NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 9

SPRING SESSION 1970

FALL SESSION 1970

RALEIGH

1971

CITE THIS VOLUME

9 N.C.App.

TABLE OF CONTENTS

THE COURT OF APPEALS
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NORTH CAROLINA

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*Sworn in office 7 December 1970.

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CASES REPORTED

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-45	*Saddle Club v. Gibson*, 565.
1-52(9)	*Cooper v. Floyd*, 645.
1-76	*Wise v. Isenhour*, 237.
1-76(1)	*Wise v. Isenhour*, 237.
1-98.2	*Robbins v. Bowman*, 416.
1-98.4	*Robbins v. Bowman*, 416.
1-121	*Robbins v. Bowman*, 416.
1-222(2)	*Hoover v. Hoover*, 310.
1-180	*Voorhees v. Guthrie*, 266.
	State v. Wood, 706.
	State v. McKinnon, 724.
1-183	*Anderson v. Mann*, 397.
1-271	*Trust Co. v. Morgan, Attorney General*, 460.
1-282	*State v. Lewis*, 323.
1-401	*In re Johnson*, 102.
1-440.10	*Palmer v. Development Corp.*, 668.
1-440.36(c)	*Palmer v. Development Corp.*, 668.
1-593	*Robbins v. Bowman*, 416.
1A-1	See Rules of Civil Procedure, *infra*
1B-4	*Wheeler v. Denton*, 167.
2-1	*In re Green*, 326.
6-21.1	*Piping, Inc. v. Indemnity Co.*, 561.
7-21.2(2)	*Binning's, Inc. v. Construction Co.*, 569.
6-21.2(3)	*Binning's, Inc. v. Construction Co.*, 569.
6-21.2(5)	*Binning's, Inc. v. Construction Co.*, 569.
7A-23(c)	*Trust Co. v. Morgan, Attorney General*, 460.
7A-196	*Thermo-Industries v. Construction Co.*, 55.
	Tractor & Implement Co. v. Lee, 524.
7A-241	*In re Green*, 326.
7A-258	*Hodge v. Hodge*, 601.
	In re Custody of Hopper, 730.
7A-259	*Hodge v. Hodge*, 601.
	In re Custody of Hopper, 730.
7A-278(5)	*In re Martin*, 576.
7A-285	*In re Garcia*, 691.
7A-286(4)(c)	*In re Eldridge*, 723.
7A-289	*In re Martin*, 576.
7A-451	*State v. Hickman*, 592.
8-35	*State v. Teasley*, 477.
14-32(a)	*State v. Hearns*, 42.
14-32(b)	*State v. Hearns*, 42.
14-34.1	*State v. Tripp*, 518.
14-54	*State v. Cleary*, 189.
14-70	*State v. Benfield*, 657.
14-72	*State v. Cleary*, 189.
14-72(b)	*State v. Cleary*, 189.
14-72(b)(1)	*State v. Benfield*, 657.
14-184	*State v. Robinson*, 433.
14-203	*State v. Bethea*, 544.
14-204(7)	*State v. Bethea*, 544.
14-255	*State v. Ledford*, 245.
Ch. 14, Art. 36A	*State v. Dobbins*, 452.

RULES OF CIVIL PROCEDURE

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

RULES OF PRACTICE CONSTRUED

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

SUPPLEMENTING CUMULATIVE TABLE REPORTED IN 8 N.C. APP.

Case	*Reported*	*Disposition in Supreme Court*
Airport Authority v. Stewart	9 N.C. App. 505	Allowed, 277 N.C. 458
Anderson v. Mann	9 N.C. App. 397	Denied, 277 N.C. 351
Cagle v. Robert Hall Clothes	9 N.C. App. 243	Denied, 277 N.C. 251
Clott v. Greyhound Lines	9 N.C. App. 604	Allowed, 277 N.C. 458
Dixon v. Shelton	9 N.C. App. 392	Denied, 277 N.C. 351
Enterprises, Inc. v. Stevens	9 N.C. App. 228	Denied, 277 N.C. 251
Gibson v. Montford	9 N.C. App. 251	Denied, 277 N.C. 251
Gray v. Clark	9 N.C. App. 319	Denied, 277 N.C. 351
Hodges v. Wellons	9 N.C. App. 152	Denied, 277 N.C. 251
Horton v. Insurance Co.	9 N.C. App. 140	Denied, 277 N.C. 251
Jernigan v. Lee	9 N.C. App. 582	Allowed, 277 N.C. 458
Jernigan v. R. R. Co.	9 N.C. App. 186	Denied, 277 N.C. 252
Kale v. Forrest	9 N.C. App. 82	Allowed, 277 N.C. 252
King v. Lee	9 N.C. App. 369	Allowed, 277 N.C. 351
Link v. Link	9 N.C. App. 135	Allowed, 277 N.C. 252
Milling Co., Inc. v. Sutton	9 N.C. App. 181	Denied, 277 N.C. 252
Oliver v. Ernul	9 N.C. App. 221	Allowed, 277 N.C. 252
Panhorst v. Panhorst	9 N.C. App. 258	Allowed, 277 N.C. 252
Partin v. City of Raleigh	9 N.C. App. 269	Denied, 277 N.C. 253
Perry v. Suggs	9 N.C. App. 128	Denied, 277 N.C. 253
Poultry Industries v. Clayton, Comr. of Revenue	9 N.C. App. 345	Denied, 277 N.C. 351
Priddy v. Cab Co.	9 N.C. App. 291	Denied, 277 N.C. 351
Public Service Co. v. Kiser	9 N.C. App. 202	Denied, 277 N.C. 253
Robbins v. Bowman	9 N.C. App. 416	Denied, 277 N.C. 352
Robbins v. Bowman	9 N.C. App. 420	Denied, 277 N.C. 352
Rooks v. Cement Co.	9 N.C. App. 57	Denied, 277 N.C. 112
Samons v. Meymandi	9 N.C. App. 490	Denied, 277 N.C. 458
Smith v. Foust	9 N.C. App. 264	Denied, 277 N.C. 253
State v. Benfield	9 N.C. App. 657	Allowed, 277 N.C. 458
State v. Blalock	9 N.C. App. 94	Denied, 277 N.C. 113
State v. Cleary	9 N.C. App. 189	Denied, 277 N.C. 253
State v. Elliott	9 N.C. App. 1	Denied, 277 N.C. 114
State v. Grant	9 N.C. App. 704	Denied, 277 N.C. 726
State v. Hill	9 N.C. App. 279	Allowed, 277 N.C. 253
State v. Hill	9 N.C. App. 410	Denied, 277 N.C. 352
State v. Lyles	9 N.C. App. 448	Denied, 277 N.C. 352
State v. McGilvery	9 N.C. App. 15	Denied, 277 N.C. 116

Case	*Reported*	*Disposition in Supreme Court*
State v. Moore	9 N.C. App. 699	Denied, 277 N.C. 726
State v. Morgan	9 N.C. App. 624	Dismissed, 277 N.C. 458
State v. Owens	9 N.C. App. 727	Denied, 277 N.C. 459
State v. Preston	9 N.C. App. 71	Denied, 277 N.C. 116
State v. Reaves	9 N.C. App. 315	Denied, 277 N.C. 352
State v. Teasley	9 N.C. App. 477	Denied, 277 N.C. 459
State v. Ward	9 N.C. App. 684	Denied, 277 N.C. 459
State v. Wingard	9 N.C. App. 719	Dismissed, 277 N.C. 459
State v. Wood	9 N.C. App. 706	Denied, 277 N.C. 459
Stewart v. Check Corp.	9 N.C. App. 172	Allowed, 277 N. C.254
Taylor v. Wright	9 N.C. App. 267	Denied, 277 N.C. 254
Wise v. Isenhour	9 N.C. App. 237	Denied, 277 N.C. 254
Wrenn v. Waters	9 N.C. App. 39	Allowed, 277 N.C. 117

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

SUPPLEMENTING CUMULATIVE TABLE REPORTED IN 8 N.C. APP.

Case	*Reported*	*Disposition on Appeal*
Allred v. City of Raleigh	7 N.C. App. 602	277 N.C. 530
Development Co., Inc. v. Phillips	9 N.C. App. 158	278 N.C. 69
In re Johnson	9 N.C. App. 102	277 N.C. 688
Keiger v. Board of Adjustment	8 N.C. App. 435	278 N.C. 17
Kresge Co. v. Davis	8 N.C. App. 595	277 N.C. 654
R. R. Co. v. City of Raleigh	9 N.C. App. 305	277 N.C. 709
State v. Dobbins	9 N.C. App. 452	277 N.C. 484
State v. Fowler	9 N.C. App. 64	277 N.C. 305
State v. Hatcher	9 N.C. App. 352	277 N.C. 380
Stubblefield v. Construction Co.	9 N.C. App. 4	277 N.C. 444

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1970

STATE OF NORTH CAROLINA v. CHRIS ROLAND ELLIOTT

No. 7015SC279

(Filed 15 July 1970)

1. **Robbery § 4— aiding and abetting in armed robbery — sufficiency of evidence**

   Evidence of the State was sufficient to be submitted to the jury on the issue of defendant's guilt of aiding and abetting in the armed robbery of a State Highway Patrolman.

2. **Criminal Law § 92— armed robbery cases against two defendants — consolidation for trial**

   The trial court did not err in consolidating for trial prosecutions against two defendants for the armed robbery of a State Highway Patrolman.

APPEAL by defendant from *Copeland, S. J.*, January 1970 Criminal Session of Superior Court held in ORANGE County.

Defendant was charged in a bill of indictment, proper in form, with the felony of armed robbery.

Upon the plea of not guilty, trial was by jury, and the verdict was guilty of the felony of armed robbery, a violation of G.S. 14-87.

From a judgment of imprisonment of thirty years in the State's prison, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Deputy Attorney General Moody for the State.

Michael D. Levine for defendant appellant.

MALLARD, C. J.

[1] The defendant contends that the trial court committed error in failing to allow defendant's motion for judgment of nonsuit. The evidence for the State tended to show that on the morning of 15 November 1969, Sergeant Wesley M. Boykin (Boykin), of the North Carolina State Highway Patrol, was on duty and was driving on Interstate 85 in Orange County, near the Durham County line. He observed a Pontiac station wagon (station wagon) parked on the side of the road and stopped to investigate. A man was standing beside the car. As Boykin's patrol car approached, the man entered the station wagon and drove away. Boykin turned on his blue overhead light, and the station wagon stopped. The driver of the station wagon was Jonas Floyd Reaves (Reaves). The defendant in this case, Chris Roland Elliott (Elliott), was a passenger in the station wagon. While talking with the driver, Boykin detected an odor of alcohol on Reaves' breath and asked him to step out, which he did. After examining Reaves, Boykin placed Reaves under arrest for operating an automobile on a highway while under the influence of intoxicating liquor. Boykin then took Reaves back to the patrol car and placed him in the passenger side of the front seat. Elliott came back to the patrol car and asked Boykin if he could sit in the back of the patrol car and was told that he could. Elliott went back to the station wagon, returned with a jacket-type coat, and got in the back seat of the patrol car. When Boykin attempted to make a call on his two-way radio in the patrol car, he heard Reaves say, "Wait a minute, I am going to kill you." Boykin saw that Reaves had a small gun pointed directly at Boykin's chest. Then Elliott said from the back seat, "You are done for, fella." Reaves attempted to take the service revolver away from Boykin, and Boykin lunged for Reaves' gun. As he did this, Reaves' gun discharged, striking Boykin in the stomach. At the time Boykin was struck in the stomach with the shot from the gun held by Reaves, he was also struck on the top of the head by some instrument, after which he could feel the blood running down his face. Boykin did not see the blow but gave the opinion that the blow came from the right rear area of the car. Elliott was

the only person in the rear seat of the car. On cross-examination, Boykin stated that he was struck on the head six or seven times with the first blow preceding the others by about twenty-five to thirty seconds. While Boykin did not think Reaves struck the initial blow, he did think it was possible that Reaves could have struck the blows that he received subsequent to the initial blow. Boykin testified that he heard the back door of the car slam after he was shot and struck on the top of his head and that Elliott left the car and ran away. Reaves then took Boykin's service revolver away from him, after a struggle for possession of the gun. The door on the driver's side of the patrol car was opened. Boykin fell out onto the pavement, went around the patrol car to the edge of an embankment and fell, rolling down the embankment about fifty feet. Reaves then took the patrol car, drove it West about three hundred feet, and Boykin heard a voice calling out, "Chris." The patrol car remained stopped for about ten or fifteen seconds and then moved on out of sight on Interstate 85. Boykin struggled to the top of the embankment to the traveled portion of the highway and stood at the rear of the station wagon. After about ten minutes a passing driver in a truck took him to Watts Hospital where he remained for a total of twenty-three days.

There was ample evidence of the defendant's guilt to require submission of the case to the jury. The defendant's contention that the court committed error in failing to allow his motion for nonsuit is without merit.

[1] Defendant contends that the trial court committed error in permitting the jury to decide whether appellant was an aider or abettor to the crime of armed robbery. Applying the principles of law enunciated by the Supreme Court of North Carolina in the cases of *State v. Keller,* 268 N.C. 522, 151 S.E. 2d 56 (1966) ; *State v. Spears,* 268 N.C. 303, 150 S.E. 2d 499 (1966) ; *State v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54 (1957), we are of the opinion and so hold that the trial judge did not commit error in charging the jury on aiding and abetting.

[2] The defendant contends that his case should have been severed from the case of *State v. Jonas Floyd Reaves.* It is established law in North Carolina that where criminal offenses charged are of the same class and appear to be so connected in time and place that the evidence upon the trial of one would be admissible upon the trial of the other, then such cases may be consolidated for trial by the trial judge. The question of con-

solidation is a matter resting in the sound discretion of the trial judge. No abuse of discretion is shown. *State v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460 (1944).

The statute, G.S. 14-87, which the defendant was charged with violating, provides that upon conviction of a violation thereof, the punishment shall be "by imprisonment for not less than five nor more than thirty years." The sentence imposed on the defendant did not exceed that provided by the statute.

We have carefully considered all of the exceptions and assignments of error brought forward and argued in his brief and find no prejudicial error in the trial of this defendant.

No error.

MORRIS and GRAHAM, JJ., concur.

JACK CARR STUBBLEFIELD, DECEASED EMPLOYEE, MR. AND MRS. HARVEY STUBBLEFIELD, PARENTS, PLAINTIFFS v. WATSON ELECTRICAL CONSTRUCTION COMPANY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7010IC355

(Filed 15 July 1970)

Master and Servant §§ 56, 60— workmen's compensation — minimal departure from assigned duties

The accident which resulted in deceased employee's death arose out of and in the course of his employment with defendant electrical contractor where deceased was doing electrical work with his foreman in the brick plant of a third party and, while waiting for his foreman to descend a ladder, began knocking dust and pieces of brick from the rollers under a conveyor belt, deceased's hand became caught in the rollers, and deceased was pulled between the rollers and the conveyor belt, causing his death, since the impulsive act of deceased in knocking dust from the roller while waiting for his foreman to descend the ladder did not constitute such a departure from his employment as to remove him from the protection of the Workmen's Compensation Act.

CAMPBELL, J., dissents.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission dated 18 February 1970.

This is an appeal from an opinion and award of the North Carolina Industrial Commission filed 18 February 1970 which adopted as its own the findings of fact, conclusions of law, and award theretofore filed in the case on 13 November 1969 by Deputy Commissioner W. C. Delbridge. For purposes of this appeal the pertinent findings of fact so adopted were as follows:

"FINDINGS OF FACT

"1. The deceased employee, Jack Carr Stubblefield, was employed with the defendant employer on May 29, 1969, and prior thereto as an apprentice electrician.

"2. On May 29, 1969 the deceased employee was working at the Cherokee Brick plant in Moncure, North Carolina. He had been doing electrical work there for about two months as a helper to Mr. Fesperman, his foreman. On May 29, 1969, the deceased was pulling an electrical wire from one box to another. The foreman was feeding the wire into the conduit while the deceased was pulling. There was about 50 to 60 feet of this wire, the deceased being on one end and the foreman on the other. The foreman was standing on an eight foot ladder at the top. When the deceased had pulled the wire about one-half way it got tight and therefore he called to his foreman and advised him that he could not pull the wire any further. The deceased then proceeded to go to the place where his foreman was working. The deceased passed under a conveyor belt on his way to his foreman. There were rollers or pullies on the conveyor belt. This conveyor was slanted about at a 45 degree angle from the floor up towards the roof. The conveyor was supported at the top end by some steel rods. There were three rollers on the conveyor and it was in operation. When the deceased reached a point about eight feet from the base of the ladder where his foreman was working the foreman was in the process of descending the ladder as the deceased stood near one of the rollers on the conveyor which was about five and one-half feet high from the floor and while so standing waiting for his foreman he used a nine inch pair of pliers to knock some dust and pieces of brick from the rollers. As he knocked the dust and brick from the rollers his hand became entangled in the conveyor

belt or rollers causing him to be pulled between the rollers and the conveyor belt up to his shoulders. The deceased received head and chest injuries from which he died instantly.

"3. When the deceased's foreman saw the deceased being caught in the belt and rollers he grabbed for him but was unable to reach him in time to prevent him from going between the rollers and the belt.

"4. There were several other conveyor belts in the room that the deceased and his foreman were working. There were no safety devices or guard rails around the rollers or conveyor belt.

"5. The deceased was on his way to his foreman when he was caught in the rollers. The parties were going to cut the wire through about one-half way. Deceased was on his way to assist his foreman when he was caught in the rollers. He had stopped at the rollers, and was knocking dust off the same while waiting for his foreman to come down the ladder. Deceased was in a direct route from the place he had been working to where his foreman was working when the episode occurred. He had to pass under the conveyor in order to get to his foreman as it was between where he was working and where his foreman was working.

"6. The deceased and his foreman were doing electrical work with reference to some new machinery which had been installed in the plant. They were not working on the conveyor belt or rollers and had no duties with reference to it.

"7. Deceased was in the plant where he was sent to work by his employer. He was performing duties incident to his employment although those duties did not require him to knock dust off the rollers on the conveyor belt. He was standing waiting for his foreman to get off the ladder, at which time they were going to fix the wire.

"8. The deceased had not been observed to have ever dusted off rollers in the plant before, but employees of the Cherokee Brick Company frequently dusted the rollers on the conveyor belt.

"9. The deceased employee sustained an injury by accident resulting in his death which arose out of and in the

course of his employment with the defendant employer on May 29, 1969."

On these findings of fact the Deputy Commissioner and the full Commission concluded as a matter of law that the deceased employee sustained an injury by accident resulting in his death which arose out of and in the course of his employment with the defendant employer. From an award in accordance with such conclusion, defendants appealed, assigning as error that Finding of Fact Number 9 and the conclusion of law in accord therewith were not supported by Findings of Fact Numbers 1 through 8.

Bryant, Lipton, Bryant & Battle, by Victor S. Bryant, Jr., for claimant appellees.

Gene C. Smith for defendant appellants.

PARKER, J.

Appellants concede and the record discloses that Findings of Fact 1 through 8 are supported by competent evidence. The sole question presented by this appeal is whether these findings are in turn sufficient to support the finding and conclusion that the accident which resulted in the employee's death arose out of and in the course of his employment with defendant employer. We agree with the Industrial Commission that they were.

The accident occurred at a time when the employee was on duty and at a place where his duties authorized him to be. The hazard to which he was exposed existed at that time and place. It must be reasonably anticipated that employees are subject to the ordinary human frailties shared by the rest of mankind. Among these is the tendency on occasion to act upon a sudden impulse, whether induced by curiosity or by some other factor. Where, as here, the resulting act involves only a minimal departure from the employee's assigned duties, the Workmen's Compensation Act, when liberally construed to effectuate its purpose, should still provide coverage.

In the present case, the impulsive act of the employee in knocking dust from the roller while waiting for his foreman to descend the ladder, did not, in our opinion, constitute such a departure from his employment as to remove him from the protection of the Act. We agree with the Industrial Commission that the time, place, and circumstances of the accident here involved were such as to support a finding and conclusion that

it arose out of and in the course of the employee's employment with his employer. The opinion and award of the Industrial Commission is

Affirmed.

VAUGHN, J., concurs.

CAMPBELL, J., dissents.

STATE OF NORTH CAROLINA v. JACK McGINNIS

No. 7029SC370

(Filed 15 July 1970)

1. **Criminal Law §§ 73, 79— testimony as to statements made by the witness — hearsay**

   Testimony by an accomplice as to statements he had made to the sheriff were not inadmissible as hearsay.

2. **Criminal Law § 162— failure to object to testimony**

   The trial court did not err in the admission of evidence of the comparison of a belt which had earlier been denied admission into evidence with another belt where defendant failed to object to such evidence.

On *certiorari* to review trial of defendant before *McLean, J.*, 22 May 1969 Session of RUTHERFORD County General Court of Justice, Superior Court Division.

This criminal prosecution arises from the larceny of some 54 suits and 57 pairs of pants from the premises of Jim Doggett's Dry Cleaners and Men's Wear of Henrietta, North Carolina. This business consists of a dry cleaning establishment on one side and a men's clothing store on the other side. The two have interconnecting doors. The case was brought to trial upon a proper bill of indictment charging felonious breaking and entering, and felonious larceny. Upon a jury verdict of guilty of both counts as charged and judgment based thereon, the defendant petitioned for and procured a writ of *certiorari* from this court.

The owner of the premises involved testified as to the type and quantity of clothes missing and to a breaking into the

premises. Frank Scruggs (Scruggs), was placed on the stand by the State. Scruggs testified, in substance, as follows: He and Donald Morgan and the defendant, Jack McGinnis (McGinnis), had gone to Doggett's on the morning of 13 November 1968 so that McGinnis and Morgan could have some clothes dry cleaned. In the early morning hours of 14 November 1968, the three of them returned to the premises in Scruggs' white Ford Torino. They had been drinking all day. Morgan and McGinnis entered the Doggett building several times and each time they returned with a quantity of clothes and men's suits. They then proceeded to Spartanburg, South Carolina, where McGinnis got out at his home and remained. Scruggs and Morgan took the car and the clothing on, and Morgan took the clothing "to several places in Spartanburg," presumably to dispose of it.

Other witnesses tended to corroborate this testimony. Jim Doggett was recalled to the stand and was shown a belt which had been found outside the store after the break-in and larceny. This Exhibit 3 was said by Doggett to be similar to a belt which he had seen in South Carolina on 5 December 1968. Wheeler Lowrance, a Rutherford County detective, stated that he had seen State's Exhibit 1, a suit, which Mr. Doggett had said was stolen from his store, in Gaffney, South Carolina, about 12-14 miles from McGinnis' home on 5 December 1968. Peggy Owens and Agnus Splawn stated that they had seen a white Ford Torino or a white car near the cleaners in the early morning of 14 November 1968. The defendant did not offer any evidence at the trial.

Defendant assigns as error the admission of hearsay evidence at his trial, the comparison of a belt which had been denied admission into evidence with another belt found in South Carolina, and the alleged misstatement by the trial judge of the contentions of the defendant.

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

Carroll W. Walden, Jr., for the defendant appellant.

CAMPBELL, J.

We have with some difficulty attempted to review the contentions of the defendant in this case. No proper exceptions have been brought forward to assist us in our search through

the record of this case. Rules 21 and 28, Rules of Practice in the Court of Appeals of North Carolina.

[1] The defendant complains of the following passages in the testimony of Scruggs, the accomplice:

"(C) Q. Now Mr. Scruggs, did you later talk to the sheriff of Rutherford County, Sheriff Damon Huskey?

A. Yes sir.

Q. Where did you talk to Sheriff Huskey and what did you talk to him about?

MR. WALDEN: Objection.

COURT: Overruled, exception.

A. Here at the courthouse.

Q. Did you come to the courthouse to see him?

A. Myself and my attorney.

Q. Who was your attorney at that time?

A. George Morrow.

Q. Now, on the advice of your attorney and in the presence of your attorney, did you tell Sheriff Huskey what had occurred relative to Mr. Doggett's Store?

MR. WALDEN: Objection.

COURT: Overruled, Exception. . . .

Q. Did you relate substantially the same set of facts to Sheriff Huskey as you have related to the jury here in this case?

MR. WALDEN: Objection.

COURT: Overruled, Exception.

A. Yes sir.

Q. Now, did you also accompany Deputy Sheriff Lowrance and Ben Humphries anywhere?

A. Yes.

Q. Where did you go with these officers?

A. I took them to where I thought the suits were —

MR. WALDEN: Objection.

COURT: Overruled, Exception.

Q. What city did you go to with these two officers?

COURT: Wait a minute, Mr. Solicitor, what are you talking about 'they were?'

A. The suits they were stealing. (C)"

This assignment is patently without merit in that the testimony refers to statements that the witness *himself* made.

[2] The defendant makes the following broadside exception to the testimony concerning two belts, (State's Exhibits 2 and 3), one found outside the store and another found in South Carolina:

"The defendant excepts to and assigns as error all of the evidence admitted relating to any of the State's Exhibits 1, 2 and 3 and most particularly as to the similarity between State's Exhibits 2 and three (3) after the defendant's motion to suppress the evidence (Exhibit 2) had been allowed as appears in the record (p. 21) in that such extended examination thereafter by the solicitor and allowed by the court greatly prejudiced the defendant in the eyes and minds of the jury. This is the defendant's EXCEPTION AND ASSIGNMENT OF ERROR NO. 4."

The evidence concerning the belts was admitted without any objection by the defendant, and as such he waived such proper objection as he may have made earlier. *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1967).

We have reviewed the entire record and we find no error which is prejudicial to the defendant.

No Error.

PARKER and VAUGHN, JJ., concur.

LOUISE CANNADY BROWN v. ANNIE LAURIE GREEN, ADMINISTRATRIX OF THE ESTATE OF WILLIE LOU CANNADY

No. 709SC403

(Filed 15 July 1970)

1. **Executors and Administrators § 31— judgment against administratrix — establishment of debt.**

A judgment against an administratrix in her representative capacity merely establishes the debt sued on and does not constitute a lien upon the lands of decedent, nor does it fix the defendant with assets or disturb the order of administration.

2. **Execution § 1; Executors and Administrators § 18— judgment against administratrix — failure to fix assets applicable to claim**

Where judgment against an administratrix fixed no amount of assets which the administratrix had applicable to the plaintiff's claim, execution could not issue in any amount. G.S. 28-142.

APPEAL by plaintiff from *Hobgood, J.*, 30 April 1970 Session of VANCE Superior Court.

On 13 June 1969, plaintiff recovered judgment against the defendant in the Superior Court of Vance County in the sum of $13,500 and interest and costs. Defendant, in open court, gave notice of appeal. On 16 July 1969, defendant filed a "stay of proceedings bond". Defendant failed to perfect her appeal, and on 30 January 1970, on motion of plaintiff, the appeal was dismissed. On 20 February 1970, plaintiff moved that the liability of the surety on the *supersedeas* bond be adjudged absolute and subject to execution. On 6 May 1970, after a hearing an order was entered denying plaintiff's motion, from which plaintiff appeals.

Vaughan S. Winborne for plaintiff appellant.

Sterling G. Gilliam and Frank Banzet for defendant appellee.

MORRIS, J.

The judgment entered on 13 June 1969, on which plaintiff relies, is as follows:

"JUDGMENT (Filed June 22, 1969)

THIS CAUSE coming on to be heard and being heard before His Honor A. Pilston Godwin, Judge Presiding, and a jury at the June Civil Session, Vance County Superior Court

Division, General Court of Justice, 1969, and the jury having answered the issues submitted to them as follows:

1. Is the defendant, as Administratrix of the Estate of Willie Lou Cannady, indebted to the plaintiff?

ANSWER: Yes.

2. If so, in what amount?

ANSWER: $13,500.00.

3. Is the plaintiff indebted to the defendant Administratrix?

ANSWER: No.

4. If so, in what amount?

ANSWER: _____

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

1. That the plaintiff have and recover of the defendant, as Administratrix of the Estate of Willie Lou Cannady, the sum of THIRTEEN THOUSAND FIVE HUNDRED ($13,500.00) DOLLARS, with interest thereon from the 5th day of April, 1965, until paid.

2. That the defendant recover nothing of the plaintiff.

3. That the costs of this action be taxed by the Clerk against the defendant Administratrix.

This the 13th day of June, 1969.

A. PILSTON GODWIN, JR.
Judge Presiding".

The order entered by Judge Hobgood from which plaintiff appeals is as follows:

"ORDER DENYING MOTION (Filed May 6, 1970)

This cause coming on to be heard and being heard before the undersigned, Hamilton H. Hobgood, Resident Judge of the Ninth Judicial District, in chambers, upon the motion by the plaintiff to have the liability of the surety on the *supersedeas* bond given in this action upon appeal adjudged absolute and subject to execution; and the Court, after reviewing the pleadings, and upon the stipulation of counsel for the plaintiff and the defendant, finds as a fact that the total assets available to Annie Laurie Green, Administratrix of the Estate of Willie Lou Cannady, on June 13, 1969, the

date of the judgment in this cause, was $16,423.03; that the total assets available to Annie Laurie Green, Administratrix of the Estate of Willie Lou Cannady, on the date of this order amounted to $16,798.75 plus interest accrued on investments from April 1, 1970; the Court further finds as a fact that the plaintiff has suffered no damage by reason of the appeal or the bond to stay execution and the Court concludes as a matter of law that the liability of the surety is limited to the assets in the hands of the Administratrix and further concludes as a matter of law that the judgment entered in this cause on June 13, 1969 served to establish the claim of the plaintiff against the Estate of Willie Lou Cannady pursuant to the terms of G.S. 28-142.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of the plaintiff, to have the liability of the surety, Joseph H. Green, upon the written undertaking to stay execution pending appeal to the North Carolina Court of Appeals adjudged absolute and subject to execution, is denied.

This 30th day of April, 1970.

HAMILTON H. HOBGOOD
Resident Judge of the Ninth
Judicial District".

We think the court's conclusion as a matter of law that the judgment served only to establish the claim of the plaintiff against the estate of Willie Lou Cannady pursuant to the terms of G.S. 28-142 is correct.

G.S. 28-142 provides:

"All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased *shall* declare —

(1) The certain amount of the creditor's demand.

(2) *The amount of assets which the personal representative has applicable to such demand.*

Execution may issue only for this last sum with interest and costs." (Emphasis supplied.)

[1] The judgment does not constitute a lien upon the lands of the decedent, nor does it fix the defendant with assets, nor

disturb the order of administration. "It merely ascertains the debt sued on." *Tucker v. Almond,* 209 N.C. 333, 183 S.E. 407 (1936); *Dunn v. Barnes,* 73 N.C. 273 (1875).

G.S. 28-142 is unambiguous in its mandate that execution may issue only for the amount fixed in the judgment which the personal representative has applicable to the claim ascertained by the judgment. This provision is necessary and must be followed to preserve and adhere to the order of payment of debts prescribed by G.S. 28-105.

[2] Here the judgment fixed no amount of assets which the defendant administratrix had applicable to the plaintiff's claim. It follows, therefore, execution could not issue in any amount. We do not discuss the legal effect of the *supersedeas* bond. Suffice it to say that the plaintiff's motion to have the liability of the surety on the *supersedeas* bond adjudged absolute and subject to execution was properly denied.

Affirmed.

MALLARD, C.J., and GRAHAM, J., concur.

THE STATE OF NORTH CAROLINA v. WILLIE McGILVERY
No. 7028SC305

(Filed 15 July 1970)

1. **Robbery § 2— armed robbery — ownership of property taken**

Ownership of the property taken need not be laid in any particular person to allege and prove the crime of armed robbery.

