms of an insurance policy issued to him, for a certain portion of the damages he allegedly sustained.

T-1 affidavits required under the Act were filed and paragraph 3 of each affidavit stated in part:

> ". . . K. M. Duncan being employed by the State of North Carolina through the North Carolina State Highway Commission as Road Maintenance Supervisor for the State of North Carolina, Fifth Highway Division, for damages resulting from the negligence of the State of North Carolina and K. M. Duncan, Road Maintenance Supervisor for the State of North Carolina, Fifth Division."

The claims were consolidated for hearing and heard by Deputy Commissioner Thomas who found facts and concluded, *inter alia:*

> "Plaintiffs allege negligence on the part of K. M. Duncan, who admittedly was road maintenance supervisor for defendant in Durham County, North Carolina. There being no evidence of a negligent act on the part of Duncan, plaintiffs' claim must be denied."

Plaintiffs appealed to the Full Commission and filed a motion with the Full Commission requesting that additional evidence be taken and that plaintiffs be allowed to amend the affidavits to make them conform with the evidence. The Full Commission denied plaintiffs' motion and affirmed the order and decision of the Deputy Commissioner. Appeal was then taken to the Superior Court where an order was entered reversing the denial of plaintiffs' motion by the Industrial Commission and remanding the case for a rehearing. Defendant appealed from this order to the Supreme Court. In *Mason v. Highway Commission,* 273 N.C. 36, 159 S.E. 2d 574, the Supreme Court, speaking through Lake, J., reversed the order of the Superior Court on the grounds that plaintiffs' motion was addressed to the sound discretion of the Industrial Commission. The case was thereupon remanded to the Superior Court for its determination respecting certain exceptions taken by plaintiffs to the findings of fact and conclusions of law of the Commission. On 16 April 1968, the Superior Court overruled plaintiffs' exceptions and assignments of error and affirmed the decision and order of the Industrial Commission.

Subsequently, on 26 April 1968, plaintiffs filed the claims now involved. The allegations in the affidavits filed in connection with the new claims are identical to those filed in the original case with two exceptions. A larger sum for damages is claimed in the new affidavits and two employees who were not mentioned in the affidavits filed in the former proceedings are named as the negligent employees of the State Highway Commission.

Defendant filed a plea in bar asserting that the judgment of the Superior Court, dated 16 April 1968, constituted *res judicata* and barred the claims filed on 26 April 1968. The plea in bar was sustained by the Hearing Commissioner and the actions dismissed. The Full Commission thereafter affirmed the order of the Hearing Commissioner and plaintiffs appealed.

Robert Morgan, Attorney General, by Fred P. Parker, III, Trial Attorney, for the State.

Brooks and Brooks by Eugene C. Brooks, III, for plaintiff appellants.

GRAHAM, J.

The sole question presented by this appeal is whether the Industrial Commission erred in affirming the order of the Hearing Commissioner dismissing plaintiffs' claims as barred on the grounds of *res judicata.*

We are of the opinion that the decision of the Industrial Commission was correct and must be affirmed.

[1, 2] "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, . . ." *Shaw v. Eaves,* 262 N.C. 656, 661, 138 S.E. 2d 520. The claims here involved arise from the identical facts upon which recovery was originally sought. The parties are identical. The merits of the cases are identical. The type of relief sought is the same though plaintiffs now seek more substantial damages. The alleged acts of negligence are identical. The only difference is that here plaintiffs allege that the negligence was that of employees Howard Vernon Moore and Cornelius Perry rather than that of employee K. M. Duncan as alleged in affidavits filed in the original cases.

[3] G.S. 143-297 provides that in all claims brought under the Tort Claims Act an affidavit must be filed in duplicate, setting forth among other things "[t]he name of the department, institution or agency of the State against which the claim is asserted, and the name of the State employee upon whose alleged negligence the claim is based; . . ." However, it is the agency and not the employee named who is a party. "The only claim authorized by the Tort Claims Act is a claim against the State agency. True, recovery, if any, must be based upon the actionable negligence of an employee of such agency while acting within the scope of his employment. However, recovery, if any, against the alleged negligent employee must be by common law action." *Wirth v. Bracey,* 258 N.C. 505, 507, 508, 128 S.E. 2d 810.

[4, 5] The reason for requiring the negligent employee to be named in the affidavit is so that the department of the State against which claim is made will not have to investigate all of its employees, but only those alleged to have been negligent. *Tucker v. Highway Commission,* 247 N.C. 171, 100 S.E. 2d 514; *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703. If a claimant mistakenly names a wrong employee, his remedy is to address a motion to amend the affidavit to the sound discretion of the Industrial Commission. We note that in the original action, during the hearing before the Deputy Commissioner, the employees Howard Vernon Moore and Cornelius Perry were identified by defendant's witnesses as the persons in charge of the placing of warning signals at the site of the alleged damage to claimants. However, claimants did not ask for a recess to interview these two employees, nor did they move for leave to amend their affidavits. Instead, upon appeal to the Full Commission, claim-

ants moved for a new trial upon the grounds of newly discovered evidence. This motion the Full Commission, in its discretion, denied. See *Mason v. Highway Commission, supra.* To allow a claimant to get back into court under such circumstances and have unlimited opportunity to pursue the same cause of action against the same party opens the door for "infinite vexation."

Res judicata as a bar to a subsequent action involves principles long established in this jurisdiction. In *Garner v. Garner,* 268 N.C. 664, 666, 667, 151 S.E. 2d 553, Branch, J., quoted, with approval, from former decisions of the Supreme Court as follows:

> "'"The principles governing estoppels by judgment are established by a long line of decisions in this and other states, and we have no desire to take a new departure which will shake the long-settled law as to *res judicata.* This rule is thus stated in 1 Herman Estoppel, sec. 122, and is fortified by a long list of leading authorities there cited: 'The judgment or decree of a court possessing competent jurisdiction is final as to the subject-matter thereby determined. The principle extends further. It is not only final as to matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided . . . . This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive. It might tend to unsettle all the determinations of law and open a door for infinite vexation. The rule is founded on sound principle.'"' *Moore v. Harkins,* 179 N.C. 167, 101 S.E. 564. This principle was again recognized by this Court when Barnhill, J. (later C.J.), speaking for the Court in the case of *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 622 [sic], said: 'A judgment rendered in an action estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, *in the exercise of reasonable diligence, could and should have brought forward.* . . . The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can neither *split up his claim nor divide the grounds of recovery.*' (Emphasis ours) See also *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909, and *Wilson v. Hoyle,* 263 N.C. 194, 139 S.E. 2d 206."

Allegations of negligence on the part of the employees in question could and should have been made in the original actions. To hold

otherwise would permit the first actions to be simply expensive and time consuming discovery proceedings to be used as a basis for future identical actions on the same claim.

Affirmed.

BROCK, J., concurs.

BRITT, J., dissenting:

In my opinion the Industrial Commission erred in sustaining defendant's plea of *res judicata* and dismissing plaintiffs' claims instituted on 26 April 1968.

The Industrial Commission stated that the reason for dismissing the former claims was that plaintiffs alleged negligence on the part of K. M. Duncan, defendant's maintenance supervisor in Durham County, and "[t]here being no evidence of a negligent act on the part of Duncan, plaintiffs' claim must be denied."

In *Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132, in an opinion by Parker, J. (later C.J.), and quoted with approval by us in *Morris v. Perkins,* 6 N.C. App. 562, 170 S.E. 2d 642, 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)."

In *Shaw v. Eaves,* 262 N.C. 656, 138 S.E. 2d 520, in an opinion by Moore, J. (Clifton L.), and quoted with approval by us in *Morris v. Perkins, supra,* it is said:

> "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."

In the instant case, it is true that the former adjudication was on the merits of the claims as pleaded at that time and that there was an identity of parties and of subject matter in the two claims,

but merits of the second claims were not *identically* the same as those of the first claims and the identical question presented in the second claims was not considered and determined adversely to plaintiffs in the first claims. In their present claims, plaintiffs contend that they were injured and damaged because of the negligence of Moore and Perry; that identical question was not considered and determined adversely to them in the former claims.

In many common law actions by an injured person against a principal based on the negligence of an employee, the providing of the name of the employee is not necessary. But, this is not a common law action; it is a remedy based entirely on statutes and one of those statutes, G.S. 143-297, provides, *inter alia,* that "the name of the State employee upon whose alleged negligence the claim is based" must be provided along with other pertinent information in an affidavit filed with the Industrial Commission.

I vote to reverse the decision and order of the Industrial Commission from which plaintiffs appealed.

OUIDA B. NEWELL v. MARY MacKAY EDWARDS

No. 7010SC56

(Filed 6 May 1970)

1. Deeds § 7— delivery

A deed becomes operative to pass title only upon its delivery.

2. Deeds § 7; Registration § 1— delivery of deed — grantee's title — registration — continued existence of instrument

After delivery of a deed, as between the parties, neither registration nor the continued existence of the physical instrument is necessary to the continued existence of the grantee's title, registration being primarily for the protection of purchasers for value and creditors.

3. Deeds § 7; Alteration of Instruments— alterations before delivery

Before delivery the grantor retains full power and control and may make such alterations in the instrument as he chooses.

4. Deeds § 7; Alteration of Instruments— alterations after delivery — consent of parties — redelivery

After delivery a deed may be changed with the consent of the parties and may then be redelivered, in such case the new delivery constituting a re-execution; absent such re-execution, transfer of title cannot be effected

by the device of substituting the name of another person for that of the grantee who was designated in the deed.

5. Deeds § 7— requisites of delivery

The requisites of valid delivery of a deed are (1) an intention on the part of the grantor to give the instrument legal effect according to its purport and tenor, (2) the evidencing of such intention by some word or act disclosing that the grantor has put the instrument beyond his legal control, and (3) acquiescence by the grantee in such intention.

6. Deeds § 7; Alteration of Instruments— change in grantee after delivery of deed — lack of consent of grantors

In this action to set aside a recorded deed in which defendant is named grantee and to obtain judgment that plaintiff be declared owner in fee of the real property described therein, the trial court erred in entering judgment of nonsuit where plaintiff's evidence, viewed in the light most favorable to her, would justify a jury finding that there had been a completed delivery of the deed to plaintiff's husband who was originally named therein as grantee, that the first two pages of the deed were thereafter retyped to substitute the name of defendant as grantee, that the grantors did not consent to the change in grantees or re-execute the deed, that plaintiff's husband is now deceased and that she is his surviving spouse and sole devisee.

APPEAL by plaintiff from *Bone, J.*, August 1969 Civil Session of WAKE Superior Court.

This is a civil action in which plaintiff seeks to set aside a deed recorded in the Wake County Registry in which the defendant is the named grantee and to obtain judgment that plaintiff be declared owner in fee of the real property described therein. Plaintiff in her complaint alleged: Plaintiff is the surviving spouse and sole devisee under the Will of John O. Newell, deceased, whose Will was probated in Chatham County on 13 March 1969. By deed dated 21 December 1968 John O. Newell purchased a house and lot at 1308 Canterbury Road in Raleigh, N. C., from Wachovia Bank & Trust Company, Administrator of the Estate of James L. Kelton, et al. This deed was executed pursuant to a court order dated 18 December 1968 entered in a special proceeding in which it was ordered that a warranty deed be given to the purchaser, John Oliver Newell. The deed as drawn, executed, and delivered, conveyed the property to John Oliver Newell. Under the Will of John Oliver Newell plaintiff is now the owner in fee simple of said property. After the execution and delivery of the deed on 21 December 1968, and before the filing of said deed for registration in the office of the Register of Deeds of Wake County on 6 March 1969, the name of the grantee was changed to Mary MacKay Edwards. The deed as registered is not the deed of Wachovia Bank & Trust Company et al, but is a deed secured by

an unauthorized material alteration perpetrated by removing pages one and two of said deed and inserting new pages one and two which changed the name of the grantee from John Oliver Newell to Mary MacKay Edwards. This material alteration was unauthorized by the grantor and was in violation of the court order. The deed as registered constitutes a cloud on plaintiff's title.

Defendant answered, denying all allegations in the complaint except those relating to the residence of the parties.

Upon the trial plaintiff presented the testimony of J. R. Ferrell, who testified in substance as follows: He is manager of the real estate department of Washovia Bank and handles all sales of real property for the bank. He handled the sale of the real property which was in the estate of James Kelton. Mr. Kelton died and the bank, in settling his estate as Administrator and also by employment of the Kelton heirs, sold the property after private negotiation to John Oliver Newell. The bank caused a special proceeding to be brought, and the property was sold under court order.

Plaintiff introduced in evidence the petition in the special proceeding in which Wachovia Bank & Trust Company, Administrator of the Estate of James L. Kelton et al, petitioned the court to approve a sale of the subject property to John Oliver Newell for $16,600.00. Plaintiff also introduced the order of the clerk of Superior Court of Wake County approving said sale to John Oliver Newell and directing a warranty deed to be made to John Oliver Newell.

Mr. Ferrell then testified:

> "Wachovia caused a deed to be delivered to John Oliver Newell, and Wachovia Bank collected the full purchase price of $16,600.00 from John Oliver Newell at the completion of the sale. I delivered the deed personally to John Oliver Newell. John Oliver Newell is the grantee in the deed that I delivered. At the time I delivered the deed, John Oliver Newell requested that I have my secretary to draw him two new sheets in which he would change or delete his name and enter the name of Mary MacKay Edwards. This was done, and I gave him the two extra sheets. The bank did not insert the sheets bearing the name of Mary MacKay Edwards and he was advised against it.
>
> ". . . Mr. Newell requested that I allow my secretary to type two new pages for him for this deed, and I allowed her to do this. I told Mr. Newell at the time that since this deed had been signed by a number of people that I thought changing it might have some bearing on the legality of it, and I would ad-

vise him not to insert the new pages. He said he was not going to have the deed recorded then. He proceeded to insert the pages.

". . . I called Mr. Newell a few days later on the phone and insisted that he not insert these pages. Mr. Newell informed me that he didn't intend to record the deed at that time, but intended to have his attorney have the court order changed to enable him to deed this to Mary MacKay Edwards. Not knowing the legality of this, I let it go at that, but told him that even so, until he did, I felt he should not record the deed as it was. He said he was going to keep it in his lock box until some future date. I did not ever deliver a deed to John Oliver Newell in which Mary MacKay Edwards was a grantee.

* * * * *

"Mr. Newell made the changes in the deed in the bank as soon as I delivered it to him or shortly thereafter. It was in my presence and against my advice. Final payment was made at the closing date on February 17, 1969. We delivered the deed and accepted payment on that date."

Plaintiff testified in substance as follows: She is the widow of John Oliver Newell, who died on 3 March 1969. At the time of his death her husband was living at 1308 Canterbury Road in Raleigh. On the day after his death she went there to get clothes for the funeral. In searching for clothes she ran across the deed, and the deed at that time was made out to John Oliver Newell. She left the deed at the house. It was recorded on 6 March 1969 in the name of Mary MacKay Edwards.

Plaintiff introduced in evidence the deed recorded in the Wake County Registry. This deed was dated 21 December 1968, and was by Wachovia Bank & Trust Company, Sarah Kelton Brown, John Ellis Kelton and wife, Beverly P. Kelton, Harold V. Kelton and wife, Darlene Marie Kelton, Roxilu K. Bohrer, June Kelton Courington and husband, Morris L. Courington, Martha K. McCutcheon and husband, James O. McCutcheon, Jr., to Mary MacKay Edwards, and purported to convey the property in question, known as 1308 Canterbury Road, Raleigh, North Carolina.

Plaintiff also introduced in evidence a certified copy of the Will of John O. Newell and the probate proceedings related thereto in Chatham County. The Will was dated 1 February 1969, was probated on 13 March 1969, and named plaintiff as beneficiary.

At the close of plaintiff's evidence, the court entered judgment sustaining defendant's motion for nonsuit. Plaintiff appealed.

Basil L. Sherrill for plaintiff appellant.

Hubert H. Senter for defendant appellee.

PARKER, J.

[1, 2] A deed becomes operative to pass title only upon its delivery. *Vinson v. Smith,* 259 N.C. 95, 130 S.E. 2d 45. "A deed must always be consummated by delivery, which is the final act of execution, and this delivery must be either actually or constructively made by the grantor to the grantee." *Perry v. Hackney,* 142 N.C. 368, 55 S.E. 289. After delivery, as between the parties, registration or even the continued existence of the physical instrument is not necessary to the continued existence of the grantee's title. 23 Am. Jur. 2d, Deeds, § 310, p. 342. "The registration of deeds is primarily for the protection of purchasers for value and creditors; an unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties." *Bowden v. Bowden,* 264 N.C. 296, 141 S.E. 2d 621. Moreover, as between the parties, even after registration "[t]he ultimate inquiry is not what the records show, but what the terms of the original deed are." *Bowden v. Bowden, supra.*

[3, 4] Before delivery the grantor retains full power and control and may make such alterations in the instrument as he chooses, for it does not become his deed until delivered. *Wetherington v. Williams,* 134 N.C. 276, 46 S.E. 728. After delivery a deed may be changed with the consent of the parties and may then be redelivered, in such case the new delivery constituting a re-execution. *Krechel v. Mercer,* 262 N.C. 243, 136 S.E. 2d 608. Absent such re-execution, however, transfer of title cannot be effected by the device of substituting the name of another person for that of the grantee who was designated in the deed. *Perry v. Hackney, supra.* In that case Walker, J., speaking for the Court, said:

> "The first question raised is the sufficiency of the deed of Hannah Jane Richardson to pass title to the *feme* plaintiff. The deed was originally made to John W. Perry, his name was erased and that of his wife inserted in its place, and, as thus altered, it was registered. The deed, therefore, which was made to John W. Perry, has never been registered, and the deed which was registered was not the one made by Hannah Jane Richardson. A deed presupposes contract, and, indeed, is itself an executed contract, passing the equitable title after delivery and before registration, the latter taking the place of the livery of seizin to the grantee, and after registration the seizin or legal estate

also passes. *Davis v. Inscoe,* 84 N.C. 396; *Hare v. Jernigan,* 76 N.C. 471; *Respass v. Jones,* 102 N.C. 5. The deed before registration may be redelivered or surrendered, as the cases we have already cited show, and a deed made by the grantor to a new grantee, at the request of the first grantee, if there is no fraud or other vice in the transaction. But that is not our case. A contract requires the assent of two minds to one and the same thing, and so, as to a deed, says Blackstone, for it is essential to its validity that there should be parties able and willing to contract and be contracted with for the purposes intended by the deed and a thing or subject-matter to be contracted for, all of which must be expressed by the parties in their deed. It therefore follows that there must be a grantor, a grantee and a thing granted, and in every lease, a lessor, a lessee and a thing demised. 2 Blk., 295-7. Consent, which is the vital element of every contract, is wanting here. Hannah J. Richardson never agreed to be bound by a conveyance to the person whose name was inserted in the deed after its execution by her. She had an undoubted right to determine, by the exercise of her contractual right of selection, to whom she would convey the land."

[5] "The requisites of valid delivery of a deed are (1) an intention on the part of the grantor to give the instrument legal effect according to its purport and tenor; (2) the evidencing of such intention by some word or act disclosing that the grantor has put the instrument beyond his legal control; and (3) acquiescence by the grantee in such intention." 3 N.C. Index 2d, Deeds, § 7, p. 248.

[6] In the light of these principles the judgment of nonsuit in the present case must be held error. Plaintiff's evidence, viewed in the light most favorable to her, would justify a jury finding that there had been a completed delivery of the deed to the grantee originally named, that thereafter the first two pages were retyped to substitute the name of a different grantee, and that the grantors never consented to the change. Plaintiff's witness Ferrell, who represented the grantors at the closing, testified that he collected the full purchase price from John Oliver Newell and personally delivered to Mr. Newell the deed which named him as grantee. The deed was executed by the bank as Administrator of the estate of the deceased former owner. In so doing the bank acted under authority of an order of court entered in a special proceeding. The deed was also executed by eleven individual grantors, who presumably were the heirs at law of the former owner. Even if we ignore the questions presented whether the bank as Administrator had authority to deliver any deed other

than as directed in the court order, or whether the bank as agent of the individual owners had authority to give their consent to a change in the grantee, the jury would have been justified in finding from plaintiff's evidence that no consent had in fact been given. Ferrell testified that the changes in the deed were made against his advice.

Plaintiff testified that when she saw the deed on the day following her husband's death, his name still appeared as grantee. This would indicate that the change in the grantee's name was never accomplished during her husband's lifetime. While there seems to be a discrepancy between plaintiff's testimony and the testimony of her witness, Ferrell, who testified that Mr. Newell made the changes "as soon as I delivered the deed to him or shortly thereafter," under either version the jury could find that there had never been any consent to the change and no valid re-execution of the deed by the grantors. In any event, discrepancies in the evidence were ultimately for the jury to resolve. For purposes of ruling on defendant's motion for nonsuit, the court must resolve all discrepancies in plaintiff's favor.

The judgment of nonsuit is

Reversed.

CAMPBELL and HEDRICK, JJ., concur.

J. H. EPPS, D/B/A J. H. EPPS T. V. v. MRS. FRANK MILLER AND HAROLD LAMBERT, D/B/A THRIFT COURT (BIRDTOWN MOTEL)

No. 7030SC209

(Filed 6 May 1970)

1. Appeal and Error § 57— findings of fact — conclusiveness

Findings on matters addressed to the court are conclusive when supported by competent evidence.

2. Judgments § 25— setting aside judgment — conduct justifying relief — findings

Trial court properly set aside a judgment of $12,000 entered against the plaintiff and his surety in a trial on a writ of inquiry, where there were findings and conclusions that neither plaintiff nor his surety had any notice of defendant's motion for a writ of inquiry; no order for a writ of inquiry was ever entered; the case did not appear on the calendar

for the term during which the judgment was entered; no transcript of the trial was made; plaintiff and the surety had a good and meritorious defense; and plaintiff's attorney failed to inform him of the status of the litigation, despite repeated inquiries from plaintiff.

3. Judgments § 34— setting aside judgment — allowing plaintiff leave to file pleading

In a hearing on plaintiff's motion to set aside a judgment of $12,000 entered against plaintiff and his surety in a trial on writ of inquiry, it was within the discretion of the court, in its order setting aside the judgment, to allow the plaintiff to plead to the issue and to allow defendant to reply thereto.

4. Appeal and Error § 41— dismissal of appeal

An appeal is subject to dismissal for failure to comply with the Rules of Practice in the Court of Appeals. Rule of Practice in the Court of Appeals No. 48.

5. Claim and Delivery § 2— defendant's right to damages

Where plaintiff has taken a voluntary nonsuit after the property has been taken in claim and delivery, defendant in that action may maintain an independent action for damages against plaintiff in the former action.

6. Claim and Delivery § 5— sureties as parties of record

Sureties on the plaintiff's undertaking in claim and delivery proceedings, within the limits of their obligation, are parties of record; and upon determination of the action as between the principals, the prevailing party is entitled to a summary judgment against the sureties in accordance with the statute and the terms of the bond.

APPEAL by plaintiff, defendants and Aetna Casualty and Surety Company from *McLean, J.*, October 1969 Mixed Session, SWAIN Superior Court.

In the judgment appealed from, the court made detailed findings of fact which, in part pertinent to this appeal, may be summarized as follows. On 1 November 1960 plaintiff was a resident of South Carolina engaged in the business of selling and leasing television sets. Defendants were the owners of a motel in Swain County. On that date the parties entered into an agreement for the lease of sixty-two television sets and certain other equipment by the defendants from the plaintiff. On 15 August 1963 the defendants were delinquent, having made only eleven of the monthly payments called for in the agreement. Plaintiff employed counsel to repossess the sets and to collect the balance due on the account. On 15 August 1963 summons and order was issued by the clerk directing the sheriff to take the sets from the defendant and deliver them to the plaintiff. Plaintiff posted a bond with the clerk in the amount of $25,000.00, an amount double the value of the property as stated by the plaintiff. Aetna Casualty and Surety Company was surety on the bond. No

complaint was ever filed in the action and no order extending time to file complaint was ever entered. The sheriff took the sets from defendants and delivered them to the plaintiff who realized $3,005.00 from the sale of the sets. Plaintiff contended that defendant then owed him a balance of $9,495.00. On 30 December 1965 defendants' attorney wrote plaintiff's attorney and advised them that he had filed a motion to dismiss the action and that it was set for hearing on 15 January 1966. In the same letter defendants' attorney suggested that plaintiff's attorney might prefer to enter a judgment of voluntary nonsuit and thereby make the hearing unnecessary. The motion to dismiss the summons was filed by the attorney for the defendants on 4 January 1966 and included a prayer that the court enter an order for such relief as the defendants might be entitled, including a proper writ of inquiry. On 7 March 1966 plaintiff's attorney caused a judgment of voluntary nonsuit to be entered. On 31 August 1966 the defendants' attorney filed a motion in the cause setting out, among other things, the taking of the property pursuant to an order of claim and delivery entered by the clerk, the failure of the plaintiff to file complaint and the judgment of voluntary nonsuit. Defendants prayed that a writ of inquiry be issued and that a jury be impanelled to fix defendants' damages. On 5 March 1969 before Martin, J., the following issue was submitted to the jury: "What amount, if any, are defendants entitled to recover of plaintiff and his surety?" The issue was answered in the amount of $12,000.00 and judgment was entered thereon against the plaintiff and his surety. At the same term an order was entered allowing plaintiff's counsel to withdraw. Plaintiff employed his present counsel and motions were filed on behalf of plaintiff and his surety to set the judgment aside. Other findings of fact in the judgment appealed from included findings that: neither the plaintiff nor his surety had any knowledge or notice of the filing of defendants' motion, no order for writ of inquiry was ever entered, the case did not appear on the calendar for the term during which the judgment was entered, and that no transcript of the trial was made and the court reporter was out of the courtroom at the time. The court found and concluded that the judgment of 5 March 1969 was entered without knowledge or information on the part of the plaintiff and his surety and that plaintiff and his surety have a good and meritorious defense.

The judgment of 5 March 1969 was vacated and set aside and a new trial ordered. The court further directed that plaintiff and his surety be allowed 30 days to file additional pleadings and that defendants have 30 days thereafter within which to file additional pleadings.

Plaintiff, Aetna Casualty and Surety Company and the defendants appeal.

Clarence N. Gilbert for plaintiff.

Landon Roberts for Aetna Casualty and Surety Company.

Van Winkle, Buck, Wall, Starnes and Hyde by Herbert L. Hyde for defendants.

VAUGHN, J.

[1, 2] The defendants contend that Judge McLean's findings of fact are not supported by the evidence and that he failed to find facts which were supported by the evidence. We have carefully considered each of the assignments of error brought forward in support of these contentions. Findings on matters addressed to the court are conclusive when supported by competent evidence. This remains to be so even though there are other findings of fact which are not supported by the evidence when, as here, the findings which are supported by competent evidence are sufficient to support the judgment. 1 Strong, N. C. Index 2d, Appeal and Error, § 57. We hold that there was an abundance of evidence to support the findings and conclusions of the trial judge. The record discloses that in 1963 plaintiff employed a reputable licensed attorney to collect a substantial debt which he contended was owed by defendants under the terms of the lease agreement. Many of the 282 pages in the record on appeal are filled with inquiries from the plaintiff to his attorney as to the status of the litigation and supplications urging the attorney to bring the case to trial. These entreaties were unavailing. Plaintiff's claim was never tried on its merits, and he was never advised of a claim against him. The judgment under all of the circumstances was properly set aside. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507. Although many of the opinions of our Supreme Court involving the setting aside of judgments are conflicting, in most instances the individual case has been determined upon its own peculiar circumstances. *Gaster v. Goodwin,* 259 N.C. 676, 131 S.E. 2d 363.

[3] Defendants assign as error that portion of the judgment which allows the parties to file additional pleadings, contending that it would allow the parties to start all over after seven years of litigation. The plaintiff, having submitted to a voluntary nonsuit on 7 March 1966, and the judgment of 5 March 1969 having been vacated, the only matter now pending between the parties is the motion of defendants for a determination of their damages. It was clearly within the discretion of his honor to allow the plaintiff to plead to the issue

and to allow defendant to reply thereto, if the parties were so advised. Despite the broad language used, we are confident that that was what was intended to be allowed by the judgment signed by Judge McLean. To avoid further litigation on this point, however, the judgment is so modified.

[4, 5] The brief filed by plaintiff appellant does not comply with the Rules of Practice in this Court. Among other things, at no place in the brief is there any reference to an exception or assignment of error based thereon. For failure to comply with Rules of Practice in this Court the appeal of plaintiff is subject to dismissal. Rule 48 Rules of Practice in the Court of Appeals. We have, however, considered the argument contained in the brief. Generally plaintiff argues that the Court should affirm that portion of the judgment which vacates the judgment entered 5 March 1969 and then that we should, in some fashion, declare the litigation ended. This contention is without merit. Where the plaintiff has taken a voluntary nonsuit after the property has been taken in claim and delivery, the defendant in that action may maintain an independent action for damages against plaintiff in the former action. *Davis v. Wallace,* 190 N.C. 543, 130 S.E. 176. It is also generally recognized that the defendant is not relegated to a separate action in order to obtain return, or return or damages as the case may be, but may assert his rights in the same action. 24 A.L.R. 3d 768. "If the plaintiff should give the undertaking and take the property, he may not then take a nonsuit and hold the property." 2 McIntosh, N. C. Practice 2d, § 2166. In *Manix v. Howard,* 82 N.C. 125, the Supreme Court posed the following: "Can the plaintiff bring his action of claim and delivery and procure the property to be taken out of the possession of the defendant and delivered to him by the process of the law, and then omit to file his complaint, so that no issue can be made or tried as to the right of possession between him and the defendant, and at length, on his motion, dismiss his action and thereby acquit and discharge himself from all relief or assertion of right in the action on the part of the defendant?" The Court answered its query in the negative, saying that to hold otherwise would allow a plaintiff to use the process of the law merely for his personal advantage, instead of as a means of a due and orderly assertion of his right by a trial thereon. This decision has been followed in *Manufacturing Company v. Rhodes,* 152 N.C. 636, 68 S.E. 141, and other decisions of our Supreme Court.

In *Davis v. Wallace, supra,* plaintiff alleged that defendant commenced an action against him which resulted in the issuance of a writ of claim and delivery. Pursuant thereto the sheriff took an au-

tomobile from the plaintiff and delivered it to defendant who sold it under a chattel mortgage executed by one Morton. Thereafter defendant took a voluntary nonsuit. After approval of issues and requested instructions thought to be proper by the plaintiff, the opinion of the Court was, in part, as follows:

"It is true that the ownership of the automobile by plaintiffs at time of its seizure by the sheriff, under the writ of claim and delivery, issued upon the filing of the bond sued upon in this action, is a question of fact material to the determination of the amount of damages which plaintiffs may have sustained by a breach of the bond, as alleged in the complaint. Such ownership, however, is not determinative of the right of plaintiffs to recover in this action.

"If the bond was executed by defendants and there was a breach thereof as alleged in the complaint, plaintiffs, although not the owners or entitled to the possession of the automobile at the time of its seizure, are entitled to recover at least nominal damages. 34 Cyc., 1585. *Alderman v. Roesel,* (S.C.), 29 S.E., 385; *Little v. Bliss,* (Kan.), 39 Pac., 1025; *Smith v. Whiting,* 100 Mass., 122.

"If there was a breach of the bond as alleged in the complaint, such breach was a wrongful act, and the law infers or presumes damages arising therefrom to plaintiffs; if no actual or substantial damages are shown, the law gives nominal damages in order to determine and establish plaintiff's right of action and thus affords a remedy for the wrong done to them by the defendants' breach of the bond; . . ."

. . .

"Upon the issue as to damages, if plaintiffs would recover more than nominal damages for the breach of the bond, as alleged, the burden is upon them to offer evidence from which such damages may be assessed; the fact that the automobile was taken from their possession is evidence of ownership by them; upon the judgment, dismissing the action, upon voluntary nonsuit, plaintiffs were entitled to an order of restitution; such order was not made, and defendant, John C. Wallace, has failed to return the automobile; nothing else appearing plaintiffs are entitled to recover of said defendant and the surety on his bond, the value of said automobile when taken from their possession, with interest as damages for detention. As an affirmative defense, defendants alleged that at the time of the taking, John C. Wallace was the owner of said automobile, by virtue of a chattel

mortgage executed to him by Leo W. Martin. The burden is upon him to establish his ownership under said mortgage as alleged by the greater weight of the evidence. *Speas v. Bank*, 188 N.C. 524. The damages in this action must be assessed upon the same principles and under the same rules as would have applied, if the damages had been assessed in the action in which the writ of claim and delivery was issued. 23 R.C.L., p. 916, § 81; *Washington Ice Co. v. Webster*, 62 Me., 341, 16 Am. Rep., 462; *Lapp v. Ritter*, 88 Fed., 108. The question of ownership is material only in mitigation of damages, and not having been adjudicated in the former action, may in this action be considered by the jury in determining the amount of damages sustained by plaintiffs by breach of the bond. Plaintiffs are entitled to recover as actual damages only such sum as the jury may assess as compensation for loss sustained by breach of bond."

. . .

". . . Failure to prosecute the action in which the property was taken from plaintiffs, under writ of claim and delivery, is a breach of the bond, entitling plaintiffs, to at least nominal damages. Failure to return the property to plaintiffs after judgment dismissing the action upon voluntary nonsuit, is a breach of the bond, and upon it appearing that the property cannot be returned, plaintiffs are entitled to recover of the principal and surety on the bond as actual damages, the value of the property, at the time of its seizure. Defendants, however, allege as an affirmative defense to the recovery of actual damages that the plaintiffs were not at the time of its seizure, and are not now owners of the automobile, but that defendant, John C. Wallace, was the owner by virtue of a chattel mortgage executed by a third person. The dismissal of the action, upon voluntary nonsuit was not conclusive as to the title to the automobile, and defendants may in this action offer evidence in support of their allegation, not to defeat plaintiffs' action, but in mitigation of actual damages which they may recover. *Gilbert v. American Surety Co.*, 121 Fed., 499, 61 L. R. A., 253. The burden of establishing the truth of this allegation by the greater weight of the evidence, is upon defendants. . . ."

[6] Appellant Aetna Casualty and Surety Company contends, in essence, that, since it has not been served with process, it is not a party to the litigation, and the court should have declared the judgment signed by Martin, J., void as to Aetna and dismissed it as a party. It contends that Judge McLean erred in including it in that

portion of his order which allowed the parties to file additional pleadings if they were so advised. It is well settled that sureties on the plaintiff's undertaking in claim and delivery proceedings, within the limits of their obligation, are parties of record. It is also well settled that, upon determination of the action as between the principals, the prevailing party is entitled to a summary judgment against the sureties in accordance with the statute and the terms of the bond. *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460; *Long v. Meares,* 196 N.C. 211, 145 S.E. 7. The assignments of error brought by the appeal of Aetna Casualty and Surety Company are overruled.

On plaintiff's appeal, the judgment is affirmed.

On Aetna Casualty and Surety Company's appeal, the judgment is affirmed.

On defendants' appeal, the judgment is modified and affirmed.

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

AMERICAN CREDIT COMPANY, INC. v. THE STUYVESANT INSURANCE COMPANY, A CORPORATION, AND WALLACE B. CLAYTON, TRADING AND DOING BUSINESS AS GRANVILLE COUNTY FARM BUREAU

No. 7014DC75

(Filed 6 May 1970)

1. Judgments §§ 14, 24— default judgment — denial of motion to set aside for excusable neglect — failure of complaint to state cause of action

Where defendant's motion to set aside a default judgment because of excusable neglect and a meritorious defense was denied on the ground that no excusable neglect existed, defendant was not estopped from thereafter making another motion to set the default judgment aside on the ground that the complaint failed to state a cause of action against defendant.

2. Judgments § 14— default judgment — failure of complaint to state cause of action

A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff, and the default judgment may be set aside even without any showing of mistake, surprise or excusable neglect.

3. Contracts § 25; Insurance § 2— breach of contract — failure of consideration

Alleged promise by defendant insurance agent that plaintiff finance company would be named as loss payee under a policy of collision insurance issued on an automobile which had been financed by plaintiff *is held* insufficient to support an action for breach of contract, there being no consideration for defendant's promise.

4. Contracts § 14— third party beneficiary — sufficiency of allegations

Complaint does not state a cause of action by plaintiff finance company as third party beneficiary of collision insurance policy on automobile financed by plaintiff, where there are no allegations that at the time the policy was issued it was intended to benefit anyone other than the insured or that insured at any time asked that plaintiff be made the loss payee of the policy.

5. Insurance § 2— action against agent for debt — sufficiency of pleadings

In this action by plaintiff finance company against the insurance agent who sold a third party a collision policy on an automobile which had been financed by plaintiff, the complaint fails to state a cause of action for debt against defendant insurance agent where it alleges that defendant assured plaintiff that the policy was in effect and that plaintiff would be named as loss payee in the policy, and that defendant failed to inform plaintiff that the policy had been cancelled until after a collision loss of $2450 occurred, the only debt shown by the complaint being that of the third party under the financing agreement with plaintiff.

6. Insurance § 2— assignment of rights against agent — failure to show claim against agent

Complaint does not state a cause of action against defendant insurance agent because of assignment to plaintiff finance company of insured's interest and claims against defendant, where the complaint shows that defendant agent had fulfilled his obligations to insured by obtaining the requested insurance coverage and that insured has no claim against defendant agent.

APPEAL from *Moore, District Judge,* 2 October 1969 Session of DURHAM County District Court.

This is a civil action instituted by the plaintiff, American Credit Company, Inc., to recover damages from the Stuyvesant Insurance Company and Wallace B. Clayton, trading as the Granville County Farm Bureau.

Plaintiff by its verified complaint alleged:

"4. That the plaintiff is in the business of financing automobiles and in August, 1968, the plaintiff had financed a certain 1968 Mustang 2 door automobile, No. 8T01C206037 for the owner thereof, to-wit: Arthur Ray Reed of 513 Granville Street, Oxford, North Carolina.

"5. That as part of the financing agreement with said Arthur Ray Reed said Reed had agreed with the plaintiff that the said automobile would be covered with comprehensive and collision insurance.

"6. That the said Arthur Ray Reed had informed the plaintiff that he had purchased from defendant, Wallace B. Clayton, a comprehensive and collision insurance policy and provided the plaintiff with a copy of said policy.

"7. That said policy was duly issued by the defendant, The Stuyvesant Insurance Company, Policy No. A2-47-67-82 and the term of said policy was from 7-31-68 to 7-31-69 for a premium of $203.00 and said policy covered the above mentioned automobile of Arthur Ray Reed in that it provided for insurance coverage on said automobile in the form of $50.00 deductible comprehensive and $50.00 deductible for collision or upset coverage.

"8. That said policy was duly sold to Arthur Ray Reed by the defendant insurance agent, Wallace B. Clayton.

"9. That in August, 1968, the plaintiff through its agents and employees corresponded with defendant, Wallace B. Clayton and defendant Clayton informed the plaintiff that the policy had been issued and was in existence and agreed that the plaintiff would be named as Loss Payee under the terms of the policy. Thereafter the plaintiff through its agents and employees corresponded with the defendant, Wallace B. Clayton, on several occasions and each time they were assured that the above mentioned policy was in effect and covered the automobile mentioned above and defendant, Wallace B. Clayton, further agreed that plaintiff would receive a copy of the policy and would be named as Loss Payee in the policy.

"10. That on 3/7/69 a collision loss occurred and plaintiff's agents and employees contacted defendant, Wallace B. Clayton, and defendant Clayton informed plaintiff that the policy had been cancelled 1/12/69.

"11. That the defendant Clayton had assured the plaintiff on numerous occasions that the policy was in effect and that on 2/18/69 defendant Clayton agreed to send the plaintiff a copy of the policy naming plaintiff as Loss Payee and that the policy would be received by the plaintiff around 2/21/69.

* * *

"14. That at the time of the above mentioned loss the fair

market value of said automobile was approximately $2,500.00 and by reason of the $50.00 deductible part of said insurance policy the defendants are indebted to pay the loss under the terms of the policy in the amount of $2,450.00 and the defendant, Wallace B. Clayton, is secondly obligated and liable for said sum if the defendant insurance corporation fails to pay same in that defendant Clayton assured the plaintiff that the policy was in effect and assured the plaintiff that it would be named as Loss Payee in said policy and the defendant, Wallace B. Clayton, never notified the plaintiff of any insurance cancellation until after the loss had occurred."

Plaintiff filed the complaint and the complaint and summons were served on the defendant Clayton. Clayton failed to make an appearance or file an answer within the time allowed and on 27 May 1969 judgment by default and inquiry was entered for the plaintiff by Judge Thomas H. Lee of the Durham County District Court. Immediately thereafter, on the same day, Judge Lee held the inquiry and answered the issue of damages in favor of the plaintiff as against the defendant Clayton in the amount of $2,450.00. On 19 August 1969 the plaintiff took a voluntary nonsuit against the other defendant, The Stuyvesant Insurance Company, and execution was issued against the defendant Clayton on the default judgment.

On 25 August 1969 Clayton, through his attorney, filed a motion to set aside the judgment because of excusable neglect and because he had a meritorious defense and filed an affidavit in support of the motion. A hearing was held by Judge Lee on 9 September 1969 and in a judgment dated 12 September 1969 the court denied the motion and stated that Clayton had appealed but had withdrawn his appeal.

On 12 September 1969 the defendant filed a "MOTION TO VACATE JUDGMENT." The matter came on for hearing before Judge E. Lawson Moore and on 2 October 1969, Judge Moore entered a judgment vacating the default judgment on the ground that the facts alleged in the complaint were insufficient to constitute a cause of action against the defendant Clayton. From Judge Moore's judgment the plaintiff appealed.

Spears, Spears, Barnes and Baker, by Robert F. Baker, for the defendant appellee.

Edwards and Manson, by W. Y. Manson, for the plaintiff appellant.

HEDRICK, J.

[1] The first question presented on this appeal is whether the court committed error in ruling upon the defendant's motion to vacate the judgment.

In *Moore v. W O O W, Inc.*, 250 N.C. 695, 110 S.E. 2d 311 (1959), the North Carolina Supreme Court considered a case similar to the one now before us. In that case a motion to set aside a default judgment was denied for want of evidence of a meritorious defense. Several months later, but within one year of the date of the entry of the judgment by default final, the defendant brought another motion on the same ground and introduced evidence of a meritorious defense which was not available at the time of the previous hearing. At the second hearing Judge Paul entered an order setting aside the default judgment. In affirming the judgment of the court below, Parker, J. (later C.J.), stated:

> "In *Collister v. Inter-State Fidelity B. & L. Assn.*, 44 Ariz. 427, 38 P. 2d 626, 98 A.L.R. 1020, the Court held that a court's denial of a motion to vacate a default judgment is not *res judicata* as to a subsequent motion to vacate it on a different ground."

In the present case the defendant filed a motion to set aside the default judgment on the grounds of excusable neglect and meritorious defense. Judge Lee, in a judgment dated 12 September 1969, denied the motion and stated:

> "That this Court having found as a fact that no excusable neglect exists does not make any further finding insofar as an alleged meritorious defense is concerned."

When the first motion to set aside the judgment was denied the defendant filed another motion entitled "MOTION TO VACATE JUDGMENT." This motion asked that the default judgment be vacated on the ground that the complaint failed to state a cause of action against the defendant. It is well established in North Carolina that no appeal lies from one judge of the superior court to another. *Neighbors v. Neighbors*, 236 N.C. 531, 73 S.E. 2d 153 (1952). However, this principle is not applicable to the present case. On the facts of this case, Judge Moore did not undertake to review or to overrule the judge who entered the previous order. The defendant was not estopped from making his second motion before Judge Moore on the ground of meritorious defense since there had been no prior ruling on that motion by any judge of the district court.

The second question presented is whether the complaint stated a cause of action against the defendant Clayton.

[2] In *Lowe's v. Worlds,* 4 N.C. App. 293, 166 S.E. 2d 517 (1969), we find the following:

> "A default judgment admits only the averments in the complaint, and the defendant may still show that such averments are insufficient to warrant the plaintiff's recovery. *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661. A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff. G.S. 1-211; *Cohee v. Sligh,* 259 N.C. 248, 130 S.E. 2d 310; *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835. Accordingly, if the complaint in the present action failed to state a cause of action as against Lois Worlds, the default judgment against her cannot be supported and must be set aside even without any showing of mistake, surprise or excusable neglect."