2. **Robbery § 4— ownership of property taken — variance between indictment and proof**

In this armed robbery prosecution, there was no fatal variance between an indictment which charged that property was taken from the "residence" or "place of business" of a named person and evidence that the armed robbery occurred at a finance company where the person named in the indictment was employed, the property having been in the lawful custody of such person.

3. **Criminal Law § 112— charge that defendant relied on alibi — prejudice to defendant**

In this armed robbery prosecution, defendant was not prejudiced by the trial court's charge that defendant relied on the defense of alibi and that he had presented evidence raising the defense of alibi.

State v. McGilvery

ON *certiorari* to review judgment of *Froneberger, J.*, 22 April 1969 Criminal Session of the BUNCOMBE County General Court of Justice, Superior Court Division.

The defendant was charged in a proper bill of indictment with the armed robbery of Bobby Ramsey at the Dial Finance Company, Asheville, North Carolina, on 11 March 1969. He was charged with taking one $20.00 bill, one $10.00 bill, one driver's license, and one K-Mart Department Store Credit Card from Ramsey by the use of a .38 caliber pistol.

McGilvery was tried and was found guilty by the jury of armed robbery. From an active sentence of 10 to 15 years in prison, a notice of appeal was entered. The appeal was subsequently dismissed for failure to prosecute it. Thereafter, in November 1969 the defendant filed a petition for a writ of mandamus and Judge Snepp ordered that another attorney be appointed for the defendant so that a petition for *certiorari* could be sought from this court and an appellate review procured. This was done and this Court entered an order granting the writ of *certiorari* on 12 March 1970.

The record reveals, in substance, the following events which gave rise to the charges in the instant case: Bobby Ramsey was working at the Dial Finance Company on Haywood Street in Asheville on 11 March 1969 when he looked up at about 8:15 a.m. and observed the defendant, McGilvery, and another person standing at the counter of the finance company pointing guns at him. McGilvery said, "On your feet," and asked where the money was. The other man, Evans, went through the cash drawer and took $30.00 which had just been placed there after a woman had made a payment moments before. Ramsey told McGilvery that that was all the money there was except for the money in the safe. McGilvery told him to get down on his knees and open the safe. Ramsey stated that the manager was the only one who could open the safe, and he had not come in yet. McGilvery said, "Okay, on your feet." Ramsey was ordered to the back of the building to a storage room and told to lie down on his stomach. McGilvery said, "I still ought to kill you . . . because I did not get the money." Ramsey informed him that the manager would be in at 8:30, five minutes from that time, and that he could get the rest of the money then. McGilvery said he would wait. Ramsey waited in a prone position 15

minutes until he heard a secretary talking. He then went out front so that the manager could untie him and call police.

Ramsey's billfold was taken from him. This had a K-Mart credit card, a B. F. Goodrich credit card, a Social Security card, a North Carolina driver's license and about $2.50 in cash in it. Ramsey identified the two, McGilvery and Evans, and the above-mentioned articles when he was taken to Virginia to view the two.

Officer Elliott, a deputy sheriff of Pittsylvania County, Virginia, testified that on 11 March 1969 he observed a 1969 Pontiac automobile pass him at a high rate of speed. After a high speed chase, he succeeded in stopping the car. Deputy Gatewood came up at this time, and they observed Willie McGilvery and five others in the car. McGilvery was arrested for reckless driving. Officer Elliott testified that during the chase, several objects had been thrown out of the car by the driver, McGilvery. Several of these objects hit Elliott's windshield. When Elliott went back to the area after carrying McGilvery to the police station, he found the cards which were subsequently identified by Ramsey as his. He also found a .38 caliber pistol along the road where the chase had taken place. The officer did admit that several minutes and a good deal of traffic had passed before he could return to the area to begin his search for the materials he had seen McGilvery throw out of his car.

An employee at the Howard Johnson Motor Lodge in Asheville identified McGilvery and Evans as having stayed there on 9 March 1969. The defendant did not offer any evidence.

The defendant brings forward the following questions for this court to review: (1) error of the trial judge in refusing to grant judgment as of nonsuit; (2) error in the charge as to (a) misstatement of G.S. 14-87, (b) the defendant's contention of alibi; and (c) the reference to the lack of evidence offered by the defendant.

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

S. Thomas Walton for defendant appellant.

CAMPBELL, J.

[1, 2] Defendant contends that a judgment of nonsuit should have been entered because there was a fatal variance between indictment and proof in that the indictment charged that the property taken was taken from the "residence" or "place of business" of Ramsey, and the evidence showed that the armed robbery, if it occurred as shown, took place at the Dial Finance Company. It is true that the $30.00 was taken from the Dial Finance Company. This assignment of error is inconsequential, however, in that it is settled law in North Carolina that ownership of the property taken need not be laid in any particular person to allege and prove the crime of armed robbery. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525 (1968). The point is that the identified property was in the lawful custody of Ramsey and it was taken from him with the threatened use of firearms.

[3] The defendant also contends that the judge should not have charged that the defendant relied on the defense of alibi, or that he had presented evidence raising the defense of alibi. We cannot see, nor has defendant satisfactorily explained to us, how this was prejudicial to him. This assignment of error is without merit.

We have reviewed the other contentions of the defendant and find them similarly without merit. The defendant received a fair trial free of prejudicial error.

No error.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE SWANN

No. 7014SC387

(Filed 15 July, 1970)

Homicide § 30— second degree murder — submission of manslaughter — prejudice to defendant

In this prosecution for second degree murder, defendant was not prejudiced by the submission to the jury of the issue of defendant's guilt of manslaughter, notwithstanding defendant's contention that all of the evidence pointed to the crime of murder and that the only controversy was whether defendant was the perpetrator.

State v. Swann

APPEAL by defendant from *Canaday, J.*, 16 February 1970 Session, DURHAM Superior Court.

Bee James, a Negro male, aged 70, was killed in his rural home-store on Wednesday, 20 May 1964. Severe blows to his head caused immediate unconsciousness and death within a few minutes. When discovered, his lifeless body was lying on the porch. The body and building were partially burned in an apparent effort to conceal the crime.

Defendant was arrested 22 May 1964 upon a warrant charging him with the murder of Bee James on 20 May 1964. The record of the events between defendant's arrest on 22 May 1964 and his trial at the 16 February 1970 Session is recounted below.

A bill of indictment charging that defendant, on 20 May 1964, murdered Bee James, was returned at June 1964 Criminal Session. C. C. Malone, Jr., court-appointed counsel, first conferred with defendant in the Durham County Jail on June 2 or 3, 1964. On 18 June 1964, the court, on motion of Mr. Malone, entered an order committing defendant to Cherry Hospital for sixty days for observation. G.S. 122-91. On 1 September 1964, at the request of the superintendent, the court entered an order extending for sixty days the period for examination.

On 12 October 1964, the court was advised that, in the opinion of the examining physicians, defendant was not able to stand trial. At 15 October 1964 Criminal Session, a jury was impaneled to pass upon the competency of defendant to stand trial. The court submitted this issue: "Is the Defendant insane and without sufficient mental capacity to undertake his defense or to receive sentence in this case?" After hearing evidence, the jury answered the issue, "Yes." Thereupon, the court ordered that defendant be committed to Cherry Hospital for an indeterminate period.

Defendant was confined at Cherry Hospital from 19 June 1964, until October, 1966, at which time he was returned to Durham County as being competent to stand trial. G.S. 122-84 and 87.

At December 1966 Criminal Session, defendant pleaded not guilty to said murder indictment returned at June 1964 Criminal

Session and was tried thereon. A mistrial was ordered on account of the jury's inability to agree on a verdict.

At February 1967 Criminal Session, defendant was again tried on said murder indictment returned at June 1964 Criminal Session. Defendant was found guilty of murder in the second degree and judgment, imposing a prison sentence of not less than twenty-eight nor more than thirty years, was pronounced. Upon defendant's appeal, judgment was affirmed by the Supreme Court of North Carolina. *State v. Swann*, 272 N.C. 215, 158 S.E. 2d 80, decided 13 December 1967.

On 15 March 1968, defendant initiated post-conviction proceedings under G.S. 15-217 *et seq.* The court appointed Jerry L. Jarvis to represent defendant in said proceedings. At the 3 June 1968 Special Criminal Session of Durham Superior Court, J. William Copeland, the Presiding Judge, entered the following judgment: "IT IS ORDERED, ADJUDGED AND DECREED that the Judgment entered at the February, 1967 Criminal Session of the Durham County Superior Court in case No. 66-CrS-64 be, and the same is hereby, set aside; that the bill of indictment therein be, and the same is hereby, quashed; and that the commitment issued on January 3, 1968, at the January 2, 1968 Criminal Session of the Durham County Superior Court in that case be, and the same is hereby, withdrawn and declared to be void."

The quoted judgment was based on Judge Copeland's conclusion of law that the facts as found establish "a prima facie case of systematic exclusion of Negroes because of race from service on the grand jury which returned the bill of indictment" against defendant at June 1964 Criminal Session, and that "the State had not overcome such prima facie case by a showing of competent evidence that the institution and management of the jury system in Durham County, prior to January, 1968, was not in fact discriminatory."

Simultaneously with the entry of Judge Copeland's said judgment, to wit, on 14 June 1968, defendant was arrested on a new warrant; and at 8 July 1968 Criminal Session, the grand jury returned a new bill of indictment. The warrant and bill of indictment charged that defendant, on 20 May 1964, murdered Bee James. The bill of indictment returned at June 1964 Criminal

Session and that returned at 8 July 1968 Criminal Session contained identical provisions.

Defendant was first tried on the bill of indictment returned at 8 July 1968 Criminal Session at the 26 August 1968 Criminal Session. A mistrial was ordered on account of the jury's inability to agree on a verdict. In a second trial thereon, at 5 December 1968 Criminal Session, the presiding judge, under circumstances and for reasons not disclosed by the record, withdrew a juror and ordered a mistrial. In a third trial on the 1968 indictment, defendant was found guilty of murder in the second degree and appealed. This court affirmed the conviction (5 N.C. App. 385), but the Supreme Court found error and ordered a new trial (275 N.C. 644). The fourth trial on the 1968 indictment at the 16 February 1970 Session resulted in a verdict of guilty of manslaughter from which defendant now appeals.

Attorney General Morgan, by Staff Attorney League, for the State.

Jerry L. Jarvis for the defendant.

BROCK, J.

Defendant's sole assignment of error is that the trial judge instructed the jury that it might return a verdict of guilty of manslaughter. It is defendant's argument that all of the evidence points to the crime of murder, and that the only controversy was whether defendant was the perpetrator. Under these circumstances defendant urges that it was error to submit the lesser offense of manslaughter to the jury.

Upon the authority of *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431, this assignment of error is overruled.

No error.

BRITT and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM J. WALL

No. 7012SC432

(Filed 15 July 1970)

1. **Robbery § 4; Larceny § 7— prosecutions — sufficiency of evidence**

In a prosecution of defendant for armed robbery and for larceny of an automobile, the victim's testimony (1) that the defendant pointed a gun at him while a companion removed the wallet from his pocket and (2) that the defendant and his companions then drove away in the victim's automobile, *held* sufficient to withstand defendant's motions for nonsuit.

2. **Criminal Law § 9— aiders and abettors**

One who is present aiding and abetting in a crime actually perpetrated by another is equally guilty with the actual perpetrator.

3. **Criminal Law § 115— instructions on lesser degree of crime**

The trial court, in instructing the jury on the lesser included offenses of felonious assault, did not err in instructing the jury to consider first the more serious charges and then to move to the lesser charges only if they found defendant not guilty of the more serious offenses.

APPEAL by defendant from *Hobgood, J.*, 9 March 1970 Regular Criminal Session of CUMBERLAND Superior Court.

In five bills of indictment defendant was charged with the following offenses: (1) kidnapping of Billy Mack Gregg; (2) armed robbery of Billy Mack Gregg; (3) felonious larceny of an automobile, the property of Marvin Dow; (4) armed robbery of Edward Sherry; and (5) felonious assault upon Edward Sherry with a deadly weapon with intent to kill inflicting serious injuries. All cases were consolidated for trial and defendant pleaded not guilty to all charges.

In summary, the State's evidence showed: At approximately 7:45 p.m. on 16 October 1969 defendant, in the company of two other individuals, forced Billy Mack Gregg at gunpoint to drive them around for approximately two hours. Gregg was driving an automobile which belonged to Marvin Dow. The gun involved was a .38 caliber pistol. After some two hours of driving, Gregg was ordered to leave the automobile. Defendant and his companions bound and gagged Gregg, and after Gregg's wallet was taken, placed him in a doghouse behind a filling station on U. S. Highway #301 south of Fayetteville. The vehicle was then driven

away. At approximately 10:30 p.m. on the same evening, Edward Sherry, the night attendant at Edward's Gulf Service Station on Fort Bragg Boulevard, was approached by defendant and another man. Defendant stepped in front of Sherry with a pistol in his hand and told Sherry this was a stickup and Sherry had three seconds to open the cash register. Sherry took one step toward the cash register and defendant shot him in the forehead. As Sherry lay on the floor semiconscious, he heard the cash register ring and footsteps leaving. After the robbery, $117.00 was missing from the cash register.

Defendant took the stand and denied being in Fayetteville on the night of 16 October 1969. He testified he was on duty at Fort Bragg on that evening, serving as CQ runner, and had never left the battalion area. The State introduced evidence in rebuttal.

The jury found defendant guilty of kidnapping Billy Mack Gregg, common-law robbery of Billy Mack Gregg, felonious larceny of the automobile, armed robbery of Edward Sherry, and assault with a deadly weapon inflicting serious injury on Edward Sherry. From judgment imposing prison sentences in all cases, defendant appealed.

Attorney General Robert Morgan and Staff Attorney Donald M. Jacobs for the State.

MacRae, Cobb, MacRae & Henley, by James C. MacRae for defendant appellant.

PARKER, J.

[1, 2] Appellant assigns as error the refusal of the court to grant his motions for nonsuit on the charges of armed robbery of Gregg and larceny of the Dow automobile. He contends nonsuit was proper in these two cases since there was no evidence that it was the defendant who took the wallet from Gregg's pocket and insufficient evidence that Gregg drove away in the Dow automobile. There is no merit in these contentions.

Gregg, appearing as a witness for the State, after testifying as to the kidnapping and as to being bound and gagged, testified: "Someone took my wallet from my pocket, then they shoved me into a little doghouse and pushed it against the station. During this the defendant was standing there with a gun pointed at me."

One who stands holding a gun pointed at the victim while another removes a wallet from the victim's pocket is in no position to contend he didn't know the wallet was being stolen. From the evidence the jury was justified in finding to the contrary. From the evidence the jury was also fully justified in finding that defendant joined his two companions in driving away in the Dow automobile. "It is well settled that one who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual perpetrator." *State v. Garnett,* 4 N.C. App. 367, 167 S.E. 2d 63.

[3] The only other assignment of error brought forward in appellant's brief relates to the felonious assault case. Appellant contends that the court erred in instructing the jury in that case in that the court, while instructing the jury on the lesser included offenses, instructed them to consider first the more serious charges and then to move to the lesser charges only if they found defendant not guilty of the more serious offenses. Appellant argues that the jury should have the unbridled right to consider each offense separately and in any order they see fit. No authority is cited for this position and reason does not support it. There is no merit to this assignment of error.

Appellant has had a fair trial before an able and experienced trial judge. In the record before us we find

No error.

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

IN THE MATTER OF THE CUSTODY OF LARRY THOMAS WILLIAMS, A MINOR, THOMAS A. WILLIAMS AND PEARL WILLIAMS v. W. E. BREWER AND FANNIE BREWER

No. 7015DC283

(Filed 15 July 1970)

Divorce and Alimony § 24; Infants § 9— modification of child custody order — failure to hear evidence and find facts

The trial court erred in modifying previous orders relating to the custody of a child without hearing evidence and finding facts so that the appellate court can determine if the modified order is adequately supported by competent evidence and is for the best interest of the child.

In re Williams

APPEAL by respondents from *McLelland, District Judge,* 22 December 1969 Session, ORANGE District Court.

This proceeding was instituted in September 1967 in superior court and involves the custody of Larry Thomas Williams (Larry). Petitioners (Mr. and Mrs. Williams) are the parents of Larry who was born on 1 March 1960, the fifth child of Mrs. Williams and the second child of Mr. Williams. As of 10 March 1968 Mr. and Mrs. Williams had two children younger than Larry. Respondents (Mr. and Mrs. Brewer) are no kin to Mr. or Mrs. Williams but have been their next-door neighbors for many years. On 10 July 1962 Mrs. Williams gave birth to her seventh child at which time Larry began staying with Mr. and Mrs. Brewer and has lived with and been supported by the Brewers since that time.

Following the institution of this proceeding and a hearing, Carr, J., on 10 March 1968, entered an order making numerous findings of fact and awarding the care, custody and control of Larry to Mr. and Mrs. Brewer "for the greater part of the time" but with the provision, among other things, that Larry be permitted to spend one night each week in the home of his parents and be with his parents and family on vacation trips and the like not more than fifteen days in any calendar year. Judge Carr found as a fact that Mr. Williams was a disabled veteran and unemployed and that Mrs. Williams was employed. There was no appeal from Judge Carr's order.

On 15 July 1969, by appropriate order, this cause was transferred to the District Court Division. On 5 September 1969 McLelland, District Judge, pursuant to a motion in the cause by Mr. and Mrs. Williams, due notice to Mr. and Mrs. Brewer, and a hearing, entered an order in which he denied custody to Mr. and Mrs. Williams but made certain modifications in Judge Carr's order including provision that Larry live with his parents during the months of June and August of each year "in order to maintain the child-parent relationship." There was no appeal from this order.

On 11 December 1969 Mr. Williams filed a petition in the cause alleging that Mr. Brewer had failed to comply with the 5 September 1969 order and asked, among other things, that Larry's exclusive custody and control be awarded to his parents. The Brewers answered the petition and on 22 December 1969

District Judge McLelland conducted a further hearing in the matter. On 31 December 1969 an order was entered modifying previous orders to the extent that Larry would spend from 25 December 1969 until 31 December 1969 and the months of June, July and August of each year with his parents. The Brewers appealed from this order.

No counsel for petitioner appellees.

Newsom, Graham, Strayhorn & Hedrick by Ralph N. Strayhorn and E. C. Bryson, Jr., for respondent appellants.

BRITT, J.

Appellants contend that the trial court erred in modifying previous orders pertaining to Larry's custody without hearing evidence and finding facts on which the appellate court can determine if the modified order is adequately supported by competent evidence and is for the best interest of the minor child. The point is well taken.

In *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967), in an opinion by Branch, J., we find the following:

> "It is generally recognized that decrees entered by our courts in child custody and support matters are impermanent in character and are *res judicata* of the issue *only so long as the facts and circumstances remain the same as when the decree was rendered.* The decree is subject to alteration upon a change of circumstances affecting the welfare of the child. *Thomas v. Thomas,* 248 N.C. 269, 103 S.E. 2d 371; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153.
>
> * * *
>
> The court's findings of fact as to the care and custody of children will not be disturbed when supported by competent evidence, even though the evidence be conflicting. *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144; *In Re Hamilton,* 182 N.C. 44, 108 S.E. 385.
>
> However, when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and

the case remanded for detailed findings of fact. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324."

In the case before us the record discloses no evidence upon which the trial judge based the order appealed from and said order contains no findings of fact tending to show a change of circumstances since entry of previous orders to justify a modification of those orders. For the reasons stated, the order appealed from must be vacated and the cause remanded for detailed findings of fact based upon competent evidence.

Error and remanded.

BROCK and HEDRICK, JJ., concur.

ROGER RAINES, ADMINISTRATOR OF THE ESTATE OF BENJAMIN LEON RAINES, DECEASED v. ST. PAUL FIRE & MARINE INSURANCE COMPANY

No. 7012DC325

(Filed 15 July 1970)

Insurance § 91— automobile liability policy — accidental shooting in parked automobile

Accidental shooting of automobile passenger by the driver while the automobile was stopped, the engine was off and one door was open does not come within the terms of an automobile liability policy providing coverage for bodily injury and death "caused by accident and arising out of the ownership, maintenance or use of the automobile," there being no casual connection between the discharge of the driver's pistol and the "ownership, maintenance or use" of the parked automobile.

APPEAL by plaintiff from *Herring, District Judge,* 16 March 1970 Session of the District Court Division of the General Court of Justice of CUMBERLAND County.

This action was tried by Judge Herring upon the following facts stipulated by the parties, which we shall employ to state the case:

"STATEMENT OF FACTS

On March 31, 1968, Benjamin Leon Raines was negligently shot and killed by Foster Williams, when Foster Williams was playing with a pistol. Suit was subsequently

brought by plaintiff herein and judgment obtained against Foster Williams in the sum of $2500 for the wrongful death of said Benjamin Leon Raines. Execution has been issued and returned unsatisfied. Prior to the accident resulting in Raines' death, Foster Williams, had been driving a car belonging to his father, Connie Williams, with permission. At the time of the accident the car was stopped, engine off and one door open. Foster Williams was sitting in the driver's seat, Raines was sitting in the front seat with one Elizabeth Watson in his lap. Lizzie Mae Smith was on the outside of the car talking to the occupants. Foster was playing with the gun, there was a sudden movement and the gun went off, killing Benjamin Raines.

At the time of the accident there was in force and effect an automobile liability policy issued by the defendant to Connie Williams covering the automobile involved under the provisions of which the defendant agreed 'to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.' The policy provisions included a definition of 'insured' as 'any person using such automobile, provided the actual use thereof is with the permission of the named insured.' Prior to this accident, Foster Williams had been driving said car with the 'permission' of his father and had with such 'permission' driven it to the point where the same was parked and the accident happened. It is stipulated that at the time of the accident, Foster Williams had permission to use the car involved."

The sole question which arises in this case, according to the further stipulation of the parties is:

"QUESTION

It is stipulated that the sole question herein is whether or not under the terms of the policy provisions the death of Benjamin Leon Raines was an accident 'arising out of the . . . use of the automobile' in which he was sitting?"

Based upon these stipulated facts the following judgment was entered:

"JUDGMENT (Filed March 19, 1970)

FACTS

As stipulated by the parties, reduced to writing and filed of record.

CONCLUSIONS OF LAW

1. That the negligent killing of plaintiff's intestate by the defendant's insured operator of an automobile, with a pistol which said operator — Foster Williams — was playing with, when the automobile, with the owner's permission, was driven to the accident scene by said operator, and was stopped, with the motor off and one door open, while the operator was seated in the driver's seat, and plaintiff's intestate was seated in the right front seat, does not constitute damage sustained, 'caused by an accident and arising out of the . . . use of the automobile', under the terms and provisions of the policy of insurance;

2. That the plaintiff is not entitled to have and recover any sum of the defendant.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover nothing of the defendant and the costs are taxed against the plaintiff.

This 19th day of March, 1970.

/s/ D. B. HERRING, JR.
Judge Presiding"

Plaintiff appeals, assigning as error the signing of the above judgment.

Bryant, Jones & Johnson, by James M. Johnson for plaintiff appellant.

Anderson, Nimocks & Broadfoot by Henry L. Anderson for defendant appellee.

CAMPBELL, J.

For the defendant to be obligated to pay the claim of the plaintiff here, the injury of the plaintiff's deceased must have been, as the insurance contract states, ". . . caused by accident

and arising out of the ownership, maintenance or use of the automobile." We hold that the accidental shooting of Benjamin Raines, under the facts of this case, did not arise out of the ownership, maintenance or use of the automobile which is the vehicle insured under the defendant's policy. No casual connection between the discharge of the pistol and the "ownership, maintenance or use" of the parked automobile was shown, and this is required to afford recovery under the policy. See *Mason v. Celina Mutual,* 161 Colo. 442, 423 P. 2d 24 (1967); *National Union Fire Ins. Co. v. Bruecks,* 179 Neb. 642, 139 N.W. 2d 821 (1966). *Whisnant v. Insurance Co.,* 264 N.C. 303, 141 S.E. 2d 502 (1965) and *Williams v. Insurance Co.,* 269 N.C. 235, 152 S.E. 2d 102 (1967) are factually distinguishable and a casual connection was shown.

Judgment was properly entered for the defendant in this case.

Affirmed.

PARKER and VAUGHN, JJ., concur.

BEN WILLIAM POMPEY v. EDA SIGMON HYDER

No. 7027SC382

(Filed 15 July 1970)

1. **Automobiles § 62— striking pedestrian at intersection — sufficiency of evidence**

In this action for personal injuries received when plaintiff pedestrian was struck by defendant's left-turning automobile at an intersection, defendant's motion for a directed verdict was properly denied where plaintiff's evidence tended to show that plaintiff was crossing the street within an unmarked crosswalk at the intersection when he was struck by defendant's automobile, and that defendant failed to keep a proper lookout and failed to yield the right-of-way to plaintiff.

2. **Rules of Civil Procedure § 50— directed verdict on ground of contributory negligence**

Motion for a directed verdict on the ground of contributory negligence should be allowed only when 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 might be drawn therefrom. Rule of Civil Procedure No. 50.

3. **Automobiles §§ 62, 83— contributory negligence of pedestrian — jury question**

Even if the evidence of plaintiff pedestrian showed that he was crossing the street at an angle and not within an unmarked crosswalk when he was struck at an intersection by defendant's left-turning automobile, defendant's motion for directed verdict was properly denied where there was evidence from which the jury could find that defendant failed to use due care to avoid colliding with plaintiff in violation of G.S. 20-174(e), a pedestrian's failure to yield the right-of-way not being contributory negligence *per se* but being evidence of negligence to be considered with other evidence in the case.

APPEAL by plaintiff from *Falls, J.*, 19 February 1970 Session, CLEVELAND Superior Court.

This is an action brought by a pedestrian against a motorist. At the conclusion of plaintiff's evidence defendant moved for a directed verdict as provided by Rule 50 of the Rules of Civil Procedure on the grounds that plaintiff had failed to show negligence on the part of defendant and that plaintiff was negligent as a matter of law. The evidence most favorable to plaintiff is summarized as follows.

The accident occurred on 9 December 1965 about 6:45 a.m., before dawn, at the intersection of First Street, S.W., and First Avenue, S.W., in the City of Hickory, North Carolina. First Street, S.W., runs in a north-south direction, and First Avenue, S.W., runs in an east-west direction. There was a traffic control light located in the center of the intersection. There was a Smile Service Station located in the southwest quadrant of the intersection and the Burns Building in the southeast quadrant of the intersection on the southside of First Avenue, S.W. The defendant was operating her 1965 Chevrolet automobile with her headlights on in a westerly direction along First Avenue, S.W., and approached the intersection from the east. The defendant made a left turn (south) into First Street, S.W., and struck the plaintiff who was crossing First Street, S.W. At the time the plaintiff was struck the traffic light at the intersection was green for westbound traffic, the direction in which the defendant was traveling prior to her turn; and the light was red for north and southbound traffic on First Street, S.W., the street which plaintiff was crossing. The plaintiff, before leaving the corner on the east side and starting across the street, observed that there was no traffic approaching and that the light was favorable

to him. He looked again when he reached the center of the street and saw no cars approaching. Between the center of First Street, S.W., and the west curb thereof he was struck by the defendant's automobile. An eyewitness stated that plaintiff was struck when he was about five feet from the west side of the street. The defendant stated to the investigating officer that she did not see the plaintiff until the time of the impact. She never sounded her horn.

The sidewalk on the southside of First Avenue, S.W., as it intersects the east side of First Street, S.W., is unpaved and very narrow. The Burns Building comes within three feet of the street. A driveway at the Smile Service Station is located on the west side of First Street, S.W., about five feet from the intersection with First Avenue, S.W. Between the driveway and the street there is a transformer pole and sign. Although plaintiff had not completed his crossing, he intended to go to the driveway "to catch the sidewalk rather than walk around the transformer." The left front fender of defendant's automobile struck plaintiff who was injured as a result of the collision.

Defendant's motion for a directed verdict against plaintiff was allowed and plaintiff appealed.

Hamrick, Mauney and Flowers by Fred A. Flowers for plaintiff appellant.

Kennedy, Kennedy and Church by Michael S. Kennedy for defendant appellee.

VAUGHN, J.

[1, 2] The only question on the appeal is whether plaintiff's evidence, taken in the light most favorable to him and giving to it the benefit of every reasonable inference which can be drawn therefrom was sufficient to withstand defendant's motion for a directed verdict. We hold that it was. The jury could reasonably have found, among other things, that plaintiff was struck by defendant's car while he was crossing First Street, S.W., within an unmarked crosswalk at an intersection, that defendant failed to keep a proper lookout and failed to yield the right-of-way to plaintiff as required by law. These and other permissible findings and inferences would support a jury verdict for plaintiff. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E. 2d 151. Nor was the

motion properly allowed on the ground that plaintiff was negligent as a matter of law. This would have been proper only if plaintiff's evidence, considered in the light most favorable to him, so clearly established his own negligence as one of the proximate causes of his injuries that no other reasonable inference might be drawn therefrom. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47. *Carter v. Murray,* 7 N.C. App. 171, 171 S.E. 2d 810.

[3] Even if defendant were correct in her contention that plaintiff's evidence showed that plaintiff was crossing the street at an angle and not in an unmarked crosswalk at the intersection, the case would still have been one for the jury. There was evidence from which the jury could find that defendant motorist failed to use due care to avoid colliding with the plaintiff pedestrian as required by law. G.S. 20-174(e). A pedestrian's failure to yield the right-of-way is not contributory negligence *per se,* but rather it is evidence of negligence to be considered with other evidence in the case in determining whether the pedestrian is chargeable with negligence which proximately caused, or contributed to, his injury. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323.

Reversed.

CAMPBELL and BRITT, JJ., concur.

LOIS LENNON LESANE AND HUSBAND, THURMAN LESANE, AND SWANNIE WILLARD LENNON, ALSO KNOWN AS SWANNIE LENNON GOWANS, SEPARATED v. REASE S. CHANDLER, FORMERLY REASE S. LENNON, AND HUSBAND, MR. SAM CHANDLER

No. 7013SC223

(Filed 15 July 1970)

1. **Wills §§ 2, 55— dispositive words — "bequeath"**

The dispositive word "bequeath" is sufficient to include both personalty and realty.

2. **Wills § 55— definition of "estate" — technical and ordinary meanings**

In its technical sense, "estate" refers to the degree, quantity, nature and extent of a person's interest in land; in its ordinary usage, "estate" embraces a testator's entire property, real and personal.

3. **Wills § 55— devise of "Personal Estate" — conveyance of realty**

The words "Personal Estate" as used in the residuary clause of a will *are held* sufficient to pass testator's real estate to his second wife.

4. **Wills §§ 28, 30— ambiguous will — presumption against intestacy**

Where the will was ambiguous as to whether real property of the testator would pass under the phrase "Personal Estate," the presumption against partial intestacy is applicable.

5. **Wills § 30— presumption against intestacy**

The law presumes that when a man who is capable of doing so undertakes to make a will, he does not intend to die intestate as to any part of his property.

6. **Wills § 30— presumption against intestacy**

The presumption against intestacy means that where a will is susceptible to two reasonable constructions, one disposing of all of testator's property, and the other leaving part of the property undisposed of, the former construction will be adopted and the latter rejected.

7. **Wills § 52— construction of residuary clause**

A residuary clause should be construed so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing.

APPEAL by petitioners from *Canaday, J.*, 15 December 1969 Civil Session, COLUMBUS Superior Court.

Petitioners instituted this proceeding for partition of a tract of land. Respondents filed an answer denying that the parties were tenants in common and alleging that the respondent Rease S. Chandler (Mrs. Chandler) was the sole owner of the subject property. The parties waived jury trial and agreed that the presiding judge should try the issues of fact and law.

It was stipulated by pretrial order that Russell Lennon at the time of his death in 1965 was seized in fee of the subject land and that Mrs. Chandler is his surviving widow and the petitioners Lois Lennon Lesane and Swannie Willard Lennon are his daughters and only children. It was stipulated during the trial that respondents' Exhibit No. 1 was his Last Will and Testament; the pertinent provisions are as follows:

> "*Second*: I gave and bequethe [sic] to my Daughters Swanie and Lois, the sum of Five Dollars each, and to my former wife, Marie Lennon, I give and bequeath the sum of One ($1.00) only.

Third: I give and bequeath unto my present wife Rease Lennon, absolute and unconditional, all of my personal property and Estate, of every character and description, wherever situate, being the residue of my personal Estate, subject only to my debts and the bequests mentioned in the Second paragraph hereof, all of my real property having been heretofore disposed of by Conveyances thereof.

Fourth: Unto my present Wife, Rease Lennon, I give and bequeath all the rest and residue of my Personal Estate, unconditionally.

Fifth: I hereby constitute and appoint my present Wife, Rease Lennon, Executrix of my Estate, to all intents and purposes, to duly execute this my last Will and Testament, without giving Bond."

No conveyance of the real estate other than by the will was shown. The court held that the will devised the subject real estate to Mrs. Chandler. Petitioners appealed.

R. H. Burns, Jr., for petitioner appellants.

J. B. Eure for respondent appellees.

BRITT, J.

Did Russell Lennon die intestate as to the lands in controversy? Construing the instrument in light of the following propositions, we conclude that he did not.

[1] 1. The dispositive word "bequeath" is sufficient to include both personalty and realty. *Case v. Biberstein,* 207 N.C. 514, 177 S.E. 802.

[2] 2. In its technical sense, "estate" refers to the degree, quantity, nature and extent of a person's interest in land. *Nicholson Corp. v. Ferguson,* 114 Okla. 16, 243 P. 195. In its ordinary usage, "estate" embraces a testator's entire property, real and personal. See *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246.

[3] 3. The words "personal estate" used in item four are sufficient to pass realty where such is the testator's intention as determined according to the applicable rules of construction. *Caracci v. Lillard,* 7 Ill. 2d 382, 130 N.E. 2d 514; *Davisson v. Sparrow,* 97 Ohio App. 117, 97 N.E. 2d 694.

[4, 5] 4. The phraseology of the will is ambiguous or uncertain, so the presumption against partial intestacy as a rule of

construction is applicable. "The law presumes that when a man who is capable of doing so undertakes to make a will, he does not intend to die intestate as to any part of his property." *Case v. Biberstein, supra.*

[6] 5. The presumption against intestacy means that "where a will is susceptible to two reasonable constructions, one disposing of all of testator's property, and the other leaving part of the property undisposed of, the former construction will be adopted and the latter rejected * * *." *Holmes v. York,* 203 N.C. 709, 166 S.E. 889.

6. Testamentary recognition of the petitioners in item two coupled with their omission from the residuary clause indicates an intention to make a specific, limited bequest to them, and this bequest was made.

[7] 7. Item four is a residuary clause, and as such should be construed "so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing." *Faison v. Middleton,* 171 N.C. 170, 88 S.E. 141. The writing contains no such apparent intent.

The judgment of the superior court is

Affirmed.

BROCK and HEDRICK, JJ., concur.

JOHN ROSS HOFFMAN, SR. v. GLENDA AGNES BROWN AND RALPH ROY BROWN

No. 7023SC309

(Filed 15 July 1970)

1. **Damages §§ 13, 16— error relating to damages — failure of jury to reach that issue**

   Error by the court, if any, in striking testimony relating to damages and in instructing the jury as to damages was harmless where the issue of damages was not reached by the jury.

2. **Automobiles § 90— instructions — defining negligence — violation of safety statute**

   The trial court did not fail to instruct the jury as to the legal meaning of negligence and did not fail to explain to the jury that the violation of a safety statute would be negligence.

3. **Rules of Civil Procedure § 51— instructions — application of law to evidence**

In this automobile accident case, the trial court adequately reviewed the evidence and declared and explained the law arising thereon in substantial compliance with Rule of Civil Procedure No. 51.

4. **Trial § 51— refusal to set aside verdict — appellate review**

Denial of a motion to set aside the verdict as being contrary to the greater weight of the evidence is not reviewable on appeal absent a showing of abuse of discretion.

BROCK and BRITT, JJ., concurring in result.

APPEAL from *Ragsdale, J.*, January 1970 Civil Session, WILKES County Superior Court.

This action was instituted to recover damages for personal injuries allegedly sustained as the result of an automobile accident on 15 October 1965. The plaintiff alleged that on the above date he was traveling South on U. S. Highway 21 in Wilkes County when the defendant, Glenda Agnes Brown, entered the highway from a private driveway on the East side of the highway causing a collision with the plaintiff. In his complaint, the plaintiff alleged that the defendant was negligent when she drove her automobile into the public highway from a private driveway without yielding the right-of-way; that she failed to keep a proper lookout to ascertain whether other vehicles were traveling on the public highway; that she failed to ascertain whether her movement into the highway could be made in safety, and that she entered the highway without stopping. In her answer the defendant alleged that she was not negligent in any manner and that the injuries sustained by the plaintiff were the result of his own negligence.

At the trial of the matter both sides presented evidence to support their allegations. At the conclusion of the presentation of the evidence the court submitted the issues of the defendant's negligence and plaintiff's damages to the jury. The jury answered the issue of negligence in favor of the defendant and from the judgment entered thereon the plaintiff appealed, assigning error.

Moore and Rousseau, by Julius A. Rousseau, Jr., for plaintiff appellant.

Hayes and Hayes, by Kyle Hayes, for defendant appellee.

HEDRICK, J.

[1] The appellant assigns as error the action of the trial court in striking testimony of Mrs. Hoffman and the supplementary testimony of Mr. Hoffman relating to damages which resulted from a decline in profits from their oil business following the collision with the defendant. They further argue that the court, in its charge to the jury, erroneously expressed an opinion in violation of G.S. 1A-1, Rule 51, Rules of Civil Procedure, when the court instructed the jury that damages could not be awarded for loss of profits from the oil business and that they would not consider the testimony of Mr. and Mrs. Hoffman concerning this loss. This assignment of error is not sustained for the record clearly reveals that the testimony stricken and the instruction complained of related solely to the issue of damages which was not reached and considered by the jury.

[2] The appellant contends that the court below erred in that it failed to instruct the jury as to the legal meaning of negligence, and particularly that the court failed to explain to the jury that the violation of a safety statute would be negligence. The court, in defining negligence, among other things, stated that negligence is the doing of a thing which a reasonably prudent person, under similar circumstances, would not do, or the failure to do something that a reasonably prudent person would do under the same or similar circumstances, and that the test is what a reasonably prudent person would or would not do under the same or similar circumstances. Moreover, the court did in fact charge the jury that the violation of a statute which has been enacted for the public safety in the State of North Carolina by the General Assembly is negligence *per se*. This assignment of error is overruled.

[3] The appellant contends that the court committed error in its charge to the jury by failing to declare and explain the law arising on the evidence as to all substantial features of the case. G.S. 1A-1, Rule 51, Rules of Civil Procedure, provides that the judge ". . . shall declare and explain the law arising on the evidence given in the case." This rule further provides that the judge does not have to state the evidence except to the extent necessary to explain the application of the law thereto. When the charge in the present case is considered as a whole it

is evident that the court adequately reviewed the evidence and declared and explained the law arising thereon in substantial compliance with the rule.

[4] Finally, the appellant contends that the court committed error in denying his motion to set the verdict aside as being contrary to the greater weight of the evidence. No abuse of discretion on the part of the judge is apparent in the present case; therefore, the action of the judge is not reviewable on appeal. *Goldston v. Chambers*, 272 N.C. 53, 157 S.E. 2d 676 (1967).

After a careful consideration of the assignments of error brought forward on this appeal by the plaintiff, it is our opinion that no prejudicial error was committed in the trial below.

No error.

BROCK and BRITT, JJ., concurring in the result.

DOROTHY M. WRENN v. HERBERT G. WATERS

No. 7010SC232

(Filed 15 July 1970)

1. **Automobiles § 19— entering intersection on green light — applicable law**

An instruction that a driver entering an intersection on a green light must exercise the care that a reasonably prudent person would exercise under the circumstances, taking into consideration the possibility that someone might come into the intersection in violation of the red light, *held* without error.

2. **Automobiles § 19— duty of motorist approaching intersection controlled by automatic signals**

A motorist approaching an intersection controlled by automatic traffic signals is not relieved of the legal duty to maintain a proper lookout to ascertain the traffic conditions and whether there are other persons or vehicles within the intersection.

3. **Appeal and Error § 50; Negligence § 38— instruction on contributory negligence — burden of proof — harmless error**

An inadvertent instruction on contributory negligence that the plaintiff had the burden to satisfy the jury that her negligence was one of the proximate causes of her injuries, *held* not prejudicial to the plaintiff, where the trial court in other portions of the charge correctly placed the burden of proof on the defendant.

APPEAL from *Carr, J.*, December 1969 Civil Term, WAKE Superior Court.

This is a civil action instituted by the plaintiff, Dorothy M. Wrenn, to recover for personal injuries sustained on 24 September 1968 as the result of a collision between automobiles driven by plaintiff and defendant, Herbert G. Waters. The evidence at the trial tended to show the facts to be as follows: On 24 September 1968 the plaintiff was traveling in a westerly direction on New Bern Avenue in the City of Raleigh, North Carolina. At this same time the defendant was approaching New Bern Avenue from the south on Tarboro Road. New Bern Avenue is a major traffic artery for the City of Raleigh and at the point where the collision occurred there are five traffic lanes with three of the lanes being used for westbound traffic. The two motor vehicles collided in the intersection. There was evidence that each driver entered the intersection on a green traffic light.

The case was submitted to the jury on the issues of negligence, contributory negligence and damages. The jury found that the plaintiff was guilty of contributory negligence, and from the judgment entered on the verdict, the plaintiff appealed.

Smith, Leach, Anderson and Dorsett, and Hollowell and Ragsdale, by William L. Ragsdale, for the plaintiff appellant.

Teague, Johnson, Patterson, Dilthey and Clay, by Ronald C. Dilthey, for the defendant appellee.

HEDRICK, J.

All of the appellant's assignments of error relate to the judge's instructions to the jury on the issue of contributory negligence.

[1] First, the appellant contends that the court failed to properly instruct the jury as to the legal duty of a motorist entering an intersection on a green light.

In this respect, Judge Carr instructed the jury as follows:

> "The law requires a driver to exercise due care in entering an intersection, even though she is entering on the green light. She must exercise the care that a reasonably prudent person would exercise, under the circumstances, taking into consideration the possibility that someone might come in the intersection in violation of the rule, coming in the intersection on the red light."

[2] In North Carolina a motorist approaching an intersection which is controlled by automatic traffic control signals is not relieved of the legal duty to maintain a proper lookout to ascertain the traffic conditions and whether there are other persons or vehicles within the intersection. *Beatty v. Bowden*, 257 N.C. 736, 127 S.E. 2d 504 (1962); *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25 (1952). This assignment of error is overruled.

[3] Finally, the appellant contends that the court failed to properly and adequately define contributory negligence and proximate cause, that the court placed unequal stress on the contentions of the defendant, and that the court committed prejudicial error when it instructed the jury that the burden was on the plaintiff to satisfy the jury that her negligence was one of the proximate causes of her injuries. These contentions are without merit. The record is clear that when Judge Carr began to instruct the jury on this issue he stated in precise language that the burden of proof rested on the defendant to show the negligence of the plaintiff. Just prior to making that statement he began by instructing the jury that the defendant was charged with showing the plaintiff's negligence by the greater weight of the evidence. Finally, in concluding his instructions to the jury he again repeated that the defendant had to prove the plaintiff's negligence by the greater weight of the evidence. It is apparent from the foregoing that Judge Carr inadvertently substituted the plaintiff for the defendant in that portion of the charge complained of. In view of the other portions of the charge which correctly placed the burden of proof on the issue of contributory negligence on the defendant, we do not believe that the plaintiff could have been prejudiced by the instruction.

When the charge is considered contextually, it is clear that the court properly and adequately defined contributory negligence and proximate cause as it related to the second issue. We do not find that the court placed unequal stress on the contentions of either party, and that the court did in fact declare and explain the law arising on the evidence.

We have reviewed the court's charge to the jury in the light of the appellant's assignments of error, and it is our opinion that the plaintiff had a fair trial free from prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT LEE HEARNS

No. 7018SC390

(Filed 15 July 1970)

1. **Criminal Law § 172; Assault and Battery § 15— erroneous instructions — error cured by verdict**

Any error in instructing the jury as to defendant's guilt or innocence of felonious assault under G.S. 14-32(a) was cured by the jury's verdict which found defendant guilty of the lesser included offense described in G.S. 14-32(b).

2. **Assault and Battery § 15— instructions — self-defense — apparent necessity**

In a felonious assault prosecution under G.S. 14-32(a), an instruction on self-defense that the defendant could use no more force than was reasonably necessary in defending himself is erroneous in omitting the element of apparent necessity, and the error is not cured by correct instructions on this point in other portions of the charge.

APPEAL by defendant from *Crissman, J.*, 23 February 1970 Criminal Session of GUILFORD Superior Court.

Defendant was charged in a bill of indictment with felonious assault upon Alvis Wayne Fewell with a deadly weapon with intent to kill inflicting serious injuries, a violation of G.S. 14-32(a). The jury found defendant guilty of assault with a deadly weapon inflicting serious injury, a violation of G.S. 14-32(b). From judgment of imprisonment for a term of not less than three nor more than five years, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Eugene A. Smith for the State.

Public Defender Wallace C. Harrelson and Assistant Public Defender D. Lamar Dowda for defendant appellant.

PARKER, J.

Section 2 of Chaper 602 of the 1969 Session Laws, which became effective upon ratification on 27 May 1969, rewrote G.S. 14-32 to read as follows:

"G.S. 14-32. *Assault with a deadly weapon or firearm with intent to kill or inflicting serious injury; punishments.* (a) Any person who assaults another person with a firearm or other deadly weapon of any kind with intent to kill and

inflict serious injury is guilty of a felony punishable under G.S. 14-2.

"(b) Any person who assaults another person with a firearm or other deadly weapon *per se* and inflicts serious injury is guilty of a felony punishable by a fine or imprisonment for not more than five (5) years, or both such fine and imprisonment.

"(c) Any person who assaults another person with a firearm with intent to kill is guilty of a felony punishable by a fine or imprisonment for not more than five (5) years, or both such fine and imprisonment."

The offense for which defendant was tried and convicted occurred on 10 June 1969, and the rewritten statute applies to this case.

It is unnecessary to review the evidence. When considered in the light most favorable to the State, it was sufficient to support a verdict of guilty under any of the subsections of the rewritten statute. When considered in the light most favorable to defendant, it was sufficient to require appropriate instructions as to defendant's right of self-defense.

[1] Appellant assigns as error certain portions of the court's charge to the jury which related to the issue of defendant's guilt or innocence of the offense described in G.S. 14-32(a). While some of these appear to have merit, any errors in this regard were cured and rendered non-prejudicial by the jury's verdict which did not find defendant guilty of the offense described in G.S. 14-32(a) but only of the lesser included offense described in G.S. 14-32(b).

[2] Appellant assigns as error the following portion of the court's charge which related to the issue of defendant's guilt or innocence of the offense described in G.S. 14-32(b):

"Now, members of the jury, . . . if you are satisfied from the evidence beyond a reasonable doubt that he (the defendant) assaulted this man, Alvis Wayne Fewell; that he did so with a deadly weapon; that he did so with his pistol; and inflicted serious injury, then it would be your duty to find him guilty of that charge, unless you are satisfied by the evidence that he had a right to defend himself and *that he used no more force than necessary in defending himself.*" (Emphasis added.)

This instruction is erroneous in that the jury was told that defendant could use no more force than *necessary* in defending himself. "The law is that the defendant could use such force as was reasonably necessary or *apparently* necessary." *State v. Hardee,* 3 N.C. App. 426, 165 S.E. 2d 43. "Or, to put it another way, one may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief." *State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756. The error noted was not cured because the court correctly instructed the jury in other portions of the charge. *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447.

It is not necessary to rule on other assignments of error since the questions raised may not recur in a new trial. For the error indicated, defendant is entitled to a

New trial.

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

STATE OF NORTH CAROLINA v. GREGORY FRAZIER

No. 708SC373

(Filed 15 July 1970)

1. **Burglary and Unlawful Breakings § 6; Larceny § 8— "recent possession" doctrine — identity of goods stolen — instructions**

In prosecutions for felonious breaking and entering and for larceny, the trial court's instruction on the inference of guilt arising from possession of recently stolen property was prejudicially erroneous in failing to require the jury to find that the watches found on defendant's person and the clocks and other property found in his residence were the same watches, clocks, and property stolen from a building supply company.

2. **Larceny § 5— inference arising from possession of recently stolen property — identity of property**

The inference of guilt arising from the possession of recently stolen property does not apply until the identity of the property is established.

APPEAL by defendant from *Burgwyn, J.,* 15 December 1969 Special Criminal Session of LENOIR Superior Court.

Defendant was tried upon his plea of not guilty to a bill of indictment charging him with the crimes of felonious breaking and entering, larceny, and receiving. The State presented the testimony of the manager of Kinston Building Supply Company, who testified that on the morning of 4 November 1969 he found that the store premises had been broken into and certain articles of personal property, including a number of watches and clocks, had been removed. The State also presented the testimony of a police officer who testified that at approximately 3:00 p.m. on the same date he had arrested the defendant for larceny of the watches, and upon searching him, found nine watches on his person. The officer also testified that he had subsequently searched defendant's house with defendant's permission, and had discovered clocks under a couch in the living room and other articles of personal property similar to those which had been removed from the premises of Kinston Building Supply Company elsewhere in the house. The officer also testified that he had questioned the defendant after warning him of his constitutional rights, and that the defendant had at first stated that he had found the watches in a bag beside the railroad track, but that subsequently defendant had admitted that he had broken into the Kinston Building Supply Company and had taken the watches and clocks therefrom.

Defendant, testifying in his own defense, denied the breaking and entering and larceny, and testified that the watches and clocks had been delivered to him by two friends, who had asked him to sell them for them. He admitted that he had confessed to the officer, but stated he did so only because he became angry at being accused of other offenses.

The jury found defendant guilty of breaking and entering and larceny, and from judgment on the verdict imposing active prison sentence of not less than five nor more than seven years, defendant appealed.

Attorney General Robert Morgan and Trial Attorneys Charles M. Hensey and Claude W. Harris for the State.

F. Fred Cheek, Jr., for defendant appellant.

PARKER, J.

[1, 2] The court's charge contained an instruction on the inference of guilt arising from possession of recently stolen

property. In this connection the court failed to require the jury to find from the evidence and beyond a reasonable doubt that the watches found on defendant's person and the clocks and other property found in his residence were the same watches, clocks and property stolen from the premises of Kinston Building Supply Company. The inference of guilt arising from the possession of recently stolen property does not apply until the identity of the property is established. *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369.

While there was ample evidence in this case from which the jury could have found the identity of the property involved, for the failure of the judge to require the State to carry the burden of showing the identity of the stolen property, the defendant is entitled to a

New trial.

CAMPBELL and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT LEE ARTIS

No. 706SC354

(Filed 15 July 1970)

1. **Criminal Law §§ 102, 116— failure of defendant to testify — argument by defense counsel — instructions by court**

In this prosecution for common law robbery, the trial court properly refused to allow defendant's attorney to argue to the jury the failure of defendant to testify and properly instructed the jury with respect to defendant's right to elect not to testify and that no unfavorable inference could be drawn from his failure to testify.

2. **Criminal Law §§ 114, 117— instructions — prior conviction of prosecuting witness — credibility of defendant**

The trial court did not express an opinion on the credibility of the defendant by its instruction that evidence that the prosecuting witness had been previously convicted of a criminal offense was to be considered for the purpose of impeaching the credibility of the witness and that the testimony of each witness was to be given such weight and credibility as the jury might think it should be given.

APPEAL by defendant from *Cohoon, J.,* February 1970 Session of Superior Court of BERTIE County.

Defendant was charged with common law robbery, entered a plea of not guilty, and was found "guilty as charged" by the jury. From judgment entered on the verdict, defendant appealed. He was represented at trial by privately retained counsel. Upon a determination of indigency, defendant was allowed to appeal in *forma pauperis* and the same counsel was appointed to prosecute his appeal.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Staff Attorney Carlos W. Murray, Jr., for the State.

A. B. Harrington, Jr., for defendant appellant.

MORRIS, J.

[1] Defendant's first assignment of error is directed to the failure of the court to allow his motions for nonsuit. In his brief, defendant candidly concedes that the evidence was sufficient to submit the case to the jury. We agree.

Defendant did not testify at the trial. We quote from the record on appeal:

> "In his argument to the jury, Attorney Harrington, for the defendant Artis, in his address to the jury, proceeded to argue relative to the defendant not taking the stand, at which time the court interrupted and advised him that neither the defendant's attorney nor the State had the right to go into the fact or failure of the defendant to take the stand, and that the court would instruct the jury as to this. Attorney Harrington objected and excepted. EXCEPTION NO. 3."

We are not given the benefit of enlightenment as to what defendant's counsel said or what the court said. In *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951), the right of counsel for defendant to argue to the jury the failure of defendant to testify was discussed at length. There defendant's counsel had stated in his argument that "the law says no man has to take the witness stand." The Court noted that

> "While the mere statement by defendants' counsel that the law says no man has to take the witness stand would seem to be unobjectionable, it is obvious that further comment or explanation might have been violative of the rule established by the decisions of this Court. Furthermore, it was the

duty of the presiding judge by prompt action to prevent infringement of this rule and to require obedience to his ruling, though he should be careful that nothing be said or done which would be calculated unduly to prejudice the defendants. *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705."

In his charge to the jury the court properly instructed the jury with respect to defendant's right to elect not to testify and to rely on what he contended to be the weakness of the State's case and, further, that no unfavorable inference could be drawn from his failure to testify. This assignment of error is overruled.

[2] Defendant's third assignment of error is directed to the charge of the court. The portion of the instructions about which defendant complains has to do with the credibility of witnesses. The evidence was that the *prosecuting witness* had been previously convicted of a criminal offense. The court summarized that evidence and instructed the jury that it was to be considered for the purpose of impeaching the credibility of the witness - as to whether he will tell the truth on the theory that a person who has no prior conviction is more likely to tell the truth than one who has prior convictions, with the further admonition that it is to be considered in the light of the convictions themselves, and the testimony of each witness is to be given such weight and credibility as the jury might think it should be given. Defendant cites no authority for his contention that this portion of the charge suggested an opinion by the court on the credibility of the *defendant.* We fail to see how defendant could have been prejudiced thereby. This assignment of error is overruled.

Defendant's remaining assignments of error are formal and do not require discussion. They are overruled.

No error.

MALLARD, C.J., and GRAHAM, J., concur.

STATE OF NORTH CAROLINA v. ERVIN MAYO, JR.

No. 702SC381

(Filed 15 July 1970)

1. **Criminal Law §§ 104, 106— motion for nonsuit — consideration and sufficiency of evidence**

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 the benefit of every reasonable inference which may be legitimately drawn therefrom; if there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, the motion for nonsuit should be denied.

2. **Bills and Notes § 22— issuing worthless check — insufficient credit with bank — sufficiency of evidence**

In this prosecution for issuing a worthless check, the State's evidence was sufficient to carry the burden of proving that defendant had no credit with the drawee bank with which to pay the check on presentation, although there was no affirmative testimony to that effect, where it showed that payment was refused when the check was presented to the drawee bank, that there never were sufficient funds in the account to honor the check, and that defendant knew the check was "no good," since a legitimate inference may be drawn from the evidence that had defendant had sufficient funds on deposit or a credit arrangement with the drawee bank the check would have been paid upon presentation.

APPEAL by defendant from *James, J.*, 16 March 1970 Session, BEAUFORT Superior Court.

During 1968 and part of 1969 defendant operated a Sunoco Service Station in Washington, North Carolina. Milan J. Muzinich, owner of Washington Tire Company, provided defendant with a stock of tires for which defendant would pay as the tires were sold. Muzinich made periodic inventory checks to determine the number of tires sold and the amount owed by defendant.

On 11 March 1969, Muzinich made an inventory check and it was agreed between him and defendant that defendant owed $465.03 for tires sold. Defendant wrote a check for $465.03 payable to Washington Tire Company and delivered it to Muzinich. A day or two later Muzinich presented the check to the Washington branch of Wachovia Bank and Trust Company, the drawee bank, but the bank refused to honor the check. Boyd Beasley, Operation Officer of the Washington branch of Wachovia Bank and Trust Company, testified that on 11 March

1969 defendant had $3.29 in his account and that up until 31 March 1969 there were not sufficient funds to cover the check.

Defendant's evidence tended to show that when he gave the check to Muzinich he told him that he did not have any money but that he would give him a note for $465.00 and that since this was written on a check form it should not be in circulation because "[i]t is no good". Defendant further testified there were never sufficient funds in his account at Wachovia to pay the check.

On 17 March 1970 defendant was tried by a jury and found guilty of issuing a worthless check. Defendant appeals.

Attorney General Morgan, by Staff Attorney Hart, for the State.

Frazier T. Woolard for appellant.

BROCK, J.

Appellant contends the trial court erred in denying his motion for a directed verdict of acquittal made at the close of the State's evidence and renewed at the close of all the evidence for the reason that the State failed to carry the burden of proving the various vital elements of the offense charged.

[2] The bill of indictment charges that defendant "did not have sufficient funds on deposit in and credit with" the drawee bank with which to pay said check upon presentation. Defendant concedes the indictment is proper in form, but contends the State's evidence is not sufficient to carry the burden of proving that defendant had no credit with the drawee bank with which to pay the check on presentation and that therefore a verdict of acquittal should have been directed for defendant. We find no merit in this contention.

[1] It is well established 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 the 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 and it is then for the jury to determine

whether the evidence establishes guilt beyond a reasonable doubt. *State v. Locklear*, 7 N.C. App. 493, 172 S.E. 2d 924.

[2] In the present case there was no affirmative testimony that the defendant had no credit with the drawee bank with which to pay the check upon presentation. However, the evidence does show that, when the check was presented to the drawee bank, payment was refused; that on 11 March 1970 defendant had $3.29 on deposit in this account; that until the account was closed there were never sufficient funds in the account to honor the check; and that defendant knew the check should not be in circulation because it was "no good".

From this evidence a legitimate inference may be reasonably drawn that had defendant had sufficient funds on deposit or a credit arrangement with the drawee bank the check would have been paid upon presentment. Indeed, on the evidence in this case it would strain credulity to find otherwise. There was ample evidence to support the jury verdict and there was no error in overruling defendant's motions for a directed verdict of acquittal.

No Error.

BRITT and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. BUDDY JIM COBB

No. 7024SC351

(Filed 15 July 1970)

1. **Escape § 1— felonious escape — sufficiency of evidence**

In a prosecution for felonious escape, the State's evidence was sufficient to submit the case to the jury, where there was testimony that eight inmates of the cell in which defendant was a prisoner attempted to escape through a severed cell window and that defendant was apprehended outside the cell block, and where defendant himself testified that he was caught while attempting to re-set the bars of the window in order to conceal the escape of the others. G.S. 148-45.

2. **Escape § 1; Criminal Law § 137— mistake in judgment — statutory reference**

The fact that the judgment and commitment in an escape prosecution erroneously referred to the escape statute as "G.S. 148.48" instead of G.S. 148-45, *held* not prejudicial to defendant.

APPEAL by defendant from *McLean, J.*, 22 January 1970 Session of Superior Court held in WATAUGA County.

Defendant was tried on a bill of indictment charging him with the felony of attempting to escape, in violation of G.S. 148-45. Upon his plea of not guilty, the verdict of the jury was "guilty of aiding and abetting an attempted escape."

From a judgment of imprisonment for the term of six months, the defendant, an indigent, appealed to the Court of Appeals.

Attorney General Morgan and Deputy Attorney General Benoy for the State.

John H. Bigham for defendant appellant.

MALLARD, C. J.

[1] The evidence for the State tended to show that the defendant, on 11 July 1966, was committed under a proper judgment of the Superior Court of Gaston County to the State prison system to serve a two-year term for the misdemeanor of non-felonious breaking and entering. He was subsequently assigned to State Prison Camp #087 located in Watauga County, and on 13 March 1967 he was serving this sentence. On 13 March 1967 appellant was locked in a cell block with several other inmates. After 7:00 in the evening of that day, the bars to a window in this cell block were severed by means of a saw. Eight of the inmates attempted to escape by exiting the cell block through this aperture. Appellant was apprehended outside the cell block. During this period the doors of the cell remained locked, and the only means of egress was by way of the window. The window did not lead to the outside but did lead to the grounds within the prison fence.

The defendant testified that he made no attempt to escape. He stated that an officer observed him at the window as he, the defendant, was trying to re-set the bars to conceal the escape attempt of the others. Defendant testified that the officer "took me out" of the window to "see" the sergeant in the sergeant's effort to determine how many men used the window to get outside the cell block.

The defendant's assignment of error that the trial court committed error in denying the defendant's motion for judgment

of nonsuit at the end of the State's evidence is without merit. There was ample evidence of the defendant's guilt to require submission of the case to the jury.

[2] In the judgment and commitment as it appears in this record, the statute under which the defendant was convicted was erroneously referred to as "G.S. 148.48" instead of G.S. 148-45. This is not prejudicial to the defendant.

The sentence imposed does not exceed that permitted by the statute, G.S. 148-45. We have examined the record, and no prejudicial error is made to appear.

No Error.

MORRIS and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. SARA DAVIS

No. 7010SC321

(Filed 15 July 1970)

Criminal Law § 88— cross examination by defense counsel — harmless error

Defendant was not prejudiced when trial court refused to permit defense counsel to cross examine a police officer concerning warrants which had been issued for defendant's arrest, the warrants being collateral matters.

APPEAL by defendant from *Bailey, J.*, 3 February 1970 Session, WAKE Superior Court.

The defendant was charged in a valid bill of indictment with the crime of larceny from the person. The defendant entered a plea of not guilty. From a verdict of guilty by the jury and the imposition of a sentence of not less than 6 nor more than 10 years, the defendant appealed.

The evidence discloses that on 29 April 1969 J. M. Glover, a member of the Raleigh Police Department, arrested Charles Bridges for public intoxication. The officer placed handcuffs on Bridges and attempted to get him from the railroad tracks, where he was arrested, to the police car. In order to accomplish this, it was necessary to go up an embankment. Bridges refused to go voluntarily, and the officer was unable to take him. During

this time the defendant and four or five other persons gathered, and the defendant proceeded to encourage Bridges to resist the officer's attempts to get him to the police car. The officer decided to wait until assistance came, and some 20 or 25 minutes elapsed. The officer continued to hold Bridges with his left hand on which he was wearing a wrist watch. The defendant came to the officer and grabbed the band which held the watch on the wrist. The officer requested that she turn loose and leave him alone. The defendant refused to do so, and finally succeeded in breaking the band of the wrist watch. When this occurred, the officer grabbed her with his right hand which was free. The defendant picked up a bottle, and thereupon the officer turned her loose. She took the watch and ran up the embankment and disappeared. The officer never saw his watch again.

Attorney General Robert Morgan by Staff Attorney Donald M. Jacobs for the State.

Samuel S. Mitchell and Romallus O. Murphy for defendant appellant.

CAMPBELL, J.