[3] Plaintiff, in its complaint, alleged that one Arthur Ray Reed purchased an automobile which was to be financed by the plaintiff. As a necessary part of the financing agreement, Reed was to provide collision coverage on the automobile naming the plaintiff as loss payee. Reed informed the plaintiff in August, 1968, when they were discussing the financing agreement, that he had already purchased a collision policy and gave the plaintiff a copy of the policy which became effective 31 July 1968. Subsequently plaintiff contacted the defendant Clayton and received a promise from him to name plaintiff as loss payee under the insurance policy which had been issued to Reed. Upon these alleged facts the plaintiff sought to assert a cause of action against the defendant for breach of contract. "A contract, in order to be enforceable, must be supported by consideration, and want of consideration constitutes legal excuse for nonperformance of an executory promise. A mere promise, without more, is unenforceable." 2 Strong, North Carolina Index 2d, Contracts, § 4. In *Matthews v. Matthews,* 2 N.C. App. 143, 162 S.E. 2d 697 (1968), the Court stated:

> "A valuable consideration is necessary to the validity of a contract not under seal, and it is necessary for the pleader to allege such facts as will enable the Court to see that there was a valuable consideration. McIntosh, N. C. Practice 2d, Sec. 1067."

The plaintiff's allegations show no consideration for the promise by Clayton to name the plaintiff as loss payee on the insurance policy purchased by Reed.

[4] The plaintiff contends that by the allegations contained in paragraph 15 of the complaint it has stated a cause of action as a third party beneficiary of the insurance policy. In paragraph 15 the plaintiff stated that on 7 March 1969 the automobile was damaged

to the extent that it was considered a total loss, that Reed is still indebted to the plaintiff in excess of $2,400.00 and that because of this the plaintiff is a third party beneficiary of the policy. North Carolina does recognize the existence of third party contracts. In 2 Strong, North Carolina Index 2d, Contracts, § 14, it is stated:

> "Where two persons enter into a contract for the benefit of a third person, such person may maintain an action for breach of the contract, and may recover, assuming the existence of a valid and enforceable agreement.
>
> * * *
>
> "In order for a third person to sue, it is required that the contract be made for his benefit."

The allegations in this complaint do not state a cause of action by the plaintiff as a third party beneficiary of the insurance policy. There are no allegations that at the time the policy was issued it was intended to benefit anyone other than Reed. When Reed applied for the policy no financing agreement existed with the plaintiff and it is not alleged that Reed, at any time, asked the defendant Clayton to make the plaintiff the loss payee of the policy. In the absence of an allegation that the insurance policy was entered into for the benefit of the plaintiff we can find nothing in the complaint to show that the plaintiff was anything but a stranger to the contract.

[5, 6] The plaintiff also contends that the allegations contained in paragraph 14 of the complaint are sufficient to state a cause of action against the defendant for debt. The allegations in the complaint are not sufficient to do this since they show that the only debt owed is one by Reed, under the financing agreement, to the plaintiff. Plaintiff further contends that it has set forth a cause of action against the defendant because of the assignment by Reed of his interest and claims against the defendant. The facts, as alleged, fail to show any claim by Reed against the defendant Clayton. The plaintiff, in its complaint, alleged that Reed went to Clayton and asked him to get him an insurance policy to cover collision and comprehensive losses and that Clayton did obtain such a policy from The Stuyvesant Insurance Company. Once Clayton, as agent, obtained the insurance policy for Reed he had fulfilled his obligations.

The complaint failed to state a cause of action against the defendant Wallace B. Clayton and cannot support a default judgment against him. He was entitled to have the default judgment vacated. For the reasons stated above, the judgment of the District Court of Durham County is affirmed.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

JULIA C. KELLY, MINNIE V. McCLURE, INDIVIDUALLY, AND MINNIE V. McCLURE AS THE ADMINISTRATRIX OF THE ESTATE OF FLOYD McCLURE, DECEASED V. DILLARD G. DAVENPORT AND WIFE, CATHERINE H. DAVENPORT

No. 7026DC216

(Filed 6 May 1970)

1. Courts § 11.1; Jury § 1— practice and procedure in district court — waiver of jury trial

Under G.S. 7A-196 (prior to its amendment effective 1 January 1970), a party waived the right to a jury trial in the district court by failing to file a written demand for jury trial within 10 days after the entry of superior court judge's order transferring the cause to the district court.

2. Courts § 11.1; Jury § 1— district court procedure — right to jury trial

Even when the right to a jury trial is waived in the district court, the statutes permit, but do not require, the judge to submit the issues to a jury.

3. Bills and Notes § 20— action on note — sufficiency of evidence

In an action on a promissory note, plaintiffs' evidence was sufficient to withstand defendants' motion for judgment of nonsuit, where the evidence tended to show that the indebtedness of $1200 was evidenced by a note secured by a deed of trust on two vacant lots; that the deed of trust had been foreclosed; and that the net proceeds from the foreclosure had been applied to the interest then due on the note, leaving a balance of $1200.

4. Pleadings § 19— demurrer to answer and defenses

A plaintiff may demur to a defendant's further answers and defenses.

5. Bills and Notes § 18— action on note — demurrer to answer and defense

In an action to recover on a promissory note, allegations in defendants' further answer and defense that the execution of the note was obtained by fraud, *held* demurrable.

6. Sales § 17— breach of warranty in sale of house — sufficiency of evidence

Defendants' evidence was sufficient to be submitted to the jury in their counterclaim for breach of warranty in the sale of a house, where the evidence was to the effect that the house, which defendants purchased for $12,000, was not a new house; that its fair market value was only $10,700; that the house was not as represented, in that the enamel on the

bathtub had been broken, the bathroom floor was unlevel, the commode was improperly installed, and there were large cracks under the windowsill; and that plaintiff's intestate had promised to correct these deficiencies but did not do so.

7. Appeal and Error § 59; Trial § 58— trial without jury — nonsuit improperly granted — harmless error

Ruling of the trial court in granting plaintiffs' motion for nonsuit on defendants' counterclaim, although improper under the facts of this case, *held* not prejudicial to defendant when the trial judge was sitting as the trier of fact, since the ruling amounted to a finding of fact and was tantamount to an answer to the issue in favor of the plaintiffs.

APPEAL by defendants from *Stukes, District Judge,* 29 September 1969 Session of District Court held in MECKLENBURG County.

Plaintiffs instituted this action on 23 January 1968 and allege in their amended complaint filed 21 March 1968 that defendants are indebted to them on a promissory note in the sum of $1,200.00 with interest thereon from 14 March 1964, with the sum of $103.43 realized from the foreclosure sale under a deed of trust of two vacant lots to be deducted from the amount of interest due.

Defendants, in their answer filed 20 August 1968, deny the material allegations of the complaint and, in the first further answer and defense, attempt to allege that the execution of the note was obtained by fraud. In a second further answer and defense, defendants assert that plaintiffs are indebted to them in the sum of $1,380.00 for breach of warranty in the sale of a house by plaintiffs to defendants. In a third further answer and defense, the defendants allege that the value of the lots foreclosed was in excess of the amount received at the foreclosure sale and that they are entitled "by way of offset the value of said lots at the time of said foreclosure sale and pursuant to G.S. 45-21.36."

Trial was by the judge, without a jury, and from the judgment that the plaintiffs have and recover of the defendants the sum of $1,096.50, plus interest thereon from 14 March 1964, the defendants appealed to the Court of Appeals.

Lindsey, Schrimsher & Erwin by Fenton T. Erwin, Jr., for plaintiff appellees.

Don Davis for defendant appellants.

MALLARD, C.J.

Defendants assign as error the failure of the court to grant their motions for a trial by jury.

District courts were established in Mecklenburg County, which is in the Twenty-Sixth Judicial District, on the first Monday in December 1968. G.S. 7A-41; G.S. 7A-131. Under date of 2 December 1968, which was the first Monday in December 1968, Judge Fred H. Hasty, who was the Senior Resident Superior Court Judge of the Twenty-Sixth Judicial District, issued an order pursuant to the provisions of G.S. 7A-259(b) transferring this case to the District Court Division for trial. The date of filing of Judge Hasty's order is not shown on the record. However, we assume that it was filed promptly on the date thereof. There is no objection or exception in the record to the issuance of this order by Judge Hasty.

G.S. 7A-259(b) provides that when a district court is established in a district, any superior court judge may on his own motion transfer to the district court cases pending in the superior court, providing that the requirements of G.S. 7A-259(a) are complied with. In this case, absent objection and exception to the order, we assume that the provisions of G.S. 7A-259(a) were complied with. This section includes giving prompt notice to the parties when the transfer is effected.

The statute in effect at the time this suit was instituted in the Superior Court of Mecklenburg County provided that district courts would be established in such county on the first Monday in December 1968, and the defendants are chargeable with notice thereof.

Defendants, in their brief, refer to G.S. 7A-196 as it was after it was amended in 1967. This amendment did not become effective until 1 January 1970. See Chapter 954 of 1967 Session Laws and Chapter 803 of 1969 Session Laws.

[1] The right to a jury trial in civil cases such as this in the District Court of Mecklenburg County, after the court's establishment on the first Monday in December 1968, was controlled by G.S. 7A-196 as it was written prior to being amended by Chapter 954 of the 1967 Session Laws. Under the applicable provisions of G.S. 7A-196, as then written, a party waived the right to a trial by jury by failing to file a written demand in the office of the clerk of superior court "after the commencement of the action and not later than 10 days after the filing of the last pleading directed to the issue, or after the entry of an order transferring the cause to the district court division, whichever occurs first." The filing of the last pleading herein was on 18 March 1969. The order transferring the cause to the

district court is dated 2 December 1968. The defendants did not file a written demand for a jury trial until 27 January 1969. This demand came too late to be allowed as a matter of right because it was not made within ten days after the entry of Judge Hasty's order transferring this cause to the district court. The trial judge did not commit error in holding that the defendants had waived their right to a trial by jury.

[2] Defendants contend that the trial judge abused his discretion by failing to allow their motion for a trial by jury made at the time the case was called for trial. Even when parties waive their right to a trial by jury, as was done in this case, the statutes permit, but do not require, the judge to submit the issues to a jury. However, we do not think the judge abused his discretion in failing to submit the issues to a jury.

[3] The plaintiffs offered evidence which tended to show that the defendants were indebted to them in the sum of $1,200.00 plus interest; that this was evidenced by a note secured by a deed of trust on two vacant lots; that the deed of trust had been foreclosed; and that the net proceeds of $103.43 from the foreclosure had been applied to the interest then due on the note, leaving a balance due of $1,200.00.

The defendants alleged and offered evidence that they purchased a new house and lot from the plaintiffs and their husbands for the sum of $12,000.00. This was to be paid by $2,300.00 cash, a note for $144.00 payable in two annual installments of $72.00 each, a credit of $1,056.00 for a deed for the two lots described in the alleged deed of trust, and the proceeds from a $8,500.00 loan from the Mutual Savings and Loan Association of Charlotte, North Carolina.

There was ample evidence to withstand the defendants' motion for judgment of nonsuit, and the judge did not commit error in the denial thereof.

Defendants' third assignment of error is to the action of the trial court in sustaining plaintiffs' demurrer *ore tenus* to the first further answer and defense. The record does not reveal whether the plaintiff had finished offering evidence when defendants interposed a motion for judgment as of nonsuit which the judge correctly overruled. However, the record reveals that immediately thereafter plaintiffs' counsel demurred *ore tenus* to the "First Further Answer and Defense," to the "Second Further Answer and Defense," and to the "Third Further Answer and Defense." The court sustained the first demurrer, and at that time denied the other two demurrers.

[4] A plaintiff may demur to a defendant's further answers and defenses. The first further answer and defense challenged here attempts to allege fraud. The rule with respect to a proper allegation thereof is set out by Chief Justice Winborne in the case of *Financing Corp. v. Cuthrell,* 251 N.C. 75, 110 S.E. 2d 484 (1959), as follows:

> "Looking to the pleadings challenged by the demurrer it is seen that it is based upon fraud. In such case it is not sufficient to allege this in a general way; but the particular facts constituting such fraud should be alleged with sufficient fullness and accuracy to apprise the opponent of what he is called on to answer. And in actual fraud the pleading must allege the essentials of the cause of action, which are 'the representation, its falsity, *scienter,* deception, and injury. The representation must be definite and specific, materially false, made with knowledge of its falsity or in culpable ignorance of its truth, made with fraudulent intent, must be reasonably relied on by the other party and he must be deceived and caused to suffer loss.' * * *."

[5] Applying the foregoing rule to the pleadings in this case, we are of the opinion and so hold that the court was correct in sustaining the demurrer to the first further answer and defense.

[6] After the defendants had offered evidence and rested, the plaintiffs moved for judgment as of nonsuit of defendants' "Second Further Answer and Defense." Defendants excepted and assigned as error the ruling of the trial judge allowing the motion. In the second further answer and defense, the defendants had asserted a counterclaim for an alleged breach of warranty. There was some evidence offered by the defendants that the house they purchased from the plaintiffs was not a new house; that its fair market value was only $10,700; that it was not as represented, in that, the enamel on the bathtub had been broken, the bathroom floor was unlevel, the commode was not properly installed, and there were large cracks under the windowsill; and that plaintiff McClure's intestate promised to correct these deficiencies but did not do so.

In ruling on plaintiffs' motion for nonsuit, the court said:

> "The court is of the opinion that there is insufficient evidence to sustain the allegations of the defendants in their Second Further Answer and Defense, pertaining to breach of warranties and the Motion to Nonsuit the Second Further Answer and Defense is allowed."

[7] This action of the judge in allowing the motion for judgment

of nonsuit was improper. However, conceding that there was sufficient evidence to require submission to a jury of an issue on breach of warranty, the allowance of the motion for nonsuit, under these circumstances, was not prejudicial error. The court was sitting as the trier of the facts. After all the evidence was in, the court ruled that the evidence was not sufficient to support a breach of warranty. This, we think, amounts to a finding of fact and is tantamount to an answer to the issue in favor of plaintiffs.

The defendants also except to and assign as error the following findings of fact as set out in the judgment:

"1. That on or about the 14th day of March, 1962, the defendants executed a certain promissory note in the original principal amount of $1,200.00 payable to plaintiffs, and their predecessors in interest as alleged in the complaint.

2. That after all sums which have been paid and credited upon said note there remains a balance owed plaintiffs by defendants of $1,096.50 plus interest as set out in said note from and after March 14, 1964."

There was ample evidence to sustain the findings of fact, and the defendants' exceptions thereto are overruled.

Defendants make other assignments of error based upon other exceptions taken. We have carefully examined all of them and are of the opinion and so sold that no prejudicial error is made to appear.

Affirmed.

MORRIS and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. RUSSELL EVERETT PERKINS

No. 7014SC211

(Filed 6 May 1970)

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

In this incest prosecution, the trial court did not express an opinion on the evidence when, in response to a question by defense counsel as to whether defendant had sexual relations with his daughter, defendant answered, "Not to my knowledge," and the court asked, "You would know, wouldn't you?" and instructed defendant to "answer the question correctly."

2. Criminal Law §§ 114, 170— expression of opinion in instructions — reference to "disagreeable case"

In this incest prosecution, the trial court did not commit prejudicial error in thanking the jury at the beginning of the instructions "for the attention you have given to this rather disagreeable case."

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

In this incest prosecution, defendant was not prejudiced when the court, upon being informed by defense counsel that defendant wished to make a statement, stated "That will not be permitted," and told the jury to retire and that he would "see what this is about."

4. Criminal Law §§ 99, 170; Constitutional Law § 32— defendant's dissatisfaction with counsel — comments by trial court in absence of jury

In this incest prosecution, defendant was not prejudiced when, upon being informed in the absence of the jury that defendant was not satisfied with his appointed counsel, the trial court stated that defendant had objected to all three lawyers who had been appointed to represent him, that defendant was not going to pick and choose lawyers to be paid by the State, that the court had done the best it could in giving defendant a good lawyer, and that "you will take him and you will like him."

5. Criminal Law § 102— solicitor's attempt to get evidence in record — prejudice

In this incest prosecution, defendant was not prejudiced by the solicitor's attempts to get into evidence State's exhibits which were identified as letters from defendant where the court sustained defense objections to their introduction.

6. Criminal Law § 34; Incest— evidence of other instances of intercourse with prosecutrix

In this incest prosecution, the trial court did not err in the admission of testimony that defendant had had intercourse with the prosecutrix on previous occasions and in referring to such testimony in the charge.

ON Certiorari to Review Judgment from *Bailey, J.*, 7 November 1967 Session of DURHAM County Superior Court.

Defendant Russell Everett Perkins (Perkins) was indicted during the July 1967 term of Durham County Superior Court for having felonious carnal intercourse with his daughter, Carolyn Perkins, age 14, on 26 June 1967. It was determined that Perkins was indigent and counsel was provided for him. After Perkins became dissatisfied with this attorney, another member of the Bar was provided for him. After a misunderstanding and a conflict arose, the second attorney was allowed to withdraw. Apparently, a third attorney was appointed for Perkins prior to the trial.

Perkins' daughter, Carolyn, testified that her mother and her older sister had left the home, leaving Carolyn and her father to

care for the smaller children. She testified that her father called her to the bedroom while the younger children were watching television; that he closed the door, told her to remove her clothes and lie on the bed; that he then had sexual relations with her. She stated, over objection, that he had done this "six or seven times" before.

Carolyn Perkins testified that she reluctantly told her mother about the incident, after the latter had questioned her "because my little sister saw the door closed." Mrs. Perkins testified she had met her husband in Germany in 1951. Perkins returned to the United States and brought her over here and married her. She stated that she had one child, Linda, before meeting Perkins and that Carolyn had been born to her before their marriage, but that Carolyn was Perkins' child. Four other children were born of the marriage. Mrs. Perkins tended to corroborate Carolyn's testimony regarding the incident in question here.

Perkins took the stand and denied having relations with Carolyn. He testified that he had merely called her to the room to find some pants for him and to tell her to dress the children so they could all leave; and that there was no way the children could have seen the door to the bedroom closed from where they sat near the television. When asked whether Carolyn Perkins was his daughter, he replied,

> "For all I know I would say yes, sir. I was dating my wife at the time steady. I was dating my wife — she had one child. That is the reason I married her. I came back to the United States and thought I had left a little baby in Germany without a father.
>
> Q And how old is Carolyn Perkins, your daughter?
>
> A She is fifteen the 28th of this month."

Perkins admitted writing the letters which were the State's exhibits and stated that he had had drinking problems.

The jury returned a verdict of guilty and the defendant, Perkins, was sentenced to 15 years imprisonment by a judgment signed 7 November 1967. Perkins petitioned this Court for a writ of certiorari which was granted and filed 31 December 1969.

Attorney General Robert Morgan, Deputy Attorney General Ralph Moody and Staff Attorney Donald M. Jacobs for the State.

W. Paul Pulley, Jr., for defendant appellant.

CAMPBELL, J.

[1] The major exception assigned is that the judge expressed an opinion to the jury about the case in the following colloquy:

"Q Now, Mr. Perkins, you are accused of having had sex relations with your daughter on the 26th day of June, 1967. Now, did you have sex relations with your daughter?

A Not to my knowledge, no, sir.

COURT: You would know, wouldn't you?

A Sir?

COURT: You would know it, wouldn't you?

A I would think I would know if I did.

COURT: Answer the question correctly.

No, I did not have sex relations with my daughter on that date. . . ."

The defendant contends that the statement "answer . . . correctly," implies that the trial judge was saying that the defendant was not answering "truthfully." We do not feel that such is the implication; and under the circumstances, this statement by the trial judge was not prejudicial. First, he subsequently answered the question, "No." Secondly, the question was posed by defendant's own counsel and he should not now complain that he was asked to answer it. Defendant does not attack the statement on the basis that it was self-incriminating, but rather attacks the conduct of the trial judge. We do not find this to have been prejudicial error. See *State v. Hoyle*, 3 N.C. App. 109, 164 S.E. 2d 83 (1968).

[2-4] Perkins asserts that if the above statement alone was not prejudicial, then that, plus the following two statements were:

1. *"CHARGE OF THE COURT*

BAILEY, J.: Ladies and Gentlemen of the Jury, let me thank you first for the attention you have given to this rather disagreeable case and for the attention you have paid the evidence and to the lawyers in the case."

2. "DEFENDANT PERKINS: I want to make a statement.

MR. BURT: May it please the Court, the defendant wishes to make a statement at this time.

COURT: That will not be permitted. Ladies and gentlemen of the jury, I will ask you to go to your jury room. I will see what this is about.

THE JURY IS EXCUSED FROM THE COURTROOM AND OUT OF THE PRESENCE OF THE JURY THE FOLLOWING PROCEEDINGS WERE HAD:

* * * *

"(Mr. Burt confers with the defendant.)

MR. BURT: May it please the Court, he wishes to make the statement that he is not satisfied with his defense in this case.

THE COURT: Mr. Perkins?

DEFENDANT PERKINS: Yes.

THE COURT: I want this in the record, Mrs. Tilley. You have had three lawyers assigned to you since you have been charged with this crime. I believe you have objected to all of them. I assigned you Mr. Burt because I believe and do believe now that he is one of the ablest lawyers at the Durham Bar. Now, I am not going to permit you to pick and choose lawyers to be paid by the State of North Carolina. I have done the best I can in giving you a good lawyer. I would be content to be represented by Mr. Burt myself. Now, you will take him and you will like him. You can sit down. You will bring the jury back."

We disagree. In the first instance, the court merely thanked the jury for their service in connection with a "disagreeable" type of case — not necessarily a "disagreeable" defendant. *State v. Phillips,* 5 N.C. App. 353, 168 S.E. 2d 704 (1969). In the second instance, the court did no more than indicate, within the hearing of the jury, that a certain procedure would be followed. The latter amounts to a judge's cautioning the defendant's attorney about the use of improper procedure, which is entirely within the province of the trial judge. Defendant's assignment of error regarding his objection to appointed counsel is without merit. *State v. Moore,* 6 N.C. App. 596, 170 S.E. 2d 568 (1969).

[5] Defendant also questions the propriety of allowing the Solicitor to "wave" letters before the jury after objections to their admission into evidence had been sustained. The record shows only that some letters were offered as State's exhibits after they were identified as letters from the defendant, and then the following occurred:

"Q This is State's Exhibit 3; do you recognize that?

A Yes, I do.

Q What is that?

A It is a letter I received from my husband through the mail.

Q When did you receive that?

A I received it in — on July 17, 1967.

Q Is that letter and all of the parts thereof in your husband's handwriting?

A Yes, they are all in my husband's handwriting (examining the letter).

A I would like to introduce that into evidence, if your Honor please.

OBJECTION — SUSTAINED.

Q Now, I would like to have this item identified as State's Exhibit 4 and ask this witness whether she recognizes State's Exhibit 4?

A Yes, it is his handwriting. I received it through mail.

(Envelope containing letter postmarked Durham, July 5, 1967, is marked for identification as STATE'S EXHIBIT No. 4.)

COURT: What did she say it was, letter received from the defendant on when?

A July the 5th, 1967.

MR. EDWARDS: I think I will have no further questions at this time. What I would like to do in State's Exhibit 4, which has been identified as being one of the letters that she received from the defendant, this one on July 5, 1967, I would like to tender that in evidence.

OBJECTION — SUSTAINED."

The Solicitor cannot be faulted for attempting to get evidence into the record. The defendant's objections were sustained and the record shows no prejudice to the defendant. *State v. Butler,* 269 N.C. 483, 153 S.E. 2d 70 (1967).

[6] The following two dialogues are also complained of by the appellant (the first during Carolyn's and the second during Mrs. Perkins' testimony):

1. "Q Now, Carolyn, had he done this before to you?

A Yes, sir.

OBJECTION — OVERRULED.

Q How often, approximately?

A I don't know, but from what I remember it was six or seven.

Q About six or seven times?

A Or more.

Q When did he start doing this to you?

A About a year ago this summer.

Q About a year ago?

A Yes, sir."

2. "Q Did you ask her whether it had ever happened to her before?

A Yes, I questioned her about it.

Q What did she say?

A And she told me 'yes,' and she told me exactly she couldn't remember how long it has been going on, and I asked her again, I said, 'Carolyn, how come you haven't told me about it?' and all she gives me for an answer is because he has threatened her."

All of this was referred to in the charge of the Judge in the following manner:

"She testified this had happened some six or seven times before over a period of a year; that she had not made any complaint to anyone before because her father had told her that if she did that she would have to go to the penitentiary; that, when her mother came home that afternoon, she reported this to her mother only after her mother had questioned her about it two separate times."

This assignment of error is without merit. *State v. Sutton,* 4 N.C. App. 664, 167 S.E. 2d 499 (1969).

We have reviewed the other assignments of error as well and find, in law,

No error.

PARKER and HEDRICK, JJ., concur.

CAROLYN BALLENTINE ELLIOTT AND REBECCA BALLENTINE v. BESSIE B. BALLENTINE, LYNTON YATES BALLENTINE, AND JULIUS W. PHOENIX, JR.

No. 7010SC84

(Filed 6 May 1970)

Wills § 34— petition for accounting of devised property — remaindermen — life tenant — demurrer

Plaintiffs, who are remaindermen under a will, failed to allege sufficient facts to entitle them to findings (1) that the life tenant under the will is a trustee of the property for herself and the remaindermen and (2) that the plaintiffs are entitled to an accounting of the property from the life tenant; therefore, the trial court erred in overruling the life tenant's demurrer to the complaint.

CAMPBELL and PARKER, JJ., concurring in the result.

APPEAL from *Bone, E.J.*, November 1969 Civil Term, WAKE County Superior Court.

This is an action instituted by the plaintiffs under the Uniform Declaratory Judgment Act seeking a declaration of rights and liabilities of the parties under the will of L. Y. Ballentine.

Under the terms of the will the defendant, Bessie B. Ballentine, widow of the testator, was given certain property as follows:

"SECOND: I give, devise and bequeath to my wife, BESSIE B. BALLENTINE, for the term of her natural life all property of every kind and description of which I may die seized and possessed; with full power in her if in her judgment it is necessary and desirable to dispose of any or all of said property, to sell and convey the same absolutely and in fee simple by Deed or Bill of Sale or if in her judgment it is desirable to do so, she is hereby empowered to encumber the same by mortgage or deed of trust, all without order from any Court.

* * *

"FIFTH: Upon the death of my said wife . . ., then I give, devise and bequeath said property or so much thereof as may not have been disposed of by my said wife under the power of disposition contained in Paragraph 2 hereof absolutely and in fee simple to my three children, Rebecca B. Scoggin, Lynton Yates Ballentine, Jr., and Carolyn Ballentine, and my stepson, Julius W. Phoenix, Jr., share and share alike. If either be left not living but with issue surviving, then the issue shall take the part of the deceased parent. If either should then be not living

and have no issue then surviving, then the part of the one then not living shall be divided among the survivors or their issue."

On 8 July 1969 the plaintiffs, two of the children of the testator, L. Y. Ballentine, instituted this action praying:

"1. That a declaratory judgment be entered that Bessie B. Ballentine holds all the property passing under the will of L. Y. Ballentine and proceeds of the sale or other disposition of said property in trust for herself as life tenant, with a power of disposition; and further that she holds the remainder after her life estate in said property and in the proceeds of the sale or other disposition of said property in trust for Rebecca Ballentine, Lynton Yates Ballentine, Jr., Carolyn Ballentine Elliott, and Julius W. Phoenix, Jr., or their surviving issue; all in accordance with Paragraph 2 and Paragraph 5 of the will of L. Y. Ballentine as set forth above.

"2. That the defendant Bessie B. Ballentine be directed by this court to provide the plaintiffs within thirty days from the entry of judgment in this cause a statement setting forth in total dollar figures the then current assets in her possession which are held under the terms of the said will of L. Y. Ballentine, with an inventory of such assets as held in the form of real estate, stocks, bonds, cash and tangible personal property, briefly describing them, and if such assets are subject to any outstanding liabilities, stating the amount thereof by items, and in the statement of assets accounting for the disposition of each item of property originally passing to the defendant Bessie B. Ballentine under the said will of L. Y. Ballentine and for the disposition of every item of property or sum received in any sale or exchange of such original property and for the disposition of all the interest, rents and profits accruing to any property held under the said will, so that all property held by the defendant Bessie B. Ballentine under said will may be identified and properly segregated from all property held by her as absolute owner; and further that she be directed to provide a like statement to the plaintiffs annually by July 1 of each calendar year, commencing with July 1, 1970."

On 8 August 1969 the defendants demurred to the complaint on the grounds that it does not state a cause of action and that there was a misjoinder of parties and causes of action. After hearing, judgment was entered on 17 November 1969 overruling the demurrer. From the entering of the judgment the defendants appealed.

Maupin, Taylor and Ellis, by Armistead J. Maupin, for the appellants.

Sanford, Cannon, Adams and McCullough, by Hugh Cannon and E. D. Gaskins, Jr., for the appellees.

HEDRICK, J.

The appellants bring forward on this appeal two assignments of error: (1) Did the court err in holding that there was no defect of parties and causes and (2) did the court err in holding that the complaint alleged a genuine controversy under the Declaratory Judgment Act?

[1] G.S. 1-254 provides that any person who has an interest "under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected . . ." may have any question of construction determined and obtain a declaration of rights, status, or other legal relations thereunder. In actions under the Declaratory Judgment Act all persons who have or claim any interest which would be affected by the declaration must be made parties. G.S. 1-260; 3 Strong, North Carolina Index 2d, Declaratory Judgment Act, § 2. The parties in the present action were proper parties within the terms of the Declaratory Judgment Act.

[2, 3] The office of a demurrer is to test the sufficiency of a pleading, admitting the truth of factual averments well stated and all relevant inferences of fact as may be deduced therefrom. "Demurrers in declaratory judgment actions are controlled by the same principles applicable in other cases. Even so, it is rarely an appropriate pleading to a petition for declaratory judgment." *Machine Co. v. Newman,* 275 N.C. 189, 166 S.E. 2d 63 (1969). However, demurrers are proper pleadings and should be sustained where the record is plain that no basis for declaratory relief exists, as where no actual controversy is alleged. 22 Am. Jur. 2d, Declaratory Judgments, § 91.

In *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404 (1949), Ervin, J., speaking for the Court, said:

> "There is much misunderstanding as to the object and scope of this legislation [the Uniform Declaratory Judgment Act]. Despite some notions to the contrary, it does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. (Citations

omitted). This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.

* * *

"While the Uniform Declaratory Judgment Act thus enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. (Citations omitted)."

In the case of *Brandis v. Trustees of Davidson College,* 227 N.C. 329, 41 S.E. 2d 833 (1947), the proceeding was instituted to have determined the validity of an attempt to sell part of the trust property for the benefit and preservation of the trust. The court said:

"While proceedings under Art. 26 of the General Statutes — Declaratory Judgments — have been given a wide latitude, *Insurance Co. v. Wells,* 225 N.C., 547, 35 S.E. (2d), 631; *Johnson v. Wagner,* 219 N.C., 235, 13 S.E. (2d), 419, nevertheless they are not without limitation, and it can hardly be said the court is expected to lend its general equity jurisdiction to such proceedings. 16 Am. Jur., 291. The purpose of the statutory enactment is to grant 'declaratory relief' and remove uncertainties when properly presented. G.S. 1-256; *Light Co. v. Iseley,* 203 N.C. 811, 167 S.E., 56; *Walker v. Phelps,* 202 N.C., 344, 163 S.E., 726."

[4] It is not our duty in this opinion to undertake to construe the provisions of the will of the testator, L. Y. Ballentine; however, we will consider the allegations contained in the complaint in order that we may determine whether they are sufficient to entitle the plaintiffs to declaratory relief. The plaintiffs have not alleged that the defendant, Bessie B. Ballentine, holds the property she received as a life tenant under the will as trustee for the remaindermen. They have alleged that she holds the property as life tenant with a power of disposition and that certain property has passed into her hands as life tenant. They further allege that they are entitled to an immediate accounting and an inventory of the assets and liabilities which constitute that property and an annual accounting thereafter. In their

prayer for relief they ask that the defendant be declared a trustee of the property for herself and the remaindermen.

In *Howell v. Alexander,* 3 N.C. App. 371, 165 S.E. 2d 256 (1969), not a case involving a declaratory judgment but one cited by the appellee, the court was asked to construe the provisions of a will which were similar to the provisions involved in the present case. Plaintiffs brought an action to impose a constructive trust on property subject to a remainder interest which property was being held by a life tenant. The evidence revealed that the life tenant had broad powers of disposition and that she had exercised her powers to acquire fee simple title in her own name to certain other property by using the proceeds from property subject to the remainder interest. The court stated that although she had the "unbridled discretion to subject the entire estate to her own use during her lifetime, even to the extent of a complete dissipation of the estate, she cannot take title in herself to the exclusion of the interest of the remaindermen." The court then held that a constructive trust could be imposed on the remaining portion of the property. In the present case, the plaintiffs have not alleged that the defendant has tried to take title in herself to the exclusion of their interests. They have only alleged that the defendant is a life tenant, that she has received property under the terms of the will, and that they are therefore entitled to an accounting and an inventory of the property. There are no allegations in the complaint which would give the court jurisdiction of this matter. No justiciable controversy has been alleged and there has been no showing that the defendant holds the property in a fiduciary relationship. Until a fiduciary relationship has been established the plaintiffs are not entitled to ask for an accounting of the property now held by the defendant. Before the plaintiffs may obtain a declaratory judgment they must show the existence of the conditions upon which the court's jurisdiction may be invoked. *Tryon v. Power Co.,* 222 N.C. 200, 22 S.E. 2d 450 (1942).

Since no justiciable controversy has been alleged in the complaint filed by the plaintiffs, the judgment of the court below overruling the defendants' demurrer is reversed, plaintiffs' allegations being insufficient to entitle them to a declaratory judgment.

Reversed.

CAMPBELL and PARKER, JJ., concurring in the result:

The assertion by the plaintiffs that this action is brought under the Uniform Declaratory Judgment Act does not make it so. It is obvious that the case seeks an accounting from Bessie B. Ballentine

as though she were a trustee. Plaintiffs failed to establish any trust, and there are no allegations establishing any wrongdoing on the part of Bessie B. Ballentine. The allegations in the complaint are insufficient to entitle the plaintiffs to the relief requested and fail to state a cause of action. We concur in the result that the judgment of the trial court should be reversed.

MILDRED LOUIS THOMPSON v. WALTER GASTON SHOEMAKER, JR. AND WATERS INSURANCE AND REALTY COMPANY, INC.

No. 7026DC153

(Filed 6 May 1970)

1. Landlord and Tenant § 19— tenant's action for rent paid — unfit premises — voluntary payment of rent

In a tenant's action for the recovery back of rents already paid, the tenant was not entitled to recover on the theory that the dwelling was maintained by the landlord in violation of the city code and was unfit for human habitation throughout the fifty-three week period of occupancy, where the payment of rent was voluntary.

2. Cancellation and Rescission of Instruments § 4; Money Received § 1— voluntary payments made under mistake of law

Voluntary payments made under a mistake of law, with all knowledge of the facts, cannot be recovered back, although there was no debt.

3. Landlord and Tenant § 19— constructive eviction — unfit premises — voluntary payment of rent

A tenant may not recover for constructive eviction on the theory that the premises were unfit for human habitation, where the complaint showed that the tenant voluntarily paid the rent with full knowledge of the unfitness of the premises and continued to occupy the premises throughout the rental period.

4. Evidence § 3— judicial notice — low income housing

The unavailability of low income housing in a municipality is subject to debate and is not a factor that can be judicially noticed by the Court.

5. Landlord and Tenant § 8— damage to tenant's property — negligence of landlord — city code — sufficiency of complaint

A tenant's complaint failed to state a cause of action that she suffered damage to her personal property and suffered mental and physical agony as the proximate result of the landlord's negligence in keeping the premises in an unfit and substandard condition in violation of the city code, where it appeared from the complaint that the tenant voluntarily continued to pay rent and to occupy the premises after learning of the violations.

6. Landlord and Tenant § 8— lessor's duty to repair — common law rule

A lessor is under no implied covenant to repair the premises and, in the absence of an agreement between the parties to the contrary, is not under a duty to keep the premises under repair or to repair defects existing at the time the lease is executed.

APPEAL by plaintiff from *Abernathy, District Judge,* 22 September 1969 Session of MECKLENBURG County District Court.

Plaintiff filed complaint on 11 June 1969 against defendant Shoemaker, owner of a rental dwelling, and his rental agent, Waters Insurance and Realty Company, Inc. She alleged for a first cause of action in substance, except where quoted, as follows: (1) Plaintiff rented the dwelling through the defendant agent on 27 May 1968 for an agreed rental of $12.50 a week. (2) From 27 May 1968 until 31 May 1969 plaintiff occupied the dwelling and paid rents in the total sum of $662.50. (3) At the commencement of the rental contract the dwelling was sub-standard and unfit for human habitation and was in violation of the Housing Code of the City of Charlotte in that it was infested with rats and other rodents; had no screens on any windows; had leaks in the roof, and generally lacked maintenance. (4) "[D]efendants were informed of the above mentioned hazards and defects at various times throughout both the plaintiff's occupancy and previous occupancies but no repairs were undertaken by the defendants." (5) "[P]laintiff is of limited means and therefore was unable to move elsewhere." (6) She is entitled to recover the amount paid in rent for the substandard and unfit dwelling.

For a second cause of action, plaintiff alleged that she suffered damage to her personal property and mental and physical agony as a result of the enumerated deficiencies of the dwelling. Recovery in the sum of $350 was sought on the second cause of action.

Defendants filed separate demurrers. Judgment was entered on 25 September 1969 sustaining the demurrers with prejudice to plaintiff and plaintiff appealed.

Gail Barber for plaintiff appellant.

Harkey, Faggart, Coira & Fletcher by Henry Lee Harkey and Francis M. Fletcher, Jr., for defendant appellees.

GRAHAM, J.

Plaintiff contends that she has sufficiently stated a first cause of action under either of two theories: (1) The rental contract was il-

legal and unenforceable because the dwelling rented was maintained in violation of the Housing Code of the City of Charlotte and was unfit for human habitation. (2) Defendants, in renting plaintiff a substandard and unfit dwelling, breached various material warranties implied in the rental contract and thereby constructively evicted plaintiff from the dwelling.

[1, 2] In our opinion neither theory will support recovery in this case because the cause of action alleged is for the recovery back of rents already paid. Plaintiff does not contend the payments were made under a mistake of fact. On the contrary, she alleges that the dwelling was substandard and unfit for human habitation at the time it was rented and throughout the fifty-three week period it was occupied by her. Voluntary payments made under a mistake of law, with all knowledge of the facts, cannot be recovered back, although there was no debt. See *Simms v. Vick,* 151 N.C. 78, 65 S.E. 621.

"It is the general rule that payments voluntarily made, although not owing, are not recoverable back, and if the payment of rent demanded of a tenant is deemed voluntary in law, the tenant cannot recover such payment even though the amount demanded and paid was not owing." 49 Am. Jur. 2d, Landlord and Tenant, § 567. The reason for such a rule is set forth in 40 Am. Jur., Payment, § 158, as follows:

> "The reason of the rule that money voluntarily paid with full knowledge of the facts cannot be recovered, and its propriety, are quite obvious when applied to a case of payment on a mere demand of money unaccompanied with any power or authority to enforce such demand, except by suit at law. In such case, if the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the one of whom the money is demanded, it should precede payment. When the person making the payment can only be reached by a proceeding at law, he is bound to make his defense in the first instance, and he cannot postpone the litigation by paying the demand in silence or under a reservation of right to litigate the claim, and afterward sue to recover the amount paid. Otherwise, the privilege would be left to him of selecting his own time and convenience for litigation, delaying it, as the case may be, until the evidence on which his adversary would have relied to sustain his claim may be lost by the lapse of time and the many casualties to which human affairs are exposed."

[3] Furthermore, plaintiff may not recover for constructive eviction when her pleadings affirmatively show that she did not abandon the premises during the entire fifty-three week term of the lease. In *Chelten Ave. Building Corp. v. Mayer,* 316 Pa. 228, 172 A. 675, the landlord brought suit for rent due for the period ending 1 May 1930. The tenant had occupied the premises for a sixteen-month period without paying any rent. The court allowed recovery by the landlord, holding that it was unnecessary to determine if the circumstances entitled the defendant to abandon the property and claim a constructive eviction since she continued to occupy the premises during the rental period. As pointed out in 1859 in the case of *Edgerton v. Page,* 20 N.Y. 281, it would be grossly unjust to permit a tenant to continue in possession of premises and shield himself from payment of rent by reason of alleged wrongful acts of the landlord.

[4] Plaintiff candidly concedes the general rule respecting constructive eviction and, in fact, cites in her brief Annot, Constructive Eviction, 91 A.L.R. 2d 638 (1963), wherein cases are collected that unanimously hold that in order to rely on a constructive eviction, a tenant must abandon the premises within a reasonable time after the claim of eviction. However, she insists that the general rule should not apply to her because of her allegation that she "is of limited means and therefore was unable to move elsewhere." The fact that she made timely payments of rent while occupying the dwelling which she now claims was unfit tends to negate any notion that she was financially unable to move elsewhere. Plaintiff attempts to counter this implication by asking this court to take judicial notice of the scarcity of low income housing in the City of Charlotte. The unavailability of low income housing in Charlotte is undoubtedly subject to debate and in our opinion it is not a factor that can be judicially noticed by this court.

[3] We have not attempted to decide whether a contract for the rent of a dwelling maintained in substantial violation of a municipal housing code is enforceable. Suffice to say, plaintiff's complaint shows that she voluntarily paid the rent with full knowledge of the facts and that she continued to occupy defendant's property throughout the rental period. For these reasons we hold that the demurrers to plaintiff's first cause of action were properly sustained.

[5] Plaintiff argues in support of her second cause of action that defendants' alleged violations of the Charlotte Housing Code constituted negligence which proximately caused injury to her and damage to her property.

[6] Under the common law rule in effect in this jurisdiction, a

lessor is under no implied covenant to repair the premises, and in the absence of an agreement between the parties to the contrary, is not under a duty to keep the premises under repair, or to repair defects existing at the time the lease is executed.

[5] The fact that defendants' alleged failure to properly maintain the dwelling is in violation of a municipal ordinance is not helpful to plaintiff under the circumstances of this case because she voluntarily continued to occupy the premises after she learned of the violations. "[W]here the tenant . . . has knowledge of the defective condition of the premises and continues thereafter to occupy them, or to use the defective portion, he may be considered to have assumed the risk, and, in case of injury resulting from such defects, be held guilty of contributory negligence." 52 C.J.S., Landlord and Tenant, § 417(20).

Even where there is a duty on the part of the landlord to repair premises arising out of his contract with the tenant, the general rule is that such a liability will not usually be imputed to the landlord. The rule is stated in the case of *Jordan v. Miller,* 179 N.C. 73, 75, 101 S.E. 550, as follows:

> "Even where the lessor contracts to keep the premises in repair, 'It has been held, with but few exceptions, that the breach by the landlord of his contract to repair the demised premises will not ordinarily entitle the tenant, his family, servants, or guests, personally injured from a defect therein, existing because of the negligence of the landlord in failing to comply with his agreement to repair, to recover indemnity for such injury, whether in contract or tort, since such damages are too remote, and cannot be said to be fairly within the contemplation of the parties. A contract to repair does not contemplate as damages for the failure to perform it that any liability for personal injuries shall grow out of the defective condition of the premises; *because the duty of the tenant, if the landlord fails to perform his contract to repair, is to do the work himself,* and recover the cost in an action for that purpose, or upon a counterclaim in an action for rent, or if the premises are made untenable by reason of the breach of contract, the tenant may move out and defend in an action for rent as upon an eviction. In accordance with this view, in order to recover damages for personal injuries, there must be shown some clear act of negligence or misfeasance on the part of the landlord beyond the mere breach of covenant.' 16 Ruling Case Law, 1095."

The above rule is well established in this State. *Leavitt v. Rental Co.*, 222 N.C. 81, 21 S.E. 2d 890; *Mercer v. Williams*, 210 N.C. 456, 187 S.E. 556; *Tucker v. Yarn Mill Co.*, 194 N.C. 756, 140 S.E. 744; *Hudson v. Silk Co.*, 185 N.C. 342, 117 S.E. 165. A different principle applies where damages result from the landowner's neglect of a portion of the premises still under his control. *Drug Stores v. Gur-Sil Corp.*, 269 N.C. 169, 152 S.E. 2d 77. We are not at liberty to overrule these well established principles. In our opinion the trial court correctly sustained defendants' demurrers to plaintiff's second cause of action.

In view of our conclusions that plaintiff's complaint does not state a cause of action we do not discuss defendants' contentions that there has been a fatal misjoinder of parties and causes under the Rules of Civil Procedure prevailing at the time the demurrers were sustained.

Affirmed.

BROCK and BRITT, JJ., concur.

TERRY CECIL WAGGONER AND WILLIAM COMPTON SCOGGINS, III, PETITIONERS v. NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL, RESPONDENT

No. 7010SC31

(Filed 6 May 1970)

1. Intoxicating Liquor § 2— denial of on-premise beer permit — sufficiency of evidence

In this proceeding upon an application for an on-premise beer permit, there was no competent evidence to support the ABC Board's denial of the permit because "of the number of citizens in the community opposing the issuance of the permit, in view of the traffic hazard in the area, and in the interest of the Governor's highway safety program."