The defendant assigns as error the ruling of the trial court in refusing to permit defendant's counsel to cross examine the police officer concerning warrants which had been issued for the defendant for (1) obstructing an officer and (2) an assault. These two warrants were identified by the witness. They had not then been introduced in evidence, and later when the defendant was offering evidence, they were introduced in evidence as exhibits. These warrants were collateral matters, and there was no error in the ruling by the trial court.

The defendant also assigns error in the charge of the trial court to the jury as to what facts would constitute the crime of larceny from the person. We have read the charge in its entire context, and we find no prejudicial error therein.

The evidence was ample, and the defendant was given a trial which was fair and free of prejudicial error. The jury found the facts against the defendant, and in the trial we find

No Error.

PARKER and VAUGHN, JJ., concur.

THERMO-INDUSTRIES OF CHARLOTTE, INC. v. TALTON CONSTRUCTION COMPANY, INC.

No. 7010DC215

(Filed 15 July 1970)

1. **Trial § 56; Jury § 1— action instituted in superior court — right to jury trial**

Defendant was entitled to a trial by jury in a civil case originally instituted in the superior court unless jury trial was waived or the facts of the controversy were not in dispute.

2. **Courts § 11.1; Jury § 1; Trial § 56— civil action in district court — necessity for demanding jury trial**

Under G.S. 7A-196 (prior to its amendment effective 1 January 1970), the right to jury trial in a civil action in the district court is available upon written demand made within 10 days after the filing of the last pleading directed to the issue or after entry of an order transferring the cause to the district court, whichever occurs first.

3. **Courts § 11.1; Jury § 1; Trial § 56— transfer of case from superior court to district court — failure to notify defendant — demand for jury trial — denial of right to jury trial**

Defendant was denied its constitutional right to a jury trial where the action was transferred from the superior court division to the district court division without notice to defendant, so that defendant made no demand for jury trial in the district court within the time allowed by statute, and the district court subsequently denied defendant's demand for a jury trial.

APPEAL by defendant from *Barnette, J.*, 8 December 1969 Session, WAKE District Court.

This is a civil action commenced in the Superior Court of Wake County on 3 March 1966 by issuance of a summons and by the filing of a complaint. On 16 November 1966 defendant filed an amended answer to the complaint.

District Courts were established within the Tenth Judicial District, which includes Wake County, on 1 December 1968. On 2 December 1968 Superior Court Judge McKinnon signed an Order transferring this case from the Superior Court Division to the District Court Division of the General Court of Justice. The Order of Judge McKinnon was filed 13 December 1968. Defendant received no notice of Judge McKinnon's Order or of the transfer.

The case was calendared for trial before Judge Barnette at the 8 December 1969 non-jury Civil Session of the District Court

of Wake County. Defendant, upon receipt of a calendar notice, objected to setting the case for a non-jury term and on 18 November 1969 filed a demand for a jury trial. When the case came on for trial defendant renewed his demand for a jury trial and moved the court to continue the case until the next jury term of the District Court.

After hearing defendant's demand for a jury trial and motion to continue the case, Judge Barnette denied said demand and motion. Defendant then moved the court in its discretion to order a trial by jury which motion was denied.

The case proceeded to trial before Judge Barnette who answered the issues in favor of the plaintiff. Defendant appeals.

White, Hooten & White, by John R. Hooten, for appellant.

Seawell & Friedberg, by Edwin P. Friedberg, for appellee.

BROCK, J.

[3] Appellant contends that the transfer of this case from the Superior Court Division to the District Court Division in the General Court of Justice without giving appellant prompt notice of the effecting of said transfer and the subsequent denial of appellant's demand for a jury trial constituted a denial of his right under the Constitution of North Carolina to trial by jury. We agree.

[1, 2] This case being originally instituted in the Superior Court of Wake County, appellant was entitled to a trial by jury unless jury trial was waived or the facts of the controversy were not in dispute. *Sullivan v. Johnson,* 3 N.C. App. 581, 165 S.E. 2d 507. With the implementation of the District Court Division in Wake County, the right to a jury trial is available to litigants upon demand and such demand must be made in writing at any time 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. G.S. 7A-196. (Prior to amendment effective 1 January 1970.)

[3] Obviously, where one of the parties has no notice of the entry of an order transferring his case from the Superior Court to the District Court, he is not on notice to demand a jury trial to prevent a statutory waiver. All of the evidence in the record

shows that appellant was not notified of the Order transferring his case from the Superior Court to the District Court; therefore, we are of the opinion that appellant was denied his constitutional right to trial by jury. *Kelly v. Davenport*, 7 N.C. App. 670, 173 S.E. 2d 600.

New Trial.

BRITT and HEDRICK, JJ., concur.

BILLY P. ROOKS, EMPLOYEE-PLAINTIFF v. IDEAL CEMENT COMPANY, EMPLOYER SELF-INSURER, DEFENDANT

No. 705IC247

(Filed 15 July 1970)

1. **Master and Servant § 93; Trial § 6— letter stipulated into evidence — waiver of objection**

Workmen's compensation claimant who stipulated that a doctor's letter could be used in evidence cannot complain that the letter was incompetent as hearsay.

2. **Master and Servant § 94— conflict in medical opinions — duty of Industrial Commission**

Where the medical opinions of two physicians conflict as to the condition of the claimant in a workmen's compensation proceeding, the conflict does not have to be resolved in favor of the claimant, since the Industrial Commission has the duty and authority to pass upon the credibility of the witnesses and to resolve conflicts in medical and non-medical testimony.

APPEAL by plaintiff from the Industrial Commission Order of 6 November 1969.

Plaintiff instituted a claim for workmen's compensation and a hearing was held on 30 January 1968. An award was filed on 6 March 1968 with the North Carolina Industrial Commission by Deputy Commissioner Thomas in which he found facts and concluded that plaintiff had no permanent disability resulting from his accidential injury. On 29 August 1968, the Full Commission reviewed the award and by opinion and award filed 23 September 1968 affirmed the opinion and award of Deputy Commissioner Thomas. On 20 January 1969, plaintiff wrote a letter to the Industrial Commission which letter was treated as a

request that the case be reopened on the basis of a change of condition. The case was heard by Deputy Commissioner Delbridge on 13 February 1969 who in turn filed his opinion and award with the Industrial Commission on 29 May 1969, finding that plaintiff had not had a change of condition arising out of the original accident. Plaintiff thereafter appealed to the Full Commission whereupon, on 6 November 1969, the Full Commission filed an opinion and award affirming the opinion and award of Deputy Commissioner Delbridge.

From the adverse opinion and award of the Full Commission, plaintiff appeals.

Earl Whitted, Jr., for plaintiff appellant.

Stevens, Burgwin, McGhee & Ryals, by Ellis L. Aycock, for defendant appellee.

BROCK, J.

[1] Appellant's main assignment of error is that the findings of fact and conclusions of law and award as made by Deputy Commissioner Delbridge and affirmed by the Full Commission are not supported by competent evidence. More specifically, appellant contends that Deputy Commissioner Delbridge's finding of fact No. 4 was based upon a letter of one Dr. Dineen which was hearsay and incompetent. Consequently, he argues that the opinion and award of Deputy Commissioner Delbridge was not based on competent evidence.

Appellant stipulated that Dr. Dineen's letter could be used in evidence; he is therefore in no position to complain that it was so used. This assignment of error is without merit.

[2] Appellant also argues that where the medical opinions of two physicians conflict as to the condition of the claimant in a workmen's compensation claim the conflict should always be resolved in favor of the claimant rather than against him. Appellant's argument completely overlooks the necessity for someone to pass upon the credibility of witnesses. The Industrial Commission has the duty and authority to resolve conflicts in testimony whether medical or not. If the findings made by the Commission are supported by competent evidence they must be

accepted as final truth. *Petty v. Associated Transport*, 4 N.C. App. 361, 167 S.E. 2d 38.

The order appealed from is

Affirmed.

BRITT and HEDRICK, JJ., concur.

S. S. STEVENSON, JR. v. J. R. PRITCHARD t/a PRITCHARD'S ESSO SERVICE-CENTER

No. 709DC294

(Filed 15 July 1970)

1. **Appeal and Error § 57— findings of fact**

The findings of fact by the court have the force and effect of a verdict of a jury and are conclusive if supported by any competent evidence.

2. **Automobiles § 6— defective windshield wiper — action for damages — sufficiency of evidence**

In an action to recover the replacement cost of an automobile windshield, the plaintiff's evidence *is held* insufficient to support trial court's finding that the windshield wiper refill blade sold by defendant service station and installed on plaintiff's windshield caused the scratches on the driver's side of the windshield.

APPEAL by defendant from *Peoples, District Judge*, 16 February 1970 Session, VANCE County District Court.

Plaintiff instituted the action to recover $114.00 which he alleged was the replacement cost of an automobile windshield. Plaintiff alleged that the windshield was damaged by the use of a wiper blade which he purchased from defendant on 22 May 1966.

Plaintiff's evidence, considered in the light most favorable to him, tends to show the following. On 22 May 1966 plaintiff went to defendant's service station intending to buy a windshield wiper arm. Defendant did not have a windshield wiper arm but told plaintiff he could install a wiper filler which would work. Defendant put the refill in and started the wipers. They seemed to work satisfactorily and plaintiff departed. The vehicle was used primarily by plaintiff's wife who testified that she could not remember using the windshield wiper until 8 July 1966 when she was returning from the beach. She did not observe the wind-

shield being scratched by the wiper blade. On 9 July 1966 plaintiff observed scratches on the windshield. He had not used the windshield wipers from 22 May until 8 July. On cross-examination plaintiff testified, "I did not notice any defect in the windshield filler that Mr. Pritchard put in and I do not know of any defect in that refill. . . . I wasn't watching the car continuously from May until July. I used it occasionally. I don't know of anything that might have happened to the wiper or to the blade or to the arm during the period of May 22, 1966 to July 8, 1966." Defendant offered evidence, which we do not deem necessary to review in detail, tending to show that the wiper blade was working satisfactorily when plaintiff returned to his premises, that it was not defective and that the scratch could have been caused by an accumulation of wind and sand or a defect in the wiper arm.

The case was heard by the district judge, without a jury, and a judgment in the amount of $114.00 was entered in favor of the plaintiff. Defendant appeals.

Bobby W. Rogers for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey and Clay by Bob W. Bowers for defendant appellant.

VAUGHN, J.

[1, 2] The findings of fact by the court have the force and effect of a verdict of a jury and are conclusive if supported by any competent evidence. The record before us fails to disclose any competent evidence to support the court's finding:

> "That the said windshield wiper refill blade sold by the defendant to the plaintiff and as installed by the defendant did not work in an acceptable manner on the plaintiff's 1964 Thunderbird as it caused the windshield wipers to scratch the driver's side of the windshield in approximately top half circle scratches."

The findings which are supported by the evidence are insufficient to support the judgment. We do not reach, therefore, the other questions raised in the briefs of the parties.

Reversed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. RONDA LEE HICKS

No. 7024SC359

(Filed 15 July 1970)

Criminal Law § 161— appeal as exception to judgment

An appeal is an exception to the judgment and presents the face of the record proper for review.

DEFENDANT appeals from *McLean, J.*, 30 March 1970 Session of WATAUGA Superior Court.

The defendant appeals from a judgment revoking probation and activating sentences of imprisonment. On 19 January 1970 the defendant, represented by his court-appointed counsel, entered pleas of guilty to two counts of forgery and two counts of uttering forged checks. The pleas were accepted after due inquiry and findings as to the voluntariness of the pleas. The counts for forgery were consolidated and judgment was entered imposing a sentence of two (2) years in the common jail of Watauga County. The counts of uttering forged checks were also consolidated for judgment and a sentence of two (2) years was imposed, sentence to commence at the expiration of the sentence previously imposed. The execution of the sentences was suspended for five years upon compliance with certain conditions.

After due notice, pursuant to G.S. 15-200.1, the cause came on for hearing on 3 April 1970. It was found that defendant had wilfully violated terms of his probation, to wit: Defendant changed his place of residence to an unknown address without securing the written consent of his probation officer in violation of the condition that he "Remain within a specified area and shall not change place of residence without the written consent of the Probation Officer"; and defendant had failed and refused to make any payment to the Clerk of the Superior Court of Watauga County pursuant to the conditions of his probation. It was ordered that each suspended sentence be revoked and that the defendant be imprisoned. Defendant appealed.

Attorney General Robert Morgan by Staff Attorney Dale Shepherd for the State.

T. Michael Lassiter for defendant appellant.

VAUGHN, J.

Counsel for this indigent defendant has not filed a brief in support of his appeal. In the record on appeal counsel includes a statement that he can find no error and asks that this Court review the record on appeal to determine whether errors appear therein. We have considered the appeal as an exception to the judgment and reviewed the record proper. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330. No prejudicial error appears therein.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT KNIGHT

No. 7012SC401

(Filed 15 July 1970)

Indictment and Warrant § 17; Narcotics § 4— sale of marijuana and heroin — variance between indictments and proof

Variance between indictments charging defendant with sale of marijuana on July 11 and heroin on July 8 and evidence that the marijuana was sold on July 8 and the heroin on July 11, *held* not fatal.

APPEAL from *Hobgood, J.,* 23 February 1970 Session of CUMBERLAND Superior Court.

The defendant, Robert Knight, was tried under two valid bills of indictment charging him with the sale on 11 July 1969 of a narcotic drug; to wit, Marijuana, and with the sale on 8 July 1969 of a narcotic drug; to wit, Heroin. The defendant was tried before a jury and was represented by court-appointed counsel. The jury found the defendant guilty in both cases. From the judgment imposed, the defendant appealed to this Court.

Robert Morgan, Attorney General, and James L. Blackburn, Staff Attorney, for the State.

Anderson, Nimocks and Broadfoot, by Henry L. Anderson, Jr., for the defendant appellant.

HEDRICK, J.

The only exception brought forward by the defendant on this appeal is that the court committed error in failing to grant

the defendant's motion for a directed verdict and to dismiss the case at the close of the State's evidence. Counsel for the defendant candidly admits in his brief that he can find no specific error of prejudicial effect in the record which would justify a new trial. We agree with counsel for the defendant.

However, he does contend that the court erred in not directing a verdict in his favor in that the State failed to prove the elements of the case in that the alleged purchaser of the narcotic drugs testified on direct examination for the State that he purchased the marijuana on 8 July 1969 and that he purchased the heroin on 11 July 1969, instead of the reverse as stated in the bills of indictment. We do not believe this is such a fatal variance as to require a new trial. G.S. 15-155 provides:

> "No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for . . . omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, *nor for stating the time imperfectly,* nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; . . . ." (Emphasis added)

After a careful consideration of the record, it is our opinion that time was not of the essence in the present case and that the court below committed no prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. RICHIE "RICKY" LEE FOWLER

No. 7027SC414

(Filed 15 July 1970)

Bastards § 1— failure to support illegitimate child — prosecution

There was no prejudicial error in the trial of defendant for neglecting and refusing to support his illegitimate child, the trial court having denied the defendant's motion for a blood grouping test after the death of the child. G.S. 49-2, G.S. 49-7.

BRITT, J., dissents.

APPEAL by defendant from *Falls, J.*, 2 March 1970 Criminal Session, GASTON Superior Court.

The defendant in this case was charged in a warrant issued on 19 September 1969 with neglecting and refusing to support his illegitimate child, Michael Wayne Hicks, born to Patricia Ann Hicks on 7 September 1969, in violation of G.S. 49-2.

When this case was called for trial, and before pleading to the charge, the defendant, through his attorney, filed a written motion for a blood grouping test as provided in G.S. 49-7. The evidence on the hearing of the motion before Judge Falls revealed that the alleged illegitimate child, Michael Wayne Hicks, died on 15 October 1969 in Duke Hospital after undergoing open heart surgery. The court denied the motion for a blood grouping test, and the defendant entered a plea of not guilty. The jury found the defendant guilty as charged, and from the entry of the judgment, the defendant appealed to the North Carolina Court of Appeals.

Robert Morgan, Attorney General, and Edward Eatman, Staff Attorney, for the State.

Richard A. Cohan for the defendant appellant.

HEDRICK, J.

The defendant assigns as error the court's action in denying his motion for a blood grouping test and the court's denial of his motion for judgment as of nonsuit aptly made at the close of the State's evidence and renewed at the close of all the evidence.

After an examination of the entire record in this case, and considering all the defendant's exceptions and assignments of

error, we conclude that the defendant had a fair trial free from prejudicial error.

No error.

BROCK, J., concurs.

BRITT, J., dissents.

STATE OF NORTH CAROLINA v. AUGUSTA BELL ALIAS GUS BELL

No. 7012SC393

(Filed 15 July 1970)

1. **Robbery § 4— sufficiency of evidence**
   The State's evidence was sufficient to be submitted to the jury in this prosecution for common law robbery.

2. **Criminal Law § 132— motion to set aside verdict — appellate review**
   A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and refusal to grant the motion is not reviewable on appeal.

APPEAL by defendant from *Bickett, J.*, 10 November 1969 Regular Conflict Criminal Session, CUMBERLAND Superior Court.

By indictment proper in form defendant was charged with common law robbery on or about 3 April 1969. He pleaded not guilty, the jury found him guilty as charged, and from judgment imposing active prison sentence of not less than eight nor more than ten years he appealed.

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

Elizabeth C. Fox for defendant appellant.

BRITT, J.

The only assignments of error brought forward in defendant's brief are that the trial court erred (1) in denying defendant's motions for nonsuit and (2) in denying defendant's motion to set the verdict aside as being against the weight of the evidence.

[1] We have carefully reviewed the testimony presented at

the trial and hold that it was sufficient to survive the motions for nonsuit and the assignment of error relating thereto is overruled.

[2] As to the second assignment of error, it is well settled in this jurisdiction that a motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant the motion is not reviewable on appeal. 3 Strong, N. C. Index 2d, Criminal Law, § 132, pp. 55-56. The assignment of error is overruled.

We have carefully reviewed the entire record and find that it is free from prejudicial error. The defendant received a fair trial and the sentence imposed is within the limits allowed by statute.

No error.

BROCK and HEDRICK, JJ., concur.

LEROY, WELLS, SHAW & HORNTHAL v. JOHN T. TAYLOR, JR.

No. 701DC276

(Filed 15 July 1970)

Appeal and Error § 44— failure to file brief on time

Appeal is dismissed for failure of appellant to file the brief within the time allowed by the Rules of Practice in the Court of Appeals. Rule No. 28.

APPEAL by defendant from order of *Horner, District Judge,* 5 March 1970 Session, PASQUOTANK District Court.

On 6 October 1969 plaintiffs filed their complaint in Pasquotank District Court asking for judgment against defendant in amount of $720.00 plus interest and costs. On 20 October 1969 defendant filed his answer denying any indebtedness to plaintiffs. Jury trial was not requested in the complaint or in the answer. On 13 January 1970 defendant filed a motion requesting and demanding trial by jury of all issues of fact raised or to be raised in the action. On 5 March 1970 Horner, District Judge,

following a hearing, entered an order denying defendant's motion, from which order defendant appeals.

J. Fred Riley for plaintiff appellees.

John T. Taylor, Jr., pro se.

BRITT, J.

The record on appeal in this case was filed on 30 April 1970 and the case was duly calendared to be argued in this Court on 30 June 1970. Defendant appellant's brief was due to be filed by noon of 9 June 1970 but had not been filed when the case was called for arguments on 30 June 1970. Plaintiffs' motion to dismiss the appeal pursuant to Rule 28 of the Rules of Practice in the Court of Appeals of North Carolina is allowed.

Appeal dismissed.

BROCK and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. HAROLD EDWARD ANDREWS

No. 7014SC363

(Filed 15 July 1970)

Criminal Law § 138— appeal from district court to superior court — increased punishment

Upon appeal to the superior court from a conviction in the district court, the imposition of punishment in the superior court in excess of that imposed in the district court did not violate defendant's constitutional rights.

APPEAL by defendant from *Canaday, J.*, 9 February 1970 Regular Criminal Session, DURHAM Superior Court.

Defendant was tried in the District Court of Durham County on a warrant charging him with possession of spiritous liquors for the purpose of sale, in violation of G.S. 18-32. A judgment imposing a fine of $100.00 was entered and the defendant appealed to the superior court. When the case was called for trial in the superior court, the defendant, who was represented by counsel, tendered a plea of guilty. Before accepting the defendant's plea of guilty, and after due inquiry, the trial judge determined that it was entered knowingly and voluntarily.

Judgment was then entered imposing a sentence of eighteen (18) months. The sentence was suspended upon certain conditions and the defendant was placed on probation. From the entry of the judgment, the defendant appealed.

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

James B. Craven III, for defendant appellant.

VAUGHN, J.

Defendant's only assignment of error is that the judgment in the superior court imposed punishment in excess of that imposed in the district court from which he had appealed. He contends that this increase in sentence denied him due process of law and violated rights secured to him by the United States Constitution. This assignment of error is overruled. See *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897, where the identical question was resolved by the North Carolina Supreme Court. Because of the comprehensive treatment of the issue in that opinion, a repetition here of the many reasons why appellant's contentions must fail is deemed unnecessary.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN JONES, JR.

No. 7025SC407

(Filed 15 July 1970)

APPEAL by defendant from *Beal, J.,* 6 October 1969 Session, CALDWELL Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the capital felony of murder of one William Reid Hatfield on 4 May 1969.

Upon the case being called for trial, defendant, through privately employed counsel, tendered a plea of guilty of murder in the second degree. Judge Beal examined defendant thoroughly

upon the question of the voluntariness of his plea, and determined that it was freely, voluntarily, and understandingly tendered. The State accepted the plea and the Court approved.

During the night of 3 May 1969 defendant went to a trailer, used for housing poker games, to play poker. At about two o'clock in the morning of 4 May 1969 deceased came to the trailer. Deceased played a little poker and left. He returned about daybreak and again joined in the poker game. Some argument developed between deceased and either defendant, defendant's brother, or defendant's father. There was cursing and threats by deceased. Defendant cut deceased's throat with his pocket knife which caused immediate death.

Defendant ran from the premises, caught a ride to Hickory, then traveled by bus to Augusta, Georgia, where he was apprehended at the bus station by Georgia police. Defendant returned voluntarily to North Carolina, and gave a complete confession to the Caldwell County Sheriff's Department.

Upon his plea of guilty of the offense of second degree murder, judgment of imprisonment for a period of thirty years was pronounced. Defendant appealed.

Attorney General Morgan, by Deputy Attorney General Lewis, for the State.

West & Groome, by Ted G. West, for defendant.

BROCK, J.

Counsel for defendant, in his usual forthright manner, states that he is unable to find error, and asks this Court to review the record. We have carefully reviewed the record and the testimony, and we find

No Error.

BRITT and HEDRICK, JJ., concur.

FRANKLIN E. DEAN v. CHUN CHA PAK DEAN

No. 7012DC101

(Filed 15 July 1970)

APPEAL by plaintiff from *Herring, District Judge,* October 1969 Session, CUMBERLAND District Court.

On 9 April 1969 plaintiff, a soldier stationed at Fort Bragg, instituted this action for absolute divorce on grounds of one year separation. Defendant is a resident of South Korea and filed answer and cross-action asking for temporary and permanent alimony. On 10 September 1969 District Judge Herring entered a judgment for alimony *pendente lite,* counsel fees, etc. On 9 October 1969 plaintiff filed a motion asking that the judgment be vacated for that he had no notice of the cross-action or application for alimony *pendente lite.* On 31 October 1969 District Judge Herring, following a hearing, entered orders finding plaintiff in wilful contempt of the judgment and denying plaintiff's motion to vacate the judgment. Plaintiff appealed from the orders.

Marion C. George, Jr., attorney for plaintiff appellant.

No counsel for defendant appellee.

BRITT, J.

We have treated the papers filed by plaintiff's counsel as a petition for *certiorari,* and have allowed the petition to the end that we might consider all judgments and orders entered by the trial court in this action. Because of the facts revealed by the record, we hold that the trial court erred in entering its 10 September 1969 judgment and its 31 October 1969 orders; the judgment and orders are vacated and this cause is remanded for further proceedings as though the judgment and orders had not been entered and the hearings preceding their entry had not been held.

Judgment and orders vacated and cause remanded.

BROCK and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. ELMORE LYNCH, JR.

No. 7027SC383

(Filed 15 July 1970)

APPEAL by defendant from *Falls, J.*, March 1970 Session, GASTON Superior Court.

In a bill of indictment proper in form, defendant was charged with feloniously burning a dwelling house on 10 August 1969. He pleaded not guilty, a jury found him guilty of feloniously attempting to burn a dwelling house, and from judgment imposing active prison sentence of ten years, he appealed.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Staff Attorney Howard P. Satisky for the State.

Robert C. Powell for defendant appellant.

BRITT, J.

We have carefully considered each of the assignments of error brought forward and discussed in defendant's brief, but finding no merit in either of them, they are all overruled. The defendant had a fair trial free from prejudicial error and the sentence imposed is within the limits prescribed by statute. G.S. 14-67; G.S. 14-2.

No Error.

HEDRICK, J., concurs.

BROCK, J., dissents.

STATE OF NORTH CAROLINA v. CALVIN LEROY PRESTON AND JAMES LOUIS MITCHELL

No. 7010SC251

(Filed 5 August 1970)

1. **Constitutional Law § 34; Criminal Law § 26— double jeopardy — N. C. Constitution**

While the prohibition against double jeopardy is not stated in express terms in the North Carolina Constitution, it has long been

regarded as an integral part of the "law of the land" within the meaning of Article 1, § 17.

2. **Constitutional Law § 34; Criminal Law § 26— double jeopardy — 5th amendment to U. S. Constitution — applicability to states**

The prohibition against double jeopardy contained in the Fifth Amendment to the Constitution of the United States has been made applicable to the states by the Fourteenth Amendment.

3. **Constitutional Law § 34; Criminal Law § 26— four mistrials because of hung jury — fifth trial — double jeopardy**

Fifth trial of defendants for the crime of armed robbery after four previous trials for the same offense had ended in mistrials when the juries had been unable to agree on a verdict did not violate defendants' constitutional or common-law guaranties against double jeopardy.

4. **Constitutional Law §§ 20, 30— denial of free transcripts of prior trials**

In this fifth trial of indigent defendants for the crime of armed robbery, defendants were not deprived of "an essential tool for their defense" by the denial of their motion that they be provided free transcripts of four previous trials for the same offenses which ended in mistrials when the juries were unable to agree on a verdict, where defendants were represented in all five trials by the same attorneys, the record shows the attorneys had become thoroughly familiar with the testimony of all of the witnesses in the case, and the court reporter was available and could have been used if there was a conflict in the State's testimony.

5. **Constitutional Law § 31; Witnesses § 8— expenses of out-of-state witnesses — refusal to order payment by state or county — use of transcript of testimony in prior trial**

In this fifth trial of two indigent defendants for armed robbery, the trial court did not err in the denial of defendants' motion for an order directing the county or state to pay the expense of transporting two defense witnesses from another state, where a similar motion had been made and allowed prior to each of the four preceding trials, the trial court found that the interests of defendants could be protected by use of the testimony of these witnesses as given by them under oath and recorded by the court reporter at a previous trial of this case, and the transcript of testimony given by the witnesses at a previous trial was in fact admitted in evidence and presented to the jury.

6. **Criminal Law § 66— lineup — nonretroactivity of Wade and Gilbert decisions**

The *Wade* and *Gilbert* decisions do not apply to a lineup conducted on 4 June 1967.

7. **Constitutional Law § 30; Criminal Law § 66— lineup procedure — totality of circumstances test — unnecessary suggestiveness — due process**

Defendants are entitled to suppress any evidence resulting from lineup procedures which the "totality of circumstances" shows were

"so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process.

8. **Constitutional Law § 30; Criminal Law § 66— illegal one-man lineup of one defendant — subsequent five-man lineup with both defendants — in-court identification of both defendants**

In this prosecution of two defendants for armed robbery, although one-man lineup of one defendant at which each of two State's witnesses identified that defendant as one of the robbers, if considered as an isolated fact, was improperly suggestive, identification of both defendants in a five-man lineup three hours later and in-court identification of both defendants by the two witnesses were not thereby so tainted as to lead to any "irreparable mistaken identification," where the five-man lineup was conducted in a proper manner, the two witnesses independently and without consultation with each other readily and positively identified both defendants, the robbery occurred only the preceding afternoon in well lighted premises, both robbers were in the immediate presence of both witnesses during the robbery from five to seven minutes, nothing occurred at the lineup which would lead the witnesses to connect defendants with each other, and the ample opportunity which both witnesses had to observe both robbers supports the conclusion that the in-court identifications were based on the witnesses' observations of defendants during the robbery and not upon identification of one defendant in the one-man lineup or both defendants in the five-man lineup.

9. **Criminal Law §§ 43, 60— admissibility of photograph of fingerprint**

A photograph of a fingerprint, as of any other object, is admissible for the restricted purpose of explaining or illustrating to the jury testimony relevant and material to the controversy where there is evidence of the accuracy of the photograph.

10. **Criminal Law §§ 43, 60— admission of photograph and negative of fingerprint**

Where there was evidence as to the accuracy of a photograph of a "lifted" fingerprint and of the negative from which it was made, and evidence that the negative had been left, and thereafter found, in a police photo laboratory which had been kept under lock and key, the trial court did not err in the admission of expert testimony concerning the identification of defendant's fingerprints and in the admission for illustrative purposes of the photograph and the negative from which it was made.

APPEAL by defendants from *Carr, J.*, 17 November 1969 Criminal Session of WAKE Superior Court.

This is an appeal from the fifth trial of defendants for the crime of armed robbery. Four previous trials ended in mistrials when the juries were unable to agree. At the fifth trial the State presented the testimony of two employees of Roy's Cleaners, who identified defendants as the men who had come into the

premises of Roy's Cleaners on New Bern Avenue in the City of Raleigh on 3 June 1967 and with the threatened use of a pistol had robbed them of the sum of $70.00. Fingerprint evidence indicated that defendant Mitchell's prints were found on a counter at a spot the witnesses said one of the robbers had placed his hand. Defendants presented evidence to show they had never been in Roy's Cleaners on 3 June 1967 or at any other time and that they had been in the constant company of other persons and at other locations throughout the entire day of 3 June 1967. The jury found each defendant guilty of armed robbery and from judgments on the verdicts imposing prison sentences, both defendants appealed.

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

Liles & Merriman, by William W. Merriman III, for defendant appellant Mitchell.

McDaniel & Fogel, by L. Bruce McDaniel for defendant appellant Preston.

PARKER, J.

Appellants first assign as error the trial court's refusal to grant their motion to dismiss which was filed prior to the fifth trial. While this motion as presented to the trial court appears to have been based in part upon the contention that defendants were being denied their Sixth Amendment right to a speedy trial, on this appeal appellants have abandoned that position and have based their argument entirely upon the contention that their motion to dismiss amounted to a plea of former jeopardy because of the four previous mistrials and should have been allowed on that ground alone. Since the briefs and arguments presented by appellants and the State are directed solely to that aspect of the matter, we will similarly limit our consideration in this opinion.

[1, 2] While the prohibition against double jeopardy is not stated in express terms in the North Carolina Constitution, it has long been regarded as an integral part of the "law of the land" within the meaning of Article I, Section 17, of our State Constitution. *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838, and cases cited therein. By the decision of the United States Supreme Court in *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed. 2d

707, 89 S. Ct. 2056, decided 23 June 1969, the prohibition against double jeopardy contained in the Fifth Amendment to the Constitution of the United States has now been made applicable to the states by the Fourteenth Amendment. Since North Carolina has long recognized the principle both as "a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence," *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243; *State v. Prince,* 63 N.C. 529, and as an integral part of our own constitutional law, we do not find it necessary to consider whether the principle announced in *Benton* should be applied retroactively to the first four trials of this case, all of which occurred prior to the date of that decision. Both federal decisions, applying the Fifth Amendment, and state decisions, applying common law and state constitutional principles, have recognized that, in certain situations arising in criminal prosecutions, the court may order a mistrial before verdict and again place defendant on trial without violating the double jeopardy prohibition. This was recognized by the United States Supreme Court in *Wade v. Hunter,* 336 U.S. 684, 93 L.Ed. 974, 69 S. Ct. 834. The majority opinion in that case contains the following:

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again."

State court decisions have also recognized that a retrial after mistrial from a hung jury does not violate the guaranty against double jeopardy. 22 C.J.S., Criminal Law, § 260, p. 679.

> "The early common-law rule was that the discharge of an impaneled jury in a criminal case for any cause before the verdict would sustain a plea of former jeopardy and operate practically as a discharge of the prisoner. The modern rule, however, permits the court to discharge a jury

> without working an acquittal of the defendant in any case where the ends of justice would otherwise be defeated. This calls for the exercise of sound discretion on the part of the court, and the power to discharge is to be exercised only where there is a cogent reason or a manifest necessity. It cannot be arbitrarily exercised." 21 Am. Jur. 2d, Criminal Law, § 194, p. 246.

Decisions of the North Carolina Supreme Court are in accord. See *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599, and cases cited therein. In *State v. Birckhead, supra,* the North Carolina rule was stated as follows:

> "We conclude that the trial judge in cases less than capital may, in the exercise of sound discretion, order a mistrial before verdict, without the consent of defendant, for physical necessity such as the incapacitating illness of judge, juror or material witness, and for 'necessity of doing justice.' . . . His order is not reviewable except for gross abuse of discretion, and the burden is upon defendant to show such abuse."

[3] Appellants recognize the foregoing principles but contend they are properly applicable to cases in which a defendant is retried after only one mistrial and that a fifth trial after four mistrials amounts to such "an overreaching and oppressive prosecution" as ought not to be allowed. A similar argument was presented to and rejected by the United States Court of Appeals for the Second Circuit in *U. S. v. Persico,* 425 F. 2d 1375, decided 15 April 1970. The court found no deprivation of constitutional rights when defendants were tried a fifth time after four previous trials for the same offense. In *Persico* the first trial ended in a hung jury, the second in conviction which was reversed on appeal, the third in a mistrial because of a hung jury and because Persico was shot, and the fourth in conviction which was again reversed on appeal. The court approved the fifth trial, which resulted in conviction, finding there had been no transgression of the due process limitations upon the governmental rights of retrial. While that case is certainly distinguishable from the case presently before us on the grounds that in *Persico* two of the four previous trials had resulted in convictions, nevertheless it is authority for the proposition that five trials for the same offense do not necessarily result in deprivation of the defendant's constitutional or

common-law rights. While it is, of course, possible that a case may occur in which the number of trials, standing alone, is so excessive as to exceed due process limitations upon the governmental rights of retrial, each case must necessarily be decided upon its own facts. Under our practice the decision must first be made by the trial judge, and his order in that regard, at least in noncapital cases, is not reviewable except for gross abuse of discretion. The burden is on defendant to show such abuse. On the record before us in the present case we find no abuse in the trial judge's ruling which denied defendants' motion to dismiss, and appellants' first assignment of error is accordingly without merit.

[4] Appellants assert that the trial court committed error in refusing to grant their motion, made prior to the fifth trial, that they be furnished at public expense transcripts of the four previous trials. In their motion as presented to the trial court defendants alleged their indigency and asserted that "said defendants deem it necessary for them to have transcripts of the evidence presented at these trials," but gave no reason why they deemed it necessary. In their brief on this appeal appellants argue that they were entitled to be furnished transcripts because use of the transcripts in connection with cross-examination of the State's witnesses was "an essential tool for their defense." However, it appears that appellants were represented at their fifth trial by the same court-appointed attorneys who had represented them at the four previous trials. The record clearly indicates that these attorneys had become thoroughly familiar with the testimony of all of the witnesses in the case. There was no showing that cross-examination of the State's witnesses was restricted in any way. It appears that the court reporter was available and could have been used if there was a conflict in the State's testimony. On the record before us we find nothing which indicates that there was such a need for the transcripts that denial of their motion amounted to any deprivation of "an essential tool for their defense." *State v. Britt,* 8 N.C. App. 262, 174 S.E. 2d 69; *State v. Keel,* 5 N.C. App. 330, 168 S.E. 2d 465.

[5] Appellants assign as error the overruling of their motion, made prior to the fifth trial, for an order directing the County or State to defray the cost of transporting two defense witnesses from Pennsylvania. A similar motion had been made and allowed prior to each of the four preceding trials, on each occasion a

judge of superior court, having ordered the Wake County Treasurer to appropriate the sum of $182.00 (being mileage at 10¢ a mile and witness fees of $5.00 per day for each witness) to obtain the attendance of these witnesses. When the motion was again made prior to the fifth trial, the presiding superior court judge entered an order finding as a fact that the testimony of these witnesses (who were a sister and brother-in-law of the defendant Mitchell) as given by them under oath at a previous trial was available to defendants, that there was no provision of law under which Wake County or the State of North Carolina could be required to pay the expenses of the witnesses as requested, and that the interests of the defendants could be protected by the use of the testimony of these witnesses as theretofore given by them under oath and recorded by the court reporter at a previous trial of this case. On these findings the judge denied the motion. In this we find no error. While North Carolina has adopted the "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings," G.S., Chap. 8, Art. 9, appellants have cited no authority, and our research has discovered none, that the court may compel the state or county to appropriate funds for purpose of paying the mileage and witness fees specified in that statute. It may be that a case might arise in which due process would require that the public bear such an expense. We do not view the present as such a case. Here the defendants were not denied opportunity to present to the jury the testimony of their out-of-state witnesses. The transcript of the testimony as given by these witnesses under oath at a previous trial of this case was admissible in evidence. *Norburn v. Mackie,* 264 N.C. 479, 141 S.E. 2d 877. This testimony was in fact admitted in evidence and presented to the jury. Under these circumstances we find no reversible error in the court's refusal to grant defendants' motion that the County or State be once again required to pay the expense of bringing these witnesses in person to North Carolina.

[6-8] Two employees of Roy's Cleaners, the premises where the robbery occurred, testified for the State and made positive in-court identification of the defendants as the persons who had committed the robbery. Appellants contend that admission of this in-court identification testimony was error because it was based upon a prior illegal lineup identification. We do not agree. It should first be observed that the lineup in question occurred

on 4 June 1967, so that *Wade* and *Gilbert* do not apply. *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S. Ct. 1967. Even so, if the "totality of circumstances" shows the use of lineup procedures "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law, defendants would be entitled to suppress any evidence resulting from such lineup procedures. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345. The question presented, therefore, is whether the lineup procedures followed in the present case were "unnecessarily suggestive and conducive to irreparable mistaken identification." In our opinion they were not. Evidence presented in this case, both before the jury and at the *voir dire* which was conducted to determine admissibility of the in-court identification testimony, discloses that on the day following the robbery each of the two witnesses saw one of the defendants, Preston, in a room by himself at the police station, at which time each of the witnesses identified Preston as one of the robbers. About three hours later each of the two witnesses positively identified both defendants when they observed them in a five-man lineup which appears to have been conducted in all respects in a proper manner. All five men in this lineup were of the same race, were about the same height, and were dressed about the same. They were identified in the lineup only by number, and the two witnesses, each acting independently and without any consultation with the other, readily and positively identified both defendants. The robbery itself had occurred only the preceding day. It took place about 12:30 p.m. on a summer afternoon in well lighted premises. Both robbers were in the immediate presence of both witnesses, at times as close as two feet, for a period of from five to seven minutes. While the presentation of the defendant Preston alone to the witnesses was, if considered as an isolated fact, improperly suggestive, we do not agree with appellants' contention that all further identification of both defendants was thereby so tainted as to lead to any "irreparable mistaken identification." On the contrary, nothing appears to indicate that at the subsequent five-man lineup anything occurred which would lead the witnesses to connect Mitchell with Preston, and both witnesses positively identified both defendants. Furthermore, the ample opportunity which both witnesses had to make full observation of both defendants during the course of the robbery, supports the conclusion that the subsequent in-court identification which both witnesses made was based on their observation of defendants during the course of the

robbery, rather than upon any identification made at the police station at the time either of the one-man lineup of Preston or at the time of the five-man lineup at which both Preston and Mitchell were identified. Nothing in the record in the present case supports the conclusion that there was even a remote, much less a substantial, likelihood of irreparable misidentification.

[10] Appellants contend there was error when the trial court overruled their objections to testimony and exhibits relating to fingerprints of defendant Mitchell which had been "lifted" from a spot on the counter at Roy's Cleaners pointed out to the police investigators by the two employees as a place touched by one of the robbers. J. W. Narron, a fingerprint expert then employed by the Raleigh Police Department, testified that he placed the "lifted" fingerprints on a white card, and on 4 June 1967, the day following the robbery, compared the prints with fingerprints of defendant Mitchell which were on file in the police department. Narron identified the "lifted" fingerprints on the card as those of Mitchell, and made handwritten notes on the card on which the "lifted" fingerprints appeared. Narron then photographed the card with the "lifted" fingerprints and his handwritten notations on it, and took the film to the police processing facility for development. The film was developed into a negative, and photographic prints (positive images) were made from this negative. These photographic prints were then placed in an envelope with the original card on which the "lifted" prints appeared, and this envelope was filed. This envelope was apparently lost and even though diligent search has been made for it, has never been found. The negative was filed in the photo processing room, but was overlooked before the first trials of this case and was not discovered until just prior to the fourth trial, when it was found among "miscellaneous" negatives.

At the fifth trial Narron testified that on the day following the robbery he compared the "lifted" fingerprints with those of Mitchell and positively identified them as being the same. The photographic negative which exactly reflected the card with the "lifted" fingerprints and handwritten notations was identified by Narron. He also identified a photographic print which had been made from this negative, and testified that defendant Mitchell's fingerprints matched those reproduced in the negative and in the photographic print which had been made therefrom.

Robert E. Lee, who was employed in the fingerprint identification and crime photography division of the police department, testified that on 11 November 1968 he discovered the negative among the miscellaneous negatives on file in the police department. He testified that the room in which this negative was found was kept under lock and key and access to it was restricted to authorized police personnel.

[9, 10] The main thrust of appellants' objections made at the trial to this fingerprint evidence, and their argument on this appeal, is directed to questioning the whereabouts of the negative from June 1967 to the date it was found by Lee on 11 November 1968. Appellants argue that this is a "missing link" in the chain of possession of the negative, and that thereby the fingerprint evidence was rendered inadmissible. Appellants cite no authority for this position, and we can find neither reason nor authority to support their contention. A photograph of a fingerprint, as of any other object, where there is evidence of accuracy of the photograph, is admissible for the restricted purpose of explaining or illustrating to the jury testimony relevant and material to the controversy. *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291. Here, there was evidence as to the accuracy of the print and of the negative from which it had been made. There was also evidence that the negative itself had been left, and thereafter found, in the police photo laboratory which had been kept under lock and key. We find no error in admission of the expert testimony concerning identification of defendant Mitchell's fingerprints and no error in admitting in evidence for illustrative purposes the photographic print and the negative from which it was made.

Appellants also assign as error portions of the court's charge to the jury. We have examined all of these assignments of error carefully, and find that the charge, taken contextually and viewed as a whole, is free from prejudicial error.

Defendants have been represented throughout by able counsel who have diligently protected all of their rights. From careful examination of the entire record we find that defendants have received a fair trial which was free from prejudicial error.

No error.

CAMPBELL and VAUGHN, JJ., concur.

THOMAS L. KALE v. FRANCES KALE FORREST AND RICHARD B. KALE, SR., INDIVIDUALLY AND AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RUSSELL H. KALE, SR., RUSSELL H. KALE, JR., TRUDY LEE KALE, THERESA LYNN KALE, TINA LOUISE KALE, TRACEY KALE, TAREN LEIGH KALE, RICHARD B. KALE, JR., MARJORIE SYM KALE AND JOSEPH TURNER FORREST, JR., AND JOHN H. VERNON, GUARDIAN AD LITEM

No. 7015SC286

(Filed 5 August 1970)

1. **Wills § 73— construction of will — sufficiency of findings and conclusions**

In a declaratory judgment action seeking the construction of a handwritten will probated in solemn form, the court's findings of fact and conclusions of law *are held* to have adequately ascertained the intent of the testator, and the judgment declaratory of the rights of the parties is affirmed.

2. **Wills § 28— construction of will — intention of testator**

The intention of the testator as gathered from the four corners of a will is the controlling guide in interpreting a will.

APPEAL by the plaintiff, and defendant, Frances Kale Forrest, from *Gambill, J.*, February 1970 Civil Session, The General Court of Justice of ALAMANCE County, Superior Court Division.

This action was instituted pursuant to the Declaratory Judgment Act (G.S. 1-253, *et seq.*) to secure a construction of the terms of the will of Russell H. Kale, Sr. The instrument in question provided as follows:

"Mebane, N. C.
August 10, 1965

This is my Last Will and Testament

Item #1

After my taxes and all other expenses have been paid, my estate shall be divided as follows:

Richard B. Kale's ¼ part shall be given to Richard B. Kale, Jr., and Marjorie Sym Kale. They shall have Kale Knitting Mills stock at book value.

Frances Kale Forrest's interest shall [sic] divided equally between she and her son Joseph Turner Forrest, Jr.

Russell Henderson Kale's share shall be put in trust for him and he shall get interest from this when he reaches 60

years of age. At his death the balance shall be given to my surviving heirs.

Richard B. Kale, Sr. and Frances Kale Forrest are to act as Co-Executors without fee.

I hereby revoke all wills and codicils heretofore made by me.

$25,000.00 shall be taken from my estate for the college education of daughters of Thomas Kale, Trudy Lee Kale, Teresa Lynn [*sic*] Kale, Tina Louise Kale, Tracey Kale and Taren Leigh Kale. Any moneys not used for their education shall be held and earnings given to Thomas L. Kale.

Thomas L. Kale's share shall be put in trust for him and income from this trust shall be given him at age 60. If he is solvent at that time he can draw $1,000.00 yearly on principal.

s/ RUSSELL H. KALE, SR.

Witness: Manley L. Warren

Witness: Shirley J. Carver"

After a hearing, the following findings of fact, conclusions of law and judgment were entered by Judge Gambill:

"THIS CAUSE, coming on to be heard before the undersigned Judge presiding at the February, 1970, Civil Term of the General Court of Justice, Superior Court Division for Alamance County, and after consideration of the admissions in the pleadings, the evidence presented, and argument of Counsel, the Court finds the facts and states conclusions of law, as follows:

FINDINGS OF FACT

1. Russell H. Kale, Sr., a citizen and resident of the County of Alamance and State of North Carolina, died on or about the 7th day of February, 1969, seized and possessed of both real and personal property.

2. That Russell H. Kale, Sr., left a handwritten, attested will dated August 10, 1965, a copy of which is attached hereto as 'Exhibit A', and said will was on the 7th day of May, 1969, duly admitted to probate in solemn form before the Clerk of Superior Court of Alamance County, North Carolina.

3. Richard B. Kale, Sr., and Frances Kale Forrest duly qualified as Executors under the will of Russell H. Kale, Sr., and are now acting in such capacity.

4. On the 7th day of May, 1969, this action was instituted by the plaintiff, Thomas L. Kale, under the North Carolina Declaratory Judgment Statute, General Statute 1-255, and all persons, heirs and any other parties who may have an interest in the subject matter were made parties to this action, and that the same have been properly served and are before this Court. The plaintiff, Thomas L. Kale, instituted this action alleging that a bona fide controversy had arisen between the plaintiff and defendants relative to their legal rights and status under the provisions of the will of Russell H. Kale, Sr.

5. Certain defendants answered the complaint of Thomas L. Kale alleging that a bona fide controversy had also arisen under certain other provisions of the Last Will and Testament of Russell H. Kale, Sr., and that the Court should construe the Last Will and Testament of Russell H. Kale, Sr., and render a judgment declaring and adjudicating the respective rights of all parties under the provisions thereof.

6. The testator, Russell H. Kale, Sr., died on February 7, 1969, and at that time he was survived by four (4) children; namely, Thomas L. Kale, Frances Kale Forrest, Richard B. Kale, Sr., and Russell H. Kale, Jr.

7. Emma C. Kale, wife of Russell H. Kale, Sr., died on the 28th day of December, 1961, and that Russell H. Kale, Sr., did not remarry prior to his death on February 7, 1969.

8. The following questions and issues, among others not herein enumerated, have arisen and the parties have requested the Court to interpretate and adjudicate the respective rights of all parties under said issues:

I. What portion of the estate of Russell H. Kale, Sr., was devised and bequeathed unto the following persons:

A. Richard B. Kale, Jr., and Marjorie Sym Kale?

B. Frances Kale Forrest and Joseph Turner Forrest, Jr.?

C. In trust for Russell Henderson Kale, Jr.?

D. In trust for Thomas L. Kale?

II. What is the disposition of the corpus in trust for Russell H. Kale, Jr., after his death, and at what time is the surviving heirs of the testator determined?

III. Whether the Co-Executors, Richard B. Kale, Sr., and Frances Kale Forrest, who have actually performed services during the administration of the estate are bound by the provision in the Last Will and Testament of Russell H. Kale, Sr., to serve without fee?

IV. Whether the will of Russell H. Kale, Sr., creates a $25,000.00 trust for the college education of the children of Thomas L. Kale and must distribution from the fund for the benefit of any one child be limited to $5,000.00?

V. Whether the $25,000.00 educational fund established for the children of Thomas L. Kale is taken from the portion of the estate of Russell H. Kale, Sr., bequeathed in trust for the benefit of Thomas L. Kale?

VI. What is the effect of the bequest to Thomas L. Kale and the disposition of the share after his death?

VII. When the testator fails to appoint a Trustee under a testamentary trust, who is the proper person to act in such capacity?

VIII. What is the meaning of book value in the bequest to Richard B. Kale, Jr., and Marjorie Sym Kale, and at what date is the determination for valuing the stock at book value?

CONCLUSIONS OF LAW

ISSUE I

1. Russell H. Kale, Sr., sired four (4) children during his lifetime; namely, Richard B. Kale, Frances Kale Forrest, Russell H. Kale, Jr., and Thomas L. Kale. All of these children survived the death of their father, their last surviving parent.

2. The Last Will and Testament of Russell H. Kale, Sr., initially states: 'My estate shall be divided as follows:'. The testator begins the division with: 'Richard B. Kale's ¼th part shall be given to Richard B. Kale, Jr., and Marjorie Sym Kale.' Thereafter, the testator mentions each of his

three remaining children with such language as 'Frances Kale Forrest's interest'; 'Russell Henderson Kale's share'; and 'Thomas L. Kale's share'.

3. The testator's intent was to distribute his estate equally between his children or their representatives. In beginning with the language to the effect 'Richard B. Kale's ¼th interest' and then stating each of his three remaining children's share shall be devised in a certain manner, it clearly illustrates that it was the intent of Russell H. Kale, Sr., to make an equal division of all his property among his children or representatives of the children's interest.

4. The intent of Russell H. Kale, Sr., was to divide his estate into four equal shares and that the estate of Russell H. Kale, Sr., should be distributed as follows:

¼ Richard B. Kale's interest divided between Richard B. Kale, Jr. (⅛), and Marjorie Sym Kale (⅛).

¼ Frances Kale Forrest's interest divided between Frances Kale Forrest (⅛) and Joseph Turner Forrest, Jr. (⅛).

¼ Russell Henderson Kale, Jr.'s share in trust for Russell Henderson Kale, Jr.

¼ Thomas L. Kale's interest in trust for Thomas L. Kale, less the $25,000.00 educational fund for his children.

ISSUE II

1. The Last Will and Testament of Russell Henderson Kale directs that: 'Russell Henderson Kale, Jr.'s share shall be put in trust for him and he shall get interest from this when he reaches 60 years of age. At his death, the balance shall be given to my surviving heirs.'

2. The testator, Russell H. Kale, Sr., intended to provide Russell Henderson Kale, Jr., a life estate in the corpus of his portion of the estate with the remainder to the testator's surviving heirs. The income produced from this portion is to be accumulated until Russell Henderson Kale, Jr., reaches the age of 60, at which time he will be paid the accumulated income; and thereafter, he shall be paid the income on the corpus at quarterly intervals.

3. In the event that the said Russell Henderson Kale, Jr., shall die prior to reaching the age of 60 years, all accumulated income shall be paid to his estate.

4. The surviving heirs of Russell H. Kale, Sr., are to be determined at the death of the life tenant, Russell Henderson Kale, Jr., as if Russell H. Kale, Sr., had died immediately after the death of Russell Henderson Kale, Jr. All heirs of Russell H. Kale, Sr., so determined will inherit the corpus.

ISSUE III

1. Russell H. Kale, Sr., testator, appointed Richard B. Kale, Jr., and Frances Kale Forrest as Co-Executors to serve without fee. Both parties have duly qualified as such and are now acting in that capacity.

2. There is an effective testamentary provision in the will of Russell H. Kale, Sr., that the Co-Executors are to serve without fee and therefore the Court does not have the power to allow a fee in conflict with the terms and provisions of the testator's will.

ISSUE IV

1. The testator, Russell H. Kale, Sr., bequeathed $25,000.00 for the education of the daughters of Thomas L. Kale.

2. The intent of the testator, Russell H. Kale, Sr., was to create a trust for the college education of the five (5) daughters of Thomas L. Kale.

3. The testator intended to establish a fund for the education of his grandchildren and did not desire to limit the expenditure for each grandchild to $5,000.00.

4. The Trustees, hereinafter appointed, are vested with the discretion to pay out such amounts, as their interests and needs shall appear, for the college education of the testator's grandchildren, Trudy Lee Kale, Theresa Lyn Kale, Tina Louise Kale, Tracey Kale, and Taren Leigh Kale. Such college education expenses shall include the cost of tuition, fees, books, clothing, laundry, and other related necessary expenses.

5. Any balance remaining after the education of the children of Thomas L. Kale, hereinabove named, shall be added to the trust created for Thomas L. Kale and administered under the provisions thereof.

6. That Thomas L. Kale is the equitable owner, in fee simple, of all properties constituting his trust estate, including any accumulated income, and, therefore, upon his death, all such properties then remaining as a part of said trust estate, including any accumulated income, shall be paid over to the estate of the said Thomas L. Kale, free and discharged from any further trust.

ISSUE V

1. The intent of the testator was to establish a $25,000.00 educational bequest for his granddaughters, the children of Thomas L. Kale.

2. The testator had already disposed of ¾th of his estate, prior to the $25,000.00 educational bequest.

3. The testator bequeathed any remainder in the educational trust to Thomas L. Kale under the terms of the trust created for his benefit.

4. The testator allowed Thomas L. Kale to draw $1,000.00 annually from his trust after age 60.

5. It was the intent of the testator, Russell H. Kale, Sr., that the $25,000.00 used to fund the educational bequest of the children of Thomas L. Kale be taken from the ¼th share of Thomas L. Kale in the estate of Russell H. Kale, Sr.

ISSUE VI

1. The testator provided that Thomas L. Kale's share shall be put in trust for him and the accumulated income from this trust given to him at age 60. If he is solvent at that time, he can draw $1,000.00 yearly on principal.

2. The intent of the testator is clear in that Thomas L. Kale's share shall be held in trust for him and all accumulated income paid to him at age 60; and thereafter he shall be paid the income on the corpus in quarterly intervals. In addition, Thomas L. Kale, at the age of 60, may invade the

principal by $1,000.00 and each year thereafter if he is solvent at the time of each such invasion.

3. That Thomas L. Kale is the equitable owner in fee simple of all properties constituting his trust estate, including any accumulated income, and, therefore, upon his death all such properties constituting said trust estate, including any accumulated income shall be paid over to the estate of the said Thomas L. Kale, free and discharged from any further trust.

ISSUE VII

1. The testator created three (3) trusts under the provisions of his Last Will and Testament: (1) Russell Henderson Kale's trust, (2) The educational trust for the college education of the testator's granddaughters, (3) The trust for Thomas L. Kale, individually, which includes any monies not used for the education of the testator's granddaughters named in the Will.

2. The testator, Russell H. Kale, Sr. in his will named Richard B. Kale, Sr., and Frances Kale Forrest as Co-Executors, but neglected to appoint a Trustee of all trusts created therein.

3. The supervision of trust estates involves the equitable jurisdiction of the Court, and where a trust has been created and for some cause there is no person to execute the trust and carry out its purposes, it then becomes the province of a Court of equity to appoint a Trustee.

4. Where property, real or personal, is devised and bequeathed by a will upon certain trusts set out in the will and the testator does not appoint a Trustee, it is the duty of the Co-Executors, Richard B. Kale, Sr., and Frances Kale Forrest, who have duly qualified as required by statute, to carry out the provisions of the Last Will and Testament of Russell H. Kale, Sr.

5. The Co-Executors, Richard B. Kale, Sr., and Frances Kale Forrest are to be Co-Trustees of all trusts created under the Last Will and Testament of Russell H. Kale, Sr.

6. Richard B. Kale, Sr., and Frances Kale Forrest, as Co-Trustees, will not be entitled to compensation for their services in such capacity.

ISSUE VIII

1. The testator provided that Richard B. Kale's share shall be given to Richard B. Kale, Jr., and Marjorie Sym Kale and their share shall be comprised of Kale Knitting Mills stock at book value.

2. It is the testator's intent that the bequest for Richard B. Kale, Jr., and Marjorie Sym Kale be satisfied out of Kale Knitting Mills stock and that the value shall be computed at book value.

3. Book value of Kale Knitting Mills stock shall be determined by generally accepted accounting procedures and by dividing the net worth by the outstanding shares of common stock in the Kale Knitting Mills at the death of the testator.

4. This book value of the stock shall be figured as of the date of death of Russell H. Kale, Sr., February 7, 1969.

5. For distribution and probate purposes, all Kale Knitting Mills stock shall be valued at book value, as hereinabove set forth.

Based upon the foregoing facts and conclusions of law, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

ISSUE I

The Estate of Russell H. Kale, Sr., is to be divided and distributed as follows:

1/8 to Richard B. Kale, Jr.

1/8 to Marjorie Sym Kale

1/8 to Frances Kale Forrest

1/8 to Joseph Turner Forrest, Jr.

1/4 in trust for Russell Henderson Kale, Jr.

1/4 in trust for Thomas L. Kale, less the $25,000.00 education fund for his children, Trudy Lee Kale, Theresa Lyn Kale, Tina Louise Kale, Tracey Kale, and Taren Leigh Kale

ISSUE II

1. The 1/4th interest devised to Russell Henderson Kale, Jr., shall be held in trust for him for life. The income pro-

duced from this portion is to be accumulated until Russell Henderson Kale, Jr., reaches the age of sixty (60), at which time he will be paid the accumulated income, and thereafter he shall be paid income on the corpus at quarterly intervals.

2. In the event the said Russell H. Kale, Jr., shall die prior to reaching the age of sixty (60) all accumulated income shall be paid to his estate.

3. Upon the death of Russell Henderson Kale, Jr., the corpus shall be paid to the surviving heirs of Russell H. Kale, Sr. The heirs of Russell H. Kale, Sr., shall be determined at the death of Russell Henderson Kale, Jr., as if Russell H. Kale, Sr., had died immediately following the death of Russell Henderson Kale, Jr. All the heirs of Russell H. Kale, Sr., so determined will inherit the corpus.

ISSUE III

The Co-Executors, Richard B. Kale, Sr., and Frances Kale Forrest, are not entitled to an Executor fee or commission as in accordance with the terms and provisions of the Last Will and Testament of Russell H. Kale, Sr.

ISSUE IV

1. The $25,000.00 bequest for the education of the testator's grandchildren, Trudy Lee Kale, Theresa Lyn Kale, Tina Louise Kale, Tracey Kale, and Taren Leigh Kale, is to be held in trust for them.

2. The expenditure to each grandchild is not limited to $5,000.00 and the Trustees, hereinafter appointed, are vested with the discretion to pay out such amounts as their needs and interests appear for the college education of Trudy Lee Kale, Theresa Lyn Kale, Tina Louise Kale, Tracey Kale, and Taren Leigh Kale. That such college education expenses shall include the costs of tuition, fees, board and lodging, books, clothing and laundry and any other reasonable and necessary related expenses.

3. Any balance remaining after the education of the children of Thomas L. Kale, hereinabove named, shall be added to the trust for Thomas L. Kale and administered under the provisions thereof.

4. Thomas L. Kale is the equitable owner in fee simple of all properties constituting his trust estate, including any

accumulated income, and, therefore, upon his death all such properties then remaining as a part of said trust estate, including any accumulated income, shall be paid over to the estate of Thomas L. Kale, free and discharged of any further trusts.

ISSUE V

The $25,000.00 used to fund the education bequest for Trudy Lee Kale, Theresa Lyn Kale, Tina Louise Kale, Tracey Kale, and Taren Leigh Kale, shall be taken from the ¼ share of Thomas L. Kale in the Estate of Russell H. Kale, Sr.

ISSUE VI

1. The share of Thomas L. Kale shall be held in trust for him and the accumulated income paid to him at age sixty (60), and thereafter he shall be paid the income from the corpus in quarterly intervals. In addition, Thomas L. Kale at age sixty (60) may invade the principal by $1,000.00 and each year thereafter, if he is solvent at the time of each such invasion.

2. Thomas L. Kale is the equitable owner in fee simple of all properties constituting his trust estate including all accumulated income and, therefore, upon his death all such properties then remaining as a part of said trust estate, including any accumulated income, shall be paid over to the estate of Thomas L. Kale, free and discharged of any further trusts.

ISSUE VII

1. The testator created three (3) trusts under the provisions of his Last Will and Testament: (1) Russell Henderson Kale's trust, (2) The educational trust for the college education of the testator's granddaughters, (3) The trust for Thomas L. Kale, individually, which includes any monies not used for the education of the testator's granddaughters named in the Will.

2. The Co-Executors, Richard B. Kale, Sr., and Frances Kale Forrest, are to be Co-Trustees of all trusts created under the Last Will and Testament of Russell H. Kale, Sr., without compensation.

ISSUE VIII

1. The shares of Richard B. Kale, Jr., and Marjorie Sym Kale in the estate of Russell H. Kale, Sr., shall be satisfied out of Kale Knitting Mills stock.

2. The value of Kale Knitting Mills stock shall be computed at book value.

3. Book value of Kale Knitting Mills stock shall be determined by generally accepted accounting procedures and by dividing the net worth by the outstanding shares of common stock in Kale Knitting Mills at the death of the testator.

4. This book value of the stock shall be figured as of the date of death of Russell H. Kale, Sr., February 7, 1969.

5. For distribution and probate purposes all Kale Knitting Mills stock shall be valued at book value as hereinabove set forth.

IT IS FURTHER ORDERED that the costs of this action shall be paid out of the estate of Russell H. Kale, Sr.

This, the 5 day of February, 1970.

s/ ROBERT M. GAMBILL
Judge Presiding"

Appellants bring forward numerous exceptions to the findings and conclusions of law of the trial judge.

Ross, Wood and Dodge by Harold T. Dodge for plaintiff appellant.

Hofler, Mount & White by Lillard H. Mount for defendant appellant, defendant appellee, Frances Kale Forrest.

Aycock, LaRoque, Allen, Cheek & Hines by C. B. Aycock for defendant appellee, Russell Henderson Kale, Jr.

CAMPBELL, J.

We have reviewed the record in this case. It is conceded by all parties that the instrument in question is a will and that it was properly probated in solemn form. The sole question is the correct construction of the will.