2. Intoxicating Liquor § 2— denial of beer permit — review in superior court — authority of court to order ABC Board to issue permit

Upon appeal to the superior court from the ABC Board's denial of an on-premise beer permit, the superior court was without authority to order the ABC Board to issue the permit to petitioners, since G.S. 18-129 gives the Board the sole power, in its discretion, to determine the fitness and qualifications of an applicant.

APPEAL from *Bailey, J.*, 15 September 1969 Session of WAKE Superior Court.

Robert Morgan, Attorney General, and Christine Y. Denson, Staff Attorney, for the respondent appellant.

Raymer, Lewis and Eisele, by Douglas D. Eisele, for petitioner appellees.

HEDRICK, J.

William Compton Scoggins, III, and Terry Cecil Waggoner (petitioners), trading as The Lantern, applied to the North Carolina Board of Alcoholic Control for an on-premise beer permit on 17 March 1969. On 21 May 1969 the Board, by letter, notified the petitioners that their application had been disapproved because of expressed opposition by several members of the community to the issuance of the permit. The petitioners applied for a hearing and on 30 June 1969 a hearing was held in Raleigh, North Carolina, before D. L. Pickard, Assistant Director and Hearing Officer of the North Carolina Board of Alcoholic Control.

At the hearing the petitioners appeared and were represented by counsel. The evidence at the hearing was as follows: H. G. Brown, an A.B.C. officer, testified that he was sent an application for an on-premise beer permit by the petitioners and that he investigated the application. The building which the petitioners intended to use had previously been operated as a grocery store and was located on U. S. Highway 21 approximately 62 feet North of where this highway intersects with North Carolina Highway 115. Besides The Lantern, two other buildings close by are used for business, one being a drive-in restaurant and the other being a Shell service station. Mr. Brown testified that there was more than two hundred and fifty feet of visibility in either direction from The Lantern on U. S. 21 and that although the area surrounding the location of The Lantern is thickly populated, U. S. 21 is a divided highway and that the area is not congested. Robert W. Combs, pastor of the Vanderburg United Methodist Church, testified that he talked with many of the people in the community and that he felt that the majority of them were opposed to the granting of a beer permit to The Lantern and that he felt the establishment of The Lantern in this area would increase an already bad traffic hazard. Reverend Combs testified that he knew Interstate 77 was in the process of being constructed and that when completed it would bypass the entire community involved in this

proceeding and that it would take the traffic from Statesville to Charlotte that now uses highways 21 and 115. Reverend Combs further testified that he knew of no traffic accidents which had occurred recently at that intersection and that he did not know when the last accident had occurred at that intersection. T. E. Carriker, Jr., testified that a school bus stopped at the intersection where Vick's Restaurant and The Lantern are located and that the intersection is congested at certain times of the day. He stated that the traffic congestion presents a hazard for the fire department of the community but that the recent addition of traffic islands at the intersection has greatly improved the situation. He testified that people often drive up this highway the wrong way and that these conditions had existed at the time the building now proposed to be used for The Lantern was being operated as a grocery store, and that many wrecks had occurred while the grocery store was in operation. Mr. Carriker was unable to state when the last accident occurred at this intersection other than to state that it was "several months ago." Terry Cecil Waggoner, one of the petitioners, testified that there is good visibility for approximately five hundred feet North along U. S. 21 from the site where they propose to operate The Lantern and for approximately two thousand feet South of the site. Traffic islands have been installed and are located in such a manner as to separate the property of The Lantern from adjoining property and there is parking space for one hundred and eighty feet beside the building. Mr. Pickard, in his recommendation to the Board, stated:

> "From material, credible and believable evidence, it is found as a fact that Terry Cecil Waggoner and William Compton Scoggins, III are suitable persons to hold a malt beverage on-premise beer permit. From material, credible and believable evidence, it is found as a fact that The Lantern, Route 4, Mooresville, N. C., is a proper place and location for a malt beverage on-premise beer permit. It is further found as a fact that the investigation of this permit did not reveal that a traffic hazard existed at the location of The Lantern at the time of the investigation. That the probability of a traffic hazard existing after the issuance of any permit to sell beer at this location would be entirely speculative."

Mr. Pickard then recommended that the on-premise beer permit be issued to the petitioners.

At its meeting on 18 August 1969 the State Board of Alcoholic Control reviewed the application of the petitioners and disapproved it and denied the permit because ". . . of the number of citizens

in the community opposing the issuance of the permit, in view of the traffic hazard in the area, and in the interest of the Governor's highway safety program."

Pursuant to the provisions of G.S. 143-306 et seq., the petitioners filed a petition for review by the Superior Court of Wake County. Judge Bailey reviewed the record and entered judgment declaring:

"2. Evidence of the opposition of citizens in the community to the issuance of the permit was hearsay in nature and was incompetent for the purposes for which it was presented, all of which was timely objected to by the petitioners at the hearing.

* * *

"4. The conclusion of the Board that there is a traffic hazard in the area is unsupported by competent, material and substantial evidence in view of the entire record as submitted.

* * *

"6. The order of the Board recites that its decision is based partly 'in the interest of the Governor's Highway Safety Program,' which basis is not one of the provisions set forth in General Statute 18-136 for which an application may be denied; this ground recited by the Board is therefore legally untenable.

"7. The Board's decision to deny the application partly in the interest of the Governor's Highway Safety Program is unsupported by competent, material and substantial evidence in view of the entire record as submitted, there being absolutely no evidence in the record as to what the Governor's Highway Safety Program is or how it affects the petitioners in this cause.

"For the foregoing reasons, it is now ordered, adjudged and decreed that the order of the Board of Alcoholic Control entered on August 18, 1969, denying a retail on-premise beer permit to the petitioners in this cause, be and it is hereby reversed.

"It is further ordered, adjudged and decreed that a copy of this order issue to the North Carolina Board of Alcoholic Control with directions to issue the permit to the petitioners as requested in the application which is the subject of this cause."

From the judgment of the Superior Court the Board of Alcoholic Control appealed.

Under the provisions of G.S. 18-129 the State Board of Alcoholic Control is given the ". . . sole power, in its discretion, to determine the fitness and qualifications of an applicant for a permit to sell, . . . beer or wine." By G.S. 18-136 the Board may refuse to issue a new permit if, in its discretion, it is of the opinion that the appli-

cant is not a suitable person to hold the permit, or that the place occupied is not a suitable place. G.S. 143-315 provides that the Superior Court of Wake County, on review, has the power to affirm, reverse, modify or remand decisions of administrative agencies ". . . if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . Unsupported by competent, material, and substantial evidence in view of the entire record as submitted."

The functions of the Superior Court, which acts as a reviewing court in an administrative law action, are set out in *Bailey v. Dept. of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28 (1968), by Branch, J., as follows:

> " 'In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision. 58 Am. Jur., Workmen's Compensation, section 530.' "

[1] There was no competent evidence in the present case which would support the Board's action in denying the permit to the petitioners. The evidence presented at the hearing was that The Lantern was to be located on a divided highway, in a forty-five mile per hour speed zone and in an area where other businesses already were established. None of the grounds given by the Board in reaching its conclusion that the permit should be denied are supported by competent, material or substantial evidence. In fact, the findings of fact made by the hearing officer, and adopted by the Board, are to the effect that no traffic hazard was shown. There is no basis for the denial of a permit for the on-premise sale of beer because people have expressed opposition or because of the "Governor's Highway Safety Program." The conclusion reached by the Board is not supported by the facts; therefore, Judge Bailey was correct in reversing the action of the Board.

[2] The Superior Court, however, was without power to order the North Carolina Board of Alcoholic Control to issue the permit to the petitioners. The statute, G.S. 18-129, gives to the Board the ". . . sole power, in its discretion, to determine the fitness and qualifications of an applicant. . . ." The Board must, of course, exercise that discretion in accordance with law, and the order of the Superior Court should have so provided.

For the reasons stated, the judgment of the court below reversing the Board is affirmed and the cause is remanded for the entry of an order directing that the Board of Alcoholic Control enter a decision consistent with the principles set forth herein.

Modified, affirmed and remanded.

CAMPBELL and PARKER, JJ., concur.

IN THE MATTER OF THE ESTATE OF NANCY S. DAVIS, DECEASED

No. 7028SC260

(Filed 6 May 1970)

1. Wills § 9— probate jurisdiction — direct or collateral attack

Unless the record of the probate proceedings in the estate of a deceased person affirmatively shows a lack of jurisdiction, an assault upon the proceedings for lack of jurisdiction must be made directly.

2. Wills § 9— probate of a will — failure to make finding as to domicile or residence of deceased — direct or collateral attack

Failure of the clerk of superior court to make a specific finding in the order of probate as to the domicile or residence of deceased does not show that the clerk lacked jurisdiction over deceased's estate so that the probate can be ignored or collaterally attacked.

APPEAL by The Northwestern Bank, Asheville, N. C. and Dr. Mark A. Griffin, Jr., from *Grist, J.*, 8 December 1969 Session, BUNCOMBE Superior Court.

This is a controversy over whether the Clerk of Superior Court of Iredell County has jurisdiction of the administration of the estate of Nancy S. Davis, or whether the Clerk of Superior Court of Buncombe County has jurisdiction of the administration of the said estate.

For some time prior to 24 September 1965, Nancy Smith Davis maintained her personal dwelling house on Race Street, Statesville, in Iredell County, N. C. On 24 September 1965 she conveyed this dwelling by deed, and did not thereafter own or acquire a personal dwelling in Iredell County. From 1960 until her death, Nancy Smith Davis regularly employed Mr. Robert A. Collier of Statesville, Iredell County, as her attorney.

From 1960 until her death, Nancy Smith Davis occupied a room and lived at Appalachian Hall, a private hospital in Asheville, Buncombe County, N. C. She had a library card issued to her by Pack Memorial Public Library, Asheville, whereon her residence was listed as Appalachian Hall.

Nancy Smith Davis died at Appalachian Hall, Asheville, Buncombe County, on 4 July 1969. On 8 July 1969 the Clerk (Iredell) admitted to probate a paper writing without subscribing witnesses, dated 30 May 1948, purporting to be the Last Will and Testament of Nancy S. Davis. On 17 July 1969 the Clerk (Buncombe) admitted to probate as the Last Will and Testament of Nancy S. Davis a paper writing dated 26 April 1965, and on the same day (17 July 1969) the Clerk (Buncombe) issued letters testamentary to The Northwestern Bank (Northwestern) as executor. On 21 August 1969 the Clerk (Iredell) issued letters of administration to North Carolina National Bank as administrator c.t.a.

At some time between 11 September 1969 and 2 October 1969, North Carolina National Bank, Administrator, c.t.a.; the James W. Davis Trust Fund; Davis Memorial Baptist Church; the Davis Hospital Relief Fund; and Davis Hospital, Inc. (N.C.N.B., et al) filed a motion with the Clerk (Buncombe) seeking to vacate and annul the probate in that court and to vacate and annul the letters testamentary issued thereon to Northwestern upon the grounds that the Clerk (Iredell) had first acquired jurisdiction of the administration of the estate of Nancy Smith Davis. Following a hearing on this motion the Clerk (Buncombe) entered his order, dated 13 November 1969, making findings of fact which are partially summarized above. In this order the Clerk (Buncombe) found that the residence and domicile of Nancy S. Davis, at the time of her death, was in Buncombe County, that she had no residence or domicile in Iredell County, and therefore the Clerk (Buncombe) had acquired jurisdiction of the administration of said estate; he thereupon denied the motion to vacate and annul the probate in his office. From this order of the Clerk (Buncombe), N.C.N.B., et al, appealed to the Judge.

From the Clerk's (Buncombe) findings that Nancy Smith Davis had died 4 July 1969; that a paper writing purporting to be her Last Will and Testament had been admitted to probate by the Clerk (Iredell) on 8 July 1969; and that a paper writing purporting to be the Last Will and Testament of Nancy Smith Davis had been admitted to probate by the Clerk (Buncombe) on 17 July 1969, Judge Grist concluded as a matter of law that the Clerk (Iredell) had first acquired jurisdiction of the administration of the said estate. He there-

upon reversed the order of the Clerk (Buncombe) and vacated, annulled, and set aside the probate by the Clerk (Buncombe) and the letters testamentary issued by the Clerk (Buncombe) to Northwestern. From the Judge's order Northwestern and Dr. Mark A. Griffin, Jr. (the primary beneficiary under the paper writing probated in Buncombe) appealed to this Court.

Van Winkle, Buck, Wall, Starnes & Hyde, by Herbert L. Hyde, for The Northwestern Bank, Asheville, N. C., appellant.

Shuford, Frue & Sluder, by Gary A. Sluder, for Dr. Mark A. Griffin, Jr., appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by Welch Jordan and Edward L. Murrelle, for North Carolina National Bank; Davis Memorial Baptist Church; the Trustees of the Davis Hospital Relief Fund; and Davis Hospital, Inc., appellees.

BROCK, J.

At this point in the controversy the only evidence which has been offered (there are no agreed or stipulated facts) is some untranscribed evidence offered at the hearing before the Clerk (Buncombe), on 21 October 1969.

There are numerous unestablished facts argued in the briefs of the parties, and numerous unestablished facts alleged in the motion filed with the Clerk (Buncombe), but at this point we are not at liberty to accept them as correct. Therefore we have only summarized certain pertinent facts which were found by the Clerk (Buncombe).

All parties, in their briefs, treat Exhibit B. which was attached to the motion filed by N.C.N.B., et al, with the Clerk (Buncombe), as being a true and exact copy of the order of probate entered by the Clerk (Iredell) on 8 July 1969. The following is the first paragraph of the order of probate as set out in the said exhibit:

> "A paper writing, without subscribing witnesses, purporting to be the last well and testament of Nancy S. Davis, deceased, is exhibited for probate in open court by Dr. J. S. Holbrook, Chairman Board, James W. Davis Foundation, one of the executors therein named; and it is thereupon proved by the oath and examination of Miss Elizabeth Hill that the said will was found among the valuable papers and effects of the said Nancy S. Davis after her death, at the Davis Hospital."

There is no finding at any place in the order of probate by the

Clerk (Iredell) that Nancy S. Davis died a resident of or domiciled in Iredell County, and appellants contend the failure to so find is fatal to the Clerk (Iredell) acquiring jurisdiction of the administration. It is appellants' contention that, in the absence of a finding of residence or domicile, lack of jurisdiction appears on the face of the record and that the Iredell probate can be ignored or attacked collaterally.

In support of this contention appellants cite *Collins v. Turner,* 4 N.C. 541; *Smith v. Munroe,* 23 N.C. 345; *Johnson v. Corpenning,* 39 N.C. 216; *London v. R. R.,* 88 N.C. 584; *Springer v. Shavender,* 118 N.C. 33, 23 S.E. 976; *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240; *In re Estate of Cullinan,* 259 N.C. 626, 131 S.E. 2d 316.

In *Collins, Smith, Johnson, London, Reynolds,* and *Cullinan,* the Supreme Court was considering appeals from direct, not collateral, attacks on probates; and, therefore, upon their facts, these cases do not support appellants' contention. In *Springer* the Supreme Court was considering an attempted administration of the estate of a living person, and held the entire administration to be void *ab initio;* this ruling, of course, does not support appellants' contention.

"Every court, where the subject-matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there be something on the face of the proceedings to show to the contrary. This must be the rule, unless we adopt the conclusion that the Court is unfit for the business which by law is confided to it." *Marshall v. Fisher,* 46 N.C. 111. "Jurisdiction is presumed when the contrary does not appear on the record." *Reynolds v. Cotton Mills, supra.* "[W]here a probate has no inherent or fatal defect appearing upon its face, the judgment of the court having full jurisdiction of the matter, cannot be indirectly or collaterally attacked, but the assault upon it must be made in the court where the judgment admitting the will to probate was rendered, and in accordance with the statutory provisions enacted for such purpose." *Edwards v. White,* 180 N.C. 55, 103 S.E. 901.

[1, 2] We are of the opinion, and so hold, that the failure of the Clerk (Iredell) to add the words "late of the county of Iredell" after the name of the deceased, or his failure to make some specific finding as to her domicile or residence in the order of probate, did not thereby create a showing of lack of jurisdiction in Iredell County so as to entitle appellants to ignore or collaterally attack the Iredell probate. Unless the record of the probate proceedings in the estate of a deceased person affirmatively shows a lack of jurisdiction, an assault upon it for lack of jurisdiction must be made directly.

Appellants have filed in this Court a "demurrer ore tenus and motion to dismiss" the motion filed with the Clerk (Buncombe) by N.C.N.B., et al, on the grounds that the said motion does not "contain a statement of facts sufficient to constitute a cause of action," and on the grounds that the said motion "does not state a claim upon which relief can be granted."

The parties do not argue and we do not decide three procedural questions raised by appellants' "demurrer ore tenus and motion to dismiss." They are: (1) is it proper to demur to a motion; (2) are appellants bound by Chap. 1A of the General Statutes, effective 1 January 1970; and (3) if so, can the question of failure to state a claim upon which relief can be granted be raised for the first time on appeal? See G.S. 1A-1, Rule 12(h)(2). We do not decide these questions because, in any event, appellants' "demurrer ore tenus and motion to dismiss" is again an undertaking to attack collaterally the probate in Iredell County. We have decided that a collateral attack is improper.

Appellants are free, if so advised, to proceed directly in Iredell County.

Affirmed.

BRITT and GRAHAM, JJ., concur.

PARNELL-MARTIN SUPPLY CO., INC., A CORPORATION v. HIGH POINT MOTOR LODGE, INC., OWNER (AND CONTRACTING PARTY FOR IMPROVEMENTS) TALTON CONSTRUCTION COMPANY, INC., CONTRACTOR AND E. R. WOOLARD, D/B/A QUALITY PLUMBING AND HEATING COMPANY, SUBCONTRACTOR

No. 7026SC59

(Filed 6 May 1970)

1. Laborers' and Materialmen's Liens § 3— materials furnished to subcontractor — effect of lien

A materialman's lien for materials furnished a subcontractor substitutes claimant to the rights of the principal contractor and is enforcible against the sum due from the owner at the time notice is given, regardless of the state of the account between the principal contractor and the subcontractor to whom the materials were furnished.

2. Laborers' and Materialmen's Liens § 6— claim against owner — burden of proof — notice before final payment

When a materialman furnishes the required itemized statement to the owner, the owner must retain a sufficient amount of the contract price to satisfy the claim; in order to hold the owner liable, the materialman has the burden of showing that the owner was notified of the claim by him or by the general contractor before the owner made final payment to the general contractor.

3. Payment § 1— delivery and acceptance of a check

In the absence of a contrary agreement, the delivery and acceptance of a check is not payment as between the parties until the check is paid by the bank on which it is drawn.

4. Laborers' and Materialmen's Liens § 8— action against owner — notice before final payment — payment by check — sufficiency of evidence

In this action against a motel owner to enforce a materialman's lien for materials furnished a subcontractor for use in construction of the motel, plaintiff's evidence affirmatively shows that the owner had made final payment to the general contractor at the time notice of the claim was given the owner, and nonsuit was properly granted, where plaintiff introduced evidence that on 18 October 1966 it sent the owner notice by registered mail of its claim of lien on the building, that on 14 October 1966 the owner issued its check to the general contractor for the balance due on the general contract, that the check was deposited by the general contractor on 17 October 1966, and that the check was subsequently paid by the drawee bank on 21 October 1966, plaintiff's notice mailed to the owner on 18 October having imposed no duty on the owner to stop payment on the check to the general contractor even if such notice was received before the check was paid by the drawee bank on 21 October.

5. Laborers' and Materialmen's Liens § 3— action against owner — failure of general contractor to notify owner of claim

No cause of action in favor of a materialman arises against the owner for failure of a general contractor to furnish the owner a statement of sums due materialmen before receiving payment from the owner in violation of G.S. 44-8.

6. Laborers' and Materialmen's Liens § 3— action against general contractor — failure of contractor to notify owner of claim — failure to show damages

In this action by a materialman against a general contractor based on the alleged failure of the general contractor to notify the owner of sums due plaintiff for materials furnished a subcontractor before accepting payment from the owner in violation of G.S. 44-8, plaintiff's evidence was insufficient for the jury where it failed to show any damage to plaintiff by reason of defendant's failure to comply with the statute, there being no evidence that the subcontractor is unable to pay the amount owed plaintiff for the materials.

APPEAL from *May, J.*, 4 August 1969 Schedule B Session, MECKLENBURG Superior Court.

This is an action seeking to recover $3,737.65; the amount allegedly due on an account between plaintiff and E. R. Woolard doing business as Quality Plumbing and Heating Company (hereinafter called Woolard).

Plaintiff named High Point Motor Lodge, Inc. (hereinafter called High Point), Talton Construction Company, Inc. (hereinafter called Talton), and Woolard as defendants in this action.

Plaintiff's evidence tended to show the following: High Point contracted with Talton as general contractor for the construction of a motel. Talton then subcontracted the plumbing, heating and air-conditioning to Woolard. Plaintiff furnished Woolard with plumbing materials which were used by Woolard in fulfilling its contract with Talton. These plumbing materials, in the amount of $3,737.65, were furnished at the request of Woolard and were charged to Woolard's open account with plaintiff. Woolard has never paid plaintiff for these materials.

Plaintiff's evidence tended to show that on 7 October 1966, it sent a letter to Talton stating that Woolard was indebted to plaintiff in the sum of $3,737.65 for materials furnished on the High Point motel job; that on 10 October 1966, plaintiff's agents made verbal demand upon Talton for payment to plaintiff for materials furnished to Woolard. Plaintiff's evidence further tended to show that, at the time of this demand, Talton had paid Woolard in full on its subcontract.

Plaintiff's evidence tended to show that plaintiff, on 18 October 1966, sent by registered mail to High Point, Talton and Woolard, formal notice of its claim of lien on the building. Plaintiff's evidence further tended to show that High Point had received from Talton a bill dated 1 September 1966 and designated a Final Certificate. The bill was for the balance due on the general contract. In response to this bill, High Point, on 14 October 1966, paid Talton by check the balance due on the general contract. This check was endorsed by First Citizens Trust Co. on 17 October 1966 and was subsequently paid by North Carolina National Bank in High Point, North Carolina on 21 October 1966.

At the close of plaintiff's evidence judgment of involuntary nonsuit was entered in favor of defendants High Point and Talton; but, since Woolard had not been properly notified of the trial date, the action was continued as to Woolard.

Plaintiff appealed assigning as error the entry of nonsuit as to High Point and Talton.

Newitt & Newitt, by John G. Newitt, Jr., for appellant.

Sanders, Walker & London and Wallace, Langley & Barwick, by F. E. Wallace, Jr., and James D. Llewellyn for appellees.

BROCK, J.

[1] "The statutes of this State, notably Revisal, secs. 2019, 2020, and 2021 [G.S. 44-6, G.S. 44-8, and G.S. 44-9], provide for a lien on the property in favor of subcontractors, laborers, and materialmen supplying material for the erection, repair, or alteration for the building, when they come within certain conditions and give the notices contemplated and required by the law, and enforcible to an amount not to exceed the sum due from the owner at the time of notice given." *Brick Co. v. Pulley,* 168 N.C. 371, 84 S.E. 513. "And where such lien arises under the provisions of the statute it does so by substituting the claimant to the rights of the contractor, enforcible, as stated, against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the contract. In well considered cases it is said to amount to an assignment *pro tanto* of the amount due or to become due from the owner to the principal contractor, and this regardless of the state of the account between the principal contractor and the subcontractor, who may be the debtor of the claimant." *Brick Co. v. Pulley, supra.* See also, *Building Supplies Co. v. Hospital Co.,* 176 N.C. 87, 97 S.E. 146; *Powder Co. v. Denton,* 176 N.C. 426, 97 S.E. 372.

Applying the principles enunciated above, the question presented by this appeal is what sum, if any, was owing from High Point, the owner, to Talton, the general contractor, at the time Parnell-Martin, the material furnisher, gave notice of the amount due them from Woolard, the subcontractor, for plumbing materials furnished Woolard to be used in the construction of the motel for High Point.

[4] Plaintiff's evidence is sufficient to establish that it furnished materials to Woolard in the amount of $3,737.65 to be used in the construction and that plaintiff, on 18 October 1966, sent by registered mail to High Point formal notice of its claim of lien on the building. Plaintiff's evidence further tends to show that High Point received a bill from Talton dated 1 September 1966, entitled Final Certificate; that High Point, on 14 October 1966, drew a check on its account with the North Carolina National Bank in High Point payable to Talton in payment of the Final Certificate; that the check was deposited by Talton on 17 October 1966; and that the

check was subsequently paid by the North Carolina National Bank in High Point, the drawee bank, on 21 October 1966.

G.S. 44-9 provides in part as follows: "The notice shall be in the form of an itemized statement of the amount due, except where the contract is entire for a gross sum and cannot be itemized. *Upon the delivery of the notice to the owner, agent, or lessee,* the claimant is entitled to all the liens and benefits conferred by law in as full a manner as though the statement were furnished by the contractor." (Emphasis added.)

[2] When the materialman furnishes the required itemized statement to the owner, the owner must retain a sufficient amount of the contract price to satisfy the claim; however, the burden is on the person furnishing materials to show that such notice was so given by the general contractor (G.S. 44-8) or that the owner was notified directly by him (G.S. 44-9), *at a time before the owner makes final payment to the general contractor. Pumps, Inc. v. Woolworth Co.,* 220 N.C. 499, 17 S.E. 2d 639; *Pinkston v. Young,* 104 N.C. 102, 10 S.E. 133.

It is earnestly contended by plaintiff that since notice of lien was mailed to High Point on 18 October 1966, High Point had sufficient notice of plaintiff's claim to impose upon High Point the duty to stop payment on its check prior to its being paid by the drawee bank on 21 October 1966.

[3, 4] It is well settled that in the absence of an agreement to the contrary, the delivery and acceptance of a check does not constitute payment and is therefore only conditional payment of a debt. *Lumber Co. v. Hayworth,* 205 N.C. 585, 172 S.E. 194. And the check does not constitute payment of the item covered by it until the check itself is paid by the bank on which it is drawn. *Wilson v. Finance Co.,* 239 N.C. 349, 79 S.E. 2d 908. However, this principle of law applies to the parties to the giving and acceptance of the check, i.e., drawer-payee, debtor-creditor, vendor-purchaser, and the principle is not available to plaintiff in this case. *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745. In the absence of a showing of fraud practiced against plaintiff, the issuance by High Point on 14 October 1966 (Friday) to Talton of its (High Point's) check in payment of the balance due on the contract, the prompt deposit by Talton on 17 October 1966 (Monday), and the payment of the check by the drawee bank on 21 October 1966 (Friday), constituted full payment of the contract price by the owner on 14 October 1966, prior to notice from plaintiff to the owner of any amount due plaintiff for materials furnished.

Plaintiff's notice mailed to the owner on 18 October 1966 imposed no duty on the owner to undertake to stop payment on the check, even if such notice was received before the check was actually paid by the drawee bank on 21 October 1966. Where the plaintiff's evidence affirmatively shows that nothing was due the contractor at the time notice was given, nonsuit is correctly granted. *Dixon v. Ipock,* 212 N.C. 363, 193 S.E. 392.

[5] As a second cause of action plaintiff seeks recovery of damages in the sum of the amount due it. Plaintiff alleges that Talton was under statutory duty (G.S. 44-8) to furnish to the owner a statement of sums due materialmen before receiving payment from the owner, and that a violation of this statute is declared a misdemeanor (G.S. 44-12). It is plaintiff's contention that these statutes were enacted for the benefit of materialmen, etc., and that a violation gives rise to a cause of action in plaintiff's favor to recover damages measured by the amount owed to plaintiff of which the general contractor failed to advise the owner before accepting payment on the general contract.

Assuming, without deciding, that such a cause of action does accrue to plaintiff against the general contractor, it is clear that no such cause of action arises against the *owner* for a violation of the statute by the general contractor. *Oldham & Worth, Inc. v. Bratton,* 263 N.C. 307, 139 S.E. 2d 653. Therefore, nonsuit as to High Point on the second cause of action was proper.

[6] In support of its alleged second cause of action against the general contractor (Talton), plaintiff's evidence tended to show that no notice, as required by G.S. 44-8, was given by Talton to High Point. However, there was no evidence to show any damage to plaintiff by reason of Talton's failure to comply with the statute. Plaintiff has neither alleged nor offered evidence to show that Woolard is unable to pay plaintiff the account. There is no evidence of Woolard's insolvency or inability to respond to judgment; in fact, this action is still pending against Woolard. Plaintiff must not only show neglect to perform a duty owed to him; he must also allege and show in what way he has been damaged by such neglect. The nonsuit as to Talton on the second cause of action was proper.

Plaintiff's remaining assignments of error have been considered, but we find no prejudicial error.

Affirmed.

BRITT and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. BETTY HASKINS CURTIS

No. 7025SC64

(Filed 6 May 1970)

1. Criminal Law § 43; Homicide § 20— photograph of deceased after autopsy — admissibility

A photograph of deceased taken immediately after an autopsy that was performed four days after the alleged shooting, *held* admissible to illustrate the pathologist's testimony that the death was caused by a gunshot wound in the head.

2. Criminal Law § 43— photograph of body — time — admissibility

The fact that the photograph was taken and portrays the condition of the body at some time after the homicide occurred does not, of itself, make the photograph incompetent.

3. Criminal Law § 43— gruesome photographs — admissibility

The fact that a photograph is gory or gruesome will not alone render it inadmissible.

4. Criminal Law § 75; Constitutional Law § 37— waiver of rights — issue of defendant's intoxication

The record fails to support defendant's contention that because of her intoxication she was incapable of knowingly waiving her constitutional rights to have counsel and to remain silent at the time of her interrogation by investigating officers.

5. Criminal Law § 169— exclusion of testimony — prejudice

The exclusion of testimony cannot be held prejudicial when the record fails to disclose what the witness' answer would have been had he been permitted to answer.

6. Criminal Law § 169; Homicide § 15— murder prosecution — exclusion of testimony of accident — harmless error

In a prosecution for murder in the second degree committed with a pistol, wherein the jury returned a verdict of guilty of involuntary manslaughter, defendant was not prejudiced by the exclusion of his witness' testimony as to whether or not the shooting was an accident, since, assuming the witness would have answered "yes," the answer would have been consistent with the verdict.

7. Homicide § 6— reckless use of loaded gun

Any careless and reckless use of a loaded gun which jeopardizes the safety of another is unlawful, and if death results therefrom it is an unlawful homicide.

8. Homicide § 6— involuntary manslaughter — elements

The unlawful killing of a human being, unintentionally and without malice, proximately resulting from some act done in a culpably negligent manner, when fatal consequences were not improbable under the existing circumstances, supports a verdict of guilty of involuntary manslaughter.

APPEAL by defendant from *Collier, J.*, 11 August 1969 Session, BURKE Superior Court.

Defendant was charged in a bill of indictment with the murder of Ruby Nell Rutherford, with premeditation and deliberation, on 20 January 1969. The Solicitor for the State announced in open court that the State would not seek a conviction of murder in the first degree, but would seek a conviction of murder in the second degree or manslaughter.

The evidence for the State tended to show the following: The defendant, a 25 year old white female, quit her job on 6 January 1969 and moved into a house in the Lake James section of Burke County which was owned and occupied by Clarence (Chief) Rutherford, a negro male. She lived there at Clarence (Chief) Rutherford's house until 20 January 1969, the date of the alleged offense. During the morning of 20 January 1969 Ruby Nell Rutherford, a negro female, and several negro males gathered at the home of Clarence (Chief) Rutherford. At the time of the alleged offense all of the negro males except Elbert (Goat) Conly had left the house. Ruby Nell Rutherford was sitting on the bed in the house and defendant told her to get up so she could make up the bed. Ruby Nell Rutherford said she would get up when she got ready and defendant told her that she (defendant) stayed there and that Ruby didn't and to get up off the bed. Ruby said "we'll just fight" and defendant said "oh no we won't". Defendant turned and picked a .38 caliber automatic pistol from off the headboard of the bed and pulled the hammer back. When defendant turned around the pistol fired and Ruby fell back across the bed. Elbert (Goat) Conly went for help and carried Ruby Nell Rutherford to the hospital. At the hospital a lead jacket bullet was surgically removed from the head of Ruby Nell Rutherford. She survived until 24 January 1969. On 24 January 1969 an autopsy was performed and in the opinion of the pathologist who performed the autopsy death resulted from the brain damage caused by a penetrating wound to the head.

Defendant's evidence tended to show the following: Since 6 January 1969, when defendant moved into the house owned and occupied by Clarence (Chief) Rutherford, defendant had been drinking various alcoholic beverages regularly up until 20 January 1969, the day of the alleged offense. During the morning in question defendant was drinking beer and Ruby Nell Rutherford was drinking whiskey. Ruby Nell Rutherford and defendant were friends. Ruby Nell Rutherford was sitting on the bed and defendant was sitting in a chair.

Defendant told Ruby Nell Rutherford to get up off the bed and Ruby said she would when she got ready. Defendant walked over, picked up the gun and when she turned it went off. Defendant said, "Oh my lord Goat, look what I've done". Elbert (Goat) Conly then took Ruby to the hospital.

Upon defendant's plea of not guilty she was tried by jury which found her guilty of involuntary manslaughter. From the verdict and judgment of confinement for not less than six nor more than ten years, defendant appealed.

Attorney General Morgan, by Assistant Attorney General Smith, for the State.

Simpson & Martin, by Wayne W. Martin, for defendant.

BROCK, J.

[1] Defendant assigns as error the admission in evidence of a photograph of deceased taken immediately after the autopsy which was performed four days after the alleged shooting. She argues stressfully that the sole purpose of the photograph was to inflame the minds of the jurors, to excite their passion, and prejudice them against the defendant. She does not argue or contend the photograph was inaccurate in any particular.

[2, 3] The fact that the photograph was taken and portrays the condition of the body at some time after the homicide occurred does not, of itself, make the photograph incompetent. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241. And, the fact that a photograph is gory or gruesome will not alone render it inadmissible. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10.

On 24 January 1969 Dr. John C. Reese, an admitted medical expert, and practicing pathologist, performed an autopsy upon the body of Ruby Nell Rutherford to determine the cause of her death. He testified in detail concerning his examination of the skull and brain to determine the cause of death. In his opinion "the track of the damage to the brain had been produced by a penetrating wound consistent with the track of the bullet." Dr. Reece also testified: "The brain was rather severely swollen and the swelling was in the area of the wound. In my opinion, death resulted from the brain damage and the destruction of the brain tissue and the swelling of which also caused the development of pneumonia."

There had been no admission or stipulation by defendant that

Ruby Nell Rutherford died as the result of a gunshot wound to the head; therefore, under her plea of not guilty, the burden was upon the State to satisfy the jury beyond a reasonable doubt that the death was caused by a gunshot wound to the head. The photograph met the test of relevance to illustrate the doctor's testimony as to how the cause of death was determined by him; its admission in evidence was not error.

[4] Defendant's assignments of errors Nos. 2, 3, 5 and 6 relate to the evidence of both oral and written statements by defendant to Mr. Wade McGalliard, chief investigator for the Burke County Sheriff's Department. It is defendant's contention that because of her intoxication she was incapable of knowingly waiving her constitutional rights to presence of counsel and to remain silent. There is no contention that she was not properly advised of all of her rights.

The record before us discloses no serious condition of intoxication at the time of the shooting or at the time of interrogation. One of defendant's witnesses who left the house moments before the shooting said he heard no kind of argument. He stated that defendant was drinking a beer, and he also stated: "While I was in the house, I did not hear any conversation other than normal conversation in a normal tone. It was just a usual conversation in regular tones." Nowhere did he indicate that anyone was obviously intoxicated.

Another of defendant's witnesses, who was an eye witness to the shooting, stated: "When I went into the room, I saw Betty Curtis had some beer." However, nowhere did this witness indicate that anyone was obviously intoxicated.

When Deputy McGalliard went to Clarence (Chief) Rutherford's house to investigate the shooting he said that defendant "had a beer in her hand when I walked into the house." Deputy McGalliard testified that he had known defendant for five or six years, and had seen her when she was sober and had seen her when she was drunk. He testified that at the time he interrogated defendant she had been drinking and to a certain extent she was under the influence of alcohol. However, he further testified that she showed him where the pistol was located, told him what had transpired, and did not say anything to indicate that she didn't understand what she was being questioned about. Later Deputy McGalliard typed defendant's statement, she read it, said it was correct, and signed it. Defendant did not testify. There is nothing in this record to support a conclusion that defendant was intoxicated to an extent that would render her incapable of giving a free and voluntary confession. These assignments of error are overruled.

[5-8] Defendant's assignment of error No. 4 challenges the ruling of the trial judge in sustaining the State's objection to the following question propounded to defendant's witness Elbert (Goat) Conly: "Elbert, did this what occurred up there appear to you to be an accident?" The record does not disclose what the witness' answer would have been had he been permitted to answer, therefore the exclusion of the testimony cannot be held prejudicial. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *State v. Huffman,* 7 N.C. App. 92, 171 S.E. 2d 339. Nevertheless, if we assume the witness would have answered "yes", the answer would have been consistent with the verdict rendered. "Any careless and reckless use of a loaded gun which jeopardizes the safety of another is unlawful, and if death results therefrom it is an unlawful homicide." *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354. The unlawful killing of a human being, unintentionally and without malice, proximately resulting from some act done in a culpably negligent manner, when fatal consequences were not improbable under the existing circumstances, supports a verdict of guilty of involuntary manslaughter. 4 Strong, N.C. Index 2d, Homicide, § 6, p. 198. "It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter." *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889.

Defendant's final assignment of error is to failure of the trial court to grant her motion for involuntary nonsuit. The evidence taken in the light most favorable to the State was clearly sufficient to support a finding that defendant was culpably negligent in handling the pistol. It seems that the jury returned its verdict consistent with defendant's evidence and defense.

No error.

BRITT and GRAHAM, JJ., concur.

RANDALL YODER, DAISY LAIL, JERRY CHATHAM, GLENN DAMERON AND LILLIAN FREY v. THE BOARD OF COMMISSIONERS OF BURKE COUNTY AND THE INDIVIDUAL MEMBERS THEREOF: JOHN A. BLEYNAT; ALFRED W. HAMER, JR.; LEIGHTON W. HARBISON; JOSEPH A. McGIMSEY, JR.; AND EVERETT ECKARD; AND WILLIAM M. AVERY, TAX COLLECTOR OF BURKE COUNTY

No. 7025SC167

(Filed 6 May 1970)

Schools § 7; Taxation § 6— school capital reserve fund — validity of statute — necessary expense

G.S. 115-80.1 authorizing the county board of commissioners to levy an ad valorem tax for a County School Capital Reserve Fund, which is to be used for the purpose of anticipating school capital outlays, is a valid exercise of legislative authority; the creation of such fund is for a "necessary expense" within the meaning of N. C. Constitution, Art. VII, § 6, and does not require a vote of the people.

APPEAL by plaintiffs from *Martin (Harry C.), J.*, 6 October 1969 Special Session of Superior Court held in Burke County.

On the alleged grounds that it was "unlawful, unconstitutional, and contrary to the law of the land of North Carolina," the plaintiffs sought to restrain the Board of Commissioners of Burke County from levying and collecting for the year 1969-1970 a tax of $0.65 on the $100 of assessed valuation of property in Burke County for the purpose of establishing a Burke County School Capital Reserve Fund (Reserve Fund).

A show cause order was entered on 3 October 1969 requiring defendants to appear in superior court on 8 October 1969, or as soon thereafter as the matter could be heard, and show cause why a restraining order should not be issued enjoining them from levying and collecting taxes for the Reserve Fund.

After hearing the evidence of the defendants, the plaintiffs offering none, Judge Martin made findings of fact, conclusions of law, and entered judgment as follows:

"THIS CAUSE COMING ON TO BE HEARD and being heard by the undersigned judge presiding at the October 6, 1969, special term of the Burke County Superior Court, upon show cause order signed by Judge J. W. Jackson on October 3, 1969, and complaint contesting the 1969-70 levy of a tax of $ .65 on the $100.00 of assessed valuation by the Burke County Board of Commissioners for the purpose of establishing a School Capital Outlay Reserve Fund;

Upon the evidence offered at said hearing the Court makes the following findings of fact:

(1) That many of the school buildings in Burke County by reason of age, size, design and location are unsuited for effective secondary education of pupils in said county.

(2) That the Board of Education of Burke County by reason of its investigations and deliberations were familiar with the conditions of said schools and their needs prior to its request to the Board of County Commissioners for funds necessary to meet said needs.

(3) That the State Board of Education several months prior to the submission by the County Board of Education of its budgetary needs to the County Commissioners, had written a report to the County Board of Education pointing out the inadequacies of several of the school buildings in said county.

(4) That the County Commissioners and School Board met in joint, public sessions on several occasions prior to the formal budgetary request presented by the School Board to the Commissioners on June 23, 1969.

(5) That the School Board prior to June 23, 1969, determined that a $ .65 levy on the $100.00 of assessed valuation was needed for a School Capital Outlay Reserve Fund 'for the purpose of anticipating future needs for school capital outlay and for financing all or a part thereof' pursuant to G.S. 115-80(a) and that the budgetary request presented to the Commissioners on June 23, 1969, actually reflects said needs.

(6) That the School Board determined that its minimal needs for a School Capital Outlay Reserve Fund would be $1,238,-250.00 of which $39,000.00 was available from other revenues, leaving $1,199,250.00 which would take a tax levy of $ .65 on the $100.00 of assessed valuation and that said sum is reflected in the county budget which was offered in evidence, without objection on the part of plaintiffs.

(7) That the Board of Commissioners held a public hearing on March 24, 1969, on said School Capital Outlay Reserve Fund.

(8) That said Board of Commissioners meeting on June 26, 1969, adopted its budget and as a part thereof the $ .65 on $100.00 of assessed valuation to provide the necessary funds for the School Board's requested School Capital Outlay Reserve Fund.

Upon the foregoing findings of fact the Court makes the following conclusions of law:

(1) That G.S. 115-78(c) is proper authority for items such as buildings and grounds, etc.

(2) That G.S. 115-80.1 is authority for defendants to levy an ad valorem tax to fund a School Capital Outlay Reserve Fund and that such statute is constitutional.

(3) That the action of defendants is not violative of Article VII, Sections 6 and 10 of the Constitution of North Carolina.

(4) That the action of defendants is not violative of Article V of the Constitution of North Carolina.

(5) That the action of defendants is not violative of Article I, Section 17 of the Constitution of North Carolina.

(6) That the requirement of G.S. 115-80(a) that boards of education submit their respective budgets to boards of county commissioners on or before the fifteenth day of June is ministerial and directory in nature and not mandatory and that a failure of said board of education to submit its budget to the board of county commissioners by June 15 in no way affects the validity of the tax levy in question.

(7) That the tax levy of $ .65 on the $100.00 of assessed valuation for the purpose of establishing a School Capital Outlay Reserve Fund in the instant case is in no manner confiscatory in nature but to the contrary is a valid exercise of the Board of Commissioners' duties and powers and is consistent with the statutory and constitutional limitations of the laws of North Carolina.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' motion to enjoin the Burke County Board of Commissioners from levying a tax of $ .65 on $100.00 of assessed valuation to establish a School Capital Outlay Reserve Fund for the year 1969-70 be and the same is hereby denied.

Further, upon its own motion, the Court sustains a demurrer to the complaint for reasons set forth in foregoing findings of fact and conclusions of law and said cause of action is therefore dismissed."

Plaintiffs assigned error and appealed to the Court of Appeals.

George S. Daly, Jr., for plaintiff appellants.

H. L. Riddle, Jr., and Dan R. Simpson for defendant appellees.

MALLARD, C.J.

In their briefs plaintiffs and defendants are in accord that the question presented by this appeal is whether the Reserve Fund created by the Burke County Board of Commissioners, without approval by vote of the people, was a "necessary expense" within the meaning of Article VII, Section 6, of the North Carolina Constitution.

G.S. 115-80(c) reads: "Capital Outlay Budget. — In the same manner and at the same time each county and city administrative unit may file with the board of county commissioners a capital outlay budget, subject to the approval of the said board." The statutory authority of a board of county commissioners applicable to the establishment of and levying a tax for a capital outlay budget is thus the same as that applicable to the county-wide current expense fund budget for schools under G.S. 115-80(a).

The statutory authority for the establishment of a county school capital reserve fund is contained in G.S. 115-80.1, which reads in part as follows:

> "A capital outlay budget of any school administration unit within the county may contain an amount to be appropriated for payment into a special fund which shall be designated '..... County School Capital Reserve Fund,' hereinafter referred to as 'the reserve fund.' Such amount, together with similar amounts which may be contained in subsequent capital outlay budgets of any such school administrative unit, shall be for the purpose of anticipating future needs for school capital outlay and for financing all or a part of the cost thereof * * *."

Since the county school capital reserve fund is, by the above quoted portion of the statute, authorized to be contained in the capital outlay budget, the statutory authority of a board of county commissioners applicable to the establishment of and levying a tax for a county school capital reserve fund is thus the same as that applicable to the county-wide current expense fund budget under G.S. 115-80(a).

In *Harris v. Board of Commissioners,* 274 N.C. 343, 163 S.E. 2d 387 (1968), the Supreme Court held, among other things, that G.S. 115-80(a) authorized a board of county commissioners to levy a tax on property to supplement teachers' salaries without approval of the

electorate. In *School District v. Alamance County,* 211 N.C. 213, 189 S.E. 873 (1937), it was held that the operation of the public schools as required by the Article IX of the Constitution was a "necessary expense" not requiring a vote of the electorate.

The capital outlay fund provides, among other things, for the purchase of school sites, the erection of all school buildings properly belonging to school plants, improvement of new school grounds, alteration and addition to buildings, purchase of furniture, equipment, trucks, automobiles, and school buses. G.S. 115-78(c). No one can logically argue that the foregoing are not necessary in the operation of the public schools. See also *Frazier v. Comrs.,* 194 N.C. 49, 138 S.E. 433 (1927) and *Harris v. Board of Commissioners,* 1 N.C. App. 258, 161 S.E. 2d 213 (1968).

We are of the opinion that the principles of law enunciated by the Supreme Court in *Harris v. Board of Commissioners, supra,* and in *School District v. Alamance County, supra,* are applicable in this case. We hold that G.S. 115-80.1 is a valid exercise of legislative authority and that the Reserve Fund created by the Burke County Board of Commissioners is a "necessary expense" within the meaning of Article VII, Section 6, of the North Carolina Constitution.

Plaintiffs excepted to each finding of fact and to many of the conclusions of law. Some of these exceptions they have abandoned by not bringing them forward in their brief. However, we are of the opinion that the evidence offered supports the findings of fact and that the findings of fact support the conclusions of law stated.

We hold that Judge Martin correctly entered the judgment denying plaintiffs' motion for a restraining order and in dismissing plaintiffs' action.

Affirmed.

MORRIS and VAUGHN, JJ., concur.

THE FALCO CORPORATION v. ALVIN S. HOOD, D/B/A HOOD'S TEXACO SERVICE

No. 7010SC34

(Filed 6 May 1970)

1. Landlord and Tenant § 5; Sales § 6— lease of equipment — instructions — implied warranty of fitness

In this action for breach of an agreement for the lease of car washing equipment which had been selected by defendant lessee and purchased by plaintiff lessor for lease to defendant, the trial court erred in instructing the jury that since there was no express warranty, the law would imply a warranty that the leased equipment was fit for the purpose for which it was leased, where the lease provided that there were no warranties from the lessor to the lessee, and under the terms of the lease it is conclusively presumed that the equipment and installation thereof were satisfactory to defendant lessee since he gave the lessor no notice of defects within the time required by the lease.

2. Landlord and Tenant § 19— breach of lease agreement — damages

In this action for breach of a lease agreement, the trial court erred in limiting recovery by plaintiff to an amount which was less than the difference between what lessee agreed to pay and what he had actually paid under the lease.

APPEAL by plaintiff from *Bone, E.J.*, August 1969 Civil Session of WAKE County Superior Court.

This action was instituted to recover an alleged indebtedness because of default in monthly payments due under a lease agreement. The pleadings and evidence tend to show that the plaintiff (Falco) is in the business of financing equipment purchases. The defendant (Hood) in April 1967 decided to install automobile washing equipment in connection with an automobile service station which he was operating in New Bern, North Carolina. The defendant went to Goldsboro, North Carolina, and examined automobile washing equipment which was installed and in use in that location. Hood then communicated with Carolina Specialty Sales (Specialty) which was engaged in the business of selling automobile washing equipment manufactured by Valley Die Cast Corporation of Detroit, Michigan (Valley Die). Thereafter, Hood agreed with Specialty to acquire a Model 501 manufactured by Valley Die. In order to finance this purchase, Hood submitted an application to Falco. It was contemplated that if Hood's credit rating was satisfactory, Falco would purchase the equipment that Hood had selected and the title to the equipment would be in Falco. The equipment would be sent direct to Hood and after it had been satisfactorily installed and accepted by Hood, Falco

would then pay for the equipment and take title thereto, and in turn, would lease the equipment to Hood.

This arrangement was carried out. Falco approved the credit rating of Hood. The equipment selected by Hood from Specialty and manufactured by Valley Die was sent direct to Hood and installed at the place of business designated by Hood. Valley Die issued its manufacturer's warranty pertaining to the equipment direct to Hood. Hood executed a certificate indicating his acceptance of the equipment and his approval of the installation thereof as a part of his lease agreement with Falco. Falco then paid for the equipment. After the equipment had been installed, it was ascertained by Hood that Specialty had installed a Model 700 rather than the Model 501 which had been originally contemplated. Upon discovery of this mistake, Hood agreed with Specialty to accept the Model 700 which was a less expensive model. Specialty then refunded to Falco the difference in the price of the two models, and Falco in turn gave Hood credit on the lease agreement. Thereafter, Hood executed and delivered a new acceptance agreement showing his acceptance and satisfaction with Model 700, and likewise in turn, Hood and Falco executed a new lease agreement.

The equipment proved to be unsatisfactory to Hood, and from the very beginning was out of operation almost all the time. After making payments for several months, Hood discontinued paying Falco in accordance with the terms of the lease agreement. Falco instituted this action. Hood filed an answer denying all the material allegations of the complaint, but did admit the execution of the lease agreement. Hood also filed a counterclaim asserting a total failure of consideration and sought to recover the payments which had theretofore been made to Falco.

One issue was submitted to the jury as to what amount, if any, Falco was entitled to recover of Hood. The jury answered this issue, "Nothing."

Coley and Clement by H. D. Coley, Jr., and Fleming, Robinson and Bradshaw by Russell M. Robinson, II, for plaintiff appellant.

Dunn and Dunn by Raymond E. Dunn for defendant appellee.

CAMPBELL, J.

[1] Falco assigns as error the charge of the trial judge to the jury as follows:

"Now where there is no express warranty the law implies a war-

ranty and the evidence in this case is to the effect that there was not an expressed warranty made by the Falco Corporation when the property was leased to the defendant Hood and, therefore, I instruct you that the law would imply that there was a warranty to the effect that the car wash equipment which was being leased by Falco to the defendant Hood was reasonably fit for the use and purpose for which it was being leased and which was in the contemplation of both lessor and lessee at the time of the execution of the contract."

We are of the opinion that this exception is well taken.

The evidence in this case reveals that Hood selected the automobile washing equipment; that Falco never saw this equipment until after it had been delivered to Hood and installed under Hood's supervision; that Hood represented to Falco that the equipment was satisfactory and met with the approval of Hood. The manufacturer's warranty was sent to and delivered directly to Hood. The contractual agreement between Falco and Hood provided:

"*TITLE AND SUITABILITY.* The Lessor covenants that is is the lawful owner of the Equipment and that Lessee shall peaceably and quietly hold, enjoy, possess and use the Equipment during the term of this lease; provided, however, that the Equipment has been ordered from a supplier selected by Lessee, and Lessor shall not be liable for specific performance of this lease or for damages if, for any reason, supplier delays or fails to fill the order. No warranties, expressed or implied, representations, promises or statements have been made by the Lessor unless endorsed hereon in writing. The Lessee agrees that each Item of Equipment and the installation thereof shall be conclusively deemed approved by and satisfactory to Lessee unless Lessee shall have given Lessor written notice to the contrary not later than five days after the effective date hereof. Lessee agrees that Lessor shall not be liable for any loss, damages or expense caused by the Equipment or the use, maintenance, servicing thereof, or for the loss of use thereof, or for any loss of business or damage whatsoever and howsoever caused."

Under the terms of this agreement, the parties thereto specifically provided that there were no warranties from Falco to Hood.

". . . When competent parties contract at arms length upon a lawful subject, as to them the contract is the law of their case." *Suits v. Insurance Co.*, 249 N.C. 383, 386, 106 S.E. 2d 579 (1958).

In addition to everything else, the contractual agreement provided in the provisions above set out that Hood should have five days within which to give written notice of any defects in the equipment, and if such notice should not be given, the equipment and installation thereof should be conclusively deemed approved by Hood and satisfactory to Hood.

Hood not only admitted the execution of the lease agreement, but raised no question as to the authenticity thereof and asserted no claim that it failed to express the agreement he had entered into with Falco.

> "Where a lease of business equipment makes no provision that the lessee might recover damages because of any defect in the equipment at the time of delivery and that the lessee should give the lessor written notice of any defect within 5 days or it would be conclusively presumed that the equipment was delivered in good repair, the lessee is not entitled to damages or replacement as against the lessor for an asserted defect or misrepresentation as to the condition of the machinery at the time of delivery, no notice of any defect having been given the lessor as required by the instrument." 5 Strong, N.C. Index 2d, Landlord and Tenant, § 5, p. 156.

This case is similar to the case of *Leasing Corp. v. Hall*, 264 N.C. 110, 141 S.E. 2d 30 (1965). Likewise, see the annotation in 68 A.L.R. 2d 850 at 859, § 5, *et seq.*

[2] The plaintiff also assigns as error the charge of the trial court on the issue of damages wherein the trial judge limited the recovery to $8,197.96. This limitation on the amount of damages is contrary to the lease agreement entered into between Hood and Falco.

> "In a suit for damages arising out of a breach of contract the party injured by the breach is entitled to 'full compensation for the loss and to be placed as near as may be in the position which he would have occupied had the contract not been breached. . . .'" *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123, 123 S.E. 2d 590 (1962).
>
> ". . . 'Generally speaking, the amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. . . .'" *Troitino v. Goodman*, 225 N.C. 406, 412, 35 S.E. 2d 277 (1945).

The above stated principles of law, when coupled with the express terms of the contractual agreement entered into between Falco

and Hood which sets out that upon default the entire amount shall be due, clearly indicates that the damages to which Falco is entitled are the differences between what Hood agreed to pay as rent and what he actually paid.

New trial.

PARKER and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. EDDIE LEE MELTON

No. 7027SC164

(Filed 6 May 1970)

1. Criminal Law §§ 1, 138; Burglary and Unlawful Breakings § 2; Statutes § 10— felonious breaking or entering — G.S. 14-54 — effect of 1969 amendment

A defendant may be prosecuted and punished, after the effective date of the 1969 amendment to G.S. 14-54, for the violation of G.S. 14-54 as it existed prior to the effective date of the 1969 amendment, since the amendment was enacted for the purpose of clarifying the laws relating to burglary and repealed G.S. 14-54 only insofar as the statute conflicted with the amendment.

2. Criminal Law § 1; Statutes § 10— amendment of criminal statute — effect on prosecution

Except insofar as an amendment may operate as an implied repeal of a statute, the amendment of a criminal statute does not affect the prosecution or punishment of a crime committed before the amendment became effective.

3. Burglary and Unlawful Breakings § 6— instructions — charge on rewritten statute

In a prosecution under G.S. 14-54 for a felonious breaking and entering committed prior to the 1969 act rewriting the statute, the trial court erred in reading to the jury G.S. 14-54 in its rewritten form and in instructing the jury on the elements described in the rewritten form, even though the evidence would have justified a jury finding of guilt under either the prior statute or the rewritten statute.

4. Burglary and Unlawful Breakings § 3— sufficiency of indictment

Indictment properly charged defendant with the violation of G.S. 14-54 as it existed prior to the 1969 amendment to the statute, although it would have been desirable had the indictment particularly identified the building allegedly broken into.

APPEAL by defendant from *May, J.*, October 1969 Session of GASTON Superior Court.

Defendant was charged in a bill of indictment with the offense of breaking and entering "a certain storehouse, shop, warehouse, dwelling house, bankinghouse, countinghouse and building occupied by one Kenneth Walsh wherein merchandise, chattels," *et cetera,* were being kept, with intent to commit larceny. He pleaded not guilty, was found guilty by the jury, and from judgment on the verdict imposing active prison sentence, defendant appealed.

Attorney General Robert Morgan and Staff Attorney Donald M. Jacobs for the State.

Childers & Fowler, by Max L. Childers for defendant appellant.

PARKER, J.

[1] The bill of indictment charged and the State's evidence indicated that the offense was committed on 6 May 1969. On that date G.S. 14-54 read as follows:

> "§ 14-54. *Breaking into or entering houses otherwise than burglariously.* — If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, bankinghouse, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years. Where such breaking or entering shall be wrongfully done without intent to commit a felony or other infamous crime, he shall be guilty of a misdemeanor."

By Section 3 of Chapter 543 of the 1969 Session Laws, entitled "An Act to Clarify the Laws Relating to Burglary and Related Offenses," G.S. 14-54 was rewritten to read as follows:

> " 'G.S. 14-54. *Breaking or entering buildings generally.* (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2.
>
> (b) Any person who wrongfully breaks or enters any building is guilty of a misdemeanor and is punishable under G.S. 14-3(a).

(c) As used in this Section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.' "

Chapter 543 of the 1969 Session Laws became effective upon its ratification on 23 May 1969 and was in effect at the time of the trial of this case. This appeal presents the question whether defendant may be prosecuted after the effective date of the 1969 act for violation of G.S. 14-54 as it existed prior to the effective date of that act. We hold that defendant in this case may be so prosecuted.

[1, 2] It is true that "[t]he rule is that when a criminal statute is expressly and unqualifiedly repealed after the crime has been committed, but before *final judgment* — even though after conviction —, no punishment can be imposed." *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698. However, G.S. 14-54 was not "expressly and unqualifiedly repealed" by the 1969 act; it was repealed only insofar as in conflict with that act. Section 7, Chapter 543 of the 1969 Session Laws. Moreover, the title of the 1969 act expresses the legislative intent to clarify, not to repeal, "the laws relating to burglary and related offenses." It is, therefore, clear that the 1969 act amended, rather than repealed, G.S. 14-54. "As a general rule, except in so far as an amendment may operate as an implied repeal of a statute, . . . the amendment of a criminal statute does not affect the prosecution or punishment of a crime committed before the amendment became effective, but as to such crimes the original statute remains in force." 22 C.J.S. Criminal Law, § 26, p. 87. Therefore, defendant in the present case may be prosecuted, and if lawfully convicted may be punished, after the effective date of the 1969 amendment for a violation of G.S. 14-54 as it existed prior to the effective date of that amendment.

[3] When charging the jury at the trial of the present case, the trial judge read to the jury G.S. 14-54 in its form as rewritten by the 1969 act and instructed the jury as to the essential elements of the offense described in the statute as so rewritten. In this there was error. Defendant was entitled to have the jury clearly instructed only as to the essential elements of the offense described in the statute as it existed on the date the offense was committed. As pointed out in *State v. McDowell,* 1 N.C. App. 361, 161 S.E. 2d 769, G.S. 14-54 as previously worded defined three separate felonies: "(1) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter the dwelling house of another otherwise

than by a burglarious breaking, he shall be guilty of a felony . . .; (2) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter any storehouse, shop, warehouse, bankinghouse, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be, he shall be guilty of a felony; (3) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter any uninhabited house, he shall be guilty of a felony." The first offense listed in *State v. McDowell, supra,* required the State to prove beyond a reasonable doubt that the building allegedly broken or entered was a dwelling house; this element is not essential to a conviction under the statute as rewritten. The second offense listed in *State v. McDowell, supra,* required the State to prove beyond a reasonable doubt the presence of personal property in the building; this element is not essential to a conviction under the rewritten statute. It is apparent, therefore, that in order to sustain a conviction of either of the first two offenses as described in *State v. McDowell, supra,* it was necessary for the jury to find the existence of facts which would not be required to sustain a conviction under G.S. 14-54 as amended. While the evidence in the present case was sufficient to justify a jury finding that defendant was guilty of the offenses described in the statute both in the form in which it existed at the date the offense was committed and in its rewritten form, defendant was entitled to have the jury instructed as to what facts they were required to find in order to find him guilty under the statute as it existed on the date the offense was alleged to have been committed, without reference to the less stringent requirements of the amended statute.

[4] The indictment in the present case was sufficient in form to charge defendant with violation of G.S. 14-54 as it existed on the date the offense was alleged to have been committed, and is practically identical to the form of indictment approved in *State v. Sellers,* 273 N.C. 641, 161 S.E. 2d 15. Therefore, defendant's motion to quash the indictment was properly overruled. We note, however, that the indictment failed to identify the subject premises by street address, highway address, or other clear designation. The desirability of particular identification in the indictment of the building alleged to have been broken into and entered was stressed in *State v. Sellers, supra,* as well as in *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105, both of which decisions related to G.S. 14-54 as it previously existed. Such particular identification is equally desirable in indictments drawn under the rewritten statute.

We do not find it necessary to pass upon other matters raised in appellant's assignments of error, since they may not recur upon a new trial, and for the error in the charge noted above, appellant is entitled to a

New trial.

BRITT and HEDRICK, JJ., concur.

APPENDIX

AMENDMENT TO RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA

AMEND RULE 19(g) AND RULE 46, RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA, BY DELETING SAME AS THEY NOW APPEAR IN 1 N.C. APP. 634 AT PAGES 642 AND 655, RESPECTIVELY, AND REWRITING SAME TO READ AS FOLLOWS:

(g) *Appeals Involving Juvenile Cases.* In all appeals from the district courts in cases involving juveniles, pursuant to G.S. 7A-277 through G.S. 7A-289, these rules shall apply, with the exception that when the evidence is not recorded and transcribed, and notice of appeal is given in such case, the district court judge shall, within ten days after the notice of appeal is given, summarize the evidence and make findings of fact as required by the statute.

46. *Citation of Reports.* Supreme Court Rule No. 46 applies with regard to citation of North Carolina Supreme Court decisions. With regard to citation of North Carolina Court of Appeals decisions, the official reports of the North Carolina Court of Appeals shall be cited.

This amendment shall become effective on July 1, 1970 and shall apply to all appeals docketed in the Court of Appeals on and after that date.

This is to certify that the foregoing amendment to Rule 19(g) and Rule 46, Rules of Practice in the Court of Appeals of North Carolina, was prescribed and adopted by the Supreme Court in conference on 19 May 1970 pursuant to authority contained in G.S. 7A-33.

HUSKINS, J.
For the Supreme Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS
ACTIONS
ALTERATION OF INSTRUMENTS
ANIMALS
APPEAL AND ERROR
ARREST AND BAIL
ASSAULT AND BATTERY
AUTOMOBILES

BILLS AND NOTES
BOUNDARIES
BROKERS AND FACTORS
BURGLARY AND UNLAWFUL BREAKINGS

CANCELLATION AND RECISSION OF INSTRUMENTS
CARRIERS
CLAIM AND DELIVERY
CLERKS OF COURT
COMPROMISE AND SETTLEMENT
CONSTITUTIONAL LAW
CONTRACTS
CONTROVERSY WITHOUT ACTION
CORPORATIONS
COSTS
COURTS
CRIMINAL LAW

DAMAGES
DEDICATION
DEEDS
DESCENT AND DISTRIBUTION
DIVORCE AND ALIMONY
DOWER AND CURTESY

EJECTMENT
EQUITY
ESCAPE
ESTOPPEL
EVIDENCE
EXTRADITION

FALSE PRETENSE
FISH AND FISHERIES
FRAUD
FRAUDS, STATUTE OF

GAS
GIFTS

HABEAS CORPUS
HIGHWAYS AND CARTWAYS
HOMICIDE
HUSBAND AND WIFE

INCEST
INFANTS
INJUNCTIONS
INSURANCE
INTOXICATING LIQUOR

JUDGMENTS
JURY

LABORERS' AND MATERIALMEN'S LIENS
LANDLORD AND TENANT
LARCENY
LIBEL AND SLANDER

MONEY RECEIVED
MONOPOLIES
MORTGAGES AND DEEDS OF TRUST
MUNICIPAL CORPORATIONS

NEGLIGENCE
NUISANCE

OBSCENITY

PARTIES
PAYMENT
PENSIONS
PLEADINGS
PRINCIPAL AND AGENT
PROCESS
PROPERTY

RAPE
REFORMATION OF INSTRUMENTS
REGISTRATION
ROBBERY
RULES OF CIVIL PROCEDURE

SALES
SCHOOLS
SEARCHES AND SEIZURES
SETOFFS
SIGNATURES
STATE
STATUTES

TAXATION
TELEPHONE AND TELEGRAPH COMPANIES
TRIAL

TRUSTS

UNJUST ENRICHMENT
USURY
UTILITIES COMMISSION

VENDOR AND PURCHASER

WATERS AND WATER COURSES
WILLS
WITNESSES

ACCOUNTS

§ 1. Open and Running Accounts

Defendant's evidence is insufficient to show that it is entitled to a setoff for its inventory of merchandise supplied by plaintiff. *Distributing Corp. v. Parts, Inc.*, 483.

In an action to recover for merchandise purchased on open account, trial court properly nonsuited defendant's counterclaim and setoff based on purported exclusive distributorship agreement where evidence was insufficient to show that such an agreement had been entered into either orally or in writing. *Ibid.*

ACTIONS

§ 6. Distinction Between Forms of Action

While a party may obtain legal or equitable relief in the same action, he must allege facts upon which the court may grant such relief. *Leffew v. Orrell*, 333.

ALTERATION OF INSTRUMENTS

Evidence held sufficient for jury in action to set aside deed in which defendant was named grantee where it tends to show that grantor did not consent to change in grantees. *Newell v. Edwards*, 650.

Before delivery, grantor may make such alterations in the instrument as he chooses; after delivery a deed may be changed with consent of the parties and may be redelivered, but absent such redelivery, transfer of title cannot be effected by substituting the name of another person for that of the grantee who was designated in the deed. *Ibid.*

ANIMALS

§ 3. Injury or Damage Caused by Animals Roaming at Large

Allegations that the defendants negligently left open the gate to an enclosure in which a pony was kept, that the pony escaped and went onto a lot in which some mules were enclosed, that the pony became excited and agitated in such a way that the mules broke out of their enclosure, that one of the mules wandered onto a highway and was struck by plaintiff's car, and that plaintiff was injured in the collision, *held* sufficient to withstand demurrer. *Sutton v. Duke*, 100.

The livestock fencing law is applicable to Lenoir County. *Ibid.*

APPEAL AND ERROR

§ 1. Jurisdiction in General

The Supreme Court has exclusive jurisdiction to make rules of procedure for the Appellate Division of the General Court of Justice. *S. v. Black*, 324.

§ 4. Theory of Trial in Lower Court

Theory of case at trial must be theory of case on appeal. *Leffew v. Orrell*, 333.

Plaintiff may not on appeal argue a different theory than that upon which the case was tried below. *Underwood v. Stafford*, 220.

§ 6. Judgments and Orders Appealable

For all practical purposes, there is an unlimited right of appeal from any final judgment of the superior court or the district court in civil and criminal cases. *S. v. Black*, 324.

An immediate appeal is available from the granting of a motion to strike an entire further answer and defense. *Bank v. Printing Co.*, 359.

Appeal lies as a matter of right from order awarding alimony pendente lite. *Peeler v. Peeler*, 456.

An immediate appeal lies from a judgment in a processioning proceeding that determined the location of the boundary lines but reserved the assessment of damages to a future session of court. *Prince v. Prince*, 638.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

The district court is without authority to consolidate two cases for the purpose of an appeal. *Shore v. Shore*, 197.

An appeal from an interlocutory order stays all further proceedings in the trial court upon the order appealed from, and the court is functus officio to try the case pending appeal. *Patrick v. Hurdle*, 44.

§ 24. Exceptions and Assignments of Error in General

Failure to include assignments of error in the record or brief presents only face of record proper for review. *Builders, Inc. v. Hollar*, 14.

§ 26. Exceptions and Assignments of Error to Judgment or Signing of Judgment

Exception to signing of judgment presents for review only face of record proper. *White v. Perry*, 36; *Prince v. Prince*, 638.

§ 28. Exceptions and Assignments of Error to Findings of Fact

Broadside exception to findings of fact does not present for review admissibility of evidence on which findings were made or sufficiency of evidence to support findings. *Crabtree v. Coats & Burchard Co.*, 624.

§ 30. Exceptions and Assignments of Error to Evidence and Motions to Strike

Trial court erred in striking entire answer of witness containing four sentences where some of the answer was admissible. *Stith v. Perdue*, 314.

§ 39. Time of Docketing Appeal

Appeal is dismissed for failure to docket record on appeal within time prescribed by Rules. *Umphlett v. Bush*, 72; *In re Custody of Maxwell*, 59.

APPEAL AND ERROR — Continued

§ 41. Form and Requisites of Transcript

Cases consolidated for trial may be appealed by filing in the Court of Appeals one record. *Shore v. Shore*, 197.

The district court is without authority to consolidate two cases for the purpose of an appeal. *Ibid.*

An appeal is subject to dismissal for failure to comply with the rules of Practice in the Court of Appeals. *Epps v. Miller*, 656.

§ 44. Effect of Failure to File Brief

Exceptions and assignments of error are deemed abandoned where appellant files no brief. *In re Custody of Maxwell*, 59.

§ 45. The Brief

Exceptions not brought forward and argued in the brief are deemed abandoned. *Shore v. Shore*, 197; *Atkins v. Parker*, 446.

Inclusion of separation agreement in controversy in defendant's brief as an appendix thereto is not approved. *Calhoun v. Calhoun*, 509.

§ 48. Harmless and Prejudicial Error in Admission of Evidence

In order to obtain a new trial for error in the admission of evidence, appellant must show that the evidence was prejudicial to his cause of action. *Wilder v. Edwards*, 513.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence

Exception to exclusion of evidence will not be considered where record fails to show what excluded evidence would have been. *Stith v. Perdue*, 314.

§ 50. Harmless and Prejudicial Error in Instructions

Possible error in the instructions upon the issue of plaintiff's contributory negligence in an automobile accident case was not prejudicial, since the jury did not reach the issue of contributory negligence. *Wilder v. Edwards*, 513.

§ 57. Findings or Judgments on Findings

Findings of fact are conclusive if supported by competent evidence. *Goldman v. Parkland*, 400; *Allen v. Allen*, 555; *Epps v. Miller*, 656.

Findings of fact to which no exception has been taken are binding on appeal. *Underwood v. Stafford*, 220.

Ordinarily, when the findings which are supported by competent evidence are sufficient to support the judgment, the judgment will not be disturbed because another finding which does not affect the conclusions is not supported by the evidence. *Allen v. Allen*, 555.

§ 59. Judgments on Motion to Nonsuit

Where trial judge was sitting as the trier of fact, his granting of plaintiffs' motion for nonsuit of defendants' counterclaim, although improper under the facts of this case, held not prejudicial. *Kelly v. Davenport*, 670.

Review on appeal of judgment of nonsuit. *Conway v. Timbers, Inc.*, 10.

ARREST AND BAIL

§ 6. Resisting Arrest

Evidence held sufficient for jury in prosecution of husband and wife for interfering with an officer in the performance of his duties. *S. v. Sparrow*, 107.

ARREST AND BAIL — Continued

§ 13. Proceedings to Obtain Arrest in Civil Actions

Although it is appropriate for a plaintiff to allege in his complaint facts upon which the remedy of arrest may be sustained, an allegation by a plaintiff in an automobile accident case that the wilful and wanton conduct of the defendants prior to the accident "constitutes one of the causes of action whereby a defendant may be arrested" is merely a conclusion of law and should not be included in the complaint. *Plummer v. Henry*, 84.

ASSAULT AND BATTERY

§ 5. Assault With a Deadly Weapon

The 1969 General Assembly created two lesser offenses of the crime of assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Parker*, 191.

Rule that whether serious injury has been inflicted must be determined according to the particular facts of each case applies to a prosecution under G.S. 14-32(b) for assault with a deadly weapon *per se* inflicting serious injury. *Ibid.*

§ 14. Sufficiency of Evidence and Nonsuit

State's evidence held sufficient for jury on question of serious injury to a police officer. *S. v. Parker*, 191.

State's evidence that the prosecuting witness was shot in the right wrist and required medical treatment is sufficient for the jury on the question of serious injury. *S. v. Shankle*, 564.

Defendant was not entitled to a directed verdict on the ground that the State's evidence showed that he did not fire a shot at the prosecuting witness, since there was sufficient evidence that defendant was in the company of the co-defendants who fired the shots resulting in serious injury. *Ibid.*

In prosecution for felonious assault, trial court properly denied defendants' motion to dismiss on ground that no intent to kill or serious bodily injury had been shown. *S. v. Haith*, 552.

§ 15. Instructions

Trial court properly instructed jury that steak knife allegedly used in assaulting police officer was a deadly weapon per se. *S. v. Parker*, 191.

§ 16. Instructions on Lesser Degree of Offense

In prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, trial court did not err in failing to charge on lesser offense of simple assault. *S. v. Parker*, 191.

§ 17. Verdict and Punishment

Sentence of not less than 18 nor more than 24 months for assault with a deadly weapon is within limits set by statute. *S. v. Haith*, 552.

AUTOMOBILES

§ 2. Grounds and Procedures for Suspension or Revocation of Driver's Licenses

The court has no jurisdiction to review a mandatory revocation of a driver's license. *Taylor v. Garrett*, 473.

Petitioner's filing of an SR-22 insurance certificate with the Commissioner

of Motor Vehicles did not automatically reinstate his suspended driver's license, and where petitioner was convicted of a number of driving offenses during the continued suspension, the Commissioner was authorized to permanently revoke petitioner's license. *Ibid.*

§ 5. Sale and Transfer of Title

Title passes to the purchaser of an automobile only when the certificate of title has been signed by the vendor and delivered to the vendee and the motor vehicle delivered to the transferee. *Insurance Co. v. Hayes*, 294.

§ 8. Look-out and Due Care in General

Plaintiff's testimony negated any inference that he failed to keep a proper lookout. *Meeks v. Atkeson*, 631.

§ 10. Stopping and Parking

To park an automobile on an incline without securing its position by the brakes and transmission constitutes negligence. *Tuttle v. Beck*, 337.

§ 12. Hitting Vehicle Stopped or Parked on Highway

Plaintiff's inability to stop his vehicle within the radius of his lights cannot be considered contributory negligence *per se*. G.S. 20-141(e). *Meeks v. Atkeson*, 631.

§ 13. Lights

Plaintiff's testimony showed that his headlights complied with G.S. 20-131(a). *Meeks v. Atkeson*, 631.

§ 30. Speed in General

Violation of the statute relating to the 55 mph speed limit is negligence per se. *Basden v. Sutton*, 6.

§ 33. Speed at Intersections

A plaintiff entering an intersection from a servient street is not required to anticipate that a car would be approaching on the dominant street from his left at a rate of speed twice the lawful limit for the area. *Rozier v. Lancaster*, 506.

§ 40. Pedestrians

Pedestrian in unmarked crosswalk may assume and act on the assumption that others will observe statute requiring them to yield the right of way. *Carter v. Murray*, 171.

§ 43. Pleadings and Parties in Action for Negligent Operation

Allegation that defendant's wilful and wanton conduct prior to the accident "constitutes one of the causes of action whereby a defendant may be arrested" is subject to demurrer. *Plummer v. Henry*, 84.

Complaint in action by guest passenger was sufficient to support evidence that defendant was negligent in parking her automobile at night on a highway with its bright lights facing oncoming traffic. *Tharpe v. Brewer*, 432.

§ 44. Presumptions and Burden of Proof of Negligent Operation

Evidence that automobile left highway for no apparent reason and wrecked is held sufficient for jury on issue of driver's negligence. *Cherry v. Smallwood*, 56.

AUTOMOBILES — Continued

§ 47. Physical Facts at Scene

Physical facts at scene of accident may speak louder than testimony of witnesses. *Jordan v. Williams*, 33.

Whether or not skid marks on highway were made by plaintiff's car was question for jury. *Meeks v. Atkeson*, 631.

§ 50. Sufficiency of Evidence on Issue of Negligence

Evidence that automobile left highway for no apparent reason and wrecked is held sufficient for jury on issue of driver's negligence. *Cherry v. Smallwood*, 56.

§ 51. Sufficiency of Evidence of Excessive Speed

Plaintiff's evidence makes out a prima facie case of defendant's negligence in driving in excess of 55 mph at the time he struck intestate. *Basden v. Sutton*, 6.

§ 55. Stopping Without Signal

Plaintiff's evidence held sufficient for jury on issue of defendant's negligence in suddenly stopping his automobile on the highway in front of plaintiff's automobile. *Stith v. Perdue*, 314.

§ 56. Hitting Vehicle Parked or Stopped on Highway

Plaintiff's evidence that defendant, while searching for his lost cat, left his unlighted vehicle at nighttime across both lanes of the highway was sufficient to go to the jury. *Meeks v.Atkeson*, 631.

§ 57. Exceeding Reasonable Speed and Failing to Yield Right of Way at Intersection

Plaintiff's evidence, which included testimony that defendant approached the intersection from the dominant street at a speed of 70 mph, *held* sufficient to be submitted to the jury on the issue of defendant's negligence in colliding with plaintiff's automobile which had just entered the intersection from the servient street. *Rozier v. Lancaster*, 506.

§ 58. Turning and Hitting Turning Vehicles

Evidence held sufficient for jury on issue of defendant's negligence in making a U-turn in front of plaintiff's automobile. *Jordan v. Williams*, 33.

§ 61. Backing

Plaintiff's evidence held sufficient to establish employee's negligence in backing a forklift into plaintiff. *Conway v. Timbers, Inc.*, 10.

§ 62. Striking Pedestrian

In action by pedestrian against automobile driver, evidence was sufficient for jury where it tended to show that plaintiff was struck while crossing the street within an unmarked crosswalk at an uncontrolled intersection. *Carter v. Murray*, 171.

§ 72. Sudden Emergency

Doctrine of sudden emergency applied in action by guest passenger against driver of truck which struck parked automobile in which plaintiff was a passenger. *Tharpe v. Brewer*, 432.

AUTOMOBILES — Continued

§ 75. Contributory Negligence in Stopping or Parking

Plaintiff's evidence was sufficient to support a jury finding that defendant's automobile was parked with the emergency brake off and the gear shift in drive position. *Tuttle v. Beck*, 337.

§ 76. Contributory Negligence in Hitting Stopped or Parked Vehicle

Plaintiff's evidence did not disclose contributory negligence as a matter of law where it tended to show that plaintiff lost control of his car and wrecked while trying to avoid defendant's vehicle which had stopped suddenly in the highway. *Stith v. Perdue*, 314.

Plaintiff's evidence was insufficient to establish that he was contributorily negligent as a matter of law in striking defendant's unlighted automobile which was parked across both lanes of a highway at nighttime. *Meeks v. Atkeson*, 631.

§ 79. Contributory Negligence in Intersection Accident

Plaintiff's evidence did not disclose his contributory negligence as a matter of law in an intersection accident. *Rozier v. Lancaster*, 506.

§ 80. Contributory Negligence in Turning

Plaintiff's wife was not guilty of contributory negligence as a matter of law in making a left turn into a driveway and colliding with defendant's overtaking automobile. *Hales v. Flowers*, 46.

§ 83. Pedestrian's Contributory Negligence

Plaintiff's intestate was guilty of contributory negligence as a matter of law in assisting in the removal of tobacco from the highway. *Basden v. Sutton*, 6.

Evidence held not to disclose contributory negligence as a matter of law by pedestrian struck by automobile while crossing a street at an unmarked crosswalk at an intersection. *Carter v. Murray*, 171.

Plaintiff's evidence discloses contributory negligence in his standing in front of a stalled automobile on the highway at nighttime. *Gregory v. Adkins*, 305.

§ 90. Instructions in Automobile Accident Cases

Trial court erred in failing to instruct jury with regard to doctrine of sudden emergency, where defendant's evidence tended to show that he was blinded by headlights of codefendant's automobile and that when he realized such automobile was in his lane of travel, he turned his truck to the left and applied brakes in an attempt to avoid a collision. *Tharpe v. Brewer*, 432.

Possible error in the instructions upon the issue of plaintiff's contributory negligence in an automobile accident case was not prejudicial to plaintiff, since the jury did not reach the issue of contributory negligence. *Wilder v. Edwards*, 513.

Plaintiff's evidence in automobile accident case is insufficient to justify an instruction on careless and reckless driving by defendant. *Ibid.*

§ 94. Contributory Negligence of Guest or Passenger

Plaintiff guest passenger was not contributorily negligent as a matter of law in remaining in an automobile which was allegedly parked in violation of G.S. 20-161.1. *Tharpe v. Brewer*, 432.

AUTOMOBILES — Continued

§ 95. Negligence of Driver Imputed to Guest or Passenger

In wrongful death action instituted by the administrator of the owner-occupant of an automobile against defendant railroad for damages arising out of a grade crossing collision, contributory negligence of the driver is imputed to the owner-occupant, the evidence being insufficient to support a jury finding that the owner-occupant had relinquished control of the automobile. *Etheridge v. R. R. Co.*, 140.

§ 98. Negligence of Owner in Permitting Incompetent or Reckless Person to Drive

Under the theory of negligent entrustment the owner is held liable, not for any imputed negligence, but by reason of his own independent and wrongful breach of duty in entrusting his automobile to one he knows or should know is likely to cause injury. *Plummer v. Henry*, 84.

Where plaintiff alleged that defendant-owner was liable for his son's negligence under the family purpose doctrine and that defendant was also liable for punitive damages on the theory of negligent entrustment, an admission by defendants father and son that the family purpose doctrine is applicable to the case does not warrant trial court in striking the allegations for punitive damages on theory of negligent entrustment. *Ibid.*

§ 105. Sufficiency of Evidence on Issue of Respondeat Superior

Defendant's admission that the automobile involved in the accident was registered in her name is sufficient to support a finding that defendant was legally responsible for the acts and omissions of the co-defendant in driving the automobile; but plaintiff still had to establish the negligence of the co-defendant. *Tuttle v. Beck*, 337.

§ 108. Family Purpose Doctrine

The family purpose doctrine is an extension of the principle of *respondeat superior*. *Plummer v. Henry*, 84.

§ 109. Recovery by Non-Driving Owner; Imputation of Driver's Negligence

In wrongful death action instituted by the administrator of the owner-occupant of an automobile against defendant railroad for damages arising out of a grade crossing collision, contributory negligence of the driver is imputed to the owner-occupant and bars recovery by the administrator, the evidence being insufficient to support a jury finding that the owner-occupant had relinquished control of the automobile. *Etheridge v. R. R. Co.*, 140.

§ 113. Sufficiency of Evidence and Nonsuit in Homicide Prosecution

In a manslaughter prosecution arising out of an automobile wreck, the State's evidence permitted a legitimate inference that deceased died from injuries received in the wreck. *S. v. Locklear*, 493.

State's evidence in manslaughter prosecution is sufficient to support a jury finding that the automobile wreck was caused by defendant's culpable negligence in driving at a high rate of speed and while intoxicated. *Ibid.*

§ 117. Prosecutions for Speeding

In a prosecution for speeding 75 mph in a 35 mph zone in violation of a statutory ordinance, evidence of defendant's guilt was properly submitted to

the jury, notwithstanding the evidence was substantially weakened on cross-examination. *S. v. Zimmerman*, 522.

Violation of a municipal speed ordinance is punishable by fine not to exceed $50 or prison sentence not to exceed 30 days. *Ibid.*

§ 126. Competency of Evidence of Driving Under the Influence

In drunken driving prosecution, trial court committed prejudicial error in admitting testimony of breathalyzer test results where there was no evidence tending to show that such test (1) was performed according to methods approved by the State Board of Health and (2) was performed by an individual possessing a valid permit issued by the Board. *S. v. Caviness*, 541.

Testimony by witness that he had graduated from the "school for breathalyzer operators put on by the Community College in Raleigh" and that he has "a license to administer the breathalyzer" was insufficient to show that the witness has a valid permit issued by the State Board of Health to administer such tests. *Ibid.*

In drunken driving prosecution, trial court erred in ruling that arresting officer could not be questioned on cross-examination regarding any statement made by defendant at the time of arrest unless defendant first took the stand and testified. *S. v. Royal*, 559.

§ 128. Argument to Jury in Prosecution for Drunken Driving

Where defendant's counsel improperly argued to jury that in other drunken driving cases tried the same week the breathalyzer indicated .29 or .30 while defendant's test showed only .15, trial court erred in commenting that his own recollection was that results introduced in other cases indicated .18 or .19 instead of instructing jury to disregard the improper argument. *S. v. Royal*, 559.

In prosecution for drunken driving, jury should have been instructed not to consider argument of defense counsel or solicitor as to what the evidence was in other drunken driving cases, how successful the officers had been in similar cases, or how other defendants had pleaded to similar charges. *Ibid.*

§ 129. Instructions in Prosecution for Drunken Driving

Trial court's instructions in drunken driving prosecution were without error. *S. v. Newsome*, 525.

BILLS AND NOTES

§ 18. Parties and Pleadings

In an action upon promissory note, demurrer to the complaint on ground that the note showed on its face it had been paid was properly overruled. *Gibson v. Jones*, 534.

Allegations in defendants' further answer that execution of the note in controversy was obtained by fraud, held demurrable. *Kelly v. Davenport*, 670.

§ 20. Sufficiency of Evidence

Plaintiff's evidence in action on promissory note was sufficient to go to jury. *Kelly v. Davenport*, 670.

§ 22. Prosecutions for Worthless Checks

A defendant granted a new trial for the offense of issuing worthless

BILLS AND NOTES — continued

checks is entitled to the defense of the statutory amendment enacted subsequent to his original trial, which amendment mitigated the punishment for such offense. *S. v. McClam*, 477.

Sentence of 12 months' imprisonment imposed upon defendant's plea of guilty to the offense of issuing worthless checks in the amounts of $30 and $26.77 held in excess of statutory maximum. *Ibid.*

BOUNDARIES

§ 8. Proceedings to Establish Boundaries

Where in an ejectment action the parties stipulated that they are the owners of the land conveyed to them and that the only question in controversy is the location of the boundary lines between the land, the action is converted into a processioning proceeding. *Prince v. Prince*, 638.

Plaintiffs in a processioning proceeding have the burden of proof to establish the true location of the boundary lines. *Ibid.*

§ 10. Sufficiency of Description and Admissibility of Evidence

Description in option contract held sufficient to admit extrinsic evidence to determine location of the property. *Carlton v. Anderson*, 264.

Where party contracts to convey land by description which actually corresponds with property he professes to own or control, there is a strong presumption the contract was intended to apply to that particular property even though the description fits property that contracting party does not profess to own or control. *Ibid.*

Reference to one deed in another for purpose of description is equivalent to incorporating and setting out its description in full. *Quadro Stations v. Gilley*, 227.

It was proper for a real property attorney to testify for purpose of more definitely identifying monuments contained in the description of a deed. *Ibid.*

In action for breach of option contract to convey land, plea in bar that the option did not comply with the statute of frauds should have been allowed where the description did not specifically locate the land and plaintiff's evidence failed to identify and locate the land. *Sheppard v. Andrews*, 517.

§ 15. Verdict and Judgment

An immediate appeal lies from a judgment in a processioning proceeding that determined the location of the boundary lines but reserved the assessment of damages to a future session of court. *Prince v. Prince*, 638.

BROKERS AND FACTORS

§ 6. Right to Commissions

Fatal variance occurred in action by realty corporation to recover from real estate agent one-half sales commission for sale of farm to corporate officer where evidence shows all negotiations with defendant were by corporate officer as an individual. *Realty Co. v. Hoots*, 362.

BURGLARY AND UNLAWFUL BREAKINGS

§ 2. Breaking and Entering Other Than Burglariously

A defendant may be prosecuted and punished, after the effective date of the 1969 amendment to G.S. 14-54, for the violation of G.S. 14-54 as it existed prior to the effective date of the 1969 amendment. *S. v. Melton*, 721.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 3. Indictment

It is desirable in a felonious breaking prosecution that the indictment particularly identify the building broken into. *S. v. Melton*, 721.

§ 6. Instructions

Failure of trial court to charge on doctrine of recent possession was not prejudicial to defendant. *S. v. Jackson*, 386.

In a prosecution under G.S. 14-54 for a felonious breaking and entering committed prior to the 1969 act rewriting the statute, the trial court erred in instructing the jury on the elements of G.S. 14-54 in its rewritten form. *S. v. Melton*, 721.

§ 9. Elements of the Offense

Elements of crime of unlawful possession of burglary tools. *S. v. McCloud*, 132.

§ 10. Prosecutions

Defendant's confession sufficiently established defendant's connection with tools and other articles found in car owned and occupied by another person so as to render them admissible against defendant. *S. v. McCloud*, 132.

Trial court committed prejudicial error in instructing jury that defendant had burden of proving lawful excuse for possession of burglary tools. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 4. For Mutual Mistake

Voluntary payments made under a mistake of law, with knowledge of the facts, cannot be recovered back, although there was no debt. *Thompson v. Shoemaker*, 687.

CARRIERS

§ 3. Sale of Franchise

Showing of public need required of an application for a new motor carrier certificate is not applicable in a transfer proceeding. *Utilities Comm. v. Petroleum Carriers*, 408.