[1, 2] The intention of the testator as gathered from the four corners of a will is the controlling guide in interpreting a will. *Campbell v. Jordan,* 274 N.C. 233, 162 S.E. 2d 545 (1968). We feel that the findings and conclusions of law reached by Judge Gambill in this case adequately plumb the intent of the testator in the instant case, and we will not disturb his judgment declaratory of the rights of the parties involved.

Affirmed.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES JACKSON BLALOCK AND MERIL LANE ANDREWS

No. 7010SC235

(Filed 5 August 1970)

1. **Criminal Law § 99— rape prosecution — questions asked by court — expression of opinion**

In this prosecution for rape, questions which the trial judge asked some of the witnesses were for the purpose of clarification and did not constitute an expression of opinion or tend to impeach the testimony of the witnesses.

2. **Criminal Law § 99— threat by court to issue bench warrants against defense witnesses — prejudice to defendants**

In this rape prosecution, defendants were not prejudiced when, after a defense witness testified that each of the men present at the prosecutrix' house on the night in question had intercourse with prosecutrix with her consent, the trial court, in the absence of the jury but in the presence of defense witnesses, threatened to issue bench warrants for the arrest of any witness who testified he had participated in the crime of aiding and abetting in prostitution, where the court's remarks obviously had no adverse effect on subsequent defense witnesses who thereafter gave similar testimony.

3. **Criminal Law § 162— necessity for objections**

Unless an objection is made at the proper time, it is waived.

4. **Criminal Law § 162— objection to specific question — apt time**

In case of a specific question, objection should be made as soon as the question is asked and before the witness has had time to answer.

5. **Criminal Law § 162— failure to object — waiver of objection**

In this rape prosecution, defendants waived objection to solicitor's question on cross-examination as to whether a defense witness would

be willing to take a lie detector test regarding his testimony, where they failed to object in apt time the first three times the question was asked.

6. **Criminal Law § 166— abandonment of assignment of error**

Assignment of error not brought forward and argued in the brief is deemed abandoned.

7. **Rape and Allied Offenses § 6— instructions defining assault**

In this rape prosecution, the trial court did not commit prejudicial error in defining assault when the charge is considered contextually.

8. **Criminal Law §§ 113, 118— inadvertence in stating contentions or recapitulating evidence — necessity for objection**

Generally, an inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction.

9. **Criminal Law §§ 118, 168— misstatement of contentions — harmless error**

In this rape prosecution, misstatements of defendants' contentions, if any, related to subordinate features of the case and did not prejudice defendants.

10. **Rape and Allied Offenses § 6; Criminal Law § 114— use of words "assault" and "rape" in charge — expression of opinion**

In this rape prosecution, the trial court did not lead the jury to assume that the facts in controversy had been established by use of the words "assault" and "rape" or "raping" in referring to the charges against defendants.

APPEAL from *Carr, J.*, 2 September 1969 Regular Criminal Session, WAKE County Superior Court.

The defendants in this case, Meril Lane Andrews (Andrews) and James Jackson Blalock (Blalock), were indicted by the Grand Jury at the August 1969 Regular Criminal Session of Wake County Superior Court in two bills of indictment each in which they were charged with the rape of Beverly Suzanne Beam and Patricia Ann Hinton. Upon arraignment each defendant entered a plea of not guilty to each charge against him and upon motion of the solicitor and with the consent of each of the defendants the four cases were consolidated for trial.

The evidence at the trial tended to show the facts to be as follows: On the night of 24 July 1969 Patricia Ann Hinton left her house at 702 Edmunds Street in the City of Raleigh to buy a bottle of liquor. Finding the A.B.C. stores all closed she went to a house on Linden Avenue where she purchased some

liquor from the defendant Andrews. When she returned to her home she was visited by some neighbors. Following their visit she took a drink and talked on the telephone until about 10:30 p.m. She then lay down on her sofa and took a nap. She was awakened by a knock on her door and when she opened it the defendant Andrews, along with Thomas Moody, entered the house and were followed by several other people. Andrews fixed a drink and told her to have a drink with him. About this time Thomas Moody asked her to go with him and she went with him into the bedroom where they had sexual intercourse. She testified that after Moody had intercourse with her the defendant Blalock came "busting" through the door, threw her down on the bed and jumped on top of her, and made her engage in some unnatural sexual acts with him. Andrews came into the room and while Blalock sat on her, he had intercourse with her after which Blalock had intercourse with her also, all against her will. During the time this was occurring, Blalock burned her with a cigarette in several places on her body. After Blalock and Andrews finished with her she dressed and went down the hall to call the police. She testified that she heard someone yell that she was going to call the police and that just as she got the receiver in her hands Blalock came running out of the other bedroom, grabbed the receiver from her and jerked the phone off the wall. Then he threw her against the side of the wall and called her names while hitting her on the arm with the receiver. When she got free from Blalock she ran out the front door and went to a neighbor's house to call the police. The neighbor, however, was not home so she returned to her own house where she found that the crowd had left. She went in, locked the door and did not remember anything until the police came the next morning. Early the next morning two policemen came to her door and asked her what had been going on. She at first denied that anything had been going on there but when informed by the policeman that another girl had claimed to have been raped there the previous night, she told the officers that she had been raped also. She was then taken to the Raleigh Municipal Building where she signed warrants against the two defendants.

Beverly Suzanne Beam testified that on the night in question she had been at The Keg, a tavern in the City of Raleigh, with another girl who was engaged to Blalock. They left the Keg and went to the other girl's apartment where Miss Beam had intended to spend the night. By prior arrangement she was to have had a date that night with Andrews while Blalock and the other girl also had a date. After Blalock and Andrews arrived,

she decided that she did not want to spend the night there and asked the defendants to take her home. Upon leaving the home of the other girl, the defendants drove to the home of Mrs. Hinton and parked there telling her they would be right back. About ten minutes later Blalock returned and asked her to come inside. When she entered the house she found a large crowd there including many of the witnesses who later testified in this case. Very soon after she got in the house, Thomas Moody grabbed her by the arm and hurt her. She ran out of the house but Moody and Blalock followed her and got her to return. When she returned to the house she went into a bedroom with Moody where they stayed for a few minutes before returning to the other room. Moody and Andrews talked for a few minutes and then Moody came over to her and told her they were going back into the bedroom. At this time Andrews slapped her several times and told her that she was going to do what he told her to do and nobody else. Upon their return to the bedroom, Moody told her that they were going to have sexual intercourse. She testified on *voir dire,* in the absence of the jury, that Moody told her that if she did not have intercourse with him she would not live to tell it, and that he gave her three examples of girls who had been beaten or killed in recent years. After Moody had intercourse with her, she testified that Andrews came in and told Moody to leave. Blalock came into the room and he and Andrews forced her to engage in unnatural sexual acts with them. Someone yelled that Mrs. Hinton was going to call the police and both men dressed and ran out of the bedroom. The defendants left the house and took her to 202 Linden Avenue where they left her. She ran from the house and met a policeman from whom she borrowed a dime to make a phone call. The policeman followed her to Watkins Grill where she called a cab. The owner of the grill asked if he could help her and she agreed to allow him to take her home. She and the grill owner got into a car driven by Deputy Sheriff Maylon Bagwell and after they had gone approximately two miles she told them she had been raped by two men whose identity she did not know. They took her to the police station where she identified the defendants from pictures shown her and she then signed warrants against them.

The State offered medical evidence from three doctors which was to the effect that the female organ of each of the prosecuting witnesses contained sperm cells which had apparently been deposited recently.

The defendants offered the testimony of several witnesses to the effect that they met Mrs. Hinton at 202 Linden Avenue on the night in question and that she accompanied them to her house on Edmunds Street where they were to have a party. Entrance to the house was gained by one of the witnesses climbing through a window because Mrs. Hinton had lost her key. The witnesses testified that as soon as they entered the house, Moody and Mrs. Hinton went to one of the bedrooms and that thereafter each of the men at the party went to the bedroom where they had intercourse with Mrs. Hinton. While Donald Jones was in the bedroom they heard a knock at the door and the voice of a man claiming to be a policeman. The people all tried to escape from the house but when the door was opened they found that it was the defendants. Moody and Blalock persuaded Miss Beam to come in and eventually Moody went to the back bedroom with her. There was no testimony from any of the witnesses that they believed anyone was being forced to engage in sexual relations against his or her will during the night.

In rebuttal the State offered the evidence of Thomas Moody who testified that on the night in question he was in the Hinton home and that he saw the defendant Andrews slap Miss Beam. He testified that he had intercourse with both of the prosecuting witnesses with their consent.

Each defendant was convicted by the jury of assault upon a female over twelve years of age with the intent to commit rape in the case of Beverly Suzanne Beam and with assault upon a female in the cases involving Patricia Ann Hinton. Each defendant was sentenced to fifteen years imprisonment in the cases involving Beverly Suzanne Beam and each was given a consecutive six months sentence and a $500 fine in the cases involving Patricia Ann Hinton. The defendants each appealed to the North Carolina Court of Appeals, assigning error.

Robert Morgan, Attorney General, Eugene A. Smith, Assistant Attorney General, and Howard P. Satisky, Staff Attorney, for the State.

Hatch, Little, Bunn, Jones and Liggett, by E. Richard Jones, Jr., and William P. Few, for defendant appellants.

HEDRICK, J.

[1] By assignments of error numbers 1, 3, 4, 7 and 14, the defendants contend that the trial judge, during the course of the trial, made remarks and asked questions of some of the witnesses which amounted to an expression of an opinion by the judge in violation of G.S. 1-180. In North Carolina it is improper for a trial judge to question a witness for the purpose of impeaching his testimony. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950). However, it is a well settled rule in this State that a trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781 (1961); *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264 (1954); *State v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409 (1956); *State v. Furley,* 245 N.C. 219, 95 S.E. 2d 448. This rule is a necessary one in our system of criminal law since there are times during the course of a trial, and especially in a trial involving facts as complicated as in the present case, when the judge finds it necessary to ask the witness competent questions to aid in clarifying the witness' testimony. *State v. Hoyle,* 3 N.C. App. 109, 164 S.E. 2d 83 (1968); *State v. Perry, supra.*

We have examined the testimony of these witnesses and after considering the questions propounded by the judge, in light of all the attendant facts and circumstances, we believe that the questions asked by the judge were for the purpose of clarification and were not expressions of opinion, and did not tend to impeach the testimony of the witnesses. These assignments of error are overruled.

[2] The defendants contend that the court erred in threatening to issue bench warrants for the arrest of any witnesses who testified that they participated in the crime of aiding and abetting prostitution. The record shows the facts to be as follows: Roger Watson, testifying for the defense, stated that everyone at the house that night, including himself twice, had intercourse with Pat Hinton. Following this testimony, Judge Carr excused the jury and called the solicitor's attention to the provisions of G.S. 14-203 and G.S. 14-204 relating to prostitution. He stated that he felt the witness had violated this statute but that he had grave doubts about the *corpus delicti.* When reminded by one of the defendant's attorneys that the witnesses were present, Judge Carr stated that he wanted them to know what the law was and what the consequences of their actions could be under the law. After the jury returned, the record shows that Donnie

Marshburn and Donald Jones took the witness stand and testified that each of the men present on the night in question took turns going into the bedroom of Pat Hinton where they had intercourse with her.

The record is clear that the remarks by Judge Carr had no adverse effect on the two witnesses that testified after he had informed them of the possible consequences of their testimony. This assignment of error is overruled.

The defendants argue that the court committed prejudicial error in allowing the solicitor on cross-examination to ask one of the defendant's witnesses whether he would be willing to take a lie detector test as to his testimony. The record discloses that the solicitor asked the witness Jones the following question: "Will you take a lie detector test regarding your testimony today." No objection appears in the record as to this question or the answer. Later, the witness was asked the same question and an objection was made by the attorney for the defendant Blalock who afterwards stated that he had no objection to the question being asked once more; whereupon, the question was asked the third time without any objection and the witness answered. Subsequently, an attorney for the defendant Andrews stated to the court that this is highly improper and asked the court to instruct the jury on the admissibility of lie detector tests in North Carolina. Later, when the question was asked for the fourth time, counsel for one of the defendants objected.

[3-5] It is the general rule that unless an objection is made at the proper time, it is waived. *Stansbury,* N.C. Evidence, 2d Ed., Sec. 27, page 49. In case of a specific question, objection should be made as soon as the question is asked and before the witness has had time to answer. *Stansbury,* N.C. Evidence, 2d Ed., Sec. 27, page 51, and cases cited thereunder. If testimony offered by a witness is not competent, objection to its admission should be interposed to the question at the time it was asked and when the objection is not taken in apt time it is waived. *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598 (1943). The defendants waived any objections they might have had to the question by failing to object in apt time the first three times it was asked. This assignment of error is overruled.

[6] By assignment of error 16, based on exceptions 8, 9 and 21, the defendants challenged the court's rulings in denying their motions for judgment as of nonsuit. The defendants have failed

to argue this assignment in their brief, and the same is therefore deemed abandoned. Moreover, in their brief, the defendants state: "Defendants concede that there was sufficient evidence, taken in the light most favorable to the State, to sustain a conviction for rape in each case."

[7] By assignment of error 17 the defendants contend that the court committed prejudicial error in defining assault as an attempt or offer with force and violence or with rudeness to do hurt to another. The defendants in this argument have lifted one sentence out of the court's charge and attempted to show that the definition is incorrect and inadequate. When the charge is considered contextually, it is our opinion that the court properly and adequately instructed the jury as to all the elements of the crimes for which the defendants were being tried. This assignment of error is without merit.

[8, 9] By assignments of error numbers 18, 20, 21 and 22, the defendants contend that the court committed prejudicial error in reviewing the evidence for the State and the defendants, and in stating their contentions. Generally, an inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction. 3 Strong, N. C. Index 2d, Criminal Law, Sec. 113, page 15. The record fails to show that this was done in the instant case. We have examined each portion of the charge to which all these exceptions are directed and find no material misstatement of the evidence or contentions of the State or the defendants. Those portions of the charge excepted to related to subordinate features of the case, and even if it can be said that the judge inadvertently misstated some of the contentions, the defendants have failed to show that they were in any way prejudiced by such statements. These assignments of error are overruled.

The defendants contend that the judge committed error in his charge by the unqualified use of the words "assault" and "rape" or "raping" in referring to the charges against the defendants. They argue that the judge, by the use of these words, was leading the jury to assume that the facts in controversy had been established. We do not agree with this contention. The charge, when read as a whole, does not show that the judge in any manner expressed any opinion in violation of G.S. 1-180 in reviewing the evidence or stating the contentions of the defendants. This assignment of error is without merit.

We have examined all of the defendants' exceptions and assignments of error brought forward on this appeal and conclude that the defendants had a fair trial in the superior court free from prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

B. D. JOHNSON, NORMAN V. JOHNSON, NASH JOHNSON AND WIFE, MARY SUE JOHNSON, MAUDE JOHNSON HODGES AND HUSBAND, GEORGE HODGES, EMMA C. JOHNSON, OPHELIA JOHNSON CARLTON, VIRGINIA JOHNSON SCARBOROUGH, MAYE JOHNSON SORRELL AND HUSBAND, JOHN SORRELL, FLETCHER JOHNSON, CORA JANE JOHNSON BOSTIC AND HUSBAND, RAEFORD BOSTIC, CARSON JOHNSON, DOROTHY JOHNSON, A MINOR REPRESENTED IN THIS ACTION BY HER NEXT FRIEND, C. E. STEPHENS, *Ex Parte*

No. 704SC368

(Filed 5 August 1970)

1. **Partition §§ 3, 9— proceeding for partitioning — sufficiency of clerk's order appointing timber commissioners — appeal to superior court**

In an appeal to the superior court from an order of the clerk appointing timber commissioners in a partitioning proceeding which had been pending since 1948, the judge of the superior court erred in setting aside the clerk's order, where (1) the clerk had jurisdiction over the parties, lands, and timber encompassed in his order; (2) with the exception of one person, all of the parties through their respective attorneys consented to a judgment dismissing their appeal from the clerk's order; (3) the absence of the person who refused her consent created no new rights in favor of the parties who now seek to set aside the clerk's order; (4) the 1948 petition for partition adequately described the timber to be cut; and (5) any new timber that had grown since 1948 was reasonably within the jurisdiction acquired over the timber by the 1948 petition.

2. **Attorney and Client § 3— authority of attorney**

Consent by the attorneys of record raises a presumption of authority.

3. **Clerks of Court § 2; Partition § 3— jurisdiction of clerk — presumption of jurisdiction**

It is presumed that the clerk of court had jurisdiction in a partitioning proceeding, and the burden is on the parties asserting the want of jurisdiction to show it.

4. **Judgments § 41— consent judgment — effect on parties**

A consent judgment is as binding upon the parties and has the same force and effect as if it had been entered by the court in regular course.

5. **Judgments § 21— attack on consent judgment**

The proper procedure to attack a consent judgment on the ground that a party thereto did not give his consent to the judgment as entered is by motion in the cause.

6. **Clerks of Court § 2— ex parte proceeding — jurisdiction to enter decree — necessity for written authorization**

The statute requiring that petitioners in an *ex parte* proceeding file written authorization with the clerk before he can make any order or decree prejudicing their rights *is held* to apply only when all persons to be affected present an *ex parte* proceeding to the clerk and the clerk acts summarily. G.S. 1-401.

VAUGHN, J., dissents.

APPEAL by respondents from *Cowper, J.*, 29 September 1969 Civil Session, DUPLIN Superior Court.

The cause now before us is an appeal from an order in superior court which grew out of an appeal to the superior court from an order of the clerk denying a motion in the cause filed on 25 January 1968 by some of the parties to a partitioning proceeding which has been pending since 1948.

On 30 October 1948 and for sometime prior thereto, the heirs of E. M. Johnson were owners as tenants in common of numerous tracts of land in Duplin and Pender Counties, including the lands described in the ex parte petition for partition filed on 20 October 1948 in Duplin County. The matter was titled S.P. 2282.

Commissioners were appointed to partition the lands. Their report was filed on 28 September 1950 and confirmed 11 November 1950. As was requested in the petition, the commissioners' report provided that timber which "will measure ten (10) inches or more in diameter measured across the stump twelve (12) inches above the ground" was to be cut and sold in accordance with a power of attorney vested in Nash Johnson and B. D. Johnson, two of the petitioners. The report prescribes the manner in which the proceeds shall be distributed among the tenants in common and in which parties the land and remaining timber will vest.

On 13 November 1950, two days after the commissioners' report was confirmed, B. D. Johnson died intestate. Nash Johnson was given a new power of attorney and proceeded to sell the timber on the five tracts allotted to himself and B. D. Johnson.

B. D. Johnson's heirs were his brothers and sisters, who are parties named in the original petition. In June 1954 Norman V. Johnson, a petitioner in the original petition, died intestate and subsequent thereto a special proceeding was filed to effect partition of the interests of his heirs. Thereafter, the power of attorney to Nash Johnson was revoked by certain parties to the proceeding. In 1960 petitioner Maude Johnson Hodges died. Seven other special proceedings were filed to effect a division of rights, either between some of the remaining parties and other parties, or *inter se*. No timber was sold after 31 December 1952 although some of the parties had conveyed their undivided interest in the land and timber.

On 7 February 1964 a motion was filed by attorneys for certain named movants who were all of the interested parties at that time with the exception of Virginia Johnson Scarborough. The motion set out the series of events which had transpired with respect to the lands and timber involved in the proceeding and prayed that "the Court enter such orders as may be proper and appropriate for carrying out the judgment heretofore entered in this proceeding." Paragraph 14 of the motion states the following:

> "Movants are unable to determine their respective rights under the Report of Commissioners and Judgment heretofore rendered in this proceeding, as to what timber should now be cut and from what tracts, and as to the manner in which the proceeds of the sale of such timber should be distributed, and as to by whom and in what manner the timber should be sold, and desire the advice and instruction of the court as to these matters."

On 7 February 1964 an order was issued finding Virginia Johnson Scarborough to be a necessary party and setting a hearing for 28 February 1964. The order was served upon her on 12 February 1964. She made no appearance.

On 22 April 1964, following a hearing, the clerk entered an order appointing commissioners who were to sell timber growing on those lands which had not been cut over. The order further provided that the appraisal value of certain timber on specified

lands allotted to B. D. Johnson and Nash Johnson shall be added to the net proceeds received from the sale, that the sum so arrived at shall be the fund available for distribution, and that the appraisal value shall be set off in determining Nash Johnson's distributive share.

Exceptions and appeals were entered as follows: "To each of the foregoing Findings of Fact and the Conclusions of Law, and to the signing and entry of the foregoing Order, the movants hereby except and appeal." Virginia Johnson Scarborough did not appeal from the order of the clerk. On 5 August 1964 and before the cause came on to be heard in superior court, a document entitled "Agreement for Division" was prepared. Its first paragraph states the following:

> "WHEREAS, the parties to Special Proceedings Numbers 3437, 3472, 3740, 3743, 3738, 3384, 3362 and 2282, as filed in the Superior Court of Duplin County (except Virginia Johnson Scarborough), are anxious to effectuate a just and equitable division of lands described in such proceedings; and WHEREAS, said parties and their attorneys of record (except Virginia Johnson Scarborough) realize and appreciate the problems presented by the pleadings as filed, and are now desirous of resolving their minor differences and effectually dividing said property; and to this end they have agreed and do now agree as follows: * * *."

The agreement provides for a distribution of the lands involved in all proceedings except S.P. #2282, and regarding S.P. #2282 provides that "* * * appeals shall be withdrawn by proper order and the case remanded to the Clerk of Superior Court of Duplin County for such supplementary orders as may be necessary to effectuate the sales and division thereby contemplated."

The agreement further provides that Nash Johnson shall have a right of election to take either the Newkirk tract in S.P. #3740 or the Norman Johnson tract in S.P. #3384. The agreement ends with the following language:

> "IN WITNESS WHEREOF, the parties hereto, except Virginia Johnson Scarborough, individually and their counsel stipulate and agree to the entering of such orders, judgments and decrees and covenants and agree that they will make and execute, or cause to be made and executed, such instrument

or instruments as are deemed proper to effectuate a division of the property as herein expressed.

This the 5th day of August, 1964.

/s/ Winifred T. Wells
Winifred T. Wells, Attorney for Cora Jane Johnson Bostic and husband, Raeford Bostic; Dorothy Johnson Lane and husband, Lester Lane; Fletcher Johnson; Carson Johnson; J. W. Blanchard and wife, Docie R. Blanchard; Mae Johnson Sorrell

/s/ Carl V. Venters
Carl V. Venters, Attorney for F. F. Hodges and wife, Maude E. Hodges; W. Victor Venters and wife, Katherine Cole Venters; George J. Hodges and wife, Blonzie Hodges

/s/ H. E. Phillips
H. E. Phillips

AND

/s/ James R. Nance
James R. Nance
Attorneys for Nash Johnson and wife, Mary Sue Johnson; Ophelia Johnson Carlton; Bizzell D. Johnson and wife, Crystal C. Johnson; Sylvia Joy Johnson Davis and husband, Earl Davis; Marvin Johnson and wife, Grace P. Johnson; W. Bruce Carlton and wife, Dixie K. Carlton; Mary Carlton Blackburn and husband, Woodrow Blackburn; Katherine Carlton Price and husband, Walter Price"

On 10 August 1964 notice of Nash Johnson's election to accept the Newkirk tract as provided in the agreement of 5 August 1964 was filed with the clerk. The signature of H. E. Phillips appears over the words "Nash Johnson, by his Attorney, H. E. Phillips."

On 7 October 1964 Judge Henry L. Stevens, Jr., entered an order dismissing the appeals noting that "* * * the attorneys for the movants in the above entitled cause now move the Court that the appeal from the order and conclusions of law and findings of fact in this cause be dismissed and that this matter be remanded to the Clerk * * *." The document includes the following:

"WE CONSENT
/s/ H. E. Phillips
H. E. Phillips, Attorney for the Petitioners

WELLS AND BLOSSOM
By: /s/ Winifred T. Wells
Attorneys for the Respondents

VENTERS AND DOTSON
By: /s/ Carl V. Venters

Attorneys for the Respondents, George J. Hodges, Individually and Administrator, and wife, Blonzie Hodges, F. F. Hodges and wife, Mrs. F. F. Hodges, W. Victor Venters and wife, Katherine Cole Venters"

No question was raised with respect to the 7 October 1964 order or the agreement until 25 January 1968 when William T. Simpson, attorney for Nash Johnson and his present co-movants, filed a motion in the cause requesting (1) a temporary restraining order prohibiting the commissioners appointed by the 22 April 1964 order from taking any action and (2) an order directing all parties in interest to appear and show cause "why the order dated 22 April 1964 should not be rescinded and dissolved." Virginia Johnson Scarborough was listed as a movant in the 25 January 1968 motion but she withdrew from the motion by way of a letter to Simpson dated 31 January 1968, a subsequent one dated 2 April 1968, and a letter to the clerk dated 2 April 1968.

The movants' allegations upon which they predicated their prayer for relief may be summarized as follows:

(1) That Virginia Johnson Scarborough did not join in the motion filed 7 February 1964, that at the date of said motion some of the parties had adverse or conflicting interests, and that the motion was signed by various attorneys for whom no written authorization had been filed with the clerk. (It is noted at this point that the movants have nowhere alleged that the attorneys did not represent them; neither have they alleged that the attorneys did not have authority to execute the various documents and other pleadings in question.)

(2) That the 22 April 1964 order is contrary to the interests of the movants.

(3) That the 22 April 1964 order is void "for that the

order is in conflict with and unsupported by the findings of fact as set forth in said order," that the conclusions of law in the order are in error because all parties were not before the court and that the timber was not a part of the original ex parte proceeding.

(4) That the 22 April 1964 order is void because it relates to timber over which the court had no jurisdiction.

When the motion filed 25 January 1968 was heard by the clerk, he entered an order vacating his earlier cease and desist order and denying the motion. The movants appealed and the matter came on for hearing in superior court. At this hearing the movants did not offer any evidence other than the record.

On 14 December 1969 Judge Cowper entered an order denying "the motion filed 7 February 1964" and setting aside and declaring null and void the order signed by the clerk on 22 April 1964. Appellants objected and excepted to the entry of said order of Judge Cowper and gave notice of appeal to the Court of Appeals.

Wheatly & Mason and W. F. Simpson for petitioner appellees, Bruce Carlton, Executor of Ophelia J. Carlton, Bruce Carlton, individually, Nash Johnson, Mary Sue Johnson, William T. Blanchard, and Margaret E. Cooper.

Wells, Blossom & Burrows, Venters & Dotson, and W. A. Johnson for respondent appellants, W. Victor Venters and wife, Katherine C. Venters, Mae J. Sorrell, Cora Jane J. Bostic and husband, Raeford Bostic, Carson Johnson, Fletcher Johnson, and Dorothy J. Lane and husband, Lester Lane.

BRITT, J.

This case deals with a complex matter which has dragged on for 22 years. The record and exhibits total some 538 pages. Much of the factual material and many of the contentions placed before the court are extraneous to the issues which we now perceive to be dispositive.

[1, 2] In our view, several salient points both chart the course of this appeal and determine the outcome: (1) The clerk had jurisdiction over the parties, lands and timber encompassed in his order of 22 April 1964. (2) All parties except Virginia Johnson Scarborough consented to a judgment dismissing the appeal

from that order of the clerk. (3) Consent by the attorneys of record raises a presumption of authority; in fact the further answer to the motion filed on 25 January 1968 alleges that Attorney H. E. Phillips represented Nash Johnson and those united in interest with him at the hearing on the 7 February 1964 motion and Nash Johnson and those united in interest with him admitted this in their reply to said further answer.

[3] The pleading which serves as a basis for entry of the 22 April 1964 order is the original ex parte petition for partition filed in 1948. It provides adequate descriptions of the lands involved and states that the timber is to be sold and the proceeds distributed in accordance with the respective interests as determined in the proceeding. The lands are described in the petition by references to books and pages in the county registries; the descriptions in the order of 22 April 1964 are by metes and bounds. The movants now argue that certain lands before the clerk in 1964 were not involved in the 1948 petition, but we are unable to determine this from the record. As jurisdiction is presumed, *Jackson v. Bobbitt,* 253 N.C. 670, 117 S.E. 2d 806, the burden was on the movants to establish this assertion as a matter of fact. The record on its face does not reveal a want of jurisdiction and the movants have offered no other evidence.

Regarding the timber, the 22 April 1964 order merely attempted to effectuate the order of 1950 and the desires of the parties as stated in the 20 October 1948 petition and the 7 February 1964 motion. To whatever extent any new grown timber was encompassed in the 1964 order, it was not a new *res* but was reasonably within the jurisdiction acquired over timber by the 1948 petition which included all timber "ten (10) inches or more in diameter measured across the stump twelve (12) inches above the ground at the time of cutting" without setting a time for cutting.

[4] Although the division agreement and the consent judgment dismissing the appeal are void as to Virginia Johnson Scarborough because she was not a party, her absence creates no rights in favor of the movants herein. As to the movants, a consent judgment "is as binding and has the same force and effect as if it had been entered by the court in regular course." *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576. In *Overton v. Overton,* 259 N.C. 31, 129 S.E. 2d 593, the court said that such a judgment "depends for its validity upon the consent

of the parties" and in *Gardiner v. May,* 172 N.C. 192, 89 S.E. 955, the court stated that "* * * [w]here parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or that consent was not in fact given * * *."

[5] In *Overton* the court pointed out that the proper procedure to attack a consent judgment on the ground that a party thereto did not give his consent to the judgment as entered is by motion in the cause. In *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897, the court stated that "* * * a judgment bearing the consent of a party's attorney of record *is not void on its face.* Indeed, it is presumed to be valid; and the burden of proof is on the party who challenges its invalidity." (Emphasis added.)

[6] The movants have asserted strenuously that G.S. 1-401 requires that "written authorization must be filed with the clerk before he may make any order or decree to prejudice their rights," and that the motion of 7 February 1964 is therefore void for want of authorization. The statute, however, clearly applies *only* when all persons to be affected present an ex parte proceeding to the clerk and he acts summarily; the statute provides that in that event all parties must sign the petition, or must sign and file with the clerk (1) a written application to be made petitioners or (2) a written authorization to the attorney, before the clerk may make any order or decree prejudicing their rights. We think this proceeding was *presented* by the original petition in 1948. Generally, the rule is that the attorneys must have proper authority, but under *Howard v. Boyce, supra,* that authority is presumed when the attorneys are of record and the document is valid on its face.

For the reasons stated, we hold that Judge Cowper erred in the entry of the order appealed from; the order is vacated and this cause is remanded to the Superior Court of Duplin County for further proceedings consistent with this opinion.

Error and Remanded.

CAMPBELL, J., concurs.

VAUGHN, J., dissents.

ELMER LOWE, PETITIONER v. PAUL RHODES, DEFENDANT

No. 7023SC315

(Filed 5 August 1970)

1. **Highways and Cartways § 15— cartway proceeding — trial de novo in superior court**

When a case involving a cartway is appealed from the clerk to the superior court, trial in superior court is *de novo*. G.S. 136-68.

2. **Highways and Cartways § 15— possession of cartway pending appeal**

The provision of G.S. 40-19 which allows the condemnor in an eminent domain proceeding to take possession of the condemned premises pending an appeal to the superior court upon payment into court of the sum appraised by the commissioners is not applicable to a proceeding to establish a cartway brought under G.S. 136-68 *et seq.*; therefore, the superior court erred in allowing petitioner to take possession of a cartway pending appeal by defendant landowner to the superior court.

BROCK and BRITT, JJ., concur in result.

APPEAL from *Armstrong, J.*, March 1970 Civil Session, WILKES Superior Court.