Requirement of public convenience and necessity for transfer of public utility franchise is satisfied by showing that the authority has been and is being actively applied in satisfaction of the public need shown to exist when the authority was originally acquired. *Ibid.*

Possibility that a transfer of a motor carrier franchise to a more competitive carrier will adversely affect other existing carriers does not make such transfer contrary to the public interest. *Ibid.*

In proceeding to obtain approval of Utilities Commission for transfer of a common motor carrier asphalt franchise, there was sufficient evidence to support Commission's finding that service under the franchise had been continuously offered to the public up to the time of filing said application. *Ibid.*

CLAIM AND DELIVERY

§ 2. Proceedings

Where plaintiff has taken a voluntary nonsuit after the property has been taken in claim and delivery, defendant may maintain an action for damages against plaintiff. *Epps v. Miller*, 656.

CLAIM AND DELIVERY — Continued

§ 5. Judgment for Defendant and Liabilities on Plaintiff's Undertaking

Sureties on plaintiff's undertaking in a claim and delivery proceeding are parties of record within the limits of their obligations. *Epps v. Miller*, 656.

CLERKS OF COURT

§ 1. Jurisdiction and Authority of Clerk in General

Statutes requiring justice of the peace to deliver his records to clerk of superior court upon expiration of his term of office and giving the clerk power to compel such delivery were not impliedly repealed by abolishment of the office of justice of the peace. *In re Robertson*, 186.

Records which a former justice of the peace can be required to deliver to the clerk of superior court are not limited to the civil and criminal dockets referred to in G.S. 7-130. *Ibid.*

§ 2. Jurisdiction to Enter Judgment

When an unverified answer has been filed to a verified complaint, the clerk of superior court has no authority to enter a judgment by default and inquiry unless and until the unverified answer has been stricken. *Steed v. Cranford*, 378.

§ 3. Probate Jurisdiction

The power of the clerk to set aside the probate of a will in common form does not extend to grounds which should be raised by caveat. *In re Spinks*, 417.

COMPROMISE AND SETTLEMENT

§ 3. Practice and Procedure

Pleading of a release in plaintiff's reply to defendant's counterclaim constituted a ratification by plaintiff of the settlement by his insurance carrier with defendant and bars plaintiff's cause of action, and withdrawal of plaintiff's reply did not constitute a revocation of the ratification. *White v. Perry*, 36.

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions

Constitutionality of an ordinance purporting to create a criminal offense may be challenged in an action to enjoin its enforcement when such relief is essential to property rights and the rights of persons against injuries which are irremedial. *Mobile Home Sales v. Tomlinson*, 289.

Mobile home dealer has standing to challenge constitutionality of municipal blue law upon allegations that ordinance is being enforced by preventing mobile home dealers from offering mobile homes for sale on Sunday but is not being similarly enforced to prevent offering for sale conventional homes. *Ibid.*

§ 14. Morals and Public Welfare

Municipal blue law which prevents sale of mobile homes on Sunday but does not prevent such sale of conventional homes held constitutional. *Mobile Home Sales v. Tomlinson*, 289.

A city ordinance regulating Sunday sales will be upheld as a valid exercise of the police power if the classifications created by the ordinance are founded upon reasonable distinctions, affect equally all persons within a particular class, and bear a reasonable relationship to the public health and welfare sought to be promoted. *Ibid.*

CONSTITUTIONAL LAW — Continued

§ 21. Right to Security in Person and Property

Defendants have standing to object to the validity of a search warrant for narcotics directed to the premises of a third person where they were both in the apartment with the seized evidence at the time of the search under the warrant. *S. v. Milton*, 425.

§ 26. Full Faith and Credit to Foreign Judgments

Complaint was not subject to demurrer on ground plaintiff was claiming custody of an adopted child and attacked an adoption judgment of another state which was entitled to full faith and credit. *Bonavia v. Torreso*, 21.

Full Faith and Credit Clause of U.S. Constitution does not prevent courts in this State from modifying child custody decree entered in another state where child is physically present in this State. *In re Kluttz*, 383.

§ 29. Right to Trial by Duly Constituted Jury

A defendant has a right to be tried by a jury from which members of his race have not been arbitrarily excluded. *S. v. Spencer*, 282.

§ 30. Due Process in Trial

Defendant was not denied right of speedy trial by delay of three and one-half months between arrest and trial. *S. v. McCloud*, 132.

Every person charged with a crime has absolute right to fair trial before impartial judge and unprejudiced jury. *S. v. McPherson*, 160.

The State has no right to appeal from order dismissing a prosecution on ground that defendant had been denied constitutional right to a speedy trial. *S. v. Horton*, 497.

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence

Defendant's motion for continuance on ground that he needed additional time to locate material witnesses held properly denied by trial court without prejudice to defendant's constitutional rights. *S. v. Lewis*, 178.

Denial of indigent defendant's petition that he be authorized to employ specialists in the field of statistics who would aid him in his defense and who would be paid by the State or county, held not reversible error. *Ibid.*

Attorney retained to represent defendant at probation revocation hearing did not have fair opportunity to prepare defense, where defendant diligently tried while in jail to retain counsel but was unsuccessful in doing so until an hour before the hearing, and court denied motion for continuance made by defendant's counsel. *S. v. Atkinson*, 355.

§ 32. Right to Counsel

Defendant charged with violation of conditions of probation sentence is entitled to representation by an attorney. *S. v. Atkinson*, 355.

Rules relating to counsel and waiver thereof in trial for misdemeanor amounting to serious offense. *S. v. McClam*, 477.

In an escape prosecution, it appeared from the record that defendant intelligently and understandingly waived his right to counsel and entered a plea of guilty. *S. v. Rogers*, 572.

§ 36. Cruel and Unusual Punishment

Punishment within statutory limits is not cruel and unusual. *S. v. Johnson*, 53.

CONSTITUTIONAL LAW — Continued

When no maximum time is fixed by statute, an imprisonment for two years will not be held cruel or unusual punishment. *S. v. Spencer*, 282.

CONTRACTS

§ 2. Offer, Acceptance and Mutuality

An offer by mail carries with it an implied invitation to accept or reject the offer by mail. *Goldman v. Parkland*, 400.

Fact that for some time after telegram containing essentials of a contract was sent the attorneys for the parties were engaged in drafting a written document which was to embody all terms agreed upon does not compel the conclusion that the minds of the parties had never met upon the essentials of a binding contract. *Yaggy v. B.V.D. Co.*, 590.

§ 7. Contracts in Restraint of Trade

Contracts in partial restraint of trade are enforceable where the restrictions are reasonably necessary to protect the legitimate interest of the covenantee and are reasonable as to time and area. *Quadro Stations v. Gilley*, 227.

No special distributorship relationship arose by implication out of the conduct of the parties in this case. *Distributing Corp. v. Parts, Inc.*, 483.

§ 8. Contracts Relating to Courts

Contract between physician and justice of the peace for the justice, under color of his office, to collect accounts owed the physician by his patients would be void. *In re Robertson*, 186.

§ 12. Construction of Contracts

The heart of a contract is the intention of the parties. *Mears v. Construction Co.*, 614.

§ 14. Contract for Benefit of Third Persons

Complaint does not state a cause of action by plaintiff finance company as third party beneficiary of collision insurance policy on automobile financed by plaintiff. *Credit Co. v. Ins. Co.*, 663.

§ 17. Term and Duration of Agreement

A distributorship contract for an indefinite period is terminable at the will of either party upon reasonable notice, but where defendant refuses to make payment for goods furnished under such agreement, notice need not be given before bringing suit on the account. *Distributing Corp. v. Parts, Inc.*, 483.

§ 21. Performance and Breach

In action by a subcontractor against a general contractor to recover damages for breach of contract, instructions of trial court relating to the submission of estimates to the general contractor and the payment of the estimates were proper. *Mears v. Construction Co.*, 614.

§ 25. Pleadings, Burden of Proof, and Issues

Alleged promise by defendant insurance agent that plaintiff finance company would be named as loss payee under a policy of collision insurance issued on an automobile which had been financed by plaintiff *is held* insufficient to support an action for breach of contract, there being no consideration for defendant's promise. *Credit Co. v. Ins. Co.*, 663.

CONTRACTS — Continued

§ 26. Competency and Relevancy of Evidence

Admission of subcontractor's testimony that his anticipated profit was 20% of the contract price was erroneous in action for breach of contract. *Mears v. Construction Co.*, 614.

§ 27. Sufficiency of Evidence and Nonsuit

No special distributorship relationship arose by implication out of the conduct of the parties in this case. *Distributing Corp. v. Parts, Inc.*, 483.

A party seeking to recover for gains prevented or lost profits must present evidence rather than speculation. *Mears v. Construction Co.*, 614.

§ 28. Instructions

Trial court erred in instructing jury it could return verdict for contract price, nothing or any amount between, without submitting separate issues based upon express contract and quantum meruit. *Roberts v. Herring*, 65.

§ 29. Measure of Damages for Breach

In an action for breach of contract, the profits and losses must be determined according to the circumstances of the case and subject matter of the contract. *Mears v. Construction Co.*, 614.

CONTROVERSY WITHOUT ACTION

§ 1. Nature and Scope of Remedy

The sufficiency of a deed to convey title can be adjudicated by submission of a controversy without action. *Land Corp. v. Styron*, 25.

§ 2. Statement of Facts, Hearings and Judgment

Upon submission of a controversy without action, the cause is for determination on agreed facts, and the facts admitted must be conclusive as to present only bare questions of law for the court. *Land Corp. v. Styron*, 25.

CORPORATIONS

§ 1. Corporate Existence

Where defendants denied the corporate existence of plaintiff, copy of promissory notes introduced in evidence in which plaintiff payee was named as a corporation provided sufficient evidence to support a finding that plaintiff was a corporation. *Wickes Corp. v. Hodge*, 529.

§ 13. Liability of Officers and Agents to Third Persons for Mismanagement, Fraud and the Like

Trial court properly found that there had been no wrongful or fraudulent appropriation of assets of the corporation by defendant stockholders and directors of the corporation. *Underwood v. Stafford*, 220.

Allegations by judgment creditor of corporation were insufficient to allege cause of action based on theory that payments had been made to other creditors in which plaintiff had a right to share. *Ibid.*

Where case was tried on theory that defendant stockholders wrongfully appropriated assets to their own use, plaintiff may not on appeal urge a different theory based on contention that other creditors were improperly preferred. *Ibid.*

CORPORATIONS — Continued

§ 16. Issuance of Stock by Corporation

Plaintiff failed to prove allegations that defendant directors are liable to corporation for failure to issue its stock for a valuable consideration or to issue any stock. *Underwood v. Stafford*, 220.

§ 23. Deeds and Conveyances

Contract for sale of property by a corporation was not invalid because not approved by the corporation's board of directors. *Yaggy v. B.V.D. Co.*, 590.

§ 30. Claims and Priorities

Allegations by judgment creditor of corporation were insufficient to allege cause of action based on theory that payments had been made to other creditors in which plaintiff had a right to share. *Underwood v. Stafford*, 220.

COSTS

§ 3. Taxing of Costs in Discretion of Court

In action for injunction to prevent violation of restrictive covenants, taxation of costs against plaintiff is within the court's discretion. *Builders, Inc. v. Hollar*, 14.

COURTS

§ 2. Jurisdiction of Courts in General

While party may obtain legal or equitable relief, or both, in the same court, he must allege facts upon which court may grant such relief. *Leffew v. Orrell*, 333.

§ 6. Appeals to Superior Court from the Clerk

Where on appeal from an order of the clerk entered in his probate jurisdiction there were no specific exceptions to the clerk's findings of fact, the superior court was limited to review of the record for errors of law therein. *In re Spinks*, 417.

§ 9. Jurisdiction of Superior Court After Orders or Judgments of Another Superior Court Judge

The sustaining by a superior court judge of a demurrer with leave to amend does not preclude another superior court judge from thereafter ruling on a demurrer to the amended pleadings. *White v. Perry*, 36.

District court judge had power to set aside a purported consent judgment entered by another district court judge on ground that defendant and her attorney had not consented thereto. *Shore v. Shore*, 197.

No appeal lies from one district court judge to another, but appeals in civil cases must be from the district court to the Appellate Division of the General Court of Justice. *Johnson v. Johnson*, 310.

Where superior court judge sustained demurrer to the complaint and allowed plaintiff 30 days in which to file an amended complaint, another judge of superior court was without authority to dismiss plaintiff's amended complaint on the ground that it failed to state a cause of action. *Tights v. Hosiery Co.*, 369.

§ 11.1. Practice and Procedure in District Court

No appeal lies from one district court judge to another, but appeals in

COURTS — Continued

civil cases must be from the district court to the Appellate Division of the General Court of Justice. *Johnson v. Johnson*, 310.

Order of a district court judge awarding custody of children to the mother became the law of the case when the father did not appeal, and three other district court judges were without authority to enter subsequent orders relating to the custody. *Ibid.*

The Court of Appeals disapproves of the "judge shopping" procedures in a child custody case, whereby four of the five district judges in a judicial district heard separate fragments of the lawsuit within an eight-month period. *Ibid.*

A party is held to have waived the right to jury trial in the district court by failing to file a written demand for jury trial within 10 days after the entry of superior court judge's order transferring the cause to the district court. *Kelly v. Davenport*, 670.

§ 14. Jurisdiction of Inferior Courts

Where defendant was brought before municipal-county court upon warrant charging felonious credit card fraud, court had jurisdiction to accept defendant's plea of guilty of the lesser included offense of misdemeanor credit card fraud. *S. v. Caudle*, 276.

The Legislature vested administrative power in the chief district judges in its anticipation of procedural quagmires resulting from multi-judge districts. *Johnson v. Johnson*, 310.

§ 15. Criminal Jurisdiction of Juvenile Courts

Provisions of [former] G.S. 110-21 defining jurisdiction of juvenile courts held not unconstitutional for vagueness. *S. v. Sparrow*, 107.

§ 17. Justices of the Peace

Contract between physician and justice of the peace for the justice, under color of his office, to collect accounts owed the physician by his patients, if made, would be void. *In re Robertson*, 186.

Statutes requiring justice of the peace to deliver his records to the clerk of superior court upon expiration of his term of office and giving clerk power to compel such delivery were not impliedly repealed by the abolishment of the office of justice of the peace. *Ibid.*

Records which a former justice of the peace can be required to deliver to the clerk of superior court are not limited to the civil and criminal dockets referred to in G.S. 7-130. *Ibid.*

CRIMINAL LAW

§ 1. Nature and Elements of Crime

Few words possess the precision of mathematical symbols, and no more than a reasonable degree of certainty in a statute or regulation making an act a criminal offense can be demanded. *S. v. Martin*, 532.

A regulation of the Wildlife Resources Commission making it unlawful "to snag fish," with no definition of the term "snag," is void for vagueness and uncertainty. *Ibid.*

A defendant may be prosecuted and punished, after the effective date of the 1969 amendment to G.S. 14-54, for the violation of G.S. 14-54 as it existed prior to the effective date of the 1969 amendment. *S. v. Melton*, 721.

CRIMINAL LAW — Continued

§ 9. Aiders and Abettors

When two or more persons aid or abet each other in the commission of a crime, all are principals and equally guilty. *S. v. Holloway*, 147.

§ 16. Status of Offense; Concurrent and Exclusive Jurisdiction

Where defendant was brought before a municipal-county court upon warrant charging a felony, court had jurisdiction to accept defendant's plea of guilty of a lesser included offense which was a misdemeanor. *S. v. Caudle*, 276.

§ 23. Plea of Guilty

The fact that defendant revealed his prior criminal record on voir dire in the absence of the jury does not support his contention that he was thereby forced to plead guilty on the ground that he believed his criminal record would be submitted to the jury. *S. v. Godwin*, 62.

Failure of trial court to find as fact and adjudicate that defendant's plea of guilty was freely, understandingly and voluntarily made was not prejudicial error where the court's questioning of defendant under oath and affidavit executed by defendant show the plea was so entered. *S. v. Johnson*, 53.

The fact that trial court accepted defendant's plea of guilty without inquiring if defendant knew the possible consequences of the plea does not constitute error. *S. v. Ray*, 129.

Appeal from guilty plea brings up for review only question of whether facts charged and admitted by the plea constitutes an offense punishable under the laws and constitution. *S. v. Caudle*, 276.

Judgment imposed upon defendant's plea of guilty to the felonies of breaking and entering and larceny held affirmed. *S. v. McClam*, 477.

§ 33. Facts in Issue and Relevant to Issues in General

Trial court properly struck unresponsive and irrelevant testimony that "we were talking about the police harassment we had been having." *S. v. Sparrow*, 107.

§ 34. Evidence of Defendant's Guilt of Other Offenses

In incest prosecution, trial court properly admitted testimony that defendant had had intercourse with prosecutrix on previous occasions. *S. v. Perkins*, 675.

Trial court did not commit prejudicial error in failing to strike testimony which possibly indicated other offenses for which defendant was not being tried, since refusal to strike the testimony could not have affected the outcome of the trial. *S. v. McCloud*, 132.

§ 42. Articles and Clothing Connected With the Crime

Defendant's connection with certain tools and other articles found in car owned and operated by another person was sufficiently established by defendant's confession to render them inadmissible against defendant. *S. v. McCloud*, 132.

Knife allegedly used in armed robbery was sufficiently identified for admission in evidence where robbery victim testified the knife was like the one he was threatened with. *S. v. Ashford*, 320.

In armed robbery prosecution, trial court properly admitted trousers worn by robbery victim. *Ibid.*

CRIMINAL LAW — Continued

In prosecution for malicious injury to property by cutting automobile tires with a knife, trial court properly admitted testimony that knife had small streaks running up and down the blade which smelled like rubber. *S. v. Locklear*, 375.

§ 43. Photographs

The trial court is not required to restrict the admission of a photograph absent a request that its admission be restricted. *S. v. Ashford*, 320.

In armed robbery prosecution, trial court properly admitted photograph of victim's swollen arm taken a few days after the robbery. *Ibid.*

A photograph of deceased taken immediately after the autopsy that was performed four days after the alleged shooting, held admissible. *S. v. Curtis*, 707.

§ 46. Flight of Defendant as Implied Admission

Flight of a person after a crime has been committed is a circumstance to be considered with other circumstances in determining his guilt or innocence. *S. v. Kirby*, 366.

Evidence of defendant's flight was properly submitted to the jury and trial court's instruction thereon did not constitute an expression of opinion. *Ibid.*

§ 50. Expert and Opinion Testimony in General

Denial of indigent defendant's petition that he be authorized to employ specialists in the field of statistics who would aid him in his defense and who would be paid by the State or county held not reversible error. *S. v. Lewis*, 178.

Trial court properly admitted testimony that small dark streaks on knife blade smelled like rubber. *S. v. Locklear*, 375.

§ 60. Fingerprint Evidence

Fingerprint cards made in 1948 and 1955 and containing fingerprint impressions of a named individual were not hearsay and were properly admitted in evidence, where an employee of the police department testified that he was in charge of the department's fingerprint records and that the fingerprint cards had been in the custody of the department. *S. v. Lewis*, 178.

§ 64. Evidence as to Intoxication

In drunken driving prosecution, trial court committed prejudicial error in admitting testimony of breathalyzer test results where there was no evidence tending to show that such test (1) was performed according to methods approved by the State Board of Health and (2) was performed by an individual possessing a valid permit issued by the Board. *S. v. Caviness*, 541.

Testimony by witness that he had graduated from the "school for breathalyzer operators put on by the Community College in Raleigh" and that he had a "license to administer the breathalyzer" was insufficient to show that the witness has a valid permit issued by the State Board of Health to administer such tests. *Ibid.*

§ 66. Evidence of Identity by Sight

Where it appears during the course of a criminal trial that the accused's right to be represented by counsel was violated at an out-of-court lineup identification, the admission in evidence of an in-court identification of the ac-

CRIMINAL LAW — Continued

cused is erroneous unless the trial court determines on *voir dire* that the in-court identification had a sufficiently independent origin and was not the result of the illegal out-of-court confrontation. *S. v. Huffman*, 92.

Voir dire testimony by victim of attempted rape is held sufficient to support the trial court's finding that her in-court identification of defendant as her assailant was based upon her observation of defendant at the crime scene and was not the result of viewing a single photograph of defendant shown her by the police or of viewing defendant in a police station elevator without his knowledge and while he was unrepresented by counsel. *Ibid.*

Findings by trial court that robbery victim's in-court identification of defendant was based on victim's observations of defendant during the robbery and not on a subsequent identification from photographs, held supported by clear and convincing evidence. *S. v. McPherson*, 160.

§ 71. "Short-hand" Statement of Fact

Trial court properly admitted testimony that small dark streaks on knife blade smelled like rubber. *S. v. Locklear*, 375.

§ 75. Test of Voluntariness of Confession; Admissibility

Trial court properly admitted testimony by police officer concerning oral confession made by defendant upon voir dire findings supported by competent evidence that defendant was given the *Miranda* warnings and that his statements were freely, voluntarily and understandingly made. *S. v. McCloud*, 132.

Defendant's contention that his confession was rendered inadmissible because his initial arrest was unlawful is without merit. *Ibid.*

§ 76. Determination and Effect of Admissibility of Confession

Where the trial court made detailed findings on *voir dire* as to the giving of *Miranda* warnings to defendant prior to his confession, it was not essential that the court make further detailed findings as to all of the other circumstances of the interrogation in the absence of any conflict in the *voir dire* evidence. *S. v. McCloud*, 132.

Defendant's contention that trial court was required to find his confession was coerced because he was being held under excessive bail and his preliminary hearing was delayed held without merit. *Ibid.*

Where there is no conflict in evidence presented at voir dire hearing to determine admissibility of a confession, it is not essential, although it is desirable, that the judge make findings of fact. *Ibid.*

Where defendant testified on voir dire that he was dizzy and "dope-like" from drinking cough syrup, trial court committed prejudicial error in failing to make findings of fact in support of its conclusion that defendant's confession was made freely and voluntarily. *S. v. Dennis*, 390.

Defendant's in-custody statements to an officer were properly admitted in evidence where the trial court conducted a void dire hearing and made the proper findings of fact and conclusions. *S. v. Freeman*, 571.

§ 77. Admissions and Declarations

Testimony by State's witness that he told the investigating officer, while he and defendant were sitting in the officer's car, that defendant was the driver of the car in which deceased received his fatal injuries, held admissible. *S. v. Locklear*, 493.

CRIMINAL LAW — Continued

§ 80. Records and Private Writings

Fingerprint cards containing fingerprint impressions of a named individual were not hearsay and were properly admitted in evidence. *S. v. Lewis,* 178.

Wherever a public officer is required or authorized to keep a record of his official transactions and observations, the record so kept is admissible as evidence of the facts recorded which are within the scope of the authority or duty. *Ibid.*

§ 84. Evidence Obtained by Unlawful Means

Entry by law officers into the house occupied by defendants was lawful and evidence obtained as a result of the entry was properly admitted, where law officers knocked on the front door and were told to "come in" by an occupant of the house, and the officers had in their possession a "juvenile summons" issued by the district court to be served on a minor who was in the house. *S. v. Sparrow,* 107.

Tools and other articles admitted in evidence were not gained by illegal search without a warrant where officers observed most of the tools on the floor of a car, the officers immediately placed the owner and sole occupant of the car under arrest for possession of burglary tools, and as incident to such arrest the officers further searched the car and discovered money and other stolen articles in the glove compartment. *S. v. McCloud,* 132.

Evidence obtained under search warrant issued without proper establishment of probable cause must be excluded in a State court proceeding. *S. v. Milton,* 425.

§ 86. Credibility of Defendant

Defendant who takes the stand is subject to cross-examination as to convictions and indictments for prior criminal offenses. *S. v. McCloud,* 132; *S. v. Haith,* 552.

§ 88. Cross-examination

In drunken driving prosecution, trial court erred in ruling that arresting officer could not be questioned on cross-examination regarding any statement made by defendant at the time of arrest unless defendant first took the stand and testified. *S. v. Royal,* 559.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Slight variances between corroborative testimony by police officer and testimony by victim of attempted rape do not render the officer's testimony inadmissible. *S. v. Huffman,* 92.

Trial court did not err in refusing to strike testimony of deputy sheriff offered to show prior consistent statements by two State's witnesses which did not in fact corroborate testimony of one of the witnesses. *S. v. Locklear,* 375.

§ 91. Time of Trial and Continuance

Defendant's motion for continuance on ground that he needed additional time to locate material witnesses held properly denied by trial court without prejudice to defendant's constitutional rights. *S. v. Lewis,* 178.

Trial court erred in refusing to allow defendant's motion for continuance of probation revocation hearing where defendant had been able to retain counsel only an hour before the hearing. *S. v. Atkinson,* 355.

CRIMINAL LAW — Continued

§ 92. Consolidation of Counts

Trial court had discretion to consolidate for trial charges of felonious assault against two defendants. *S. v. Haith*, 552.

§ 97. Introduction of Additional Evidence

Trial court did not abuse its discretion in allowing the State to recall a witness after the State had rested its case and after defendant's motion for nonsuit had been denied. *S. v. Gattison*, 70.

§ 98. Custody of Witnesses

Sequestration of witnesses during trial rests solely in the discretion of the trial judge. *S. v. Sparrow*, 107.

§ 99. Conduct of Court and Its Expression of Opinion on Evidence During Trial

In the exercise of its right to control and regulate the conduct of the trial, a court may on its own motion exclude or strike evidence which is wholly incompetent or inadmissible. *S. v. McPherson*, 160.

Unflattering exchanges during the course of a trial, including trial court's remark to counsel "why don't you go in the paint business," held not prejudicial to defendant. *Ibid.*

Trial court did not comment on weight of evidence when, after defendant stated on cross-examination that police officer had lied in his testimony, court directed defendant to refrain from such characterization and upon defendant's reply of "I'm sorry, he asked me," the court further stated, "You heard me, too, didn't you?" *S. v. Sparrow*, 107.

In prosecution for assault with intent to commit rape, trial court did not express opinion on evidence by asking the prosecutrix to repeat, explain or clarify portions of her testimony. *S. v. Huffman*, 92.

Trial court may properly ask a witness clarifying questions. *S. v. Newsome*, 525; *S. v. Zimmerman*, 522.

Where defendant's counsel improperly argued to the jury that in other drunken driving cases tried the same week the breathalyzer indicated .29 or .30 while defendant's test showed only .15, trial court expressed an opinion in commenting that his own recollection was that results introduced in other cases indicated .18 or .19. *S. v. Royal*, 559.

Trial court did not commit prejudicial error in remarks made in absence of the jury upon being told of defendant's dissatisfaction with court-appointed counsel. *S. v. Perkins*, 675.

Trial court did not express an opinion on the evidence in instructing defendant to answer a question "correctly." *Ibid.*

§ 102. Argument and Conduct of Counsel or Solicitor

Defendant was not prejudiced by trial court's instruction to counsel with reference to his argument to the jury. *S. v. Huffman*, 92.

Trial court did not err in denial of defendant's motion to have the court reporter record the solicitor's closing argument to the jury. *S. v. Sparrow*, 107.

It will be assumed there was no improper argument where there were no objections by opposing party and trial court found no impropriety. *Ibid.*

Argument of counsel outside the record ordinarily will be cured by the court's action promptly sustaining objection to the argument and cautioning the jury not to consider it. *S. v. Royal*, 559.

CRIMINAL LAW — Continued

Argument of defense counsel that breathalyzer indicated .29 or .30 in other drunken driving cases tried same week while defendant's test showed only .15 was improper. *Ibid.*

In this incest prosecution, defendant was not prejudiced by the solicitor's attempts to get into evidence State's exhibits which were identified as letters from defendant where the court sustained defense objections to their introduction. *S. v. Perkins*, 675.

§ 104. Consideration of Evidence on Motion to Nonsuit

Rules relating to motion for nonsuit in a criminal case. *S. v. Locklear*, 493; *S. v. Zimmerman*, 522.

§ 112. Instructions on Burden of Proof and Presumptions

In absence of request, trial judge is not required to define term "reasonable doubt" in charging jury in criminal case. *S. v. Brown*, 372.

Trial court's instructions properly placed burden of proof on the State to satisfy the jury of defendant's guilt beyond a reasonable doubt. *S. v. Newsome*, 525.

§ 113. Statement of Evidence and Application of Law Thereto

In a consolidated trial of two defendants for unlawful possession of narcotics, the charge, when considered as a whole, made it clear to the jury that the guilt or innocence of each defendant was to be determined separately. *S. v. Staley*, 345.

Trial court was not required to define the word "corroborate" in its instructions. *S. v. Mitchell*, 49.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court's instruction on flight of defendant did not constitute an expression of opinion. *S. v. Kirby*, 366.

Trial court did not commit prejudicial error in referring to "this rather disagreeable case" in the instructions. *S. v. Perkins*, 675.

§ 115. Instructions on Lesser Degrees of Crime

Where there is evidence that would support a lesser degree of the crime charged, a defendant is entitled to have the question of his guilt of the lesser crime submitted to the jury. *S. v. Holloway*, 147.

§ 118. Charge on Contentions of the Parties.

Where the misstatement of a contention upon a material point includes an assumption of evidence unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. *S. v. Bradshaw*, 97.

In prosecution for rape of a ten year old child, trial court erred in instructing jury that the State contended that no other male person could have committed the offense, if it were committed, where there was no evidence to support such an instruction. *Ibid.*

§ 127. Arrest of Judgment

Defects which appear only by aid of the evidence cannot be the subject of a motion in arrest of judgment. *S. v. Ray*, 129.

Defendant's motion in arrest of judgment on the ground that more than

10 days had elapsed from the date of his trial in district court to the time of his appeal to superior court and that superior court consequently had no jurisdiction of the case, held properly denied. *Ibid.*

§ 128. Discretionary Power of Court to Set Aside Verdict and Order Mistrial

Trial court did not err in denial of defendant's motion for mistrial made immediately before selection of the jury when deputy sheriff brought a rifle and coat into courtroom in presence of prospective jurors. *S. v. Williams*, 51.

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

Motion to set aside verdict as against greater weight of the evidence is addressed to the discretion of the trial court. *S. v. Parker*, 191; *S. v. Ashford*, 320.

§ 138. Severity of Sentence and Determination Thereof

In cases involving petty misdemeanors which are appealed from the district court to superior court, imposition of a more severe sentence by the superior court judge does not violate defendant's due process or Sixth Amendment rights. *S. v. Sparrow*, 107; *S. v. Spencer*, 282.

Although a defendant is not entitled to credit for time spent in jail awaiting trial because of his inability to post bond, the defendant on the retrial of the instant case was entitled to credit for time served on the prior sentence and for time held in custody pending appeal. *S. v. Lewis*, 178.

When no maximum time is fixed by statute, sentence of imprisonment for two years will not be held cruel or unusual. *S. v. Spencer*, 282.

A defendant granted a new trial for the offense of issuing worthless checks is entitled to the defense of the statutory amendment enacted subsequent to his original trial, which amendment mitigated the punishment for such offense. *S. v. McClam*, 477.

Defendant is not entitled to credit on his sentence for time spent in custody in lieu of bond while awaiting trial, for time spent in custody during a commitment to a state hospital for mental evaluation, or for time spent in custody pending appeal prior to 22 April 1969. *S. v. Walker*, 548.

A defendant may be prosecuted and punished, after the effective date of the 1969 amendment to G.S. 14-54, for the violation of G.S. 14-54 as it existed prior to the effective date of the 1969 amendment. *S. v. Melton*, 721.

§ 140. Concurrent and Cumulative Sentences

Where the first of three consecutive sentences is set aside for invalidity, the second sentence commences as of the first day of the term when it was imposed. *S. v. McClam*, 477.

§ 142. Suspended Sentences and Judgments

The execution of a judgment in a criminal case may be suspended upon prescribed conditions only with the defendant's consent, express or implied. *S. v. Zimmerman*, 522.

§ 143. Revocation of Suspension of Judgment or Sentence

Finding that defendant violated term of suspension by being $800 in arrears in restitution payments is insufficient to support court's conclusion that the violation was without just cause or excuse. *S. v. Caudle*, 276.

CRIMINAL LAW — Continued

Defendant charged with violation of condition of probation sentence is entitled to representation by an attorney. *S. v. Atkinson*, 355.

Attorney retained to represent defendant at probation revocation hearing did not have opportunity to prepare a defense where defendant diligently endeavored while in jail to retain counsel but was unsuccessful until an hour before the hearing, and the court denied motion for continuance of the hearing made by defendant's counsel. *Ibid.*

A defendant on probation is entitled to notice and hearing before his probation can be revoked. *S. v. Young*, 393.

A verified report of the probation officer is competent evidence. *Ibid.*

§ 144. Modification and Correction of Judgment in Trial Court

Where judgment in the record on appeal is different from sentence pronounced in open court as shown by original transcript, cause is remanded to have judgment corrected to conform to sentence actually pronounced. *S. v. Brown*, 372.

§ 146. Nature and Grounds of Appellate Jurisdiction of Court of Appeals in Criminal Cases

The face of the record supported defendant's conviction upon his plea of guilty. *S. v. Fox*, 55.

Where defendant enters a plea of guilty, his plea presents for review only error appearing on the face of the record. *S. v. Ray*, 129.

Rules of Court of Appeals are mandatory and not directory. *S. v. Black*, 324.

§ 148. Judgments Appealable

An appeal from an order denying defendant's motion to dismiss the warrants and from an order remanding the case to a recorder's court is an appeal from interlocutory orders and the appeal is subject to dismissal. *S. v. Black*, 324.

For all practical purposes there is an unlimited right of appeal from any final judgment of superior court or district court in civil and criminal cases. *Ibid.*

§ 149. Right of State to Appeal

The State has no right to appeal from order dismissing a prosecution on ground that defendant had been denied constitutional right to a speedy trial. *S. v. Horton*, 497.

§ 154. Case on Appeal

It is not required that argument of counsel be included in the record on appeal. *S. v. Sparrow*, 107.

§ 155.5. Docketing of Transcript of Record in Court of Appeals

Defendant's appeal is subject to dismissal where the record on appeal was not docketed within 90 days after date of judgment, nor was there any order extendidng the time for docketing record on appeal. *S. v. Alphin*, 60; *S. v. Fulk*, 68; *S. v. Stovall*, 73.

Where more than eight months had elapsed from date of judgment appealed from, judge of superior court had no power to enter an order purporting to extend time for docketing of record on appeal. *S. v. Alphin*, 60.

CRIMINAL LAW — Continued

Appeal is subject to dismissal where record on appeal was docketed 237 days after entry of judgment appealed from. *S. v. Brown*, 372.

§ 156. Certiorari

Where time for docketing record on appeal in the Court of Appeals has expired, defendant's proper remedy is to file a petition for certiorari. *S. v. Alphin*, 60.

§ 157. Necessary Parts of Record Proper

Order of the Court of Appeals allowing defendant's petition for certiorari is a necessary part of the record on appeal. *S. v. Jackson*, 386; *S. v. Blizzard*, 395.

Record proper in armed robbery prosecution consists of the indictment, plea of not guilty, verdict and judgment. *S. v. Gwyn*, 397.

§ 159. Form and Requisites of Transcript

In a consolidated prosecution, it was improper to file separate records and briefs in the Court of Appeals. *S. v. Alphin*, 60.

Exceptions which appear nowhere in the record except in the purported assignments of error will not be considered. *S. v. Black*, 324; *S. v. Young*, 393.

§ 161. Exceptions and Assignments of Error Generally

An appeal itself is an exception to the judgment and presents the face of the record proper for review. *S. v. Carter*, 74; *S. v. Young*, 393; *S. v. Gwyn*, 397; *S. v. McClam*, 477; *S. v. Rogers*, 572; *S. v. Johnson*, 574.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

An exception will not be considered on appeal where an objection was sustained, unless the record discloses what the witness would have said if he had been permitted to answer. *S. v. Huffman*, 92.

Trial court did not err in striking unresponsive and irrelevant testimony that "we were talking about the police harassment we had been having." *S. v. Sparrow*, 107.

§ 163. Exceptions and Assignments of Error to Charge

Assignments of error based on exceptions to entire charge are broadside and ineffectual. *S. v. Williams*, 51.

The appropriate time for taking an exception to the charge of the court is within the time allowed for the preparation of the case on appeal. *S. v. Newsome*, 525.

Only such exceptions to the charge as appear in the record on appeal can be made the basis for appellate relief. *Ibid.*

Objections to the statement of contentions are waived unless made before the jury retires. *Ibid.*

§ 165. Exceptions and Assignments of Error to Remarks of Court and Argument of Solicitor

Defendant was not prejudiced by trial court's instruction to counsel with reference to his argument to the jury. *S. v. Huffman*, 92.

Trial court did not err in denial of defendant's motion to have the court reporter record the solicitor's closing argument to the jury. *S. v. Sparrow*, 107.

CRIMINAL LAW — Continued

§ 166. The Brief

In a consolidated prosecution, it was improper to file separate records and briefs in the Court of Appeals. *S. v. Alphin*, 75.

Exceptions and assignments of error not set out in the brief and properly numbered are ineffectual. *S. v. Black*, 324.

Failure of defendant to file his brief in the Court of Appeals on time and his failure to deliver a copy of the brief to the Attorney General will subject the appeal to dismissal. *Ibid.*

Exceptions in the record not set out in the brief and not supported by argument or citations of authority will be taken as abandoned by defendant. *S. v. Kirby*, 366; *S. v. Brown*, 372.

§ 168. Harmless and Prejudicial Error in Instructions

New trial is necessary where court charges correctly at one point and incorrectly at another. *S. v. Collins*, 67.

Where the trial court in the original larceny and burglary prosecution committed reversible error in its instruction on the presumption of guilt arising from the unexplained possession of recently stolen property, failure of the court on retrial to charge on the presumption could not be prejudicial to defendant, the court having eliminated any possibility of error. *S. v. Jackson*, 386.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Trial court did not commit prejudicial error in failing to strike testimony which possibly indicated other offenses for which defendant was not being tried, since refusal to strike the testimony could not have affected the outcome of the trial. *S. v. McCloud*, 132.

Action of the trial court in sustaining State's objection to questions asked by defendant's counsel will not be held prejudicial error where record fails to show what reply of witness would have been. *S. v. Sparrow*, 107.

Refusal of trial court to grant defendant's motion to permit the prosecuting witness to state what his testimony would have been had he been permitted to answer defendant's question on cross-examination held not prejudicial in this case. *S. v. McPherson*, 160.

Failure of trial court to strike uncorroborative testimony was not prejudicial error where testimony was merely cumulative of testimony given by another witness. *S. v. Locklear*, 375.

Exclusion of evidence cannot be reviewed on appeal when the record does not disclose what the excluded evidence would have been. *S. v. Curtis*, 707.

§ 170. Harmless and Prejudicial Error in Remarks of Court and Argument of Solicitor

It will be assumed there was no improper argument where there were no objections by opposing party and trial court found no impropriety. *S. v. Sparrow*, 107.

Unflattering exchanges in the course of a trial, including remarks of the trial court to counsel, "Why don't you go in the paint business," held not prejudicial in this case. *S. v. McPherson*, 160.

Where defendant's counsel improperly argued to jury that in other drunken driving cases tried the same week the breathalyzer indicated .29 or .30 while

CRIMINAL LAW — Continued

defendant's test showed only .15, trial court erred in commenting that his own recollection was that results introduced in other cases indicated .18 or .19 instead of instructing jury to disregard the improper argument. *S. v. Royal*, 559.

In prosecution for drunken driving, jury should have been instructed not to consider argument of defense counsel or solicitor as to what the evidence was in other drunken driving cases, how successful the officers had been in similar cases, or how other defendants had pleaded to similar charges. *Ibid.*

Argument of counsel outside the record ordinarily will be cured by the court's action promptly sustaining objection to the argument and cautioning the jury not to consider it. *Ibid.*

Trial court did not commit prejudicial error in referring to "this rather disagreeable case" in the instructions. *S. v. Perkins*, 675.

§ 177. Determination and Disposition of Cause

Where the sentence exceeded statutory maximum and where indigent defendant entered plea of guilty to the felony of issuing worthless checks without a finding of voluntary waiver of counsel, the Court of Appeals vacated the judgment and granted defendant a new trial. *S. v. McClam*, 477.

Where sentence of imprisonment exceeds the statutory maximum, the sentence is vacated and the cause remanded for proper sentence. *S. v. Zimmerman*, 522.

Cause is remanded to superior court for correction of judgment to show the offense to which defendant entered a plea of nolo contendere. *S. v. Walker*, 548.

§ 178. Law of the Case

Decision of the Supreme Court on a prior appeal of defendant's larceny conviction was conclusive on issue of nonsuit in his appeal of retrial to the Court of Appeals. *S. v. Jackson*, 386.

DAMAGES

§ 11. Punitive Damages

Punitive damages are recoverable for wanton conduct. *Plummer v. Henry*, 84.

§ 13. Competency of Evidence on Issue of Compensatory Damages

In action for injury to land, plaintiff's testimony relating to loss of income from loss of roomers held incomplete and speculative. *Bradley v. Texaco*, 300.

DEDICATION

§ 1. Nature, Methods and Elements of Dedication

A dedication must be made to the public and not to part of the public. *Land Corp. v. Styron*, 25.

Where subdivision lot was sold by reference to a map on which the word "park" appears, equity will not compel defendant to comply with a contract for the sale of the lot until other parties who have purchased with reference to the map have been brought into the action as necessary parties and their rights determined with respect to the park. *Ibid.*

DEEDS

§ 7. Delivery, Acceptance and Registration

A deed passes title only upon its delivery. *Newell v. Edwards*, 650.

Before delivery, grantor may make such alterations in the instrument as he chooses; after delivery a deed may be changed with consent of the parties and may be redelivered, but absent such redelivery, transfer of title cannot be effected by substituting the name of another person for that of the grantee who was designated in the deed. *Ibid.*

Evidence held sufficient for jury in action to set aside deed in which defendant was named grantee where it tends to show that grantor did not consent to change in grantees. *Ibid.*

Neither registration nor continued existence of the physical deed is necessary to continued existence of grantee's title. *Ibid.*

§ 19. Restrictive Covenants, Generally

Restrictive covenants are not favored and are to be strictly construed against limitation on use. *Builders, Inc. v. Hollar*, 14.

Construction of garden utility shed does not violate restrictive covenant providing that no structure shall be erected, placed or permitted to remain on any lot other than one detached single family dwelling. *Ibid.*

A restrictive covenant between grantor of a lot and the grantee, the predecessor in title to an oil company, providing that a four acre tract adjoining the lot will not be used for the sale or advertising of any petroleum products for 25 years, which covenant was executed contemporaneously with the conveyance to the grantee of the lot as a filling station site, held legally enforceable by the oil company and is not in violation of the statute prohibiting monopolies. *Quadro Stations v. Gilley*, 227.

Covenants restricting the use of property for purposes competitive with those of the covenantee are generally enforceable where they involve only partial restraints of trade and are reasonably limited as to duration and area. *Ibid.*

Restrictive covenants in a deed are enforceable against subsequent purchasers of the original parties. *Ibid.*

Restrictive covenants cannot be established except by an instrument of record containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction. *Marrone v. Long*, 451.

§ 20. Restrictive Covenants as Applied to Subdivision Development

Where subdivision lot was sold by reference to a map on which the word "park" appears, equity will not compel defendant to comply with a contract for the sale of the lot until other parties who have purchased with reference to the map have been brought into the action as necessary parties and their rights determined with respect to the park. *Land Corp. v. Styron*, 25.

Where there is a uniform scheme or plan, owners of all lots in the subdivision are necessarily interested parties in any action against or by another lot owner where a mutual covenant, such as a restrictive covenant for residential use, is in dispute, and all persons having a right to enforce the covenants inter se or otherwise should be made parties. *Building Co. v. Peacock*, 77.

A valid restrictive covenant is neither nullified nor superseded by the adoption of a zoning ordinance. *Ibid.*

DEEDS — Continued

Limited uses for non-residential purposes of two lots in a subdivision do not estop owners of other lots from asserting their rights against subsequent violations of restrictive covenants limiting use of land to residential purposes. *Ibid.*

When subdivision property was originally developed pursuant to a uniform scheme or plan, restrictive covenants are enforceable *inter se* by the owners of the lots in the subdivision. *Ibid.*

Restrictive covenants in deed to plaintiff are held not applicable to other lots thereafter conveyed in same subdivision which contained no restrictive covenants. *Marrone v. Long*, 451.

DESCENT AND DISTRIBUTION

§ 1. Nature and Titles by Descent in General

Intestate share of surviving spouse defined. *Heller v. Heller*, 120.

Deed by plaintiff's husband, which conveyed his separate real property to his children by a prior marriage, was effective to convey title to the children free from any claims of plaintiff under statute defining intestate share of surviving spouse. *Ibid.*

Widow's allegations that her husband conveyed his separate real property to his children of a prior marriage without her knowledge and joinder, and that the conveyance was an attempt by her husband and defendants to defraud her of her marital rights in the realty, held insufficient to state a cause of action for fraud. *Ibid.*

DIVORCE AND ALIMONY

§ 2. Process and Pleadings

Where wife's application for temporary alimony raised an issue of fact as to her mental competency at the time she signed the deed of separation, trial court had no authority to dismiss the wife's action until such time as the wife waived her right to a jury trial. *Holcomb v. Holcomb*, 329.

§ 14. Adultery

Trial court erred in admission of evidence of acts of adultery by defendant that occurred approximately a year after the complaint was filed. *Gordon v. Gordon*, 206.

Wife is incompetent witness to prove adultery of husband in action for alimony without divorce. *Ibid.*

§ 16. Alimony Without Divorce

Wife's right to alimony was established by findings that husband without provocation assaulted and threatened to kill plaintiff and their minor daughter and through his cruel treatment compelled them to leave the home for fear of their safety. *Radford v. Radford*, 569.

Finding that plaintiff wife worked and had a separate income did not preclude trial court from determining that plaintiff was a dependent spouse and that defendant was a supporting spouse. *Ibid.*

§ 18. Alimony and Subsistence Pendente Lite

In order to be a dependent spouse for the purpose of receiving alimony pendente lite, one does not have to be unable to exist without aid of the other spouse. *Peeler v. Peeler*, 456.

DIVORCE AND ALIMONY — Continued

Finding that dependent spouse owned property worth $8000 and was employed did not preclude award of alimony pendente lite. *Ibid.*

Trial judge did not abuse his discretion by allowing the sum of $200 as alimony pendente lite. *Ibid.*

Where plaintiff wife is entitled to alimony pendente lite, she is entitled, upon application, to counsel fees pursuant to G.S. 50-16.4. *Ibid.*

Trial court's order directing the husband to pay alimony pendente lite is erroneous where there were no findings of fact that the husband abandoned the wife and that he was capable of making the required payments. *Hatcher v. Hatcher*, 562.

G.S. 50-16.8(f) requires the trial judge to make findings of fact upon application for alimony pendente lite. *Ibid.*

The granting of temporary alimony is within the discretion of the court. *Holcomb v. Holcomb*, 329.

§ 22. Jurisdiction and Procedure in Child Custody and Support Proceeding

In child custody proceeding, complaint was not demurrable on ground that it appeared on face of complaint that child was a resident of another state and that plaintiff was attacking adoption judgment of another state which is entitled to full faith and credit. *Bonavia v. Torreso*, 21.

Order of a district court judge awarding custody of children to the mother became the law of the case when the father did not appeal, and three other district court judges were without authority to enter subsequent orders relating to the custody. *Johnson v. Johnson*, 310.

The Court of Appeals disapproves of the "judge shopping" procedures in a child custody case, whereby four of the five district judges in a judicial district heard separate fragments of the lawsuit within an eight-month period. *Ibid.*

Child custody orders may be modified or vacated at any time upon motion in the cause and a showing of changed circumstances. *In re Bowen*, 236; *Allen v. Allen*, 555.

Father's motion, in child custody proceeding, for blood grouping test of the parties and the children was properly denied on grounds of public policy and welfare of the children. *Ibid.*

The courts of this State may modify foreign child custody decree upon gaining jurisdiction and upon showing of changed circumstances. *In re Kluttz*, 383.

Trial court has discretion to decline jurisdiction in proceeding to change foreign child custody decree. *Ibid.*

Where child custody had been granted to the mother by the courts in another state, trial court erred in refusing to hear evidence offered by father and paternal grandparents on ground that Full Faith and Credit prevented court from issuing any order other than the one which would require compliance with the foreign decree. *Ibid.*

§ 23. Support of Children of Marriage

Allegation that portion of separation agreement relating to payments to plaintiff's child should be set aside was insufficient to state a cause of action to modify the child support, where the complaint is silent as to any change in conditions necessitating increased support. *Calhoun v. Calhoun*, 509.

DIVORCE AND ALIMONY — Continued

Amount which father should pay for support of his child is a matter for the trial judge's determination. *Allen v. Allen*, 555.

Where trial court's order denying motion of plaintiff mother for increase in father's child support payment was based in part on a finding of fact not supported by the evidence that the mother had a separate monthly income of $1100, the cause must be remanded for proper findings and determination. *Ibid.*

Party requesting modification of amount of child support has burden of showing a material change of circumstances. *Ibid.*

§ 24. Custody of Children of Marriage

A change in child custody may be ordered even though there is no finding that the person having custody under a previous order has become unfit to retain custody. *In re Bowen*, 236.

Trial court properly modified child custody order which had awarded custody to the father to give custody to the mother based upon a substantial change of circumstances. *Ibid.*

DOWER AND CURTESY

§ 1. Current Status of Estates

Although dower and curtesy have been abolished in this State, the General Assembly has placed limitations on the right of a married person to convey his real property free from the elective life estate provided by G.S. 29-30. *Heller v. Heller*, 120.

EJECTMENT

§ 6. Nature of Ejectment to Try Title

Where in an ejectment action the parties stipulated that they are the owners of the land conveyed to them and that the only question in controversy is the location of the boundary lines between the land, the action is converted into a processioning proceeding. *Prince v. Prince*, 638.

EQUITY

§ 1. Nature of Equity

Equitable relief will be granted only when the facts set forth in the complaint bring the case within the recognized jurisdiction of equity. *Leffew v. Orrell*, 333.

ESCAPE

§ 1. Prosecutions for Escape

In a prosecution for a second escape, sentence of nine months imprisonment is within statutory maximum. *S. v. Alphin*, 75.

In an escape prosecution, it appeared from the record that defendant intelligently and understandingly waived his right to counsel and entered a plea of guilty. *S. v. Rogers*, 572.

ESTOPPEL

§ 4. Equitable Estoppel

Lessee is estopped to assert the invalidity of a lease because of insufficiency of description of the premises where he has gone into possession under the lease and has paid the stipulated rent or otherwise exercised control of the premises. *Advertising, Inc. v. Harper*, 501.

EVIDENCE

§ 3. Facts Within Common Knowledge

The unavailability of low income housing in a municipality is not a factor that can be judicially noticed by the Court of Appeals. *Thompson v. Shoemaker*, 687.

§ 5. Burden of Proof

A plaintiff has the burden of proving all allegations, negative as well as affirmative, which are essential to his claim or cause of action. *Insurance Co. v. Hylton*, 244.

§ 14. Communications Between Physician and Patient

Admission of hospital records which disclosed that plaintiff pedestrian was intoxicated shortly after the accident complained of was not prejudicial to plaintiff. *Wilder v. Edwards*, 513.

§ 15. Relevancy and Competency of Evidence in General

Evidence not supported by allegations must be excluded. *Gordon v. Gordon*, 206.

§ 28. Public Records and Documents

Where a public officer is authorized to keep a record of his official transactions and observations, the record so kept is admissible as evidence of the facts recorded within the scope of the authority. *S. v. Lewis*, 178.

EXTRADITION

No appeal lies from an order entered in a habeas corpus hearing which inquired into the legality of defendant's restraint under extradition proceedings instituted by another state. *Texas v. Rhoades*, 388.

FALSE PRETENSE

§ 5. Fraudulent Use of Credit Device

Warrant held sufficient to charge felonious credit card fraud and necessarily to charge all essential elements of misdemeanor credit card fraud. *S. v. Caudle*, 276.

FISH AND FISHERIES

A regulation of the Wildlife Resources Commission making it unlawful "to snag fish," with no definition of the term "snag," is void for vagueness and uncertainty. *S. v. Martin*, 532.

FRAUD

§ 9. Pleadings

Fraud must be particularly alleged. *Heller v. Heller*, 120.

FRAUDS, STATUTE OF

§ 2. Sufficiency of Writing

Contract to sell or convey land or memorandum thereof must contain description of the land either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Carlton v. Anderson*, 264; *Sheppard v. Andrews*, 518; *Yaggy v. B.V.D. Co.*, 590.

FRAUDS, STATUTE OF — Continued

Defendant's name affixed to a telegram in print constitutes a signing of the telegram by defendant within the requirement of the statute of frauds. *Yaggy v. B.V.D. Co.*, 590.

Writing required by the statute of frauds may be signed by an agent. *Ibid.*

§ 3. Pleading

Defendant's general denial of an alleged contract was sufficient to invoke defense of the statute of frauds. *Yaggy v. B.V.D. Co.*, 590.

Failure to object to testimony as to an oral contract does not waive defense of statute of frauds. *Ibid.*

§ 7. Contracts to Convey or Devise

Where a party contracts to convey land by a description which actually corresponds with property that he professes to own or control, there is a strong presumption that the contract was intended to apply to that particular property even though the description fits property the contracting party does not profess to own or control. *Carlton v. Anderson*, 264.

Description in an option contract held sufficient to admit extrinsic evidence to determine location of the property. *Ibid.*

Description in a telegram referring to property to be conveyed as "BVD property in Carrboro NoCar subject to reacquisition from Montvale Realty Corp" is not patently ambiguous. *Yaggy v. B.V.D. Co.*, 590.

Memorandum of agreement for sale of land is not insufficient to satisfy statute of frauds because time for performance is not stated therein. *Ibid.*

§ 8. Leases

Lessee is estopped to assert the invalidity of a lease because of insufficiency of description of the premises where he has gone into possession under the lease and has paid the stipulated rent or otherwise exercised control of the premises. *Advertising, Inc. v. Harper*, 501.

GAS

§ 3. Delivery to Consumer

In an action to recover for tobacco curing gas sold and delivered, testimony by plaintiff's office manager was sufficient to make out a prima facie case. *Gas Co. v. Weeks*, 40.

GIFTS

§ 1. Gifts Inter Vivos

A gift *inter vivos* is absolute and takes effect *in præsenti. Atkins v. Parker*, 446.

§ 4. Gifts Causa Mortis

Trial court properly found that a brother made a gift *causa mortis* of certificates of deposit to his sister; evidence that the donor, upon delivery of the certificates to the donee's son, told the son he would let him know if the donor wanted the certificates back, held not to defeat the gift. *Atkins v. Parker*, 446.

A gift *causa mortis* is revocable and takes effect *in futuro. Ibid.*

HABEAS CORPUS

§ 4. Review

No appeal lies from a habeas corpus judgment, review being available only by certiorari. *Surratt v. State*, 398.

No appeal lies from an order entered in a habeas corpus hearing which inquired into the legality of defendant's restraint under extradition proceedings instituted by another state. *Texas v. Rhoades*, 388.

HIGHWAYS AND CARTWAYS

§ 7. Construction of Highways, Liability of Contractor

Plaintiff's evidence is insufficient to support a finding that defendant construction company was connected with the road excavation work that resulted in the damages to plaintiff's truck. *Gunter v. Construction Co.*, 545.

§ 10. Obstruction of Public Roads

Conduct of defendants in walking slowly back and forth across a public highway in such a manner as to cause traffic to be blocked in both directions for five minutes is within the purview of the statute making it unlawful for any person to wilfully stand on a highway and impede the flow of traffic. *S. v. Spencer*, 282.

The offense of wilfully impeding the flow of traffic on a public highway or street is a misdemeanor and is punishable by fine, imprisonment up to two years, or both. *Ibid.*

HOMICIDE

§ 2. Parties and Offenses

Technically speaking, there is no offense in this State of aiding and abetting in the offense of murder. *S. v. Holloway*, 147.

§ 5. Murder in Second Degree

Malice is an essential element of second degree murder. *State v. Currie*, 439.

§ 6. Manslaughter

Any careless and reckless use of a loaded gun which jeopardizes the safety of another is unlawful, and if death results therefrom it is an unlawful homicide. *S. v. Curtis*, 707.

§ 10. Accidental Death

A person may lawfully kill in defense of his father and brother. *S. v. Holloway*, 147.

§ 14. Presumptions and Burden of Proof

A defendant who intentionally shot the deceased with a rifle is guilty of second degree murder unless he can rebut the presumption of malice by proving that he killed in the heat of passion or that he used no more force than was necessary while exercising his right of defense of his family. *S. v. Holloway*, 147.

An unintentional firing of a deadly weapon believed to be unloaded is not such an intentional use thereof as gives rise to the presumption of malice. *S. v. Currie*, 439.

§ 15. Relevancy and Competency of Evidence

Circumstantial evidence is satisfactory in proof of matters of the gravest moment, including homicide cases. *S. v. Thomas*, 350.

HOMICIDE — Continued

In a prosecution for second degree murder committed with a pistol, wherein the jury returned a verdict of guilty of involuntary manslaughter, defendant was not prejudiced by the exclusion of his witness' testimony as to whether or not the shooting was an accident. *S. v. Curtis*, 707.

§ 20. Photographs

A photograph of deceased taken immediately after the autopsy that was performed four days after the alleged shooting, held admissible. *S. v. Curtis*, 707.

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence in prosecution for murder in the second degree by use of a .22 caliber rifle was properly submitted to the jury. *S. v. Thomas*, 350.

The State must prove the proximate cause of death. *S. v. Locklear*, 493.

In a manslaughter prosecution arising out of an automobile wreck, the State's evidence permitted a legitimate inference that deceased died from injuries received in the wreck. *Ibid.*

§ 24. Instructions on Presumptions and Burden of Proof

In a prosecution for second degree murder committed with a rifle, where defendant testified that he was only playing with deceased and did not know the rifle was loaded, portion of the court's instructions which would have permitted the jury to consider the presumption of malice had they believed defendant's testimony to be true, held error. *S. v. Currie*, 439.

§ 28. Instructions on Defenses

Instruction on self-defense which assumed that stabbing of deceased by defendant was an established fact held erroneous. *S. v. Ealy*, 42.

Instruction on self-defense that defendant could use no more force than was reasonably necessary is erroneous. *Ibid.*

Trial court did not err in failing to charge on defense of accident where defendant did not contend shooting was accidental but testified that it was the State's witness who shot deceased. *S. v. Blizzard*, 395.

§ 30. Submission of Question of Guilt of Lesser Degree of Crime

Where there is evidence that defendant was acting in defense of his father and brother when he shot deceased, the question of defendant's guilt of voluntary manslaughter must be submitted to the jury, *S. v. Holloway*, 147.

Where there was no evidence of culpable negligence, trial court in second degree murder prosecution did not err in failing to submit an issue of involuntary manslaughter. *S. v. Thomas*, 350.

HUSBAND AND WIFE

§ 1. Marital Rights, Privileges and Liabilities in General

The real and personal property of any married person in this State remains the sole and permanent property of such married person. *Heller v. Heller*, 120.

§ 3. Agency of One Spouse for the Other

No presumption that the husband is acting as agent for the wife arises from mere fact of the marital relationship. *Sheppard v. Andrews*, 517.

HUSBAND AND WIFE — Continued

§ 5. Wife's Separate Estate, Contracts and Conveyances

In an action against husband and wife for breach of an option contract to convey land, trial court properly allowed motion for nonsuit as to femme defendant where plaintiff's evidence failed to show tender of payment made to femme defendant. *Sheppard v. Andrews*, 517.

§ 11. Construction and Operation of Separation Agreement

A widow who had separated from her husband under a separation agreement in which each party contracted away all rights in the property of the other party is held not to have relinquished her separate rights to a widow's pension under the retirement plan of her husband's employer. *Tobacco Group Ltd. v. Trust Co.*, 202.

§ 12. Revocation and Rescission of Separation Agreement

Allegation that portion of separation agreement relating to payments to plaintiff's child should be set aside was insufficient to state a cause of action to modify the child support, where the complaint is silent as to any change in conditions necessitating increased support. *Calhoun v. Calhoun*, 509.

Allegation that a separation agreement is not fair, adequate or equitable is a conclusion of the pleader and not admitted by demurrer. *Ibid.*

Allegation by wife that she was under sedation at the time she executed a separation agreement is insufficient to state a cause of action to modify or set aside the agreement where the wife admits she was represented by counsel when the agreement was executed. *Ibid.*

INCEST

In incest prosecution, trial court properly admitted testimony that defendant had had intercourse with prosecutrix on previous occasions. *S. v. Perkins*, 675.

INFANTS

§ 7. Contributing to Delinquency of Minor

The statute making it a misdemeanor to contribute to the delinquency of a minor held not unconstitutional for vagueness. *S. v. Sparrow*, 107.

Warrants are sufficient to charge defendants with contributing to the delinquency of a minor where they allege that defendants harbored and provided lodging for a 14 year old female and wilfully concealed her from officers knowing they had a petition for her arrest for delinquency, runaway and truancy. *Ibid.*

In prosecution of three defendants for contributing to the delinquency of a minor female by wilfully concealing her from officers with knowledge they had a petition for her arrest as a runaway and truant, State's evidence was insufficient to be submitted to the jury as to the guilt of two defendants and was sufficient to be submitted to the jury as to the guilt of the third defendant. *Ibid.*

§ 8. Jurisdiction to Award Custody of Minor

In child custody proceeding, complaint was not demurrable for lack of jurisdiction on ground it appears on face of the complaint that child is a resident of another state and on ground plaintiff was attacking adoption judgment of another state which was entitled to full faith and credit. *Bonavia v. Torreso*, 21.

INFANTS — Continued

§ 9. Hearing and Grounds for Awarding Custody of Minor

Child custody order may be modified or vacated at any time upon motion in the cause and showing of changed circumstances. *In re Bowen*, 236.

Change in child custody may be ordered even though there is no finding that person having custody under previous order has become unfit to retain custody. *Ibid.*

Order which awarded custody to the father was properly changed by the court to award custody to the mother on the basis of a material change of circumstances. *Ibid.*

INJUNCTIONS

§ 5. To Restrain Enforcement of Ordinance

Constitutionality of an ordinance purporting to create a criminal offense may be challenged in an action to enjoin its enforcement when such relief is essential to property rights and the rights of persons against injuries which are irremedial. *Mobile Home Sales v. Tomlinson*, 289.

§ 11. Injunction Against Public Boards, Agencies or Officers

Action to restrain individual defendants, officials of the State, from awarding a contract for the microfilming of patient medical records at a State hospital to the apparent low bidder or to anyone other than plaintiff *is held* an unauthorized action against the State and not an action against the defendants as individuals. *Microfilm Corp. v. Turner*, 258.

INSURANCE

§ 2. Brokers and Agents

An insurance company was not entitled to recover from an insurance agent, on the theory of common law indemnity, for the company's voluntary payment to an insured under a policy of fire insurance to which a rider was erroneously attached by an employee of the agent, where the company had a valid defense to the insured's claim. *Insurance Co. v. Hylton*, 244.

In action by plaintiff finance company against insurance agent who sold third party a collision policy on an automobile which had been financed by plaintiff, complaint fails to state cause of action (1) against agent for breach of contract that plaintiff would be named as loss payee in the policy, (2) against the company as third party beneficiary of the policy, (3) against agent for debt, and (4) against agent because of assignment to plaintiff of insured's claim against the agent. *Credit Co. v. Ins. Co.*, 663.

§ 3. Contract and Policy Generally

Renewal of an insurance policy is a bilateral transaction involving both an offer and acceptance, and where no offer to renew is made by the insurer, there can be no acceptance, and a failure to renew under such circumstances is unilateral action on the part of the insurer. *Insurance Co. v. Davis*, 152.

§ 6. Construction and Operation of Policies

Contracts of insurance will be liberally construed in favor of the insured and strictly against the insurer. *Burk v. Ins. Co.*, 209.

§ 10. Reformation of Policies

Reformation of an insurance policy is allowed where the employee of the insurance agent made a clerical error on the policy. *Ins. Co. v. Hylton*, 244.

INSURANCE — Continued

An insurance company was not entitled to recover from an insurance agent, on the theory of common law indemnity, for the company's voluntary payment to an insured under a policy of fire insurance to which a rider was erroneously attached by an employee of the agent, where the company had a valid defense to the insured's claim. *Ibid.*

§ 43.1. Hospital and Surgical Insurance

Institution which provided a residential treatment program for mentally and emotionally disturbed children was not a "hospital" within the terms of a major medical expense insurance policy. *Burk v. Ins. Co.*, 209.

§ 69. Protection Against Injury by Uninsured

Compulsory uninsured motorist coverage does not apply where the insured rejected the coverage. *Lichtenberger v. Ins. Co.*, 269.

In plaintiff's action against his automobile liability insurer to recover under the uninsured motorist provision of the policy, plaintiff's evidence is held insufficient to establish as a matter of law that he rejected the uninsured motorist coverage. *Ibid.*

The compulsory uninsured motorist statute, G.S. 20-279.21(b)(3), was enacted as remedial legislation and is to be liberally construed to effectuate its purpose. *Ibid.*

§ 79. Liability Insurance Generally

An insured under a non-owner's liability policy whose recently purchased automobile was involved in an accident was covered under a provision of the non-owner's policy which stated that an automobile purchased by the insured shall be covered for a period of 30 days next following the date of such acquisition. *Ins. Co. v. Hayes*, 294.

The provisions of the Financial Responsibility Act are written into every automobile liability policy as a matter of law. *Lichtenberger v. Ins. Co.*, 269.

§ 85. Coverage of Other Vehicles Used by Insured

An insured under a non-owner's liability policy whose recently purchased automobile was involved in an accident was covered under a provision of the non-owner's policy which stated that an automobile purchased by the insured shall be covered for a period of 30 days next following the date of such acquisition. *Ins. Co. v. Hayes*, 294.

§ 95. Vehicle Financial Responsibility Act

In order for insurer to terminate a liability policy issued pursuant to provisions of Vehicle Financial Responsibility Act of 1957, it must give 15 days prior notice to insured and to the Motor Vehicle Department, and failure to give notice in proper form to either renders ineffective an attempted termination by the insurer; but where such a policy is terminated by insured, insurer is not required to give notice of cancellation to insured, and although insurer must immediately notify the Department of Motor Vehicles, failure to give such notice does not affect termination of coverage. *Insurance Co. v. Davis*, 152.

Premium notice sent by insurer to insured is held not to constitute an offer to renew the insurance policy, but is simply a statement of the account that will be due on the date indicated, and where insured failed to make payment within the time specified in the policy, an attempted termination of the policy was a unilateral act of the insurer which required insurer to give notice to insured and the Department of Motor Vehicles in order for the termination to become effective. *Ibid.*

INTOXICATING LIQUOR

§ 2. Beer and Wine Licenses

There was no competent evidence to support ABC Board's denial of on-premise beer permit. *Waggoner v. Board of Alcoholic Control*, 692.

Superior court is without authority to order ABC Board to issue beer permit to petitioner. *Ibid.*

§ 19. Instructions

In this trial upon two warrants charging the possession and sale of non-taxpaid whiskey on two specified dates, the trial court erred in instructing the jury that defendant should be found guilty of each count under both warrants if defendant had non-taxpaid whiskey in his possession at any time, or at least on either of the two specified dates. *S. v. Collins*, 67.

§ 20. Verdict

Where defendant is charged with illegal sale of non-taxpaid whiskey, verdict of guilty of illegal possession for sale was improper. *S. v. Collins*, 67.

JUDGMENTS

§ 1. Nature and Requisites

A judgment affecting a citizen not a party to the proceeding is absolutely void as to him. *Land Corp. v. Styron*, 25.

§ 3. Conformity to Verdict and Pleadings

Equitable relief will be granted only when the facts set forth in the complaint bring the case within recognized jurisdiction of equity. *Leffew v. Orrell*, 333.

§ 9. Jurisdiction to Enter Consent Judgment

Purported consent judgment signed by the presiding judge is void for lack of defendant's consent where record fails to show that defendant or her attorney knew the consent judgment had been tendered to or signed by the judge. *Shore v. Shore*, 197.

§ 14. Sufficiency of Pleadings to Sustain Default

A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff, and the default judgment may be set aside even without any showing of mistake, surprise or excusable neglect. *Credit Co. v. Ins. Co.*, 663.

Defendant was not estopped from making motion to set aside default judgment on ground that complaint failed to state cause of action after previous motion to set aside judgment because of excusable neglect and meritorious defense had been denied for lack of excusable neglect. *Ibid.*

Default judgment is void where summons and complaint were not served on defendant. *Auto Co. v. McLain*, 567.

§ 15. Form and Effect of Default Judgment

When an unverified answer has been filed to a verified complaint, the clerk of superior court has no authority to enter a judgment by default and inquiry unless and until the unverified answer has been stricken. *Steed v. Cranford*, 378.

JUDGMENTS — Continued

§ 17. Void Judgments

A judgment affecting a citizen not a party to the proceeding is absolutely void as to him. *Land Corp. v. Styron*, 25.

Proper procedure to attack a void judgment is by motion in the cause. *Auto Co. v. McLain*, 567.

§ 20. Particular Kinds of Judgments; By Default or After Trial

Judge of the superior court has authority to set aside a judgment by default and inquiry where the clerk entered judgment with no notice to defendant on the ground that the answer had not been verified. *Steed v. Cranford*, 378.

Where the summons and complaint were not served on defendant, the default judgment entered in the action was void. *Auto Co. v. McLain*, 567.

§ 21. Consent Judgment

District court judge had power to set aside purported consent judgment entered by another district court judge on ground that defendant and her attorney had not consented thereto. *Shore v. Shore*, 197.

§ 24. Mistake, Surprise or Excusable Neglect

Defendant was not estopped from making motion to set aside default judgment on ground that complaint failed to state cause of action after previous motion to set aside judgment because of excusable neglect and meritorious defense had been denied for lack of excusable neglect. *Credit Co. v. Ins. Co.*, 663.

§ 25. What Conduct Justifies Relief

Trial court properly set aside a $12,000 judgment entered against plaintiff and his surety. *Epps v. Miller*, 656.

§ 34. Trial, Determination and Judgment

Trial court's findings that defendant had been properly served with process held supported by the evidence in hearing to set aside a default judgment. *Auto Co. v. McLain*, 567.

A motion in the cause to set aside a judgment presents questions of fact and not issues of fact. *Ibid.*

In a hearing on plaintiff's motion to set aside a judgment of $12,000 entered against plaintiff and his surety in a trial on writ of inquiry, it was within the discretion of the court, in its order setting aside the judgment, to allow the plaintiff to plead to the issue and to allow defendant to reply thereto. *Epps v. Miller*, 656.

§ 35. Conclusiveness of Judgments and Bar in General

Plea of res judicata must be founded upon an adjudication on the merits and may be maintained only where there is identity of parties, subject matter and issues. *Barringer v. Weathington*, 126; *Mason v. Highway Comm.*, 644.

§ 37. Matters Concluded

Judgment denying claim against State Highway Commission based upon alleged negligence of a named employee is res judicata, and second action filed against Highway Commission for same accident based upon alleged negligence of two different highway employees was properly dismissed. *Mason v. Highway Comm.*, 644.

JUDGMENTS — Continued

§ 42. Judgments of Retraxit and Dismissal

Judgment of dismissal based on referee's report that plaintiff had failed to prove title to the land in controversy was not an adjudication on the merits and would not support a plea of res judicata made prior to hearing plaintiff's evidence in subsequent action. *Barringer v. Weathington*, 126.

JURY

§ 1. Right to Trial by Jury

A party is held to have waived the right to jury trial in the district court by failing to file a written demand for jury trial within 10 days after the entry of superior court judge's order transferring the cause to the district court. *Kelly v. Davenport*, 670.

§ 7. Challenges

The record in an obstructing traffic prosecution fails to support defendants' contention that the trial court denied their motion to be allowed to make a showing of racial discrimination in the composition of the jury venire. *S. v. Spencer*, 282.

LABORERS' AND MATERIALMEN'S LIENS

§ 1. Nature and Grounds of Lien of Contractor

Contractor is not entitled to have lien enforced against property owned by femme defendant and her late husband as tenants by the entirety for labor and materials furnished in constructing a residence on the property where contractor's evidence is insufficient to show that either femme defendant or her late husband entered into contract for construction of the residence. *Leffew v. Orrell*, 333.

§ 2. Contract With Husband or Wife

Even if plaintiff contractor's evidence had been sufficient to make out a case of contract for indebtedness against the estate of the deceased husband of femme defendant, plaintiff contractor would not be entitled to a laborers' and materialmen's lien against property which had been held by femme defendant and her late husband as tenants by the entirety. *Leffew v. Orrell*, 333.

§ 3. Liens of Subcontractor or Material Furnisher

A materialman's lien for materials furnished to subcontractor substitutes claimant to the rights of the principal contractor and is enforceable against the sum due from the owner at the time notice is given. *Supply Co. v. Motor Lodge*, 701.

No cause of action in favor of a materialman arises against the owner for failure of a general contractor to furnish the owner a statement of sums due materialman before receiving payment from the owner in violation of G.S. 44-8. *Ibid.*

Materialman's evidence held insufficient for jury in action against general contractor based on alleged failure of the contractor to notify the owner of sums due plaintiff for materials furnished a subcontractor where it fails to show that the subcontractor is unable to pay the amount owed plaintiff for the materials. *Ibid.*

§ 6. Filing of Notice or Claim of Lien

In order to hold owner liable, materialman has burden of showing that

LABORERS' AND MATERIALMEN'S LIENS — Continued

owner was notified of the claim by him or by the general contractor before the owner made final payment to the general contractor. *Supply Co. v. Motor Lodge*, 701.

§ 8. Enforcement of Lien

Owner was not notified of materialman's claim prior to time the owner had made final payment to the general contractor where notice of the materialman's claim was mailed to the owner a few days after the owner had issued its check to the general contractor for the balance due on the contract, notwithstanding the check was paid by drawee bank three days after materialman mailed its notice of claim. *Supply Co. v. Motor Lodge*, 701.

LANDLORD AND TENANT

§ 2. Validity of Leases in General

Lessee is estopped to assert the invalidity of a lease because of insufficiency of description of the premises where he has gone into possession under the lease and has paid the stipulated rent or otherwise exercised control of the premises. *Advertising, Inc. v. Harper*, 501.

§ 5. Lease of Personal Property

In action for breach of agreement for lease of car washing equipment, trial court erred in instructing jury that the law would imply warranty that the leased equipment was fit for the purpose for which it was leased, where the lease provided there were no warranties from lessor to lessee. *Falco Corp. v. Hood*, 717.

§ 8. Liability for Injury to Person or Damage to Property

A tenant's complaint failed to state a cause of action that she suffered damage to her personal property as a proximate result of the landlord's negligence in keeping the premises in an unfit condition. *Thompson v. Shoemaker*, 687.

§ 19. Rent, and Actions Therefor

In action for breach of contract for lease of two highway signs, lessee is estopped to assert invalidity of the lease on ground of uncertainty of description of land upon which the signs were to be located, where plaintiff lessor had constructed the signs in accordance with terms of the lease and lessee had paid eight months rental and had accepted the benefits of the signs. *Advertising, Inc. v. Harper*, 501.

Lessor is entitled to recover for breach of a lease the difference between what lessee agreed to pay and what he had actually paid under the lease. *Falco Corp. v. Hood*, 717.

A tenant was not entitled to recover rents already paid upon theory that the dwelling was unfit for human habitation throughout the period of occupancy. *Thompson v. Shoemaker*, 687.

A tenant could not recover for constructive eviction on theory that the premises were unfit for human habitation. *Ibid.*

LARCENY

§ 8. Instructions

Trial court's failure to charge on doctrine of recent possession of stolen property in retrial was not prejudicial to defendants. *S. v. Jackson*, 386.

LIBEL AND SLANDER

§ 14. Pleadings

In this action for libel based upon an article printed by defendant newspaper stating that plaintiff's ex-husband had divorced her for adultery, the trial court erred in striking from defendant's further answer allegations of facts tending to show that the reporter and photographer responsible for the article were led, through conversations with plaintiff's ex-husband, reasonably to conclude that he had divorced plaintiff on the ground of adultery. *Littlejohn v. Publishing Co.*, 1.

In action for libel based upon a newspaper article stating that plaintiff's ex-husband divorced his wife for adultery, the trial court did not err in striking from defendant's further answer allegations that the article in question did not contain the new married name of plaintiff and that any damage plaintiff has suffered resulted from the institution of this suit and not from publication of the article. *Ibid.*

§ 15. Competency and Relevancy of Evidence

In an action for libel, defendant may under a general denial of malice and absent any affirmative pleading rebut a showing by plaintiff that the publication was maliciously made, but defendant must plead mitigating circumstances and affirmative defenses in order to offer evidence thereof to reduce the amount of compensatory damages. *Littlejohn v. Publishing Co.*, 1.

§ 18. Damages and Verdict

Punitive damages for libel may not be awarded on a showing of implied malice alone, but it must be shown that the publication was prompted by actual malice or recklessly or carelessly published. *Littlejohn v. Publishing Co.*, 10.

MONEY RECEIVED

§ 1. General Principles

Voluntary payments made under a mistake of law, with knowledge of the facts, cannot be recovered back, although there was no debt. *Thompson v. Shoemaker*, 687.

MONOPOLIES

§ 2. Agreements and Combinations Unlawful

A restrictive covenant between the grantor of a lot and the grantee, the predecessor in title to an oil company, providing that a four-acre tract adjoining the lot will not be used for the sale or advertising of any petroleum products for 25 years, which covenant was executed contemporaneously with the conveyance to the grantee of the lot as a filling station site, held legally enforceable by the oil company and is not in violation of the statute prohibiting monopolies. *Quadro Stations v. Gilley*, 227.

MORTGAGES AND DEEDS OF TRUST

§ 34. Agreements to Purchase at the Sale for Mortgagor or Trustor

A parol agreement to purchase at a foreclosure sale and hold title for the debtor and to reconvey the title to the debtor on repayment of the amount advanced creates a resulting trust. *Bahadur v. McLean*, 488.

Plaintiff debtor's evidence is insufficient to support a jury finding that defendant purchaser at a foreclosure sale had made an express agreement to acquire and hold title for plaintiff's benefit as would be required to give rise to a resulting trust. *Ibid.*

MORTGAGES AND DEEDS OF TRUST — Continued

Alleged agreement by purchaser at foreclosure sale to convey to the debtor an option to repurchase the property is insufficient to charge the purchaser as trustee or to impress a trust upon his title. *Ibid.*

MUNICIPAL CORPORATIONS

§ 14. Injuries in Connection With Streets and Sidewalks

Plaintiff's evidence held sufficient for jury in action for personal injuries received when plaintiff fell on snow and his finger became caught in chain drive of salt spreader on defendant municipality's truck. *Shoffer v. Raleigh*, 468.

§ 30. Zoning Ordinances and Building Permits

Evidence held sufficient for jury in prosecution for unlawfully parking or storing a mobile home or trailer in violation of municipal zoning ordinance. *S. v. Martin*, 18.

Zoning ordinance of the Town of Ahoskie clearly and concisely establishes standards and procedures for obtaining approval of a mobile home park by the town council and is not unconstitutional. *Ibid.*

It is no defense to a charge of unlawfully parking a mobile home in violation of a municipal zoning ordinance that the ordinance has not been enforced against owners of other mobile homes parked in the municipality. *Ibid.*

A comprehensive plan is a plan which zones an entire city or town in a manner which is calculated to achieve statutory purposes. *Allred v. Raleigh*, 602.

Ordinance which changed zoning classification of 9.26 acres from single family residential to a residential classification permitting apartments and other non-single family residence uses is held not to constitute spot zoning. *Ibid.*

Evidence held not to show that city councilmen violated announced municipal zoning policy in rezoning a certain area. *Ibid.*

In action seeking to invalidate municipal ordinance which rezoned certain property, trial court properly denied motion to compel mayor and three councilmen to answer questions asked them on adverse examination which constituted an inquiry into their motives in passing the ordinance. *Ibid.*

Trial court properly admitted evidence of long-range plan for construction of streets and thoroughfares in rezoned area. *Ibid.*

The fact that the use permitted in a rezoned area has not been changed from residential but only permits a more dense concentration of residents in the area must be given weight in determining whether the reclassification constitutes spot zoning. *Ibid.*

Spot zoning arises where a small area, usually a single lot or a few lots, surrounded by other property of similar nature, is placed arbitrarily in a different use zone from that to which the surrounding property is made subject. *Ibid.*

While the size of an area is not solely determinative of whether an ordinance constitutes spot zoning, it is a factor for the court to consider. *Ibid.*

If an amendment to a zoning ordinance is within the legislative power of the city, the area rezoned becomes a legitimate part of the original comprehensive zoning plan of the city. *Ibid.*

§ 31. Review of Orders of Municipal Zoning Boards

How a city or town shall be zoned or rezoned rests with the municipal

MUNICIPAL CORPORATIONS — Continued

legislative body, and its judgment is presumed to be reasonable and beyond judicial interference unless shown to be arbitrary, unreasonable or capricious. *Allred v. Raleigh*, 602.

§ 32. Regulations Relating to Public Morals

A city ordinance regulating Sunday sales will be upheld as a valid exercise of the police power if the classifications created by the ordinance are founded upon reasonable distinctions, affect equally all persons within a particular class, and bear a reasonable relationship to the public health and welfare sought to be promoted. *Mobile Home Sales v. Tomilnson*, 289.

Municipal blue law which prevents sale of mobile homes on Sunday but does not prevent such sale of conventional homes held constitutional. *Ibid.*

NEGLIGENCE

§ 4. Sudden Emergencies

Doctrine of sudden emergency defined. *Tharpe v. Brewer*, 432.

§ 5. Dangerous Substances, Machinery and Instrumentalities

Persons having possession and control over dangerous substances, machinery, and instrumentalities are under a duty to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others. *Shoffner v. Raleigh*, 468.

§ 5.1. Business Places; Duties to Invitees

Judgment of nonsuit was proper in plaintiff's action for personal injuries sustained when she stumbled over a rug placed at the entrance of defendant's drug store. *Farmer v. Drug Store*, 538.

§ 8. Proximate Cause

A negligent act, standing alone, does not create liability. *Sutton v. Duke*, 100.

§ 9. Foreseeability

It can be reasonably foreseen that a pony, running at large, would go to a place where other animals were, and that some injury would result to the person or property of another if the animal at large agitated and excited other animals. *Sutton v. Duke*, 100.

§ 11. Indemnity

Common law indemnity rests upon a contract implied by law. *Insurance Co. v. Hylton*, 227.

Indemnity against losses does not cover losses for which the indemnitee is not liable to a third person and which he improperly pays. *Ibid.*

Insurance company was not entitled to recover, on theory of indemnity, from insurance agent for the company's voluntary payment to insured under a policy of fire insurance to which a rider was erroneously attached by an employee of the agent. *Ibid.*

§ 13. Contributory Negligence

The law imposes upon a person sui juris the duty to use ordinary care to protect himself from injury. *Basden v. Sutton*, 6.

NEGLIGENCE — Continued

§ 22. Pleadings in Negligence Actions

On demurrer the court is not concerned with whether plaintiff can prove his factual allegations of negligence and proximate cause. *Sutton v. Duke*, 100.

§ 29. Sufficiency of Evidence of Negligence

Plaintiff's evidence held sufficient to establish employee's negligence in backing a forklift into plaintiff. *Conway v. Timbers, Inc.*, 10.

Plaintiff's evidence held sufficient for jury in action for personal injuries received when plaintiff fell on snow and his finger became caught in chain drive of salt spreader on defendant municipality's truck. *Shoffner v. Raleigh*, 468.

§ 30. Nonsuit

Rules relating to judgment of nonsuit on issue of negligence. *Gregory v. Adkins*, 305.

§ 35. Nonsuit for Contributory Negligence

Rules relating to nonsuit for contributory negligence. *Conway v. Timbers, Inc.*, 10; *Hales v. Flowers*, 46; *Etheridge v. R. R. Co.*, 140; *Gregory v. Adkins*, 305.

Nonsuit may not be entered on grounds of contributory negligence if it is necessary for the court to rely on any part of the evidence offered by defendant. *Carter v. Murray*, 171.

Plaintiff who was injured by a forklift was not guilty of contributory negligence as a matter of law in emerging from behind a row of parked trucks into the path of the forklift. *Conway v. Timbers, Inc.*, 10.

Plaintiff's evidence does not establish contributory negligence as a matter of law in action for personal injuries received when plaintiff fell on snow and his finger became caught on chain drive of salt spreader mechanism on defendant municipality's dump truck. *Shoffner v. Raleigh*, 468.

§ 53. Duties and Liabilities to Invitees

Storeowner's liability to invitees defined. *Farmer v. Drug Corp.*, 538.

§ 57. Nonsuit in Actions by Invitees

Judgment of nonsuit was proper in plaintiff's action for personal injuries sustained when she stumbled over a rug placed at the entrance of defendant's drug store. *Farmer v. Drug Store*, 538.

NUISANCE

§ 1. Private Nuisances

The operation of a hog buying station is not a nuisance per se. *Moody v. Packing Co.*, 463.

§ 7. Damages and Abatement

In an action between private landowners, it was prejudicial error for the jury to consider testimony of plaintiff's witness relating to permanent damages in the absence of an agreement by the parties that permanent damages might be assessed. *Bradley v. Texaco Co.*, 300.

Allegations by a rural church held insufficient to state a cause of action that defendant's proposed hog buying station on land adjoining the church will constitute a nuisance. *Moody v. Packing Co.*, 463.

The courts will ordinarily not enjoin a legitimate business enterprise. *Ibid.*

OBSCENITY

Exposure by a female of her breasts to the public view in a public place is not an offense under the statute prohibiting the indecent public exposure of a person's private parts. *S. v. Jones*, 166.

PARTIES

§ 1. Necessary Parties

Where subdivision lot was sold by reference to a map on which the word "park" appears, equity will not compel defendant to comply with a contract for the sale of the realty until other parties who have purchased with reference to the map have been brought into the action as necessary parties and their rights determined with respect to the park. *Land Corp. v. Styron*, 25.

Farm equipment manufacturer was not a necessary party to an action between a finance company and a farm equipment sales company. *Credit Corp. v. Equipment Co.*, 29.

Owners of all lots in a subdivision are necessary parties in an action involving validity of subdivision restrictive covenants as applied to certain lots within the subdivision. *Building Co. v. Peacock*, 77.

§ 8. Joinder of Additional Parties

The parties to be joined must have rights which will be directly affected by the judgment. *Credit Corp. v. Equipment Co.*, 29.

PAYMENT

§ 1. Transactions Constituting Payment

Delivery and acceptance of a check is not payment as between the parties until the check is paid by the bank. *Supply Co. v. Motor Lodge*, 701.

§ 4. Evidence and Proof of Payment

Payment is an affirmative defense which may not be raised by demurrer. *Gibson v. Jones*, 534.

PENSIONS

A wife who has separated from her husband but has never divorced him is, upon the husband's death, a widow within the meaning of the retirement plan of the husband's employer, and the wife is entitled to receive the widow's pension. *Tobacco Group Ltd. v. Trust Co.*, 202.

A widow who had separated from her husband under a separation agreement in which each party contracted away all rights in the property of the "other party" *is held* not to have relinquished her separate rights to a widow's pension under the retirement plan of her husband's employer. *Ibid.*

PLEADINGS

§ 1. Filing and Service of Complaint

It is error for the trial court to rewrite any part of plaintiff's complaint for him. *Plummer v. Henry*, 84.

An action should be treated as individual or representative as its true nature is disclosed by an inspection of the whole record. *Microfilm Corp. v. Turner*, 258.

§ 2. Statement of Cause of Action in General

While a party may obtain legal or equitable relief, or both, in the same

PLEADINGS — Continued

action, he must allege facts upon which court may grant such relief. *Leffew v. Orrell*, 333.

In order to state a cause of action, it is not necessary to put in the complaint the statute upon which the pleader is relying. *Tharpe v. Brewer*, 432.

§ 16. Verification of Answer

Judge of superior court has authority to allow defendant to verify nunc pro tunc the answer filed to a verified complaint. *Steed v. Cranford*, 378.

§ 19. Office and Effect of Demurrer

In passing upon a demurrer, the court may not consider any fact not appearing in the pleadings. *Bonavia v. Torreso*, 21.

Principles of law relating to demurrer. *Sutton v. Duke*, 100.

Allegation that a separation agreement is not fair, adequate or equitable is a conclusion of the pleader and not admitted by demurrer. *Calhoun v. Calhoun*, 509.

In an action upon promissory note, demurrer to the complaint on ground that the note showed on its face it had been paid was properly overruled. *Gibson v. Jones*, 534.

A plaintiff may demur to defendant's further answers and defenses. *Kelly v. Davenport*, 670.

§ 22. Speaking Demurrers

Defendant's demurrer to complaint in child custody proceeding is a "speaking demurrer" since it invokes the aid of supposed facts which do not appear in the complaint. *Bonavia v. Torreso*, 21.

§ 25. Demurrer for Defect of Parties or for Misjoinder of Parties and Causes of Action

In action on nine separate promissory notes, defendants were not prejudiced by error, if any, in denial of demurrer interposed on ground that complaint did not comply with [former] G.S. 1-123, where complaint complies with new Rules of Civil Procedure, since action would be dealt with under new Rules if remanded to superior court. *Wickes Corp. v. Hodge*, 529.

§ 31. Withdrawal of Pleadings

Pleading of a release in plaintiff's reply to defendant's counterclaim constitutes a ratification by plaintiff of the settlement of his insurance carrier with defendant, and withdrawal of plaintiff's reply did not constitute a revocation of the ratification. *White v. Perry*, 36.