This proceeding was instituted by the plaintiff, Elmer Lowe (Lowe), against the defendant Paul Rhodes (Rhodes), under the provisions of G.S. 136-68 *et seq.*, to establish a cartway across the lands of the defendant. The matter was first heard, according to statutory provisions, by the Clerk of Superior Court in Wilkes County. The clerk found that Lowe was entitled to a cartway across the lands of Rhodes and appointed a jury of view of three disinterested freeholders to lay off the cartway and to assess damages. On 29 October 1969, the commissioners submitted their report to the clerk for his approval. The report contained a description of the cartway and damages assessed in the amount of $750.00. Rhodes excepted to the ruling of the clerk and appealed to the superior court from the report of the commissioners and the order of the clerk.

After the appeal was entered Lowe filed a motion in superior court asking the court to authorize him to take possession of and hold the cartway pending appeal to the superior court. After considering the motion, Judge Armstrong entered the following order:

"This cause coming on to be heard and being heard before the undersigned Judge presiding over the March 9, 1970

Civil Session of Superior Court of Wilkes County on motion of the petitioner to be placed in possession of the cartway established by the jury of view appointed by the Clerk Superior Court, Wilkes County pending the appeal to the Superior Court in this proceeding, upon condition that the petitioner pay into the office of the Clerk Superior Court, Wilkes County for the use and benefit of the defendant the sum of Seven Hundred Fifty ($750.00) Dollars being the damages assessed by the jury of view;

"And it appearing to the undersigned Judge that all parties have had proper notice of the motion, and that all parties are present in court by and through their respective attorneys of record;

"And the court having considered the argument of counsel, the briefs filed in this proceeding by counsel, the pleadings, the report of the jury of view, and all orders heretofore entered in this cause;

"And the court having examined the civil issue docket of the Superior Court of Wilkes County and having questioned counsel concerning the approximate time when this matter will be before the Superior Court for trial on the merits, and it appearing to the court that there will be considerable delay before this action comes on for trial in the Superior Court of Wilkes County, possibly for as long as twelve (12) to eighteen (18) months, and it further appearing to the court that this action was instituted July 9, 1969, that the jury of view made its report on the 29th day of October, 1969, that the defendant appealed from said order, and that there will be a substantial delay before the matter can be heard on its merits;

"And it further appearing to the court that G.S. 136-68 provides that on appeal to the Superior Court in cartway proceedings that the procedure established under Chapter 40, entitled 'Eminent Domain', shall be followed insofar as the same is applicable and in harmony with the provisions of the cartway proceedings; and it further appearing to the court that G.S. 40-19 provides that on appeal to the Superior Court in an Eminent Domain proceeding that the condemning party may, if it so desires, pay into court the sum appraised by the commissioners and that in such event the condemning party may then enter, take possession of, and hold the

condemned lands until the final judgment rendered on the appeal to the Superior Court; and the undersigned being of the opinion that this provision of the Eminent Domain Law is applicable to a cartway proceeding commenced under G.S. 136-68 *et seq.*;

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

"1. That the provision of the Eminent Domain Law allowing the condemning party to take possession of the condemned premises pending an appeal to the Superior Court upon payment into the court of the sum appraised by the commissioners, applies to cartway proceedings established under G.S. 136-68 and by virtue thereof the petitioner in this proceeding shall, upon compliance with the terms of this order, be authorized to enter into, take possession of, and use the cartway established by the jury of view in this proceedings, pending the final judgment rendered on the appeal to the Superior Court of Wilkes County.

"2. In the discretion of the court, and to promote the ends of justice in this proceeding, the court, in its discretion, orders that the plaintiff may enter into, take possession of, and hold the cartway established by the jury of view, upon compliance by the plaintiff with the terms of this order, pending the final judgment rendered on the appeal to the Superior Court of Wilkes County.

"3. In order to enter into, take possession of and use the cartway, pending such final judgment, the plaintiff shall pay into the office of the Clerk of Superior Court, Wilkes County the sum of Seven Hundred Fifty ($750) Dollars, being the sum assessed by the jury of view. The petitioner shall further post with the court a justified bond in the sum of Five Thousand ($5,000.00) Dollars to save the defendant harmless from any damage done to his property by virtue of the petitioner's use and possession of the cartway, in the event that the final judgment entered in this proceeding should decree that the plaintiff is not entitled to the establishment of a cartway over the land of the defendant.

"This 10 day of March, 1970.

"FRANK M. ARMSTRONG
Judge Presiding"

From the entry of this order giving Lowe possession and use of the cartway pending trial in the superior court, Rhodes excepted and appealed, assigning error.

E. James Moore for petitioner appellee.

Wicker, Vannoy and Moore, by J. Gary Vannoy, for defendant appellant.

HEDRICK, J.

The sole question presented on this appeal is whether the superior court judge committed error in allowing the appellee to take possession of the cartway premises pending trial *de novo* in the superior court.

Under the provisions of G.S. 136-68, *et seq.*, the clerk of superior court is given the authority to grant or deny to one individual a cartway across the lands of another. G.S. 136-68 also provides that "[f]rom any final order or judgment in said special proceeding, any interested party may appeal to the superior court for trial *de novo* and the procedure established under chapter 40, entitled 'Eminent Domain,' shall be followed in the conduct of such special proceeding *insofar as the same is applicable and in harmony with the provisions of this section.*" (Emphasis added) The question for our determination then, is whether the provisions of Chapter 40 are applicable to the situation presented in the present case.

G.S. 40-19, insofar as it is pertinent to this case, is as follows:

> "Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the appellate division. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. *If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pen-*

dency of the appeal, and until the final judgment rendered upon said appeal." (Emphasis added)

In order that we may properly determine the applicability of this section of the General Statutes to the present case, it is necessary that we review the law regarding an appeal in a cartway proceeding prior to 1931 when it was made a part of the "Eminent Domain" proceedings. In Revised Statutes of North Carolina, Chapter CIV, Section 33, the county courts in North Carolina were given the power to lay out cartways upon the fulfillment of certain conditions. Section 36 gave the parties the right to appeal as follows:

"Either party, dissatisfied with the judgment of the county court in any case arising under the thirty-third section of this act, shall have a right to appeal to the superior court of said county *under the same rules and restrictions as in other cases of appeals.*" (Emphasis added)

This statute remained substantially as quoted above until 1901. In 1901 the Legislature, by Chapter 729, amended Chapter 821, Laws 1899, by providing that the act would include cartways; however, they did not provide a method of appeal from a matter involving a cartway. In *Cook v. Vickers*, 141 N.C. 101, 53 S.E. 740 (1906), the North Carolina Supreme Court held that a right to appeal did exist in cartway proceedings and that that right could be exercised under the general law of the State. In 1931 the Legislature again acted with reference to cartways and changed the statute to include appeals from cartway proceedings in the provisions established for appeals from eminent domain proceedings. The apparent basis for this change was that cartways are considered to be essentially a part of the eminent domain law. In *Parsons v. Wright*, 223 N.C. 520, 27 S.E. 2d 534 (1943), our Court said:

"Cartways are public roads in the sense that they are open to all who see fit to use them, although the principal benefit inures to the individual or individuals at whose request they were laid out. The term is used merely for the purpose of classification and to distinguish a class of roads benefiting private individuals who, instead of the public at large, should bear the expense of their establishment and maintenance. They are designated *quasi*-public roads, and the condemnation of private property for such use has been frequently sus-

tained upon that ground as a valid exercise of the power of eminent domain. *Cook v. Vickers,* 141 N.C. 101, 58 S.E., 740; *Barber v. Griffin,* 158 N.C., 348, 74 S.E., 110; *Waldroup v. Ferguson,* 213 N.C., 198, 195 S.E., 615; 50 C.J., 380, sec. 5. They are properly considered an auxiliary part of the public road system of the county, although they are distinguished from public highways proper. *Cook v. Vickers, supra.*"

Thus, we can see that the Legislature felt that since cartways were a part, to some extent, of the public highway system there should be some method of protecting them. In placing the cartway appeal procedure under the eminent domain procedure, however, the Legislature was careful to insert a provision that the procedure established for eminent domain appeal was to be utilized "[i]nsofar as the same is applicable and in harmony with the provisions of this section." Can we, therefore, hold that all of the procedure established for eminent domain proceedings on appeal is applicable to appeals in matters involving the granting or denying of a cartway? We think not. That there are distinctions between the two proceedings has been expressly recognized by our Supreme Court in the case of *Dailey v. Bay,* 215 N.C. 652, 3 S.E. 2d 14 (1939). In that case, *Barnhill, J.,* speaking for the Court, said:

"There is a necessary distinction drawn as to the right of appeal in condemnation proceedings and in proceedings for the establishment of a cartway. Ordinarily the municipal or public service corporation seeking a right-of-way by condemnation is entitled to the easement as a matter of right. The establishment of the bounds of the easement and the assessment of damages are the matters primarily involved. No appeal lies until the easement is laid out and the damages assessed. In proceedings under C.S., 3836, as amended, the right to a cartway is primarily at issue. An adjudication as to that affects a substantial right of the parties and is deemed to be a final judgment from which either party may appeal. Due to this distinction the cases cited by petitioner are not decisive of the question here presented.

"Upon the docketing of the appeal upon the civil issue docket the Superior Court acquired full jurisdiction thereof and it is its duty to determine the issues of fact and questions of law involved."

[1] When a case involving a cartway is appealed from the clerk to the superior court, trial in superior court is *de novo.* G.S. 136-68; *Candler v. Sluder,* 259 N.C. 62, 130 S.E. 2d 1 (1963). "The issue to be tried in superior court is the same as before the clerk—whether petitioners are entitled to a cartway over some lands. It involves only the elements set out in G.S. 136-69." In the trial *de novo* it is entirely possible that the party that won in the hearing below, in this case the petitioner, will not win on appeal. If this occurs the property of the defendant has been injured by giving the plaintiff possession of the proposed cartway pending appeal. It is true that under the provisions of G.S. 40-19 the respondent is afforded some protection by the requirement that the condemnor pay into court the amount of damages assessed by the commissioners pending the appeal to the superior court. This requirement in the statutes contemplates the inevitable loss of the property by the appealing respondent to the condemnor. In the present case we have an individual attempting to condemn property belonging to another individual rather than the State or a subdivision thereof with powers of eminent domain taking the property of the individual. A careful review of the appeal procedure prior to 1931 and the inclusion of the cartway appeal procedure in the procedure established for eminent domain leads us to the conclusion that the Legislature has never intended that this particular portion of the eminent domain procedure be applied to an appeal from the clerk of court allowing a cartway to be laid off.

[2] It is our belief, and we so hold, that that provision in G.S. 40-19, which gives the court the authority to give possession and use of land to the condemnor while pending appeal, is not applicable to proceedings brought under G.S. 136-68, *et seq.,* and the order of Judge Armstrong giving the petitioner possession and use of the cartway pending appeal is hereby reversed.

Reversed.

BROCK and BRITT, JJ., concur in result.

KOPPERS COMPANY, INC., PLAINTIFF v. KAISER ALUMINUM AND CHEMICAL CORPORATION, DEFENDANT AND FIRST COLBERT NATIONAL BANK, ADDITIONAL DEFENDANT

No. 7013SC391

(Filed 5 August 1970)

1. **Process § 14— service on foreign corporation — contract to be performed in this State — assignee of contract**

A contract between a Delaware corporation and a Georgia contractor for the construction of railroad sidings at the corporation's plant in North Carolina is a contract "to be performed in this State" within the meaning of the statute authorizing service of process on foreign corporations, and the contractor is subject to the jurisdiction of the courts of this State; however, the assignee of the contract proceeds, an Alabama bank, was not subject to the courts' jurisdiction under the contract, where the assignee was not a party to the contract and had incurred no duties or liabilities thereunder. G.S. 55-145(a)(1).

2. **Assignments § 4— effect of assignment — duties imposed by the contract**

An assignment of a contract does not operate to cast upon the assignee the duties and obligations or the liabilities imposed by the contract on the assignor, in the absence of the assignee's assumption of such liabilities.

3. **Contracts § 2— nature and effect of promises not to be performed except on happening of stated events**

Promises not to be performed except upon the happening of stated events, whether the events be called a contingency or the time of performance, cannot be the basis of a contract.

4. **Contracts § 12— construction of contract**

A contract must be viewed from its four corners.

5. **Contracts § 12— construction of contract — rules of construction**

Where an Alabama bank, in a letter to a Delaware corporation, offered to use funds owing from the corporation to the bank's customer for the purpose of liquidating the customer's debts, the language of the letter must be given such a construction as the bank, at the time the letter was written, should have supposed the corporation would give it, or as the corporation was justified in giving it.

6. **Contracts § 12— construction of contract — words capable of more than one meaning**

If the words employed in a contract are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have.

7. **Contracts § 12— construction of ambiguity**

An ambiguity in a written contract is to be inclined against the party who prepared the writing.

8. **Contracts § 2— offer and acceptance — compliance with terms of offer**

Where a bank, in a letter to a corporation, offered to use funds owing from the corporation to the bank's customer under a construction contract for the liquidation of the contractor's debts, the corporation's release of the funds to the bank constituted its acceptance and created a contract binding the bank to perform as promised.

9. **Contracts § 2— acceptance of offer — performance or nonperformance of act**

Where the offer so provides, it may be accepted by performing or refraining from performing a specified act.

10. **Contracts § 2— acceptance of offer by act or payment**

An acceptance of an offer may be by act, as where an offer is made that the offeror will pay or do something else if the offeree shall do a particular thing.

11. **Payment § 1— payment of debt — place of payment**

In the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or at his place of business if he has one.

12. **Payment § 1— place of payment**

Where a Delaware corporation and an Alabama bank entered into a contract whereby the bank agreed to use funds owing from the corporation to a construction company for purpose of liquidating the construction company's debts to its creditors, all of whom were located in North Carolina, the payments of the debts were to be made in North Carolina, where the letter failed to state where the creditors would be paid.

13. **Process § 14— service on foreign corporation**

Where a Delaware corporation and an Alabama bank entered into a contract whereby the bank agreed to use funds owing from the corporation to the bank's customer for purpose of liquidating the customer's debts to its North Carolina creditors, the contract was "to be performed in this State" within the meaning of the statute authorizing service of process on foreign corporations; consequently, the bank was amenable to the jurisdiction of the courts of this State in the manufacturer's cross-action to recover the funds, which had been applied by the bank to its own debts.

14. **Constitutional Law § 24; Process § 14— requisites of due process — subjecting foreign defendant to in personam judgment — minimum contacts**

Due process requires only that in order to subject a defendant to judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice; but it remains essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.

15. **Process § 14— service on foreign defendant — claims of immunity from suit — lien laws**

Where an Alabama bank through a contract with a Delaware corporation voluntarily inserted itself directly into the North Carolina affairs of its customer, a construction contractor, by stepping into the customer's shoes and agreeing to pay the debts owed by the customer to its North Carolina creditors—provided that the manufacturer released to the bank funds owing to the contractor for construction work—the bank cannot now say that it has any more immunity from a suit in North Carolina arising out of its undertaking than that enjoyed by its customer, especially where the funds released by the manufacturer were held pursuant to the lien laws of North Carolina. G.S. 44-9.

16. **Constitutional Law § 24— due process — service on foreign corporation**

Where a Delaware corporation and an Alabama bank entered into a contract whereby the bank agreed to use funds owing from the corporation to the bank's customer for purpose of liquidating the customer's debts to its North Carolina creditors, the contract was "to be performed in this State" within the meaning of the statute authorizing service of process on foreign corporations; subjecting the bank to the jurisdiction of the North Carolina courts does not offend the traditional notions of fair play and substantial justice nor does it violate the due process clause of the Federal Constitution.

APPEAL by additional defendant from *Tillery, J.*, March 1970 Civil Session of Superior Court for COLUMBUS County.

Plaintiff Koppers Company, Inc. (Koppers) and the original defendant, Kaiser Aluminum and Chemical Corporation (Kaiser), are Delaware corporations. Both are transacting business in North Carolina and both maintain "usual places of business" here. The additional defendant, First Colbert National Bank (Bank), has its usual place of business in the State of Alabama.

Koppers instituted this action on 11 July 1969 seeking to enforce a lien for materials furnished a contractor and used in the construction of certain railroad sidings for Kaiser at Kaiser's Acme, North Carolina, plant. The contractor, Southeastern Railroad Construction and Maintenance Company (Contractor), is alleged to be a partnership with the partners domiciled in the State of Georgia. The complaint alleges that Kaiser surrendered funds owed to the Contractor after having been notified of Koppers' claim pursuant to G.S. 44-9. Kaiser alleges in a cross action against the Bank that it released the funds due the Contractor to the Bank upon representation by the Bank that it would liquidate the Contractor's debts arising out of the work performed for Kaiser in North Carolina, and

that the Bank refused to apply the funds as agreed, applying them instead to a debt owed the Bank by the Contractor. Upon motion by Kaiser, the Bank was made a party defendant and process was served on it in the manner provided by G.S. 55-146 for service of process on foreign corporations. Kaiser seeks through its cross action to recover the funds released to the Bank so that they may be used to satisfy any judgment obtained by Koppers in this action.

Before time for answering had expired the Bank moved that the cross action be dismissed on the grounds that: (1) As a foreign corporation it is not amenable to service of process under G.S. 55-145 for that it has insufficient "ties or connections" with this state to subject it to this state's jurisdiction and (2) G.S. 55-145 is unconstitutional insofar as it purports to authorize service of process on the Bank.

The written motion, which contains no factual allegations, was not verified and it does not appear from the record that the Bank presented any affidavit or other evidence in support of its motion. The motion was heard, however, upon the verified pleadings and an uncontradicted affidavit offered by Kaiser. At the conclusion of the hearing, the court found facts, made conclusions and denied the motion. This appeal followed.

Hogue, Hill and Rowe by C. D. Hogue, Jr., for defendant appellee Kaiser Aluminum and Chemical Corporation.

D. Jack Hooks for additional defendant First Colbert National Bank.

GRAHAM, J.

Appellant is a banking corporation with its principal place of business in the State of Alabama. The only connection it has ever had with the State of North Carolina, insofar as the record shows, arose out of the following:

In October 1967 Kaiser entered a contract with Southeastern Construction and Maintenance Company (Contractor), for the construction of certain railroad sidings at Kaiser's Acme Plant in Columbus County, North Carolina. The contract provided in part: "Both parties to this contract hereby accepts [sic] the assignment of this contract by the Contractor to the First Colbert National Bank and agrees [sic] that the money to become due and paid to the Contractor, will be paid by check

made jointly to the Contractor and the First Colbert National Bank and mailed or delivered by Kaiser Agricultural Chemicals to the First Colbert National Bank in lieu of payment thereof to the said contractor."

During the performance of the contract, the Contractor defaulted on various accounts arising out of the work performed, including the account owed to Koppers for materials furnished. On 17 July 1968, appellant's president wrote to an official of Kaiser at its Savannah, Georgia location requesting the release of money owed by Kaiser to the Contractor. The letter is as follows:

"Mr. D. R. Martin
130 East Bay Street
Savannah, Georgia 31402

Dear Ray:

Confirming our telephone conversation of July 16, 1968, providing Kaiser releases the $14,000.00 plus check due David Waldrep's plant, [Contractor] Our bank will assist his firm to the fullest extent possible in order to see that all creditors are paid on a basis which we, at present, deem appropriate. Furthermore, our bank will take assignments on other work which his firm has either completed or is in the process of completing and an assignment on all other contracts which he might enter into subsequent to this date in order to assure further payments to the creditors.

The following is a list of known creditors and said proposition to liquidate the indebtedness from the Kaiser check and from another check at Clyco in the approximate amount of $4,300.00 and miscellaneous contracts making up the difference;

Creditor	*Amount Due*	*First Liquidation*
L. B. Foster	$16,644.37	$10,000.00
Koppers	7,222.79	4,000.00
State of N. C.	1,000.00	1,000.00
J. H. Huffan Contractors	1,200.00	1,200.00
Superior Stone	2,685.85	2,685.85
Hanover	111.10	111.10
Hyman	1,100.00	1,100.00
A. D. Stewart	166.02	166.02

Creditor	*Amount Due*	*First Liquidation*
E. G. Dale	99.45	99.45
Konig Hardware	66.00	66.00
Kaiser	2,483.00	
Demurge	675.00	
Unloading	474.53	

Creditor	*Second Liquidation*	*Third Liquidation*
L. B. Foster	$ 2,000.00	$ 4,644.37
Koppers	3,222.79	
Kaiser		2,483.00
Demurge		675.00
Unloading		474.53

From the records available to our bank the first liquidation would be handled within two weeks from date of receipt of the $14,000.00 check and the $4,300.00 check and other checking funds available. The second liquidation would be handled from the net profits of a contract already signed involving the Reynolds plant here at Sheffield and the third liquidation would have to be handled from contracts which have not yet been awarded. We will monitor the affairs of this company in the very best manner that we can in order to see that the above creditors are satisfied and it might be wise for you to converse with some of these creditors along the lines which we mentioned in our telephone conversation. You may feel free to send a copy of this letter to anyone you deem necessary. David Waldrep is a fine, hard working and honest young man and we are doing all we can to see him through. Your cooperation in the matter is greatly appreciated.

Very truly yours,
s/ F. E. Draper
F. E. Draper"

In response to the above letter, and in reliance upon the representations contained therein, Kaiser released to appellant the sum of $14,375.13, being the final amount owed by Kaiser to the Contractor.

Based on evidence of the transactions set forth above, the court found facts and concluded that the cross action asserted against appellant arose out of a contract having a substantial

connection with the State of North Carolina and to be performed to a substantial degree within the State, and that appellant is subject to suit in this State under the terms and provisions of G.S. 55-145.

At no time has it been contended that appellant is subject to the jurisdiction of this State as a result of having transacted business here within the meaning of G.S. 55-144. Nor has it been contended that appellant is properly before the court as a result of engaging in any activities delineated in G.S. 55-145, other than those specified in subparagraph (a) (1) thereof. Therefore, the only statutory provision pertinent to this appeal is G.S. 55-145(a) (1) which provides 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; . . ."

The initial question is whether the cross action asserted by Kaiser arises "out of any contract made in this State or to be performed in this State" within the meaning of G.S. 55-145(a) (1). Since there was no evidence presented and no finding made that any contract forming the basis of this litigation was made in North Carolina, our inquiry is limited to the issue of "performance within this State."

[1, 2] We first look to the contract between Kaiser and the Contractor. This contract was to be substantially performed in this State within the meaning of the interpretation placed on G.S. 55-145(a) (1) by previous decisions. *Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225; *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E. 2d 473. Conceding, however, that the contact provided by the contract between the Contractor and this State was sufficient to subject the Contractor to the jurisdiction of this State's courts, it does not follow that it would bring appellant, as assignee of the proceeds thereunder, within their jurisdiction. We think it clear that the operation of G.S.

55-145(a)(1) is limited to situations where the foreign defendant against whom a cause of action is asserted is a party to the contract forming the basis of jurisdiction. "It is a general principle that an assignment of a contract does not operate to cast upon the assignee the duties and obligations or the liabilities imposed by the contract on the assignor, in the absence of the assignee's assumption of such liabilities." 6 Am. Jur. 2d, Assignments, § 109. Appellant was not a party to the contract between Kaiser and the Contractor. Under the terms of that contract appellant incurred no obligation to Kaiser and had no duties to perform. In our opinion that contract affords no basis for jurisdiction.

[3-7] We turn now to the relationship initiated between Kaiser and appellant by appellant's letter. Some of the language contained in the letter is obviously illusory. In one sense it can be argued that the letter constitutes simply a promise to assist the Contractor in liquidating its debts upon the happening of certain contingencies outside the control of appellant, i.e., a realization of profit from certain of Contractor's contracts, and the assignment of contracts not yet awarded. Promises not to be performed except upon the happening of stated events, whether the events be called a contingency or the time of performance, cannot be the basis of a contract. *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906. However, the agreement, as embodied in the letter, must be viewed from its four corners. *Jones v. Realty Co., supra.* The language of the letter must be given such a construction as appellant, at the time it was written, should have supposed Kaiser would give to it, or as Kaiser was fairly justified in giving to it. See 17 Am. Jur. 2d, *Contracts*, § 248, p. 641. " 'If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have.' *King v. Davis*, 190 N.C., 737, 130 S.E., 707. It is also a rule of construction that an ambiguity in a written contract is to be inclined against the party who prepared the writing. *Wilkie v. Ins. Co.*, 146 N.C., 513, 60 S.E., 427." *Jones v. Realty Co., supra,* at p. 305.

[8-10] Following these rules of construction, we are of the opinion that appellant's letter constituted an unconditional offer to use the funds in question, along with other funds *then* available, to complete the first proposed liquidation of the Contractor's debts. All of the Kaiser funds were to be used in

the first liquidation. A fair construction of the terms of the letter is that other funds needed to complete the first liquidation were already on hand or unconditionally forthcoming. "[S]aid proposition to liquidate the indebtedness from the Kaiser check and from another check at Clyco in the approximate amount of $4,300.00 and miscellaneous contracts making up the difference; . . . From the records available to our bank the first liquidation would be handled within two weeks from date of receipt of the $14,000.00 check and the $4,300.00 check and other checking funds available." It is therefore immaterial that the second and third proposed liquidations depended upon the happening of future events, for appellant's offer with respect to the use of the Kaiser funds was unconditional. Kaiser's release of the funds, as requested in appellant's letter, constituted its acceptance and created a contract binding appellant to perform as promised. "Where the offer so provides, it may be accepted by performing or refraining from performing a specified act. An acceptance of an offer may be by act, as where an offer is made that the offerer will pay or do something else, if the offeree shall do a particular thing." 17 C.J.S., Contracts, § 41(d), p. 668. See also 17 Am. Jur. 2d, Contracts, § 45; 1 Williston on Contracts, 3d Ed., § 65.

[11-13] Once appellant's offer was accepted by Kaiser, the sole performance called for under the contract was the payment of the funds by the Bank to the Contractor's creditors as set forth in the liquidation schedule. The trial court found that all of the creditors were located in North Carolina; that they were to be paid in North Carolina; and that the debts arose out of work performed in North Carolina. These findings are fully supported by evidence. The only contention made by appellant with respect to any of these findings is that since its letter did not say where payment was to be made, it should be inferred that the creditors would be paid in the State of Alabama. We reject such an inference as inconsistent with the well established principle that ". . . in the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or at his place of business, if he has one, . . ." 70 C.J.S., Payment, § 6, p. 217. Our conclusion is that the cause of action alleged by Kaiser arises out of a contract to be performed in North Carolina within the meaning of G.S. 55-145(a)(1). Findings and conclusions made by the trial court to this effect support its order denying appellant's motion to dismiss.

A final question arises; namely, does the exercise of jurisdiction under circumstances here presented, though appropriate under the statute, violate the due process clause of the Federal Constitution?

[14] It has been consistently held, since the landmark case of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95, that " 'due process requires only that in order to subject a defendant to judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "the traditional notions of fair play and substantial justice." ' " *McGee v. International Life Ins. Co.,* 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed. 2d 223; see *Byham v. House Corp., supra,* and cases therein cited. But it remains essential in each case ". . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U. S. 235, 78 S. Ct. 1228, 2 L.Ed. 2d 1283.

[15] Here, appellant through the contract arising out of its letter to Kaiser, inserted itself directly into the North Carolina affairs of its customer, the Contractor, by stepping into its shoes and agreeing to pay the debts owed by the Contractor under North Carolina law. Having voluntarily assumed this role, appellant cannot now say that it has any more immunity from a suit in this State arising out of its undertaking than that enjoyed by its customer. The obligations to North Carolina creditors arose while the Contractor for whom appellant undertook to act was enjoying the protection of the laws of North Carolina. The funds which appellant induced Kaiser to release outside this State's jurisdiction were being held pursuant to this State's lien laws as a result of notice given Kaiser by Koppers pursuant to G.S. 44-9. Appellant's inducement of Kaiser to release the funds frustrated the natural operation of this State's laws with respect to the funds. Appellant was aware, or certainly should have been aware, that unless it fulfilled its contractural obligation, its activity in obtaining the release of the funds from this State would substantially affect the rights of creditors within North Carolina and the right of Kaiser to avoid liability for payment of the North Carolina debts of appellant's customer as imposed by the lien laws of this State.

[16] The entire circumstances are such that to hold that appellant is not subject to the jurisdiction of this State would, in our opinion, offend "the traditional notions of fair play and substantial justice." We are of the opinion, and so hold, that no violation of appellant's constitutional rights has been shown.

Affirmed.

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

MILDRED SUGGS PERRY AND HUSBAND, J. W. PERRY, AND E. L. McCOY AND WIFE, FLORENCE McCOY v. SUDIE MAE SUGGS, WIDOW; JOHN WILLIAM SUGGS AND WIFE, ALICE SUGGS; JAMES HAYWOOD SUGGS AND WIFE, IMEDIA SUGGS; JOSIE SUGGS RADFORD AND HUSBAND, PATRICK RADFORD; LAWTON SUGGS, MINOR; MARY LOU SUGGS, MINOR; MELVIN SUGGS, MINOR; ROBERT SUGGS, MINOR; TIMOTHY SUGGS, MINOR, AND SUDIE MAE SUGGS, ADMINISTRATRIX OF THE ESTATE OF ROBERT L. SUGGS, DECEASED

No. 708SC418

(Filed 5 August 1970)

1. **Deeds § 7— registration after death of grantor — presumption of delivery**

The presumption of delivery resulting from the registration of a deed applies even though the registration is made after the grantor's death.

2. **Deeds § 7— registration after death of one grantor — presumption of delivery — sufficiency of evidence to rebut presumption — acquiescence by grantee in delivery**

Plaintiff's evidence was insufficient to rebut the presumption of delivery of a deed to the property in question arising from registration of the deed after the death of one of the two grantors, and was insufficient to show that the grantee failed to acquiesce in the grantors' intent to make the deed an effective conveyance.

APPEAL by plaintiffs from *Bundy, J.*, 5 January 1970 Session of Superior Court of GREENE County.

Plaintiffs Mildred Perry and Florence McCoy are children of Emma G. Suggs, who died intestate in 1949, survived by her husband R. L. Suggs, Sr., who died in 1960, and a son R. L. Suggs, Jr. who died intestate in 1964. Defendant Sudie Mae

Suggs is the widow of R. L. Suggs, Jr., and the other defendants are the children and grandchildren of R. L. Suggs, Sr.

Plaintiffs instituted this action for the removal of alleged cloud on their title to an undivided 2/5 interest in a certain tract of land and to recover rents and profits therefrom for a period of nine years. They allege that defendants claim title to the entire interest in the land under a deed from R. L. Suggs, Sr. and wife, Emma G. Suggs, to R. L. Suggs, Jr., for his lifetime with remainder to his children. The deed is dated 5 December 1942; was executed on 13 March 1943; and was recorded on 10 December 1949, in Book 252, page 351, Greene County Registry. It recites a consideration of $500. The deed was recorded after the death of Emma G. Suggs. Plaintiffs and defendants claim under a common source of title; to wit, Emma G. Suggs, to whom the property was conveyed by Robert L. Suggs by deed dated 1 January 1923, recorded 7 November 1923, in Book 130, page 514, Greene County Registry.

Plaintiffs allege that the deed of 5 December 1942 was a deed of gift not recorded in two years, was never delivered, and is void. They claim as heirs of Emma G. Suggs.

Defendants admit that they claim under the deed of 5 December 1942, but deny that the deed is void and set up adverse possession and *laches* as affirmative defenses.

The matter was heard without a jury upon stipulations of the parties and oral evidence. Upon the conclusion of the plaintiffs' evidence, the court allowed defendants' motion for dismissal and entered judgment for the defendants. Plaintiffs appealed to this Court.