§ 32. Motions to Amend

Where superior court judge sustained demurrer to the complaint and allowed plaintiff 30 days in which to file an amended complaint, another judge of the superior court was without authority to dismiss plaintiff's amended complaint on the ground that it failed to state a cause of action. *Tights v. Hosiery Co.*, 369.

§ 36. Variance Between Proof and Allegation

Plaintiff has the burden of proving all allegations essential to his claim or cause of action. *Insurance Co. v. Hylton*, 244.

To establish a cause of action there must be allegata and probata and the two must correspond. *Gordon v. Gordon*, 206.

PLEADINGS — Continued

Fatal variance occurs in action by realty corporation to recover from real estate agent one-half sales commissions for sale of a farm to realty company officer where evidence shows negotiations by officer were conducted as an individual. *Realty Co. v. Hoots*, 362.

§ 37. Issues Raised by the Pleadings and Necessity for Proof

A material fact alleged in the complaint and admitted in the answer will be taken as true for the purpose of trial. *Johnson v. Johnson*, 310.

§ 41. Motions to Strike

Where motion to strike paragraphs of defendant's further answer is not directed to any specific allegation, the paragraphs should not be stricken in their entirety. *Littlejohn v. Publishing Co.*, 1.

§ 42. Right to Have Allegations Stricken on Motion

Trial court properly struck portion of defendant's answer which consisted of confusing and redundant allegations. *Bank v. Printing Co.*, 359.

PRINCIPAL AND AGENT

§ 1. Creation and Existence of the Relationship

No special distributorship relationship arose by implication out of the conduct of the parties in this case. *Distributing Corp. v. Parts, Inc.*, 483.

Writing required by the statute of frauds may be signed by an agent. *Yaggy v. B.V.D. Co.*, 590.

§ 3. Termination or Revocation of Agency

A distributorship contract for an indefinite period is terminable at the will of either party upon reasonable notice, but where defendant refuses to make payment for goods furnished under such agreement, notice need not be given before bringing suit on the account. *Distributing Corp. v. Parts, Inc.*, 483.

§ 4. Proof of Agency

Evidence supported a jury finding that the operator of a forklift was the agent and employee of a corporate defendant at the time the operator backed into the vehicle driven by plaintiff. *Conway v. Timbers, Inc.*, 10.

Testimony by alleged agent of corporate defendant that he had actual authority from his superiors to accept plaintiff's offer to purchase property is competent to prove agency and extent of such agency. *Yaggy v. B.V.D. Co.*, 590.

PROCESS

§ 1. Requisites

Service of process, unless waived, is a jurisdictional requirement. *Auto Co. v. McLain*, 567.

§ 14. Service of Process on Foreign Corporation by Service on Secretary of State

In an action by a resident of this State against a nonresident manufacturer for breach of contract, the manufacturer is subject to *in personam* jurisdiction of the courts in this State under provisions of statute giving the courts jurisdiction in any action arising out of a contract made in this State. *Goldman v. Parkland*, 400.

PROCESS — Continued

A single contract made or to be performed in N. C. is sufficient to subject the nonresident corporation to suit in this State under the long arm statute. *Ibid.*

In action against foreign corporation for commission on sales by plaintiff in this State and nine other states, service of process on corporation by service on the Secretary of State was valid. *Crabtree v. Coats & Burchard Co.*, 624.

Summons which commands the sheriff to summon "the following named" to appear and answer the complaint, states that the manner of service shall be by delivery of the summons and complaint personally to the Secretary of State, and thereafter names corporate defendant as defendant *is held* sufficient to give the court jurisdiction of defendant. *Ibid.*

PROPERTY

§ 4. Criminal Prosecutions for Wilful or Malicious Destruction of Property

In prosecution for malicious destruction of property by cutting automobile tires with a knife, trial court properly admitted testimony that small dark streaks on knife blade smelled like rubber. *S. v. Locklear*, 375.

RAPE

§ 6. Instructions

Trial court committed prejudicial error in charging the jury that the State contended that no other male person could have committed the alleged rape. *S. v. Bradshaw*, 97.

§ 18. Prosecutions

In a prosecution for assault with intent to commit rape, the indictment need not allege that defendant was over 18 years of age at the time of the offense. *S. v. Johnson*, 574.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence

To reform a written instrument on the ground of mutual mistake of the parties, the evidence must be clear, strong, and convincing. *Insurance Co. v. Hylton*, 244.

REGISTRATION

§ 1. Necessity for Registration

Neither registration nor continued existence of the physical deed is necessary to continued existence of grantee's title. *Newell v. Edwards*, 650.

§ 3. Registration as Notice

A purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed in his line of title, even though it does not appear in his immediate deed. *Quadro Stations v. Gilley*, 227.

ROBBERY

§ 3. Competency of Evidence

Where defendant failed to show the relevancy of why robbery victim was carrying three dollars in change at the time of the robbery, the exclusion of such evidence cannot be prejudicial to defendant. *S. v. McPherson*, 160.

ROBBERY — Continued

In prosecution for robbery of store proprietor by violence or intimidation, trial court properly admitted photograph showing condition of store premises. *S. v. Brown*, 372.

§ 4. Sufficiency of Evidence

In armed robbery prosecution, testimony by victim was sufficient to show positive identification of defendant as perpetrator of the robbery. *S. v. Ashford*, 320.

§ 6. Verdict and Sentence

Sentence of imprisonment of 14 to 18 years upon conviction of armed robbery is not excessive. *S. v. Gwyn*, 397.

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

The Rules of Civil Procedure are of general application and do not abrogate the requirements of a statute of more specificity. *Hatcher v. Hatcher*, 562.

§ 8. General Rules of Pleadings

New rules of civil procedure require a claim for relief to be set forth sufficiently particular to give the court and the parties notice of the occurrences intended to be proved showing that the pleader is entitled to relief, and a pleading cannot give notice of occurrences that take place a year after the pleading is filed. *Gordon v. Gordon*, 206.

§ 18. Joinder of Claims and Remedies

In action on nine separate promissory notes, defendants were not prejudiced by error, if any, in denial of demurrer interposed on ground that complaint did not comply with [former] G.S. 1-123, where complaint complies with new Rules of Civil Procedure, since action would be dealt with under new Rules if remanded to superior court. *Wickes Corp. v. Hodge*, 529.

§ 52. Findings by the Court

The provision of Rule 52 that the trial judge is not required to make findings of fact unless requested to do so by a party does not abrogate the specific requirement of the alimony statute that the trial judge shall make findings of fact upon an application for alimony pendente lite. *Hatcher v. Hatcher*, 562.

§ 85. Validity and Effect

The new Rules of Civil Procedure became effective on 1 January 1970 and apply to actions and proceedings pending on that date. *Wickes Corp. v. Hodge*, 529.

SALES

§ 6. Implied Warranties

In action for breach of agreement for lease of car washing equipment, trial court erred in instructing jury that the law would imply warranty that the leased equipment was fit for the purpose for which it was leased, where the lease provided there were no warranties from lessor to lessee. *Falco Corp. v. Hood*, 717.

SALES — Continued

§ 10. Recovery of Goods or Purchase Price

In an action to recover for tobacco curing gas sold and delivered, testimony by plaintiff's office manager was sufficient to make out a prima facie case. *Gas Co. v. Weeks*, 40.

In an action to recover for merchandise purchased on open account, trial court properly nonsuited defendant's counterclaim and setoff based on purported exclusive distributorship agreement where evidence was insufficient to show that such an agreement had been entered into either orally or in writing. *Distributing Corp. v. Parts, Inc.*, 483.

§ 17. Sufficiency of Evidence

Defendants' evidence held sufficient to go to jury in counterclaim for breach of warranty in the sale of a house. *Kelly v. Davenport*, 670.

SCHOOLS

§ 7. Taxation, Bonds and Allocation of Proceeds

The statute authorizing the county board of commissioners to levy ad valorem taxes for a County School Capital Reserve Fund is a valid exercise of legislative authority; the creation of such fund is for a necessary expense and does not require a vote of the people. *Yoder v. Bd. of Commissioners*, 712.

§ 10. Assignment and Supervision of Pupils

A citizen's group challenging the pupil assignment plan adopted by a county board of education must appeal the plan to the superior court within 10 days from the date of its adoption by the board, G.S. 115-179, and the failure of the group to follow this procedure subjects its action to dismissal. *Fries v. Bd. of Education*, 341.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Seizure of tools and other articles from car without search warrant was legal where tools were observed on floor of car and other articles were discovered by search as incident to lawful arrest for possession of burglary tools. *S. v. McCloud*, 132.

§ 3. Requisites and Validity of Search Warrant

Police officers' affidavit based on an informant's report was sufficient reasonably to satisfy the magistrate that probable cause existed for search warrant for narcotics. *S. v. Staley*, 345.

An affidavit for a search warrant may be based on hearsay information and need not reflect the personal observation of the affiant. *Ibid.*

Defendants have standing to object to the validity of a search warrant for narcotics directed to the premises of a third person where they were both in the apartment with the seized evidence at the time of the search under the warrant. *S. v. Milton*, 425.

While magistrate must be informed of enough of the underlying circumstances to support finding of probable cause for issuance of a search warrant, it is not constitutionally required that all of such underlying circumstances be set forth in the affidavit to obtain the warrant. *Ibid.*

Affidavit of police officer to obtain warrant for narcotics was insufficient to establish grounds for issuing the warrant under [former] G.S. 15-25.1 in force when the warrant was issued and the search conducted. *Ibid.*

SETOFFS

Defendant's evidence is insufficient to show that it is entitled to a setoff for its inventory of merchandise supplied by plaintiff. *Distributing Corp. v. Parts, Inc.*, 483.

In an action to recover for merchandise purchased on open account, trial court properly nonsuited defendant's counterclaim and setoff based on purported exclusive distributorship agreement where evidence was insufficient to show that such an agreement had been entered into either orally or in writing. *Ibid.*

SIGNATURES

Defendant's name affixed to a telegram in print constitutes a signing of the telegram by defendant within the requirement of the statute of frauds. *Yaggy v. B.V.D. Co.*, 590.

STATE

§ 4. Actions Against the State

Action to restrain individual defendants, officials of the State, from awarding a contract for the microfilming of patient medical records at a State hospital to the apparent low bidder or to anyone other than plaintiff *is held* an unauthorized action against the State and not an action against the defendants as individuals. *Microfilm Corp. v. Turner*, 258.

§ 7. Filing of Claim and Procedure

Judgment denying claim against State Highway Commission based upon alleged negligence of a named employee is res judicata, and second action filed against Highway Commission for same accident based upon alleged negligence of two different highway employees was properly dismissed. *Mason v. Highway Comm.*, 644.

If claimant mistakenly names a wrong State employee, his remedy is to address a motion to amend the affidavit to the Industrial Commission. *Ibid.*

STATUTES

§ 4. Construction in Regard to Constitutionality

If a statute is susceptible to constitutional and unconstitutional interpretations, the former will be adopted. *S. v. Martin*, 18.

§ 5. General Rules of Construction

Courts often resort to dictionaries for assistance in determining the common and ordinary meaning of words and phrases. *S. v. Martin*, 532.

§ 10. Construction of Criminal Statutes

Criminal statutes must be strictly construed in favor of a defendant. *S. v. Spencer*, 282.

Interpretation of a criminal statute should not be made which leads to a ridiculous result. *Ibid.*

Criminal provisions must be strictly construed against the State and liberally construed in favor of a defendant with all conflicts resolved in favor of the defendant. *S. v. Martin*, 532.

Few words possess the precision of mathematical symbols, and no more than a reasonable degree of certainty in a statute or regulation making an act a criminal offense can be demanded. *Ibid.*

STATUTES — Continued

A defendant may be prosecuted and punished, after the effective date of the 1969 amendment to G.S. 15-54, for the violation of G.S. 14-54 as it existed prior to the effective date of the 1969 amendment. *S. v. Melton*, 721.

Except insofar as an amendment may operate as an implied repeal of a statute, the amendment of a criminal statute does not affect the prosecution or punishment of a crime committed before the amendment became effective. *Ibid.*

TAXATION

§ 6. Necessary Expenses and Necessity for Vote

The statute authorizing the county board of commissioners to levy ad valorem taxes for a County School Capital Reserve Fund is a valid exercise of legislative authority; the creation of such fund is for a necessary expense and does not require a vote of the people. *Yoder v. Bd. of Commissioners*, 712.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

In fixing the rates for a telephone company, the Utilities Commission was not required as a matter of law to credit to the company's working capital requirements the amounts paid by its customers in advance of monthly services rendered. *Utilities Comm. v. Morgan*, 576.

Utilities Commission was authorized to grant a telephone company a rate increase notwithstanding the Commission's finding that the quality of service rendered by the company was poor and substandard. *Ibid.*

In fixing the rate for a telephone company, the Utilities Commission properly considered the value of the company's plant under construction but not yet in operation. *Ibid.*

TRIAL

§ 21. Consideration of Evidence on Motion to Nonsuit

Consideration of evidence on motion for nonsuit. *Realty Co. v. Hoots*, 362.

§ 26. Nonsuit for Variance

When there is a material variance between allegation and proof, motion for judgment of nonsuit will be allowed. *Realty Co. v. Hoots*, 362.

§ 27. Nonsuit in Favor of Party Having Burden of Proof

Judgment of nonsuit will not be granted in favor of the party upon whom rests the burden of proof; but nonsuit is proper where plaintiff's own evidence established an affirmative defense as a matter of law. *Lichtenberger v. Ins. Co.*, 269.

§ 31. Directed Verdict and Peremptory Instructions

Trial court properly gave jury peremptory instructions in favor of plaintiff where defendant's counterclaim and setoff was properly nonsuited, and the amount of the account between plaintiff and defendant had been stipulated. *Distributing Corp. v. Parts, Inc.*, 483.

§ 33. Statement of Evidence and Application of Law Thereto

Trial judge has duty to declare and explain the law and apply it to the evidence. *Roberts v. Herring*, 65.

TRIAL — Continued

§ 40. Form and Sufficiency of Issues

Issues of fact raised by the pleadings must be tried by a jury unless there has been a waiver of that right. *Holcomb v. Holcomb*, 329.

§ 45. Acceptance or Rejection of Verdict by the Court

Trial court did not err in accepting jury's verdict after one juror, upon poll of the jury, answered that he agreed with the verdict "with the understanding that tender means money not offer," where the record shows that upon further questioning the juror unequivocally agreed with the verdict. *Sheppard v. Andrews*, 517.

§ 58. Findings and Judgment of the Court; Appeal and Review

Where jury trial is waived in district court, separate findings of fact and conclusions of law must be entered by trial judge in support of judgment entered by him, and entry of verdict based on issues of fact answered by the court is disapproved. *Gibson v. Jones*, 534.

Where trial judge was sitting as the trier of fact, his granting of plaintiffs' motion for nonsuit on defendants' counterclaim, although improper under the facts of this case, held not prejudicial. *Kelly v. Davenport*, 670.

TRUSTS

§ 13. Creation of Resulting Trusts

A parol agreement to purchase at a foreclosure sale and hold title for the debtor and to reconvey the title to the debtor on repayment of the amount advanced creates a resulting trust. *Bahadur v. McLean*, 488.

Alleged agreement by purchaser at foreclosure sale to convey to the debtor an option to repurchase the property is insufficient to charge the purchaser as trustee or to impress a trust upon his title. *Ibid.*

§ 19. Sufficiency of Evidence

Plaintiffs' evidence is insufficient to support a jury finding that defendant had made an express agreement to acquire and hold title for plaintiffs' benefit as would be required to give rise to a resulting trust. *Bahadur v. McLean*, 488.

UNJUST ENRICHMENT

Where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor. *Leffew v. Orrell*, 333.

USURY

§ 1. Contracts and Transactions Usurious

In an action by a bank to recover on a demand note to secure a loan to a corporation, the transaction is governed by the 6 per cent interest limitation set forth in G.S. 24-2, and defendants are entitled to the defense that the 6½ per cent annual interest rate on the note is usurious. *Bank v. Printing Co.*, 359.

UTILITIES COMMISSION

§ 6. Hearings and Orders; Rates

Principles applicable to the determination of utility rates. *Utilities Comm. v. Morgan*, 576.

UTILITIES COMMISSION — Continued

Utilities Commission was authorized to grant a telephone company a rate increase notwithstanding the Commission's finding that the quality of service rendered by the company was poor and substandard. *Ibid.*

In fixing the rate for a telephone company, the Utilities Commission properly considered the value of the company's plant under construction but not yet in operation. *Ibid.*

In fixing the rates for a telephone company owned by a parent holding company, the Utilities Commission was acting within its discretion in postponing an investigation into the reasonableness of profits earned on materials sold to the telephone company by a supply company that was also owned by the parent company. *Ibid.*

The Utilities Commission is authorized to consider quality of service as a factor in determining what constitutes just and reasonable rates to be charged by a utility. *Ibid.*

In fixing the rate for a public utility, the value of the utility's plant and service must be determined as of the end of the test period used in the hearing. *Ibid.*

§ 7. Services

In proceeding to obtain approval of Utilities Commission for transfer of a common motor carrier asphalt franchise, there was sufficient evidence to support Commission's finding that service under the franchise had been continuously offered to the public up to the time of filing said application. *Utilities Comm. v. Petroleum Carriers*, 408.

Showing of public need required of an application for a new motor carrier certificate is not applicable in a transfer proceeding. *Ibid.*

Requirement of public convenience and necessity for transfer of public utility franchise is satisfied by showing that the authority has been and is being actively applied in satisfaction of the public need shown to exist when the authority was originally acquired. *Ibid.*

Possibility that a transfer of a motor carrier franchise to a more competitive carrier will adversely affect other existing carriers does not make such transfer contrary to the public interest. *Ibid.*

VENDOR AND PURCHASER

§ 1. Validity and Construction of Contracts of Bargain and Sale and Options

Writing required by the statute of frauds may be signed by an agent. *Yaggy v. B.V.D. Co.*, 590.

Defendant's name affixed to a telegram in print constitutes a signing of the telegram by defendant within the requirement of the statute of frauds. *Ibid.*

Memorandum of agreement for sale of land is not insufficient to satisfy statute of frauds because time for performance is not stated therein. *Ibid.*

Fact that for some time after telegram containing essentials of a contract for sale of land was sent the attorneys for the parties were engaged in drafting a written document which was to embody all terms agreed upon does not compel the conclusion that the minds of the parties had never met upon the essentials of a binding contract. *Ibid.*

Contract for sale of property by a corporation was not invalid because not approved by the corporation's board of directors. *Ibid.*

VENDOR AND PURCHASER — Continued

Options are to be construed strictly in favor of the optionee. *Sheppard v. Andrews*, 517.

§ 2. Duration of Option or Contract; Performance or Tender

Time is of the essence in an option contract. *Sheppard v. Andrews*, 517.

In an action against husband and wife for breach of an option contract to convey land, trial court properly allowed motion for nonsuit as to femme defendant where plaintiff's evidence failed to show tender of payment made to femme defendant. *Ibid.*

§ 3. Description and Amount of Land

Where a party contracts to convey land by a description which actually corresponds with property that he professes to own or control, there is a strong presumption that the contract was intended to apply to that particular property even though the description fits property the contracting party does not profess to own or control. *Carlton v. Anderson*, 264.

Description in an option contract held sufficient to admit extrinsic evidence to determine location of the property. *Ibid.*

In action for breach of option contract to convey land, plea in bar that the option did not comply with the statute of frauds should have been allowed where the description did not specifically locate the land and plaintiff's evidence failed to identify and locate the land. *Sheppard v. Andrews*, 517.

A written memorandum sufficient to comply with the requirements of the statute of frauds must contain a description of the land either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Yaggy v. B.V.D. Co.*, 590.

Description in a telegram referring to property to be conveyed as "BVD property in Carrboro NoCar subject to reacquisition from Montvale Realty Corp" is not patently ambiguous. *Ibid.*

§ 5. Specific Performance

Testimony by alleged agent of corporate defendant that he had actual authority from his superiors to accept plaintiff's offer to purchase property is competent to prove agency and extent of such agency. *Yaggy v. B.V.D. Co.*, 590.

§ 10. Actions Involving Interests of Third Person

Where subdivision lot was sold by reference to a map on which the word "park" appears, equity will not compel defendant to comply with a contract for the sale of the lot until other parties who have purchased with reference to the map have been brought into the action as necessary parties and their rights determined with respect to the park. *Land Corp. v. Styron*, 25.

In action for specific performance of a contract to purchase land lying partially within a subdivision, owners of all lots within the subdivision were necessary parties before court could determine that recorded subdivision restrictions could not be enforced against the portion of the land within the subdivision because of fundamental changes within and without the subdivision. *Building Co. v. Peacock*, 77.

WATERS AND WATER COURSES

§ 1. Surface Waters

Owners of land on higher levels cannot divert surface water by artificial

WATERS AND WATER COURSES — Continued

obstruction so as to injure the premises of the servient owner without incurring actionable liability. *Bradley v. Texaco Co.*, 300.

In an action between private landowners, it is prejudicial error for the jury to consider evidence of plaintiff's permanent damages when the parties had not stipulated that permanent damages might be assessed. *Ibid.*

WILLS

§ 9. Proof of Will and Probate in Common Form

Motion addressed to the clerk of superior court to vacate the probate of a holographic will on the ground that the will was not in the handwriting of the testator held properly denied by the clerk; movants' proper procedure to challenge the probate is by caveat. *In re Spinks*, 417.

The burden of proof on a motion to vacate a probate is on the movants to establish sufficient grounds to set aside the probate. *Ibid.*

Failure of clerk of superior court to make a specific finding in order of probate as to domicile or residence of deceased does not show that the clerk lacked jurisdiction over deceased's estate so that probate can be ignored or collaterally attacked. *In re Davis*, 697.

§ 13. Nature of, and Jurisdiction Over Caveat Proceeding

The filing of a caveat is a statutory procedure for an attack upon a paper-writing which has been probated as a will in common form. *In re Spinks*, 417.

§ 22. Mental Capacity

In caveat proceeding challenging a purported codicil on ground of mental incapacity, trial court erred in preventing counsel for caveator from arguing to the jury the legal effect of a subsequent codicil executed by testator which left him intestate as to a considerable portion of his property. *In re Farr*, 250.

§ 23. Instructions in Caveat Proceedings

In a caveat proceeding challenging a purported codicil, trial court did not err in refusing to charge jury that under G.S. 31-5.8 a subsequent codicil executed by testator revoking the codicil challenged by caveator did not have the legal effect of reviving articles of the will which the challenged codicil had revoked. *In re Farr*, 250.

§ 34. Fees, Life Estates, and Remainders

Remaindermen under a will failed to allege sufficient facts to entitle them to finding that the life tenant under the will is a trustee of the property for herself and the remaindermen and that the remaindermen are entitled to an accounting of the property from the life tenant. *Elliott v. Ballentine*, 682.

WITNESSES

§ 4. Rule That a Party May Not Impeach His Own Witness

In wrongful death action, trial court did not err in permitting plaintiff to question plaintiff's witness, whose testimony was favorable to defendant, as to how he had answered questions at a previous hearing, since plaintiff was attempting to contradict the witness rather than impeach him. *Jordan v. Williams*, 33.

WORD AND PHRASE INDEX

ABC BOARD

Denial of on-premise beer permit —
sufficiency of evidence, *Waggoner v. Board of Alcoholic Control*, 692.

ACCIDENT OR MISADVENTURE

Homicide prosecution —
failure to instruct on, *S. v. Blizzard*, 395.

ACCOUNTING FOR DEVISED PROPERTY

Petition by remaindermen, *Elliott v. Ballentine*, 682.

ADOPTED CHILD

Custody proceeding —
full faith and credit, *Bonavia v. Torreso*, 21.

ADULTERY

Alimony without divorce —
evidence of adultery occurring after pleading was filed, *Gordon v. Gordon*, 206.

Libel action —
newspaper article, *Littlejohn v. Publishing Co.*, 1.

Testimony by spouse, *Gordon v. Gordon*, 206.

AFFIDAVIT FOR SEARCH WARRANT

Sufficiency of —
confidential informer, *S. v. Staley*, 345.

AHOSKIE, TOWN OF

Violation of zoning ordinance in parking mobile home, *S. v. Martin*, 18.

ALIMONY

See Divorce and Alimony this Index.

ALTERATION OF DEED

Change of grantee's name —
consent of grantor, *Newell v. Edwards*, 650.

AMENDED PLEADINGS

Consideration by another judge, *White v. Perry*, 36.

ANIMALS

Liability in allowing pony to escape from enclosure, subsequent injury to motorist, *Sutton v. Duke*, 100.

ANSWER

Verification nunc pro tunc, *Steed v. Cranford*, 378.

APPEAL

Habeas corpus —
appellate review by certiorari, *Surratt v. State*, 398.
review of inquiry into extradition, *Texas v. Rhoades*, 388.

APPEAL AND ERROR

Brief —
failure to file, *In re Custody of Maxwell*, 59.
inclusion of separation agreement in controversy as an appendix, *Calhoun v. Calhoun*, 509.

Cases consolidated for appeal, *Shore v. Shore*, 197.

Interlocutory order —
appeal from, *Patrick v. Hurdle*, 44.

Judgments appealable —
award of alimony pendente lite, *Peeler v. Peeler*, 456.
order in processioning proceeding, *Prince v. Prince*, 638.

Record on appeal —
failure to docket in apt time, *In re Custody of Maxwell*, 59; *Umphlett v. Bush*, 72.

APPENDIX TO BRIEF

Separation agreement in controversy, *Calhoun v. Calhoun*, 509.

ARREST

Pleading of civil remedy of arrest in automobile accident case, *Plummer v. Henry*, 84.

Unlawful arrest —
effect on admissibility of confession, *S. v. McCloud*, 132.

ARREST OF JUDGMENT

Contention that superior court had no jurisdiction on appeal from district court, *S. v. Ray*, 129.

ARREST OF MINOR

Legality of officers' entry into house, *S. v. Sparrow*, 107.

ASPHALT MOTOR CARRIER

Transfer of carrier certificate, *Utilities Comm. v. Petroleum Carriers*, 408.

ASSAULT AND BATTERY

Serious injury —
shooting prosecuting witness in the wrist, *S. v. Shankle*, 564.
stabbing of police officer with steak knife, *S. v. Parker*, 191.

ASSAULT WITH DEADLY WEAPON

Offense created by 1969 General Assembly —
steak knife as a deadly weapon, *S. v. Parker*, 191.

ASSAULT WITH INTENT TO COMMIT RAPE

In-court identification of defendant —
pretrial photographic identification and identification in police department elevator, *S. v. Huffman*, 92.

ATTORNEY GENERAL

Appeal from order of Utilities Commission granting rate increase to telephone company whose services were substandard, *Utilities Comm. v. Morgan*, 576.

AUTOMOBILE LIABILITY INSURANCE

Cancellation by insured —
notice by insurer to Department of Motor Vehicles, *Insurance Co. v. Davis*, 152.

Cancellation by insurer —
notice to Department of Motor Vehicles, *Insurance Co. v. Davis*, 152.

Certified assigned risk policy —
cancellation, *Insurance Co. v. Davis*, 152.

Determination of coverage —
non-owner's liability policy, *Insurance Co. v. Hayes*, 294.
uninsured motorist clause, *Lichtenberger v. Insurance Co.*, 269.

Premium notice sent by insurer —
offer to renew, *Insurance Co. v. Davis*, 152.

Renewal of insurance policy —
offer and acceptance, *Insurance Co. v. Davis*, 152.

AUTOMOBILE PARTS

Action for goods sold and delivered —
counterclaim and setoff, *Distributing Corp. v. Parts, Inc.*, 483.
exclusive distributorship agreement, *Distributing Corp. v. Parts, Inc.*, 483.

AUTOMOBILE TIRES

Malicious destruction of —
testimony that mark on knife smelled like rubber, *S. v. Locklear*, 375.

AUTOMOBILE TRANSMISSION

Action to recover for installation of, *Roberts v. Herring*, 65.

AUTOMOBILES

Contributory negligence —
guest passenger remaining in illegally parked automobile, *Tharpe v. Brewer*, 432.
pedestrian, *Basden v. Sutton*, 6; *Gregory v. Adkins*, 305.

Driving under the influence —
argument of counsel, breathalyzer test results in other cases, *S. v. Royal*, 559.
breathalyzer test results, prerequisites for admission in evidence, *S. v. Caviness*, 541.
instructions to jury, *S. v. Newsome*, 525.

Driver's license —
driving while suspended, basis for revocation, *Taylor v. Garrett*, 473.

Family purpose doctrine defined, *Plummer v. Henry*, 84.

Imputation of negligence to owner-occupant, *Etheridge v. R. R. Co.*, 140.

Intersection accident —
excessive speed, *Rozier v. Lancaster*, 506.

Left turn —
contributory negligence in making, *Hales v. Flowers*, 46.

Lights —
stopping vehicle within radius of, *Meeks v. Atkeson*, 631.

Manslaughter prosecution —
cause of death, sufficiency of evidence, *S. v. Locklear*, 493.
identity of driver, *S. v. Locklear*, 493.

Negligent entrustment theory —
recovery of punitive damages under, *Plummer v. Henry*, 84.

Owner-occupant —
imputation of negligence to, *Etheridge v. R. R. Co.*, 140.

Ownership of automobile —
proof of registration, *Tuttle v. Beck*, 337.

Parking —
evidence that defendant's car was improperly parked, *Tuttle v. Beck*, 337; *Meeks v. Atkeson*, 631.

AUTOMOBILES — Continued

hitting stopped vehicle whose owner was searching for lost cat, *Meeks v. Atkeson*, 631.
with bright lights facing oncoming traffic, sufficiency of pleadings, *Tharpe v. Brewer*, 432.

Pedestrian —
contributory negligence, *Basden v. Sutton*, 6; *Gregory v. Adkins*, 305.
intoxication of pedestrian, admission of hospital records, *Wilder v. Edwards*, 513.
unmarked crosswalk, action for personal injuries, *Carter v. Murray*, 171.

Physical facts at accident scene, *Jordan v. Williams*, 33.

Registration as proof of ownership, *Tuttle v. Beck*, 337.

Res ipsa loquitur —
vehicle leaving road without apparent reason, *Cherry v. Smallwood*, 56.

Speed —
sufficiency of evidence of speeding, *S. v. Zimmerman*, 522.
violation of speed restriction as negligence, *Basden v. Sutton*, 6.

Stopping on highway —
hitting stopped vehicle whose owner was searching for lost cat, *Meeks v. Atkeson*, 631.
negligence in, *Stith v. Perdue*, 314; *Meeks v. Atkeson*, 631.

Sudden emergency —
automobile parked with bright lights facing oncoming traffic, *Tharpe v. Brewer*, 432.

Title —
determination of title transfer on question of coverage under non-owner's liability policy, *Insurance Co. v. Hayes*, 294.

U-turn —
negligence in making, *Jordan v. Williams*, 33.

AUTOPSY

Photograph of deceased's body after, *S. v. Curtis*, 707.

BAIL

Excessive bail —
effect on admissibility of confession, *S. v. McCloud*, 132.

BEER PERMIT

Denial by ABC Board —
sufficiency of evidence, *Waggoner v. Board of Alcoholic Control*, 692.

Superior court's authority to order ABC Board to issue, *Waggoner v. Board of Alcoholic Control*, 692.

BILLBOARDS

Lease of —
estoppel to assert invalidity of lease for uncertainty of description, *Advertising, Inc. v. Harper*, 501.

BILLS AND NOTES

Action on note —
demurrer to answer, *Kelly v. Davenport*, 670.
sufficiency of evidence of indebtedness, *Kelly v. Davenport*, 670.

BLUE LAW

Prevention of Sunday sale of mobile homes —
constitutionality of, *Mobile Home Sales v. Tomlinson*, 289.

BOND

Failure to post —
credit for confinement while waiting trial, *S. v. Walker*, 548.

BOUNDARIES

Processioning proceeding —
burden of proof to establish disputed boundary, *Prince v. Prince*, 638.

BREACH OF WARRANTY

Action on in sale of house, *Kelly v. Davenport*, 670.

BREATHALYZER TEST RESULTS

Jury argument of results in other cases, *S. v. Royal*, 559.

Prerequisites for admission in evidence, *S. v. Caviness*, 541.

BRIEF

Appendix to brief —
separation agreement in controversy, *Calhoun v. Calhoun*, 509.

Failure to file, *In re Custody of Maxwell*, 59.

Failure to send copy to Attorney General, *S. v. Black*, 324.

Necessity of filing only one brief on appeal, *S. v. Alphin*, 60.

BURGLARY AND UNLAWFUL BREAKINGS

Effect of 1969 amendment to felonious breaking statute in prosecution for felonious breaking committed prior to the amendment, *S. v. Melton*, 721.

BURGLARY TOOLS

Articles in plain view in automobile —
search of automobile incident to lawful arrest, *S. v. McCloud*, 132.

Found in car of third person —
rendered admissible against defendant by confession, *S. v. McCloud*, 132.

Unlawful possession —
burden of proving lawful excuse, *S. v. McCloud*, 132.

BVD COMPANY PROPERTY

Telegram sale of, *Yaggy v. BVD Co.*, 590.

CAMPER

Sudden stopping of automobile behind turning camper, *Stith v. Perdue*, 314.

CARRIERS

Asphalt motor carrier certificate —
transfer of, *Utilities Comm. v. Petroleum Carriers*, 408.

CAR WASH EQUIPMENT

Lease of —
damages for breach, *Falco Corp. v. Hood*, 717.
implied warranty of fitness, *Falco Corp. v. Hood*, 717.

CAT

Hitting stopped car on highway whose owner was searching for lost cat, *Meeks v. Atkeson*, 631.

CAVEAT PROCEEDING

Codicil of will —
instructions as to legal effect of, *In re Farr*, 250.

CERTIORARI

Appellate review of habeas corpus, *Surratt v. State*, 398.

Order allowing certiorari in record, *S. v. Jackson*, 386; *S. v. Blizzard*, 395.

Substitute for appeal, *S. v. Alphin*, 60.

CHECK

Laborers' and materialmen's liens —
payment to general contractor, *Supply Co. v. Motor Lodge*, 701.

Mitigation of sentence in worthless check prosecution, *S. v. McClam*, 477.

CIVIL PROCEDURE, RULES OF

Demurrer for misjoinder of causes —
denial where complaint complies with new rules, *Wickes Corp. v. Hodge*, 529.

Effective date of new rules, *Wickes Corp. v. Hodge*, 529.

Proof of corporate existence —
promissory notes naming plaintiff as corporation, *Wickes Corp. v. Hodge*, 529.

CLAIM AND DELIVERY

Damages —
right of defendant to where plaintiff has taken voluntary nonsuit, *Epps v. Miller*, 656.

Sureties as parties of record, *Epps v. Miller*, 656.

CLERK OF SUPERIOR COURT

Authority to set aside verified complaint to which unverified answer has been filed, *Steed v. Cranford*, 378.

Compelling delivery of justice of peace records, *In re Robertson*, 186.

Probate jurisdiction —
failure to make findings as to domicile of deceased, *In re Davis*, 697.
generally, *In re Spinks*, 417.

CODICIL OF WILL

Caveat proceeding —
legal effect of codicil, *In re Farr*, 250.

COMMUNAL LIVING

Contributing to delinquency of minor, *S. v. Sparrow*, 107.

Interference with officer in arrest of minor, *S. v. Sparrow*, 107.

COMPROMISE AND SETTLEMENT

Pleading settlement by insurance carrier —
ratification of settlement, *White v. Perry*, 36.

COMPULSORY REFERENCE

Res judicata in subsequent action, *Barringer v. Weathington*, 126.

CONFESSION

Admissibility —
delay of preliminary hearing, *S. v. McCloud*, 132.
excessive bail, *S. v. McCloud*, 132.

CONFESSION — Continued

findings by court on voir dire, *S. v. McCloud*, 132.
unlawful initial arrest, *S. v. McCloud*, 132.

CONFIDENTIAL INFORMER

Sufficiency of officer's affidavit for search warrant, *S. v. Staley*, 345.

CONSENT JUDGMENT

Divorce action —
lack of defendant's consent, *Shore v. Shore*, 197.
Power of district court to set aside judgment entered by another judge, *Shore v. Shore*, 197.
Setting aside for lack of defendant's consent, *Shore v. Shore*, 197.

CONSTITUTIONAL LAW

Counsel, right to —
defendant dissatisfied with counsel, *S. v. Perkins*, 675.
intoxication as affecting waiver of counsel, *S. v. Curtis*, 707.
probation revocation, *S. v. Atkinson*, 355.
time to prepare defense, *S. v. Atkinson*, 355.
waiver in escape prosecution, *S. v. Rogers*, 572.
Full faith and credit —
foreign child custody decree, *In re Kluttz*, 383.
Jury —
opportunity to show racial discrimination in composition of, *S. v. Spencer*, 282.
School Capital Reserve Fund —
necessary expense not requiring vote of the people, *Yoder v. Board of Commissioners*, 712.
Speedy trial —
delay of 3½ months between arrest and trial, *S. v. McCloud*, 132.
right of State to appeal dismissal of prosecution for denial of, *S. v. Horton*, 497.

CONSTITUTIONAL LAW — Continued

Sunday blue law —
prevention of mobile home sales, *Mobile Home Sales v. Tomlinson*, 289.
Waiver of counsel in escape prosecution, *S. v. Rogers*, 572.

CONSTRUCTIVE EVICTION

Allegations by tenant that premises were unfit for human habitation and were in violation of city code, *Thompson v. Shoemaker*, 687.

CONTINUANCE

Probation revocation hearing —
time to prepare defense, *S. v. Atkinson*, 355.

CONTRACTS

Acceptance by mail, *Goldman v. Parkland*, 400.
Breach of contract —
measure of damages and recovery of lost profits, *Meares v. Construction Co.*, 614.
Damages —
automobile transmission installation, *Roberts v. Herring*, 65.
Exclusive distributorship agreement —
action for goods sold and delivered, *Distributing Corp. v. Parts, Inc.*, 483.
Justice of the peace —
collection of physician's accounts, *In re Robertson*, 186.
Lease contract for highway signs —
estoppel to assert invalidity of, *Advertising, Inc. v. Harper*, 501.
Option contract —
agreement to purchase at foreclosure sale and reconvey to debtor, *Bahadur v. McLean*, 488.
breach by husband and wife, *Sheppard v. Andrews*, 517.
to convey land, sufficiency of description, *Carlton v. Anderson*, 264.

CONTRACTS — Continued

Restraint of trade —
validity of restrictive covenant protecting filling station against competition, *Quadro Stations v. Gilley*, 227.

State officials —
injunction to prevent microfilming of medical records, *Microfilm Corp. v. Turner*, 258.

Telegram sale of land —
printed name as signature, *Yaggy v. BVD Co.*, 590.

CONTRIBUTING TO DELINQUENCY OF MINOR

Constitutionality of statute, *S. v. Sparrow*, 107.

Sufficiency of evidence, *S. v. Sparrow*, 107.

CONTROVERSY WITHOUT ACTION

Determination of sufficiency of a deed to convey title, *Land Corp. v. Styron*, 25.

CORPORATIONS

Action against corporation to recover sales commissions —
variance between allegations and proof, *Realty Co. v. Hoots*, 362.

Corporate assets —
wrongful appropriation by directors and stockholders, *Underwood v. Stafford*, 220.

Corporate existence —
proof of by notes naming plaintiff as corporation, *Wickes Corp. v. Hodge*, 529.

Directors and stockholders —
appropriation of corporate assets, *Underwood v. Stafford*, 220.

Non-resident corporation —
service of process on Secretary of State, *Crabtree v. Coats & Burchard Co.*, 624.

Sale of corporate property —
approval by board of directors, *Yaggy v. BVD Co.*, 590.

COSTS

Taxing of costs —
injunction to prevent violation of restrictive covenant, *Builders, Inc. v. Hollar*, 14.

COUGH SYRUP

Admissibility of confession —
testimony that defendant had been drinking cough syrup, *S. v. Dennis*, 390.

COUNSEL, RIGHT TO

Defendant dissatisfied with counsel, *S. v. Perkins*, 675.

Intoxication as affecting waiver of counsel, *S. v. Curtis*, 707.

Probation revocation hearing, *S. v. Atkinson*, 355.

Time to prepare defense, *S. v. Atkinson*, 355.

COUNTY SCHOOL CAPITAL RESERVE FUND

Validity of statute authorizing creation of, *Yoder v. Board of Commissioners*, 712.

COURTS

Consent judgment —
power of district court to set aside judgment entered by another district court judge, *Shore v. Shore*, 197.

District court —
"judge shopping" procedures in divorce action' disapproved. *Johnson v. Johnson*, 310.

Judgment on demurrer —
consideration of amended pleadings by another judge, *White v. Perry*, 36.

Judicial notice —
availability of low income housing, *Thompson v. Shoemaker*, 687.

Jurisdiction —
motion in arrest of judgment on ground that superior court lacked, *S. v. Ray*, 129.

COURTS — Continued

Justice of the peace —
abolishment of office of, *In re Robertson*, 186.
delivery of records to clerk of superior court, *In re Robertson*, 186.

Juvenile courts —
constitutionality of statutes defining jurisdiction, *S. v. Sparrow*, 197.

Municipal-county court —
guilty plea to misdemeanor credit card fraud, *S. v. Caudle*, 276.

Superior court —
authority to order ABC Board to issue beer permit, *Waggoner v. Board of Alcoholic Control*, 692.

Trial by court without jury —
necessity for separate findings and conclusions, *Gibson v. Jones*, 534.

CREDIT CARD FRAUD

Jurisdiction of municipal-county court, *S. v. Caudle*, 276.

Revocation of suspended sentence, *S. v. Caudle*, 276.

Sufficiency of warrant, *S. v. Caudle*, 276.

CREDIT ON PRISON SENTENCE

Confinement awaiting trial, *S. v. Walker*, 548.

Confinement for mental evaluation prior to trial, *S. v. Walker*, 548.

CRIMINAL LAW

Appeal from interlocutory order, *S. v. Black*, 324.

Appeal, right of State to —
dismissal of prosecution for denial of speedy trial, *S. v. Horton*, 497.

Brief —
failure to send copy to attorney General, *S. v. Black*, 324.

Certiorari —
necessity for order allowing certiorari in the record on appeal, *S. v. Jackson*, 386; *S. v. Blizzard*, 395.
substitute for appeal, *S. v. Alphin*, 60.

CRIMINAL LAW — Continued

Colloquy between court and counsel, *S. v. McPherson*, 160.

Confession —
delay of preliminary hearing, *S. v. McCloud*, 132.
excessive bail, *S. v. McCloud*, 132.
necessity for findings of fact, *S. v. Dennis*, 390.
testimony that defendant had been drinking cough syrup, *S. v. Dennis*, 390.
unlawful initial arrest, *S. v. McCloud*, 132.

Consolidation of cases for trial —
discretion of court, *S. v. Haith*, 552.

Continuance —
additional time to find material witness, *S. v. Lewis*, 178.

Evidence —
knife used in robbery, *S. v. Ashford*, 320.
photograph of body of deceased after autopsy, *S. v. Curtis*, 707.
seizure under search warrant, establishment of probable cause, *S. v. Staley*, 345; *S. v. Milton*, 425.
steak knife used to stab officer, *S. v. Parker*, 191.
trousers worn by robbery victim, admissibility of, *S. v. Ashford*, 320.

Flight of defendant —
sufficiency of evidence, *S. v. Kirby*, 366.

Guilty plea —
misdemeanor credit card fraud, *S. v. Caudle*, 276.
necessity for findings of fact as to voluntariness of, *S. v. Johnson*, 53; *S. v. Fox*, 55; *S. v. Godwin*, 62; *S. v. Ray*, 129; *S. v. Rogers*, 572.

Identification of defendant —
independent origin of in-court identification from illegal pretrial

CRIMINAL LAW — Continued

identification, *S. v. Huffman*, 92.
in-court identification from photographs, *S. v. McPherson*, 160.

Impeachment of defendant —
prior conviction, *S. v. Haith*, 552.

In-custody statements, admissibility of, *S. v. Freeman*, 571.

Instructions —
charge correct at one point and incorrect at another, *S. v. Collins*, 67.
testimony considered as corroborating evidence, *S. v. Mitchell*, 49.

Jurisdiction —
motion in arrest of judgment on ground that superior court lacked, *S. v. Ray*, 129.
municipal-county court to accept guilty plea of misdemeanor credit card fraud, *S. v. Caudle*, 276.

Law of the case, *S. v. Jackson*, 386.

Photographs —
body of deceased after autopsy, *S. v. Curtis*, 707.
robbery victim's swollen arm, *S. v. Ashford*, 320.

Prior convictions —
impeachment of defendant, *S. v. Haith*, 552.

Probation —
notice and hearing on revocation of, *S. v. Young*, 393.

Reasonable doubt —
failure to define in instructions, *S. v. Brown*, 372.

Record on appeal —
argument of counsel, *S. v. Sparrow*, 107.
failure to docket on time, *S. v. Alphin*, 60; *S. v. Fulk*, 68; *S. v. Stovall*, 73; *S. v. Brown*, 372.

Sentence —
consecutive sentences, invalidity of first, *S. v. McClam*, 477.
credit for confinement awaiting trial, *S. v. Walker*, 548.
credit for confinement for mental evaluation prior to trial, *S. v. Walker*, 548.

CRIMINAL LAW — Continued

credit for time served on prior sentence, *S. v. Lewis*, 178.
increased sentence upon appeal from district court to superior court, *S. v. Sparrow*, 107; *S. v. Spencer*, 282.
probation revocation hearing, denial of continuance, *S. v. Atkinson*, 355.
remand for proper sentencing, speeding prosecution, *S. v. Zimmerman*, 522.
revocation of suspended sentence for credit card fraud, *S. v. Caudle*, 276.
statutory mitigation of crime, benefit to defendant on retrial, *S. v. McClam*, 477.

Statutes —
amended criminal statute, effect on prosecution, *S. v. Melton*, 721.

Suspended sentence —
restitution to bank for credit card fraud, *S. v. Caudle*, 276.

Witnesses —
indigent defendant's right to expert witness, *S. v. Lewis*, 178.
recall of, *S. v. Gattison*, 70.

CROSSWALK

Unmarked —
striking of pedestrian, *Carter v. Murray*, 171.

CUSTODY IN LIEU OF BOND

Credit on subsequent sentence, *S. v. Walker*, 548.

CUSTODY OF CHILDREN

See Infants this Index.

DAMAGES

Breach of lease agreement for car wash equipment, *Falco Corp. v. Hood*, 717.

Punitive damages —
malice, *Littlejohn v. Publishing Co.*, 1.

DAMAGES — Continued

recovery on theory of negligent entrustment of automobile, *Plummer v. Henry*, 84.

DANGEROUS MACHINERY

Salt spreader on municipal dump truck, *Shoffner v. Raleigh*, 468.

DEADLY WEAPON

Steak knife as deadly weapon per se, *S. v. Parker*, 191.

Unintentional firing of deadly weapon believed to be unloaded, *S. v. Currie*, 439.

DEDICATION

Sale of lots by reference to map showing streets and parks, *Land Corp. v. Styron*, 25.

DEEDS

Alteration before or after delivery, *Newell v. Edwards*, 650.

Change of grantee's name —
consent of grantor, *Newell v. Edwards*, 650.

Description —
reference to another deed, *Quadro Stations v. Gilley*, 227.

Restrictive covenants —
effect of zoning ordinance, *Building Co. v. Peacock*, 77.
fundamental changes within area, *Building Co. v. Peacock*, 77.
garden utility shed, *Builders, Inc. v. Hollar*, 14.
limited non-residential use, *Building Co. v. Peacock*, 77.
necessary parties in action to enforce, *Building Co. v. Peacock*, 77.
prior recorded deed from grantor to other grantees, *Marrone v. Long*, 451.
protecting filling station against competition, *Quadro Stations v. Gilley*, 227.

DEMURRER

Child custody proceeding —
full faith and credit, *Bonavia v. Torreso*, 21.

Judgment sustaining demurrer with leave to amend —
dismissal of amended complaint, *Tights, Inc. v. Hosiery Co.*, 369.

DEPENDENT SPOUSE

Alimony pendente lite —
ownership of $8000 in property by dependent spouse, *Peeler v. Peeler*, 456.

DESCENT AND DISTRIBUTION

Intestate succession —
life estate, widow's timely election of, *Heller v. Heller*, 120.
right of spouse to convey separate property, *Heller v. Heller*, 120.

DEVEREUX FOUNDATION

Treatment of mentally disturbed children —
hospital within meaning of major medical policy, *Burk v. Insurance Co.*, 209.

DICTIONARY

As aid in statutory construction, *S. v. Martin*, 532.

DISAGREEABLE CASE

Comment by trial court in incest prosecution, *S. v. Perkins*, 675.

DISTRIBUTORSHIP AGREEMENT

Foreign automobile parts —
counterclaim and setoff in action for goods sold and delivered, *Distributing Corp. v. Parts, Inc.*, 483.

Termination of, *Distributing Corp. v. Parts, Inc.*, 483.

DISTRICT COURT

"Judge shopping" procedures employed in divorce proceeding —
disapproved by Court of Appeals, *Johnson v. Johnson*, 310.

Verdict upon issues answered by court, *Gibson v. Jones*, 534.

Waiver of jury trial, *Kelly v. Davenport*, 670.

DIVORCE AND ALIMONY

Adultery —
evidence of act occurring after pleading was filed, *Gordon v. Gordon*, 206.

Alimony pendente lite —
appeal from award, *Peeler v. Peeler*, 456.
dependent spouse, *Peeler v. Peeler*, 456.
necessity for findings of fact, *Hatcher v. Hatcher*, 562.

Alimony without divorce —
constructive abandonment by husband's cruel treatment of wife and daughter, *Radford v. Radford*, 569.
effect of act of adultery occurring after pleading was filed, *Gordon v. Gordon*, 206.

Consent judgment —
setting aside for lack of defendant's consent, *Shore v. Shore*, 197.

Custody of children —
(see Infants this Index.)

Dependent spouse —
ownership of $8,000 in property, *Peeler v. Peeler*, 456.
separate income of wife, *Radford v. Radford*, 569.

"Judge shopping" —
in divorce action, disapproved by Court of Appeals, *Johnson v. Johnson*, 310.

Temporary alimony —
right to jury trial, *Holcomb v. Holcomb*, 329.

DRIVER'S LICENSE

Driving while suspended, basis for revocation, *Taylor v. Garrett*, 473.

DOWER AND CURTESY

Abolition by statute, *Heller v. Heller*, 120.

DRIVING UNDER THE INFLUENCE

Argument of counsel —
breathalyzer test results in other cases, *S. v. Royal*, 559.

Breathalyzer test, results —
prerequisites for admission in evidence, *S. v. Caviness*, 541.

Instructions to jury, *S. v. Newsome*, 525.

DUMP TRUCK

Injury from sale spreader on, *Shoffner v. Raleigh*, 468.

EJECTMENT

Conversion of ejectment action into processioning proceeding, *Prince v. Prince*, 638.

ELEVATOR

Pretrial identification of defendant in police elevator, *S. v. Huffman*, 92.

ENTRUSTMENT OF AUTOMOBILE

Recovery of punitive damages on theory of negligent entrustment, *Plummer v. Henry*, 84.

ESCAPE

Sentence for second escape, *S. v. Alphin*, 75.

Waiver of counsel in escape prosecution, *S. v. Rogers*, 572.

ESTOPPEL

Lease of highway signs —
estoppel to assert invalidity of

ESTOPPEL — Continued

lease for uncertainty of description, *Advertising, Inc. v. Harper*, 501.

EXCLUSIVE DISTRIBUTORSHIP AGREEMENT

Foreign automobile parts —
counterclaim and setoff in action for goods sold and delivered, *Distributing Corp. v. Parts, Inc.*, 483.

EXPERT WITNESS

Indigent defendant's right to, *S. v. Lewis*, 178.

EXPRESSION OF OPINION BY COURT

Argument by counsel as to breathalyzer test results in other cases —
comment by court as to its recollection, *S. v. Royal*, 559.

Assault with intent to commit rape prosecution —
questions by court, *S. v. Huffman*, 92.

Assumption that defendant stabbed deceased, *S. v. Ealy*, 42.

Colloquy between court and counsel, *S. v. McPherson*, 160.

Comment by court upon defendant's dissatisfaction with counsel, *S. v. Perkins*, 675.

Comment by court upon witness' statement that officer had lied, *S. v. Sparrow*, 107.

Instruction to answer question correctly, *S. v. Perkins*, 675.

Reference to disagreeable case in incest prosecution, *S. v. Perkins*, 675.

Trial court's instruction on flight of defendant, *S. v. Kirby*, 366.

EXTRADITION

Review of order entered in habeas corpus hearing that inquired into legality of extradition, *Texas v. Rhoades*, 388.

FAMILY PURPOSE DOCTRINE

Defined, *Plummer v. Henry*, 84.

FARM EQUIPMENT SALES CONTRACT

Necessary parties in action upon, *Credit Corp. v. Equipment Co.*, 29.

FILLING STATION

Restrictive covenant protecting against competition on adjoining land, *Quadro Stations v. Gilley*, 227.

FINGERPRINT CARDS

Admissibility as official police records, *S. v. Lewis*, 178.

FISH AND FISHERIES

Wildlife Resources Commission —
validity of regulation prohibiting the "snagging" of fish, *S. v. Martin*, 532.

FLIGHT OF DEFENDANT

Evidence of flight is question for jury, *S. v. Kirby*, 366.

FORECLOSURE SALE

Resulting trust —
agreement to purchase and reconvey to debtor, *Bahadur v. McLean*, 488.

FOREIGN AUTOMOBILE PARTS

Action for goods sold and delivered —
counterclaim and setoff, *Distributing Corp. v. Parts, Inc.*, 483.

FOREIGN CHILD-CUSTODY DECREE

Modification of —
full faith and credit, *In re Kluttz*, 383.

FORKLIFT

Negligence in operation of, *Conway v. Timbers*, 10.

FORKLIFT — Continued

Proof that operator was agent of corporation, *Conway v. Timbers*, 10.

FRAUDULENT CONVEYANCE

Wife's contention that husband fraudulently conveyed his separate property to his children, *Heller v. Heller*, 120.

FRAUDS, STATUTE OF

Lease of highway signs —
estoppel to assert invalidity of lease for uncertainty of description, *Advertising, Inc. v. Harper*, 501.

Option to convey land —
sufficiency of description, *Carlton v. Anderson*, 264.
sufficiency of extrinsic evidence to support description, *Sheppard v. Andrews*, 517.

Patent ambiguity —
telegram sale of BVD property, *Yaggy v. BVD Co.*, 590.

Telegram sale of BVD Company property, *Yaggy v. BVD Co.*, 590.

FULL FAITH AND CREDIT

Foreign child custody decree —
modification of, *Bonavia v. Torreso*, 21; *In re Kluttz*, 383.

GARDEN TOOL SHED

Restrictive covenants, *Builders, Inc. v. Hollar*, 14.

GAS

Action to recover on sale of tobacco curing gas, *Gas Co. v. Weeks*, 40.

Restrictive covenant protecting filling station from competition on adjoining land, *Quadro Stations v. Gilley*, 227.

GIFT CAUSA MORTIS

Gift of certificates of deposit to sister, *Atkins v. Parker*, 446.

GLEN EDEN

Rezoning to allow apartments, *Allred v. Raleigh*, 602.

GOODS SOLD AND DELIVERED

Foreign automobile parts, *Distributing Corp. v. Parts, Inc.*, 483.

GUEST PASSENGER

Contributory negligence of —
remaining in illegally parked automobile, *Tharpe v. Brewer*, 432.

GUILTY PLEA

Misdemeanor credit card fraud —
jurisdiction of municipal county court, *S. v. Caudle*, 276.

Voluntariness —
necessity for findings of fact, *S. v. Johnson*, 53; *S. v. Fox*, 55; *S. v. Godwin*, 62; *S. v. Ray*, 129.

HABEAS CORPUS

Appellate review —
certiorari, *Surratt v. State*, 398.
order in extradition hearing, *Texas v. Rhoades*, 388.

HEARSAY EVIDENCE

Admissibility of police fingerprint cards not in violation of hearsay evidence rule, *S. v. Lewis*, 178.

HIGHWAY SIGNS

Executed lease contract —
estoppel to assert invalidity, *Advertising, Inc. v. Harper*, 501.

HIGHWAYS AND CARTWAYS

Obstructing traffic by wilfully walking back and forth across public highway, *S. v. Spencer*, 282.

Road contractor, action against —
sufficiency of evidence, *Gunter v. Construction Co.*, 545.

HIPPIE HOUSE

Contributing to delinquency of minor, *S. v. Sparrow*, 107.

Interfering with officer in arrest of minor, *S. v. Sparrow*, 107.

HOG BUYING STATION

Enjoining the operation of, *Moody v. Packing Co.*, 463.

HOMICIDE

Accident or misadventure —
failure to instruct on, *S. v. Blizzard*, 395.

Accidental shooting —
exclusion of evidence that shooting was an accident, *S. v. Curtis*, 707.

Aiding and abetting, *S. v. Holloway*, 147.

Cause of death —
sufficiency of evidence in automobile manslaughter prosecution, *S. v. Locklear*, 493.

Defense of father and brother, *S. v. Holloway*, 147.

Instruction on self-defense —
apparent necessity, *S. v. Ealy*, 42.
assumption that defendant stabbed deceased, *S. v. Ealy*, 42.

Involuntary manslaughter, elements of, *S. v. Curtis*, 707.

Malice —
presumption arising from intentional use of rifle, *S. v. Holloway*, 147.
presumption where defendant testified he did not know rifle was loaded, *S. v. Currie*, 439.

Photograph of deceased after autopsy, *S. v. Curtis*, 707.

Second degree murder —
exclusion of evidence that shooting was an accident, *S. v. Curtis*, 707.
sufficiency of evidence, *S. v. Thomas*, 350.

HOSPITAL

Records —
admissibility of showing pedestrian's intoxication, *Wilder v. Edwards*, 513.

Residential treatment program for mentally disturbed children, *Burk v. Insurance Co.*, 209.

HOSPITAL EXPENSE POLICY

Major medical policy —
residential treatment program for mentally disturbed children, *Burk v. Insurance Co.*, 209.

HUSBAND AND WIFE

Agency of husband for wife —
option contract, *Sheppard v. Andrews*, 517.

Separation agreement, modification of—
allegations that wife was under sedation, *Calhoun v. Calhoun*, 509.

IDENTIFICATION OF DEFENDANT

In-court identification —
prior identification in police department elevator and by photograph, *S. v. Huffman*, 92.

Robbery prosecution —
sufficiency of evidence, *S. v. Ashford*, 320.

IMPEACHMENT OF OWN WITNESS

Contradiction of party's own witness, *Jordan v. Williams*, 33.

IMPEDING TRAFFIC

Walking back and forth across public highway, *S. v. Spencer*, 282.

IMPLIED WARRANTY OF FITNESS

Lease of car wash equipment, *Falco Corp. v. Hood*, 717.

INCEST

Evidence of other instances of intercourse with prosecutrix, *S. v. Perkins*, 675.

Expression of opinion by court —
comment upon defendant's dissatisfaction with counsel, *S. v. Perkins*, 675.
instruction to answer question correctly, *S. v. Perkins*, 675.
reference to disagreeable case, *S. v. Perkins*, 675.

INCREASED PUNISHMENT

Appeal from district court to superior court, *S. v. Sparrow*, 107; *S. v. Spencer*, 282.

INDEMNITY

Insurer's action against its agent for clerical mistake of agent's employee, *Insurance Co. v. Hylton*, 244.

INFANTS

Child support order —
denial of increased support based on material findings unsupported by evidence, *S. v. Haith*, 554.
modification of, *S. v. Haith*, 554.

Contributing to delinquency of minor, *S. v. Sparrow*, 107.

Custody proceeding —
adoption of child in another state, *Bonavia v. Torreso*, 21.
change of custody of children from father to mother, *In re Bowen*, 236.
full faith and credit, *Bonavia v. Torreso*, 21; *In re Kluttz*, 383.
modification for foreign decree, *In re Kluttz*, 383.
motion for blood grouping test of family, *Johnson v. Johnson*, 310.
physical presence in the State, *Bonavia v. Torreso*, 21.

Mentally disturbed children —
major medical policy, *Burk v. Insurance Co.*, 209.

Modification of custody order for changed circumstances, *In re Bowen*, 236.

INJUNCTIONS

Hog buying station —
enjoining operation of, *Moody v. Packing Co.*, 463.

Ordinance preventing Sunday sale of mobile homes, *Mobile Home Sales v Tomlinson*, 289.

INSURANCE

Automobile liability insurance —
determination of coverage under non-owner's liability policy, *Insurance Co. v. Hayes*, 294.
premium notice sent by insurer is not offer to renew, *Insurance Co. v. Davis*, 152.

Collision insurance —
default judgment against agent for failure to name finance company as loss payee, *Credit Co. v. Insurance Co.*, 663.

Coverage under uninsured motorist clause, *Lichtenberger v. Insurance Co.*, 269.

Hospital expense policy —
residential treatment program for mentally disturbed children, *Burk v. Insurance Co.*, 209.

Indemnity —
insurer's action against its agent for clerical mistake of agent's employee, *Insurance Co. v. Hylton*, 244.

Reformation of policy —
clerical mistake of agent, *Insurance Co. v. Hylton*, 244.

Setting aside default judgment by finance company against insurance agent, *Credit Co. v. Insurance Co.*, 663.

INTERFERING WITH OFFICER

Arrest of juvenile, *S. v. Sparrow*, 107.

INTESTATE SUCCESSION

Life estate, widow's timely election of, *Heller v. Heller*, 120.

Right of spouse to convey separate property, *Heller v. Heller*, 120.

INTOXICATING LIQUOR

Beer permit —
sufficiency of evidence to support denial of, *Waggoner v. Board of Alcoholic Control*, 692.

Driving under the influence —
breathalyzer test results, admission in evidence, *S. v. Caviness*, 541.
instructions to jury, *S. v. Newsome*, 525.

Prosecution for possession and sale of non-taxpaid whiskey, *S. v. Collins*, 67.

INVITEE

Liability of drugstore to customer slipping on rug, *Farmer v. Drug Corp.*, 538.

JUDGMENTS

Consent judgment —
lack of defendant's consent, *Shore v. Shore*, 197.

Default judgment —
authority to set aside, *Steed v. Cranford*, 378.
failure of complaint to state cause of action against agent, *Credit Co. v. Insurance Co.*, 663.
motion in the cause for failure to serve process, *Auto Co. v. McLain*, 567.

Res judicata —
denial of tort claim against State Highway Commission, *Mason v. Highway Comm.*, 644.
referee's report as basis for judgment, *Barringer v. Weathington*, 126.

Setting aside judgment —
conduct of attorney justifying relief, *Epps v. Miller*, 656.

"JUDGE SHOPPING"

In divorce action in district court disapproved by Court of Appeals, *Johnson v. Johnson*, 316.

JURY

Racial discrimination —
opportunity to offer evidence, *S. v. Spencer*, 282.

JURY — Continued

Unanimous verdict —
comment by juror, *Sheppard v. Andrews*, 517.

Waiver of jury trial in district court, *Kelly v. Davenport*, 670.

JUSTICE OF THE PEACE

Abolishment of office of, *In re Robertson*, 186.

Contract to collect physician's accounts, *In re Robertson*, 186.

Delivery of records to clerk of court, *In re Robertson*, 186.

JUVENILE COURTS

Statute defining jurisdiction —
constitutionality, *S. v. Sparrow*, 107.

JUVENILE SUMMONS

Interference with officer in service of, *S. v. Sparrow*, 107.

LABORERS' AND MATERIALMEN'S LIENS

Action against owner —
failure of general contractor to notify owner of claim, *Supply Co. v. Motor Lodge*, 701.

Construction of residence —
failure to show express contract, *Leffew v. Orrell*, 333.

Entirety property —
contract with deceased husband, *Leffew v. Orrell*, 333.

Motel construction —
claim against owner, *Supply Co. v. Motor Lodge*, 701.
laborers' and materialmen's liens, action against owner, *Supply Co. v. Motor Lodge*, 701.

LANDFILL

Diversion of water onto neighboring lands, determination of damages, *Bradley v. Texaco, Inc.*, 300.

LANDLORD AND TENANT

Car wash equipment, lease of —
implied warranty of fitness, *Falco Corp. v. Hood*, 717.

Constructive eviction —
action on ground that premises were unfit for habitation, *Thompson v. Shoemaker*, 687.

Duty to make repairs —
lessor's duty under common law, *Thompson v. Shoemaker*, 687.

Lease of highway signs —
estoppel to assert invalidity of lease for uncertainty of description, *Advertising, Inc. v. Harper*, 501.

Recovery of rents paid, tenants' action for, *Thompson v. Shoemaker*, 687.

LENOIR COUNTY

Applicability of livestock law, *Sutton v. Duke*, 100.

LIBEL AND SLANDER

Newspaper article —
adultery of plaintiff wife, *Littlejohn v. Publishing Co.*, 1.

Punitive damages —
malice, *Littlejohn v. Piedmont Publishing Co.*, 1.

LINE-UP IDENTIFICATION

Independent origin of in-court identification, *S. v. Huffman*, 92; *S. v. McPherson*, 160.

LOSS PAYEE

Collision insurance policy —
failure to name finance company as loss payee, *Credit Co. v. Insurance Co.*, 663.

MAGISTRATE

Probable cause —
issuance of search warrant for narcotics, *S. v. Staley*, 345; *S. v. Milton*, 425.

MALICIOUS DESTRUCTION OF PROPERTY

Cutting automobile tires —
testimony that mark on knife smelled like rubber, *S. v. Locklear*, 375.

MANSLAUGHTER

See Homicide this Index.

MARIJUANA

Confidential informer —
sufficiency of officer's affidavit, *S. v. Staley*, 345; *S. v. Milton*, 425.

MEDICAL RECORDS

Microfilming —
suit against State officials, *Microfilm Corp. v. Turner*, 258.

MENTAL CAPACITY TO MAKE WILL

Caveat proceeding —
legal effect of codicil, *In re Farr*, 250.

MENTAL EVALUATION

Confinement for —
credit on prison sentence, *S. v. Walker*, 548.

MENTALLY DISTURBED CHILDREN

Residential treatment program —
hospital within meaning of major medical policy, *Burk v. Insurance Co.*, 209.

MICROFILMING MEDICAL RECORDS

Suit against State officials —
sovereign immunity, *Microfilm Corp. v. Turner*, 258.

MINIMUM CONTACTS

Foreign corporation —
service of process on Secretary of

MINIMUM CONTRACTS — Continued

State, *Crabtree v. Coats & Burchard Co.*, 624.

MINORS

Contributing to delinquency of, *S. v. Sparrow*, 107.

MIRANDA WARNINGS

Admissibility of confession, *S. v. McCloud*, 132.

MISTRIAL

Armed robbery prosecution —
rifle brought into courtroom before jury selection, *S. v. Williams*, 51.

MOBILE HOMES

Ordinance preventing Sunday sale of, *Mobile Home Sales v. Tomlinson*, 289.

Parking in violation of zoning ordinance, *S. v. Martin*, 18.

MORTGAGES AND DEEDS OF TRUST

Resulting trusts —
parol agreement to purchase at foreclosure sale and reconvey to debtor, *Bahadur v. McLean*, 488.

MOTOR CARRIER CERTIFICATE

Application for transfer of, *Utilities Comm. v. Petroleum Carriers*, 408.

MUNICIPAL CORPORATIONS

Comprehensive zoning plan —
spot zoning, *Allred v. Raleigh*, 602.

Salt spreader on dump truck —
injury from, *Shoffner v. Raleigh*, 468.

Zoning —
parking of mobile home in violation of ordinance, *S. v. Martin*, 18.

rezoning to allow apartment buildings, *Allred v. Raleigh*, 602.

MURDER

See Homicide this Index.

NARCOTICS

Search warrant for —
sufficiency of officer's affidavit, *S. v. Staley*, 345; *S. v. Milton*, 425.

NECESSARY EXPENSE

County School Capital Reserve Fund, creation by county commissioners, *Yoder v. Board of Commissioners*, 712.

NEGLIGENCE

Dangerous machinery —
degree of care, *Shoffner v. Raleigh*, 468.

Foreseeability —
injury to motorist in permitting pony to run at large, *Sutton v. Duke*, 100.

Imputation of to owner-occupant of automobile, *Etheridge v. R. R. Co.*, 140.

Inapplicability of res ipsa loquitur where invitee slipped on rug in drug store, *Farmer v. Drug Corp.*, 538.

Indemnity —
insurer's action against its agent for clerical mistake of agent's employee, *Insurance Co. v. Hylton*, 244.

Liability of drugstore to customer slipping on rug, *Farmer v. Drug Corp.*, 538.

Parking automobile without securing its position by use of brake and transmission, *Tuttle v. Beck*, 337.

NEWSPAPER ARTICLE

Libel action —
adultery of plaintiff wife, *Littlejohn v. Publishing Co.*, 1.

NON-RESIDENT DEFENDANT

Service of process —
action on contract made in this

NON-RESIDENT DEFENDANT — Continued

State, *Goldman v. Parkland*, 400.
contract substantially performed in this state, *Crabtree v. Coats and Burchard Co.*, 624.

NON-TAXPAID WHISKEY

Prosecution for possession and sale, *S. v. Collins*, 67.

NUISANCE

Hog buying station —
enjoining operation of, *Moody v. Packing Co.*, 463.

OBSTRUCTING OFFICER

Arrest of juvenile, *S. v. Sparrow*, 107.

OBSTRUCTING TRAFFIC

Walking back and forth across public highway, *S. v. Spencer*, 282.

ON-PREMISES BEER PERMIT

Denial of by ABC Board, sufficiency of evidence, *Waggoner v. Board of Alcoholic Control*, 692.

OPTION CONTRACT

Breach by husband and wife —
failure to show tender of payment to wife, *Sheppard v. Andrews*, 517.
Description of land —
sufficiency of description, *Carlton v. Anderson*, 264.
sufficiency of extrinsic evidence, *Sheppard v. Andrews*, 517.
Parol trust —
agreement to give debtor option to repurchase, *Bahadur v. McLean*, 488.
Unanimous verdict —
comment by juror, *Sheppard v. Andrews*, 517.

PARENT HOLDING COMPANY

Determination of rates for telephone company, *Utilities Comm. v. Morgan*, 576.
Inquiry by Utilities Commission into transactions between telephone company and its affiliated supply company, *Utilities Comm. v. Morgan*, 576.

PARK

Dedication of, *Land Corp. v. Styron*, 25.

PAROL TRUST

Agreement to purchase at foreclosure sale and reconvey to debtor, *Bahadur v. McLean*, 488.

PARTIES

Necessary parties —
action on farm equipment note, *Credit Corp. v. Equipment Co.*, 29.
action to determine sufficiency of a deed, *Land Corp. v. Styron*, 25
action to enforce restrictive covenants, *Building Co. v. Peacock*, 77.
Sureties as parties of record in claim and delivery proceeding, *Epps v. Miller*, 656.

PATENT AMBIGUITY

Writing required by statute of frauds —
signature by agent, *Yaggy v. BVD Co.*, 590.

PATERNITY

Husband's motion for blood grouping test of family to determine paternity of children, *Johnson v. Johnson*, 310.

PAYMENT

Affirmative defense in action on promissory note, *Gibson v. Jones*, 534.
Delivery of check —
laborers' and materialmen's liens, *Supply Co. v. Motor Lodge*, 701.

PEDESTRIAN

Contributory negligence of —
accident case, *Basden v. Sutton*, 6.
standing in front of stalled automobile, *Gregory v. Adkins*, 305.
unmarked crosswalk, *Carter v. Murray*, 171.

Intoxication of —
admissibility of hospital records, *Wilder v. Edwards*, 513.

Unmarked crosswalk —
failure of motorist to yield right of way, sufficiency of evidence, *Carter v. Murray*, 171.

PENSIONS

Widow's right in pension plan of deceased husband, *Tobacco Group Ltd. v. Trust Co.*, 202.

PHOTOGRAPHS

Body of deceased after autopsy, *S. v. Curtis*, 707.

Identification of defendant —
independent origin of in-court identification, *S. v. Huffman*, 92; *S. v. McPherson*, 160.

Robbery victim's swollen arm, *S. v. Ashford*, 320.

Store premises —
robbery prosecution, *S. v. Brown*, 372

PLEAS IN BAR

Settlement —
ratification by pleading, *White v. Perry*, 36.

POLICE OFFICER

Entry into private home, legality of, *S. v. Sparrow*, 107.

Interfering with arrest of juvenile, *S. v. Sparrow*, 107.

Stabbing of police officer with steak knife, *S. v. Parker*, 191.

PONY

Liability in allowing pony to escape from enclosure causing subsequent injury to motorist, *Sutton v. Duke*, 100.

PRELIMINARY HEARING

Delay of —
effect on admissibility of confession, *S. v. McCloud*, 132.

PRINCIPAL AND AGENT

Proof that operator of forklift was agent of corporation, *Conway v. Timbers*, 10.

PRIOR OFFENSES

Cross examination of defendant, *S. v. McCloud*, 132.

PRIVILEGED COMMUNICATION

Admissibility of hospital records showing pedestrian's intoxication, *Wilder v. Edwards*, 513.

PROBABLE CAUSE

Search warrant for narcotics, issuance by magistrate, *S. v. Staley*, 345; *S. v. Milton*, 425.

PROBATION REVOCATION HEARING

Counsel, right to —
denial of continuance, *S. v. Atkinson*, 355.
time to prepare defense, *S. v. Atkinson*, 355.

Notice of revocation and hearing, *S. v. Young*, 393.

PROCESS

Service as jurisdictional requirement, *Auto Co. v. McLain*, 567.

Service on foreign corporation —
service on Secretary of State, *Goldman v. Parkland*, 400; *Crabtree v. Coats & Burchard Co.*, 624.

PROCESSIONING PROCEEDING

Determination of true boundary lines, burden of proof, *Prince v. Prince*, 638.

PROMISSORY NOTES

Denial of demurrer for misjoinder of causes where complaint complies with new civil procedure rules, *Wickes Corp. v. Hodge*, 529.

Payment as affirmative defense, *Gibson v. Jones*, 534.

Proof of corporate existence —
notes naming plaintiff as corporation, *Wickes Corp. v. Hodge*, 529.

PUBLIC CONVENIENCE AND NECESSITY

Transfer of asphalt motor carrier certificate, *Utilities Comm. v. Petroleum Carriers*, 408.

PUNISHMENT

See Sentence this Index.

PUNITIVE DAMAGES

Libel action, *Littlejohn v. Publishing Co.*, 1.

Negligent entrustment of automobile, *Plummer v. Henry*, 84.

PUPIL ASSIGNMENT PLAN

Challenge to —
statutory procedure, *Fries v. Board of Education*, 341.

QUANTUM MERUIT

Automobile transmission installation, *Roberts v. Herring*, 65.

RALEIGH BLUE LAW

Prevention of Sunday sale of mobile homes —
constitutionality, *Mobile Home Sales v. Tomlinson*, 289.

RAPE

Assault with intent to commit rape —
age of defendant in indictment, *S. v. Johnson*, 574.

RAPE — Continued

questions by court, *S. v. Huffman*, 92.

Instructions —
misstatement of State's contentions, *S. v. Bradshaw*, 97.

RATIFICATION OF INSURANCE SETTLEMENT

Pleading settlement as bar to counterclaim, *White v. Perry*, 36.

REASONABLE DOUBT

Failure to define in instructions, *S. v. Brown*, 372.

RECORD ON APPEAL

Argument of counsel, *S. v. Sparrow*, 107.

Cases consolidated for appeal, *Shore v. Shore*, 197; *S. v. Haith*, 552.

Failure to docket in apt time, *In re Custody of Maxwell*, 59; *S. v. Alphin*, 60; *S. v. Fulk*, 68; *Umphlett v. Bush*, 72; *S. v. Stovall*, 73; *S. v. Brown*, 372.

Necessity for order allowing certiorari, *S. v. Jackson*, 386; *S. v. Blizzard*, 395.

REFORMATION OF INSURANCE POLICY

Defense in insurer's action against agent for clerical mistake, *Insurance Co. v. Hylton*, 244.

REMAINDERMEN

Petition for accounting by life tenant of devised property, *Elliott v. Ballentine*, 682.

RES IPSA LOQUITUR

Driver's negligence —
vehicle leaving road without apparent reason, *Cherry v. Smallwood*, 56.

Storeowner's negligence —
inapplicability of res ipsa loquitur

RES IPSA LOQUITUR—Continued

to invitee slipping on rug in drugstore, *Farmer v. Drug Corp.*, 538.

RES JUDICATA

Judgment based upon referee's report, *Barringer v. Weathington*, 126.

Tort claim against Highway Commission —
denial of claim naming different highway employee, *Mason v. Highway Comm.*, 644.

RESTRAINT OF TRADE

Notice of restrictive covenant, *Quadro Stations v. Gilley*, 227.

RESTRICTIVE COVENANTS

Covenant protecting filling station against competition, validity of, *Quadro Stations v. Gilley*, 227.

Fundamental changes within area, *Building Co. v. Peacock*, 77.

Necessary parties in action to enforce, *Building Co. v. Peacock*, 77.

Residential use —
garden tool shed, *Builders, Inc. v. Hollar*, 14.
limited non-residential use, *Building Co. v. Peacock*, 77.

Subdivision lots —
prior recorded deed from grantor to other grantees, *Marrone v. Long*, 451.

Zoning ordinance —
effect of, *Building Co. v. Peacock*, 77.

RESULTING TRUSTS

Agreement to purchase at foreclosure sale and reconvey to debtor, *Bahadur v. McLean*, 488.

RIFLE

Armed robbery prosecution —
rifle brought into courtroom before jury selection, *S. v. Williams*, 51.

RIFLE WOUNDS

Homicide prosecution arising out of use of rifle, *S. v. Thomas*, 350.

ROAD CONTRACTOR

Damage to plaintiff's truck, action against road contractor, *Gunter v. Construction Co.*, 545.

ROBBERY

Identification of defendant —
sufficiency of evidence, *S. v. Ashford*, 320.

Knife used in robbery —
admissibility, *S. v. Ashford*, 320.

Photographs —
condition of store premises, *S. v. Brown*, 372.
victim's swollen arm, *S. v. Ashford*, 320.

RUG

Liability of drug store to customer slipping on, *Farmer v. Drug Corp.*, 538.

SALES

Breach of warranty in sale of house —
sufficiency of evidence, *Kelly v. Davenport*, 670.

SALES COMMISSION

Action against realty corporation —
variance between allegations and proof, *Realty Co. v. Hoots*, 362.

SALT SPREADER ON MUNICIPAL TRUCK

Action for personal injury, *Shoffner v. Raleigh*, 468.

SCHOOL CAPITAL RESERVE FUND

Validity of statute authorizing the creation of, *Yoder v. Board of Commissioners*, 712.

SCHOOLS

Pupil assignment plan, challenge to, *Fries v. Board of Education*, 341.

Validity of statute authorizing School Capital Reserve Fund, *Yoder v. Board of Commissioners*, 712.

SEARCHES AND SEIZURES

Affidavit for search warrant —
sufficiency of, *S. v. Staley*, 345; *S. v. Milton*, 425.

Burglary tools found in automobile —
search without warrant, *S. v. McCloud*, 132.

Confidential informer, *S. v. Staley*, 345.

Evidence obtained under search warrant —
establishment of probable cause, *S. v. Staley*, 345; *S. v. Milton*, 425.

Narcotics —
sufficiency of officer's affidavit, *S. v. Staley*, 345; *S. v. Milton*, 426.

SECRETARY OF STATE

Agent for service of process on foreign corporation, *Crabtree v. Coats & Burchard*, 624.

SEDATION

Allegations that wife was under —
modification of separation agreement, *Calhoun v. Calhoun*, 509.

SELF-DEFENSE

Instructions —
apparent necessity, *S. v. Ealy*, 42.
assumption that defendant stabbed deceased, *S. v. Ealy*, 42.

SENTENCE

Consecutive sentences —
invalidity of first, *S. v. McClam*, 477.

Credit on prison sentence —
confinement awaiting trial, *S. v. Walker*, 548.
confinement for mental evaluation prior to trial, *S. v. Walker*, 548.

SENTENCE — Continued

Increased sentence on appeal from district court to superior court, *S. v. Sparrow*, 107; *S. v. Spencer*, 282.

Remand for proper sentencing, speeding prosecution, *S. v. Zimmerman*, 522.

Second escape, *S. v. Alphin*, 75.

Suspension of sentence —
misdemeanor credit card fraud, restitution to bank, *S. v. Caudle*, 276.

SEPARATION AGREEMENT

Effect on widow's right in husband's pension plan, *Tobacco Group Ltd. v. Trust Co.*, 202.

Inclusion as an appendix to brief, *Calhoun v. Calhoun*, 509.

Modification of —
allegation that wife was under sedation, *Calhoun v. Calhoun*, 509.

SEQUESTRATION OF WITNESSES

Discretion of court, *S. v. Sparrow*, 107.

SERIOUS INJURY

Evidence that prosecuting witness was shot in the wrist, *S. v. Shankle*, 564.

Stabbing of police officer with steak knife, *S. v. Parker*, 191.

SETOFF

Inventory of foreign automobile parts —
action for goods sold and delivered, *Distributing Corp. v. Parts, Inc.*, 483.

SIGNATURE

Printed name in telegram, *Yaggy v. BVD Co.*, 590.

"SNAGGING FISH"

Validity of regulation prohibiting, *S. v. Martin*, 532.

SNOW

Salt spreader on municipal truck —
injury from, *Shoffner v. Raleigh*, 468.

SOLICITOR

Recording of jury argument, *S. v. Sparrow*, 107.

SOVEREIGN IMMUNITY

Suit against State officials —
microfilming of medical records, *Microfilm Corp. v. Turner*, 258.

SPECIFIC PERFORMANCE

Contract to convey land —
necessary parties to determine applicability of restrictive covenants, *Building Co. v. Peacock*, 77.

SPEEDING PROSECUTION

Sufficiency of evidence —
remand for proper sentence, *S. v. Zimmerman*, 522.

SPEEDY TRIAL

Delay of 3½ months between arrest and trial, *S. v. McCloud*, 132.

Dismissal of prosecution for denial of —
right of State to appeal, *S. v. Horton*, 497.

SPOT ZONING

Raleigh zoning ordinance, *Allred v. Raleigh*, 602.

STATE

Appeal, right to —
dismissal of prosecution for denial of a speedy trial, *S. v. Horton*, 497.

Sovereign immunity —
suit against State officials involving contract for microfilming medical records, *Microfilm Corp. v. Turner*, 258.

STATE HIGHWAY COMMISSION

Res judicata —
denial of claim naming different Highway employee, *Mason v. Highway Comm.*, 644.

STATE HOSPITAL

Microfilming of medical records —
suit against State officials, *Microfilm Corp. v. Turner*, 258.

STATUTES

Criminal statutes —
construction of, *S. v. Spencer*, 282.
effect of amended breaking and entering statute in prosecution, *S. v. Melton*, 721.

Dictionary, as aid to statutory construction, *S. v. Martin*, 532.

STEAK KNIFE

Deadly weapon per se, *S. v. Parker*, 191.

STOCKHOLDERS OF CORPORATION

Wrongful appropriation of corporate assets to own use, *Underwood v. Stafford*, 220.

SUBDIVISION

Dedication of streets and parks in, *Land Corp. v. Styron*, 25.

Fundamental changes within area —
necessary parties, *Building Co. v. Peacock*, 77.

Restrictive covenants —
enforcement by owners, *Building Co. v. Peacock*, 77.
prior recorded deed from grantor to other grantees, *Marrone v. Long*, 451.

SUDDEN EMERGENCY

Avoiding automobile parked with bright lights facing oncoming traffic, *Tharpe v. Brewer*, 432.

SUNDAY OBSERVANCE ORDINANCE

Prevention of mobile home sales — constitutionality, *Mobile Home Sales v. Tomlinson*, 289.

SUPERIOR COURT

Beer permit — authority to order ABC Board to issue beer permit, *Waggoner v. Board of Alcoholic Control*, 692.

Ruling of judge on demurrer to amended pleadings, *White v. Perry*, 36.

SUPREME COURT

Exclusive authority to make rules for the appellate division, *S. v. Black*, 324.

SURFACE WATERS

Diversion of surface waters onto neighboring land, *Bradley v. Texaco, Inc.*, 300.

TAXATION

School Capital Reserve Fund — necessary expense not requiring vote of the people, *Yoder v. Board of Commissioners*, 712.

TELEGRAM

Sale of BVD Company property — printed name as signature, *Yaggy v. BVD Co.*, 590.

TELEPHONE RATES

Consideration of transactions between utility and affiliated supply company, *Utilities Comm. v. Morgan*, 576.

Determination of rates, *Utilities Comm. v. Morgan*, 576.

Substandard services by utility, *Utilities Comm. v. Morgan*, 576.

Value of plant and services, *Utilities Comm. v. Morgan*, 576.

TENDER OF PAYMENT

Breach of option contract by husband and wife — failure to show tender of payment to wife, *Sheppard v. Andrews*, 517.

TIRES

Malicious destruction of — testimony that mark on knife smelled like rubber, *S. v. Locklear*, 375.

TOBACCO

Contributory negligence of pedestrian in removing tobacco from highway, *Basden v. Sutton*, 6.

TOBACCO CURING GAS

Action to recover on sale of, *Gas Co. v. Weeks*, 40.

TORT CLAIMS ACT

Amendment of affidavit — naming wrong State employee, *Mason v. Highway Comm.*, 644.

Res judicata — denial of claim naming different State employee, *Mason v. Highway Comm.*, 644.

TRAFFIC

Impeding traffic by walking back and forth across public highway, *S. v. Spencer*, 282.

TRIAL

Trial by court without jury — necessity for separate findings and conclusions, *Gibson v. Jones*, 534.

Waiver of jury trial — procedure in district court, *Kelly v. Davenport*, 670.

Wife's right to jury trial on issue of temporary alimony, *Holcomb v. Holcomb*, 329.

TRUSTS

Parol trust —
agreement to purchase at foreclosure sale and reconvey to debtor, *Bahadur v. McLean*, 488.

UNANIMOUS VERDICT

Action for breach of contract —
comment by juror, *Sheppard v. Andrews*, 517.

UNINSURED MOTORIST CLAUSE

Determination of coverage in automobile policy, *Lichtenberger v. Insurance Co.*, 269.

USURY

Defense of in action on corporate demand note, *Bank v. Printing Co.*, 359.

UTILITIES COMMISSION

Determination of rate increase for telephone company —
consideration of transactions between utility and affiliated supply company, *Utilities Comm. v. Morgan*, 576.
substandard service by utility, *Utilities Comm. v. Morgan*, 576.
value of plant and services, *Utilities Comm. v. Morgan*, 576.
Transfer of asphalt motor carrier certificate, *Utilities Comm. v. Petroleum Carriers*, 408.

UTILITY SHED

Restrictive covenants, *Builders, Inc. v. Hollar*, 14.

U-TURN

Negligence in making, *Jordan v. Williams*, 33.

VENDOR AND PURCHASER

Option contract —
time is of essence, *Sheppard v. Andrews*, 517.

VERDICT

Acceptance by court —
comment by juror, *Sheppard v. Andrews*, 517.
Upon issues answered by district court, *Gibson v. Jones*, 534.

VOIR DIRE HEARING

In-court identification of defendant —
legality of pretrial lineup, *S. v. Huffman*, 92.

WALKING BACK AND FORTH ON HIGHWAY

Wilfully impeding traffic, *S. v. Spencer*, 282.

WARRANTY

Action on breach of in sale of house, *Kelly v. Davenport*, 670.
Car washing equipment —
implied warranty of fitness, *Falco Corp. v. Hood*, 717.

WATERS AND WATERCOURSES

Diversion of water onto neighboring lands, evidence of permanent damages, *Bradley v. Texaco, Inc.*, 300.

WIDOW

Widow's right in deceased husband's pension plan, *Tobacco Group Ltd. v. Trust Co.*, 202.

WILDLIFE RESOURCES COMMISSION

Validity of regulation prohibiting "snagging" fish, *S. v. Martin*, 532.

WILLS

Accounting —
devised property, petition by remaindermen for, *Elliott v. Ballentine*, 682.
Caveat proceeding —
instruction on legal effect of codicil, *In re Farr*, 250.

WILLS — Continued

Holographic will —
effect of typewritten words, *In re Spinks*, 417.

Mental capacity —
legal effect of codicil, *In re Farr*, 250.

Probate jurisdiction of clerk —
direct or collateral attack, *In re Davis*, 697.
failure to make findings as to domicile of deceased, *In re Davis*, 697.

Probate of holographic will, motion to vacate, *In re Spinks*, 417.

WITNESSES

Contradiction of party's own witness, *Jordan v. Williams*, 33.

Expert witness —
indigent defendant's right to, *S. v. Lewis*, 178.

Impeachment of party's own witness, *Jordan v. Williams*, 33.

Recall of in criminal case, *S. v. Gattison*, 70.

WITNESSES — Continued

Sequestration —
discretion of court, *S. v. Sparrow*, 107.

WORTHLESS CHECK

Mitigation of sentence in prosecution for, *S. v. McClam*, 477.

ZONING

Comprehensive plan —
spot zoning, *Allred v. Raleigh*, 602.

Mobile homes —
parking in violation of zoning ordinance, *S. v. Martin*, 18.

Restrictive covenants —
effect on, *Building Co. v. Peacock*, 77.

Rezoning to allow apartment buildings, *Allred v. Raleigh*, 602.

Spot zoning —
Raleigh zoning ordinance, *Allred v. Raleigh*, 602.