Turner and Harrison, by Fred W. Harrison, and Lewis and Rouse, by Robert D. Rouse, Jr., for plaintiff appellants.

Aycock, LaRoque, Allen, Cheek and Hines, by C. B. Aycock and I. Joseph Horton, for defendant appellees.

MORRIS, J.

The record shows that "AT THE CONCLUSION OF PLAINTIFFS' EVIDENCE, THE DEFENDANTS — THROUGH COUNSEL — MOVE FOR A DIRECTED VERDICT." The judgment entered states that "at the conclusion of the plaintiffs' evidence and the plaintiffs having rested, the defendants, through counsel, moved for a dismissal

on the grounds that upon the facts and the law, the plaintiffs have shown no right to relief."

Apparently defendants' motion was for involuntary dismissal under Rule 41(b) applicable in actions tried by the court without a jury, rather than for a directed verdict under Rule 50(a) applicable in actions tried before a jury. The court rendered judgment on the merits and found facts as provided in Rule 52(a).

The pertinent findings of fact and conclusions of law based thereon, to all of which plaintiffs except, are as follows:

"5. That the deed dated December 5, 1942 and recorded in Book 252, page 351 of the Greene County Public Registry, which embraces the property which is the subject of this lawsuit, was a deed for a consideration and is not a gift deed; and said deed reserved unto the grantors, R. L. Suggs and wife, Emma G. Suggs, a life estate.

6. That the deed dated December 5, 1942 and recorded in Book 252, page 351 of the Greene County Public Registry, which embraces the property which is the subject of this lawsuit, was delivered to one of the grantees, Robert L. Suggs, Jr., during the lifetime of the grantors and was accepted by Robert L. Suggs, Jr., upon the death of one of the grantors, Emma G. Suggs, on July 14, 1949.

7. That Robert L. Suggs, Jr., received the rents and profits from and was in possession of the property described in that deed dated December 5, 1942 and recorded in Book 252, page 351 of the Greene County Public Registry, from the death of one of the grantors, Emma G. Suggs, until his death on June 30, 1964; and that since the death of Robert L. Suggs, Jr., his children have received the rents and profits and have been in possession of the property which is the subject of this lawsuit.

8. That Sudie Mae Suggs, the widow of Robert L. Suggs, Jr., has no interest in the property which is the subject of this lawsuit.

CONCLUSIONS OF LAW

1. That the deed from R. L. Suggs and wife, Emma G. Suggs, to R. L. Suggs, Jr., for the term of his natural life

and after his death to his children, of record in Book 252, page 351 of the Greene County Public Registry is a good and valid deed.

2. That the defendants, other than the defendant, Sudie Mae Suggs, are now the owners of said tract of land described in said deed recorded in Book 252, page 351 of the Greene County Public Registry, and that the plaintiffs have no interest therein and are not entitled to the ownership or possession of any part thereof."

At trial and on appeal, the only question upon which there is disagreement is the question of delivery.

In *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316 (1949), Ervin, J., clearly set out the principles applicable to this controversy:

"The word 'deed' ordinarily denotes an instrument in writing, signed, sealed, and delivered by the grantor, whereby an interest in realty is transferred from the grantor to the grantee. (citations omitted.) The requisites to the valid delivery of a deed are threefold. They 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, though not necessarily beyond his physical control; and (3) acquiescence by the grantee in such intention. (citations omitted.) But manual possession of the instrument by the grantee is not essential to delivery. It is sufficient if the grantor delivers the writing to some third person for the grantee's benefit. (citations omitted.) Thus, there is an effective delivery where the grantor causes the written instrument to be recorded, or leaves it with the proper officer for recording with the intention that it thereby shall pass title to the grantee according to its purport and tenor, and the act of the grantor is accompanied or followed by the assent of the grantee. (citations omitted.) In such cases, assent on the part of the grantee is presumed until the contrary is shown if the conveyance be beneficial to him. This is so although the transaction occurs without the grantee's knowledge. (citations omitted.)"

The evidence with respect to delivery came solely from the testimony of Sudie Mae Suggs, widow of Robert L. Suggs, Jr., grantee, on her adverse examination. She testified, in substance, that at the time of the death of Mrs. Emma Suggs, one of the grantors, she had no knowledge of a deed conveying to her husband the "home place" tract; that her husband first came into possession of the home place at his mother's death. She later testified as follows:

> "Yes, I have some knowledge of the Deed dated December 5, 1942 and purporting to convey to my husband the home place; but I didn't think it went back as far as 1942. I know that such a Deed was in existence. I may be wrong about the date but actually I don't know. I have never seen the Deed; or if I have, I don't recall it. I don't know when I first heard about the Deed you refer to; but it was prior to the death of 'Miss Emma' Suggs. My husband got the Deed earlier but I don't know what year; but he would not accept the Deed.
>
> When I say that 'He would not accept it,' I mean that he didn't want the Deed to the home place because he felt that he was putting his Mama and Daddy out of a home. For that reason, he did not accept it and he did not accept the Deed until after his mother died. He did not receive the Deed until after his mother died. He did not receive the Deed for the property until after his mother died. I do not know whether or not the Deed was a gift on the part of his mother and father. I do not know if he paid anything for the Deed. I do not know exactly when the Deed was given to him because I did not meddle in my husband's affairs. All I know is that he did not accept the Deed prior to his mother's death and that he did not get it until after his mother's death; that is all I know.
>
> I may have seen the Deed to the home place. I might know where it is at this time. I never did discuss this Deed with my husband; and he never made any statements to me about it. I don't know whether he paid anything for it. I don't have any of his old checks or records."

[1] Although the findings in finding of fact No. 6 may appear to be technically inconsistent and contradictory, an analysis of the evidence and stipulations of the parties leads us to the con-

clusion that the judgment should be affirmed. The land in controversy was owned by Emma G. Suggs, mother of *femme plaintiffs* and Robert L. Suggs, Jr. The deed, which is the subject of this litigation, was executed by R. L. Suggs and his wife, Emma G. Suggs to R. L. Suggs, Jr., for the term of his natural life and after his death to his children, "if any survive him; if not, to his next of kin." The deed was dated 5 December 1942 and recorded 10 December 1949. Emma G. Suggs died 14 July 1949. R. L. Suggs died in May 1960. R. L. Suggs, Jr., died 30 June 1964 survived by his widow, six children and two grandchildren. There was evidence that R. L. Suggs, Jr., grantee, had the deed in his possession prior to the death of his mother in July 1949, and that he went into possession of the land after her death and remained in possession thereof until his death. Since his death in 1964 his children have been in possession and receiving the rents and profits. In our view, the evidence is not sufficient to rebut the presumption of delivery resulting from the registration of the deed, notwithstanding the prior death of Emma G. Suggs, one of the grantors. *Cannon v. Blair,* 229 N.C. 606, 50 S.E. 2d 732 (1948). Nor do we find that the evidence compels a conclusion that the grantee, R. L. Suggs, Jr., failed to acquiesce in the intention of grantors to give the deed legal effect according to its purport and tenor. The case is not unlike *Cannon v. Blair, supra.* There the land which was the subject of litigation was owned by David H. Blair, his wife, and the brothers and sisters of David H. Blair. In 1932 all of them conveyed the land by proper deed to David H. Blair, Adelaide Cannon Blair, and John Fries Blair, grantees, as trustees for David H. Blair, Jr., "subject to the privilege of each of the grantors to occupy, use, and enjoy the premises during his or her natural life." Upon the death of the last surviving grantor, the property was to be conveyed to David H. Blair, Jr., with provisions with respect to the possible death of David H. Blair, Jr., prior to the death of the last surviving grantor. After the death of David H. Blair, in October 1944, the deed was found unrecorded among the papers of David H. Blair and other members of the Blair family in the home on the property in question. It was then recorded. Subsequently an action was brought seeking to have the deed declared invalid. One of the grounds of attack was the alleged nondelivery of the deed by David H. Blair. The trial court found as a fact that the deed was executed and delivered by David H. Blair. On appeal, the

Supreme Court, speaking through Ervin, J., said:

> "The presumption of delivery resulting from the registration of the trust indenture of 21 September, 1932, arose in this case notwithstanding the prior death of David H. Blair. *Linker v. Linker,* 167 N.C. 651, 83 S.E. 736; *Fortune v. Hunt,* 149 N.C. 358, 63 S.E. 82. It is familiar law that 'where a deed has been registered, whether after or before the death of the grantor, it is presumed to have been delivered, and the burden shifts to the other side to rebut that presumption.' *Rogers v. Jones,* 172 N.C. 156, 90 S.E. 117.
>
> We are not inadvertent to the testimony indicating that the trust indenture was found among the papers of David H. Blair after his death. This evidence was not incompatible in any degree with the finding that the deed was delivered by David H. Blair during his lifetime. He reserved a life estate in the property covered by the deed. Moreover, he was one of the trustees who acquired legal title to the remainder in such property under the conveyance. In consequence, he was entitled to the possession of the deed and was interested in its preservation subsequent to its delivery as much as any other person on earth. *Ratione cessante cessat ipsa lex.* Both authority and reason declare that a presumption of nondelivery of a deed does not arise from the finding of it among the grantor's effects on his death when he reserved an interest in the property or was otherwise lawfully entitled to its possession after its delivery. *Cribbs v. Walker,* 74 Ark. 104, 85 S.E. 244; *Smith v. Adams,* 4 Tex. Civ. App. 5, 23 S.W. 49."

Here the deed was in possession of the grantee prior to the death of either grantor, was recorded after the death of one of the grantors, and the grantee took possession during the lifetime of the grantor, R. L. Suggs, to whom a life estate had been reserved in the deed.

[2] We are compelled to conclude that the evidence was not sufficient to rebut the presumption of delivery, nor was there evidence that the grantee failed to acquiesce in the grantor's intent to make the deed an effective conveyance, and that the trial court's finding that the deed was delivered to Robert L. Suggs, Jr., during the lifetime of the grantors is correct and supports the conclusion that the deed was a good and valid deed.

These conclusions compel an affirmance of the judgment of the trial court.

Affirmed.

BROCK and GRAHAM, JJ., concur.

BLYTHE M. LINK v. JAMES C. LINK

No. 7026SC399

(Filed 5 August 1970)

1. **Fraud § 12— action to set aside transfer of stock — issue of fraud — sufficiency of evidence**

In the wife's action to set aside on ground of fraud the transfer to her husband of her interest in corporate stock and debentures, the wife's evidence was sufficient to make out a *prima facie* case of fraud, thereby entitling her to go to the jury, where the evidence showed that (1) a relationship of trust and confidence had existed between the parties, and the wife had always relied upon the husband in business transactions; (2) the parties had separated as a result of the wife's disclosure to the husband of her love affair with another man; (3) the wife transferred to her husband her interest in the stocks and debentures while she was receiving psychiatric treatment and was emotionally distraught over the breakup of her marriage; (4) the wife received no consideration for the transfer and she was incapable of comprehending the value of the stocks transferred; and (5) the wife had no intention of making a gift to her husband of the stocks and debentures.

2. **Fraud § 13— fraudulent transfer of stock — issues**

In the wife's action to set aside on ground of fraud the transfer to her husband of her interest in corporate stock and debentures, all the facets of the case could have been properly tried on the issue of fraud rather than on the additional issues of duress, undue influence, and gift.

3. **Rules of Civil Procedure § 51— instructions — substantial features of case — duty of trial court**

It is incumbent upon the judge to declare and explain the law arising on the evidence as to all the substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient.

4. **Rules of Civil Procedure § 51— instructions — application of the law to the facts**

The judge must apply the facts to the law for the enlightenment of the jury, that is, the judge must bring into view the relations of the

particular evidence adduced to the particular issues involved. G.S. 1A-1.

5. Fraud § 13 —fraud — instructions on issue

In the wife's action to set aside on ground of fraud the transfer to her husband of her interest in corporate stock and debentures, the trial court committed reversible error in failing to apply the facts as contended by the husband to the first three issues submitted to the jury.

APPEAL by defendant from *Anglin, J.*, 12 January 1970 Schedule "C" Civil Session of the MECKLENBURG County General Court of Justice, Superior Court Division.

This action was instituted to set aside a transfer of corporate stock in one corporation and three $1,000 face value, 5% debentures in another corporation.

The parties are husband and wife, and this action was brought by the wife. For convenience, the plaintiff, who is the wife, will be designated throughout as wife; and the defendant, who is the husband, will be designated throughout as husband.

The parties were married 21 October 1948. Of the marriage three children were born: two boys, one born in 1952 and the other born in 1954, and a daughter, born in 1957. Both parties are college graduates, having graduated from the University of Illinois. Throughout the marriage the wife has been a housewife and has not participated in any business ventures. The husband has been a successful businessman and has devoted all of his business career to the management of Royal Crown Bottling Company, Charlotte, North Carolina, a family corporation. The stock is owned by the husband, his father and uncle; and in addition, there is the corporate stock in dispute in this action. The husband at all times conducted the family business, paid all family bills and had prepared and filed all necessary tax returns. The wife was not interested in, and in no way participated in, any business transactions.

In 1956 the husband's grandfather gave three $1,000 face value, 5% debentures issued by Royal Crown Bottling Company of Houston, Texas, to the wife as a present.

In 1966 the husband's parents gave the parties in this action 295 shares of the capital stock of Royal Crown Bottling Company, Charlotte, North Carolina, as joint tenants with right

of survivorship. From the time of the receipt of these securities, both the stock and the debentures, they were kept by the husband in a lock box at the bank. The wife never went to the lock box, and at all times left the securities under the control and supervision of the husband.

In this action the wife asserts that the debentures have a value in excess of $3,000. The husband says they have a value of $3,000. The wife asserts that one-half of the 295 shares of stock, namely, 147½ shares, have a value in excess of $75,000. The husband says the value of the stock is not in excess of $43,564.13.

On 2 December 1967 the parties separated and are still living in a state of separation. The wife asserts that during the month of December 1967, when she was nervous and emotionally distraught due to the breakup of her marriage, the husband took advantage of her lack of business experience, her distraught condition and her trust and dependence upon him for financial and business guidance to effect a transfer to himself of her one-half interest in the 295 shares of stock and all of her interest in the three debentures. She asserts that the husband's conduct amounted to fraudulent concealment of the value of the securities being transferred and coercion, and she seeks to have the assignment declared null and void and her property returned to her.

The husband denies any fraudulent concealment or coercion or any misdoing on his part and asserts that the transfer of all of the securities involved was done freely and voluntarily and as an outright gift from his wife to himself.

The issues of fraud, duress, undue influence and gift were submitted to the jury. The jury answered the first three issues in the affirmative, finding that the transaction involved fraud, duress and undue influence and did not answer the fourth issue as to whether or not a gift had been made. Based upon the jury finding, a judgment was entered to the effect that the 295 shares of stock were owned as joint tenants with right of survivorship, and the husband was directed to effectuate such a transfer of the stock and to then deliver the stock certificate for the 295 shares to the wife. It was also adjudged that the wife is the sole owner of three $1,000 debentures, and the husband

was directed to return them to the wife, together with $450 interest that had been paid thereon from 15 December 1967.

From this judgment the husband appeals.

Bradley, DeLaney and Millette by Ernest S. DeLaney, Jr., for plaintiff appellee.

Warren C. Stack for defendant appellant.

CAMPBELL, J.

[1] The evidence on behalf of the wife was to the effect that in November 1967 in an effort to effect a better marriage and family relationshp, she told her husband of a love affair she had had with another man. Following this disclosure, both wife and husband sought marriage counsel, and she sought psychiatric help. The husband left home on 2 December 1967 and has lived separate and apart from the wife since that date. She testified, "My husband had been in love with his business and himself and worked hard." While she was receiving psychiatric treatment and at a time when she was nervous and emotionally distraught over the breakup of the family relationship and her marriage, and at a time when she did not comprehend and was incapable of comprehending the value involved, she transferred her interest in the stock and all of the debentures to her husband. She received no consideration for this transfer and had not consulted with any attorney to advise her as to her rights. She had no intention whatsoever of making a gift to her husband, and later when she executed a gift tax return, she did not know that she was doing so and thought the gift tax return had something to do with the income tax returns which she had always signed in order to make a joint return with her husband because her husband desired to do it that way. She had always relied upon her husband in business matters and was still doing so in this instance.

The husband's evidence was to the effect that on 17 November 1967 his wife told him of an affair she had had with another man, and that she was in love with this man, and of her adulterous conduct with him. He moved out of the home on 2 December 1967, and since that time has lived separate and apart from his wife. On 5 December 1967 the wife's father came to Charlotte, and he and his wife and her father discussed business matters, including certain debentures. Sometime later during

the month of December 1967, his wife told him that she wanted nothing to do with any debentures and signed a waiver of all of her rights in the debentures involved. Subsequently, and in the same month of December 1967, he went to the home to talk to his wife after having made an appointment to do so. At that time he took the stock certificate and told her, "This is the stock that my parents gave the two of us and I think that I should own it." His wife then said, "I don't want any part of your old company. Here, let me have it and I will sign it." The stock was then transferred on the books of the company, and while he had seen his wife from time to time thereafter, she never accused him of forcing her to transfer the stock or debentures or perpetrating any fraud whatsoever until the present action was instituted in October 1968. In April 1968 he had taken income tax returns and gift tax returns to his wife and had explained to her at that time the difference between making individual tax returns and joint returns; that the individual tax return would require a tax to be paid, both income and gift, whereas if a joint return should be made, no tax would have to be paid, and there would be a refund on the income tax return. The wife gladly and willingly signed the joint returns based upon this explanation, and she received one-half of the refund on income taxes. He asserted that the transfer of the stock and debentures had been an outright gift from the wife which she had made freely and voluntarily because she did not want to have anything to do with him or the company or his family; that she ratified the gift some four months later when she executed the gift tax return.

Based upon the allegations in the pleadings and the evidence on behalf of the wife, we think the wife made out a *prima facie* case entitling her to go to the jury on the issue of fraud. The evidence was ample to show that a relationship of trust and confidence existed between the parties, and the wife had always relied upon the husband in business transactions. This confidential relationship did not terminate with the moving out of the home by the husband on 2 December 1967. It is reasonable to assume that certainly during the month of December 1967, while the wife was seeking psychiatric treatment, she was continuing to rely upon her husband for business advice and guidance. The law in this regard is amply set forth in *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1950). The assignments of error directed

towards the refusal of the trial court to direct a verdict in favor of the defendant are without merit.

[2] The defendant assigns error in the instructions by the trial court to the jury and in the submission of four issues to the jury. These assignments of error have merit. We think that all facets of this case could be tried properly with one issue, namely, "Did the defendant procure the plaintiff's endorsement of the stock certificates and the debentures by fraud?"

[3-5] The trial judge in the instant case gave the contentions of both parties. He likewise gave full instructions as to the applicable law. He did not, however, apply the facts as contended by the defendant to the first three issues which were submitted to the jury. It is incumbent upon the judge to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. The judge must bring into view the relations of the particular evidence adduced to the particular issues involved. This is what is meant by the expression that the judge must apply the facts to the law for the enlightenment of the jury. G.S. 1A-1, Rule 51; *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522 (1962); *Bulluck v. Long,* 256 N.C. 577, 124 S.E. 2d 716 (1962).

New Trial.

BRITT and VAUGHN, JJ., concur.

GEORGE W. HORTON AND WIFE, MARGOT HORTON v. IOWA MUTUAL INSURANCE COMPANY AND NORTHWESTERN BANK

No. 7029SC340

(Filed 5 August 1970)

1. **Rules of Civil Procedure § 50— motion for judgment n.o.v. — consideration of evidence**

Upon motion for judgment *non obstante veredicto* under G.S. 1A-1, Rule 50(b)(1), all the evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor.

2. **Insurance § 128— fire insurance — time limitations for proof of loss and institution of suit — waiver by adjuster**

An insurance adjuster clothed with the authority to adjust and settle a fire insurance loss has the authority to waive the 60-day limitation for filing proof of loss and the 12-month limitation for instituting suit.

3. **Insurance § 128— fire insurance — waiver of policy time limitations — sufficiency of allegations**

In this action on a fire insurance policy, allegations in the complaint and the amendment thereto were not too indefinite for submission of issues as to whether defendant insurer had waived or was estopped to assert provisions of the policy requiring proof of loss within 60 days and the institution of suit within one year of the loss.

4. **Rules of Civil Procedure §§ 50, 59— conditional grant of new trial on issue of damages**

In this action on a fire insurance policy, the trial court did not err in conditionally granting defendants' motion under Rule 50(c)(1) for a new trial on the issue of damages for loss of contents on the ground that the amount awarded by the jury was excessive and appeared to have been given under the influence of passion and prejudice. Rule of Civil Procedure No. 59(a)(6).

APPEAL by plaintiff from *Snepp, J.*, 12 January 1970 Session of the RUTHERFORD County General Court of Justice, Superior Court Division.

This action arises from a fire which destroyed the plaintiffs' store and gasoline station located in Henrietta, North Carolina, on 10 November 1965. The plaintiffs' premises were insured by the defendant Iowa Mutual Insurance Company (Iowa Mutual) against loss by fire. The policy, No. F 442652, a standard fire insurance contract, was in full force and effect and all premiums had been paid as of the date of the fire. The limits of coverage provided were $4,000 on the building and $13,000 on the contents. The policy had a loss payable provision in favor of Northwestern Bank.

Under the provisions of the policy, a proof of loss must be filed within 60 days of the loss (unless such time is extended by the company) and suit must be instituted within one year of the loss. A proof of loss was not filed within the 60-day period and a suit was not instituted by the claimants herein within the period of one year from the time of loss. The question at trial, then, became whether the defendant waived these provisions by the statements or actions of its agents.

The jury held that the above two requirements had been waived and gave a verdict in the amount of the maximum coverage of the policy. This verdict was set aside and judgment notwithstanding the verdict was entered for the defendant as follows:

"JUDGMENT

THIS CAUSE COMING ON TO BE HEARD AND BEING HEARD before his Honor, Frank W. Snepp, Jr., Judge Presiding over the January 12, 1970, session of the Superior Court of Rutherford County, upon Motion of the Defendant, Iowa Mutual Insurance Company to set aside the verdict for the plaintiff rendered herein and to order judgment for the defendant notwithstanding the verdict, pursuant to Rule 50(b)(1) of the Rules of Civil Procedure for North Carolina and in accordance with previous motions for directed verdict made by the defendant Iowa Mutual Insurance Company and on the motion made for a new trial made pursuant to Rules 59, 50(b)(1), and 50(c)(1), of said rules.

IT APPEARING TO THE COURT that the jury answered the issues as follows:

1) Did the defendant waive, or is the defendant estopped to require, the filing of a proof of loss as required by the policy?

ANSWER: Yes.

2) Did the defendant waive, or is the defendant estopped to require, compliance with the policy requirement that suit on the policy be instituted within twelve months next after inception of the loss?

ANSWER: Yes.

3) What amount, if any, are plaintiffs entitled to recover for loss to their building?

ANSWER: $4,000.00.

4) What amount, if any, are plaintiffs entitled to recover for loss of their contents?

ANSWER: $13,000.00.

AND THE COURT FURTHER HAVING HEARD the argument of counsel for both sides, it is, therefore, ORDERED, ADJUDGED and DECREED:

1) The motion to set aside the verdict and for judgment for the defendant Iowa Mutual Insurance Company notwithstanding the verdict be and the same is hereby allowed and the plaintiff shall have and recover nothing of the defendant, Iowa Mutual Insurance Company.

2) Pursuant to Rule 50(c)(1) of the rules, a motion for a new trial is hereby conditionally granted as to the Fourth issue of the verdict rendered by the jury in the event that judgment notwithstanding the verdict entered herein for the defendant Iowa Mutual Insurance Company is vacated or reversed on appeal, for the reason that the damages awarded to plaintiffs in answer to the said Fourth issue was excessive and appeared to have been entered under the influence of passion or prejudice.

3) The plaintiffs shall pay the costs of this action to be taxed by the Clerk.

This the 16th day of January, 1970.

/s/ Frank W. Snepp, Jr.
Judge Presiding."

Plaintiffs appeal, assigning as error the granting of the motion to set aside the verdict of the jury and the entering of a judgment for the defendant, Iowa Mutual, as well as the conditional granting of a new trial by the trial judge on the Fourth issue.

Hamrick and Hamrick by J. Nat Hamrick for plaintiff appellant.

Williams, Morris and Golding by William C. Morris, Jr., for defendant appellee.

CAMPBELL, J.

[1] Upon a motion for judgment *non obstante veredicto,* under G.S. 1A-1, Rule 50(b)(1), the sufficiency of the evidence upon which the jury based its verdict is drawn into question.

All evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor.

Musgrave v. Savings & Loan Association, 8 N.C. App. 385, 174 S.E. 2d 820 (Filed 24 June 1970).

Applying this rule, if the plaintiffs have made out a case sufficient to go to the jury, then it was error to enter the judgment setting aside the verdict and granting a judgment for the defendant notwithstanding the verdict.

In the instant case the evidence for the plaintiffs would support a finding by the jury that on 11 November 1965, the day after the fire, Charles Z. Black Agency notified Kenneth Bostic, the North Carolina Claims Manager of the defendant, that there had been a loss by fire. Bostic testified that pursuant to this notification, "I employed General Adjustment Bureau of Shelby, North Carolina, to adjust the claim. Mr. Harold Payne in that Bureau handled the claim. I telephoned the coverage and asked him to adjust the claim for us. . . . He is, in fact, an independent adjuster and I gave him such information as I had and told him to do the necessary work to adjust the loss and thereafter, I received periodic reports from him. . . ."

Payne proceeded to communicate with the male plaintiff. Payne requested the male plaintiff to furnish income and sales tax reports and all of his invoices. Mr. Horton testified that Payne told him "he wanted to compile all this information so that he could pay me as soon as possible." About two weeks after the fire, "Mr. Payne said as long as we were negotiating that I would not have to file proof of loss, that they were going to pay me right off as soon as he got the necessary information together."

Plaintiffs also offered in evidence the following testimony from the male plaintiff of a conversation with Payne.

> "I asked him would I have to bring suit against the company or was it necessary to instigate a suit before one year and he said, 'Oh, no, you don't have to do that, they are going to pay you as soon as I turn in this information, and get it compiled, they are going to pay you and it won't be necessary.' "

An objection to this testimony on behalf of the defendant was sustained, and plaintiffs assigned this for error. We are of the opinion that this testimony was competent, as shown hereafter.

In July or August 1966 the plaintiffs employed Oscar J. Mooneyham, an attorney of Rutherford County, to represent

them; and the plaintiffs discontinued further negotiations with Payne. On 14 October 1966 Payne wrote Mooneyham advising that the information theretofore received was unacceptable without other supporting evidence as to the stock of merchandise contained in the building at the time of fire. In this letter Payne suggested further steps and further information to be supplied in order to establish values. Mooneyham died during the Spring of 1967 and the plaintiffs procured present counsel. In April 1967 Payne was still working on the case attempting "to secure information regarding the values, regarding the stock of merchandise."

[2] As far back as 1892, it was established in North Carolina that an insurance adjuster clothed with the authority to adjust and settle a fire insurance loss had the authority to waive the 60-day limitation for filing proof of loss and also the 12-month limitation for instituting a suit. Both sides of the question are clearly presented in the majority opinion and in the dissenting opinion in the case of *Dibbrell v. Insurance Co.*, 110 N.C. 193, 14 S.E. 783 (1892). Likewise, see *Strause v. Ins. Co.*, 128 N.C. 64, 38 S.E. 256 (1901); *Meekins v. Insurance Co.*, 231 N.C. 452, 57 S.E. 2d 777 (1950); *Gaskins v. Insurance Co.*, 260 N.C. 122, 131 S.E. 2d 872 (1963).

While an insurance adjuster has such implied authority, while adjusting losses, local agents are treated differently. See *Tatham v. Ins. Co.*, 181 N.C. 434, 107 S.E. 450 (1921); *Zibelin v. Insurance Co.*, 229 N.C. 567, 50 S.E. 2d 290 (1948); *Fleming v. Insurance Co.*, 269 N.C. 558, 153 S.E. 2d 60 (1967).

The case at bar involves Payne, an insurance adjuster, employed specifically to settle a loss; and we think this case falls under the Dibbrell line of cases and not the Tatham line.

[3] In the instant case the fire loss occurred 10 November 1965. The action was not instituted until 7 November 1967, which was nearly two years after the loss and well beyond the 12-month limitation provision of the policy. In order for the plaintiffs to avail themselves of the doctrine of *estoppel* or waiver of this policy provision on the part of the defendant, they must plead it. We are not prepared to say that the allegations in the complaint and the amendment thereto are too indefinite to justify the submission of an issue on this question.

Laughinghouse v. Insurance Co., 200 N.C. 434, 157 S.E. 131 (1931).

[4] We hold that the judgment entered for defendant notwithstanding the verdict is reversed, and it is ordered that the jury verdict be reinstated on the first three issues. It is to be noted that Judge Snepp conditionally granted a motion for a new trial as to the fourth issue. This was done pursuant to Rule 50(c)(1), and the grounds therefore comply with Rule 59(a)(6). G.S. 1A-1 (Rules of Civil Procedure). In this we find no error. It is therefore necessary that this case be remanded to the Superior Court for determination of the fourth issue as to the amount plaintiffs are entitled to recover for loss of contents in the building.

Reversed in Part, and Remanded.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. HORACE ANDERSON

No. 7028SC233

(Filed 5 August 1970)

1. **Criminal Law § 26— test of former jeopardy**

The test of former jeopardy is not whether the defendant has already been tried for the same act but whether he has been put in jeopardy for the same offense.

2. **Criminal Law § 26— attachment of jeopardy**

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial on a valid indictment or information, before a court of competent jurisdiction, after arraignment, after plea, and when a competent jury has been empaneled and sworn to make true deliverance in the case.

3. **Criminal Law § 26— plea of former jeopardy — effect of nolle prosequi — attachment of jeopardy**

The solicitor's taking of a *nolle prosequi* on the misdemeanor charge of assault on a female cannot support defendant's plea of former jeopardy in a subsequent prosecution for the felony of assault with intent to commit rape, both offenses arising out of the same occurrence, where jeopardy had not attached at the time of the taking of the *nolle prosequi*.

4. Criminal Law § 81— admission of evidence — contents of note — best evidence rule

In a prosecution for assault with intent to commit rape, the admission of parol testimony of the contents of a note handed to the prosecutrix by defendant was reversible error, where (1) the State offered no evidence explaining the absence of the note and (2) the contents of the note were directly in issue in showing the intent of the defendant.

BROCK, J., concurring.

APPEAL by defendant from *Snepp, J.*, 1 December 1969 Session, BUNCOMBE Superior Court.

Defendant was charged in an indictment, proper in form, with assault with intent to commit rape. Briefly summarized, the evidence tended to show: The defendant (41) went to the home of the prosecuting witness, a fifteen-year-old girl, around 5:00 p.m. on 23 November 1968 and arranged for her to baby-sit for his sister. Defendant returned later and picked up the prosecuting witness and her eight-year-old companion, telling them that they were to meet his sister at a certain hamburger stand. After waiting a period of time at the hamburger stand and the sister did not appear, the defendant indicated they would go on to his sister's house. As they proceeded on certain streets of the City of Asheville, the defendant handed the prosecuting witness a note, not produced at the trial, which read: "Keep quiet, don't say anything to the child. Give me what I want or I'll kill you." The prosecuting witness threw her companion from the car, which was still in motion, struggled free of the defendant's grasp and got out of the car herself. The two girls then walked to a nearby house and obtained a ride home.

Shortly thereafter, two warrants were issued by the Clerk of the General County Court. Warrant No. 3634 charged the defendant with assault with intent to commit rape, a felony. Warrant No. 3633 charged the defendant with assault on a female, a misdemeanor. It is conceded that both warrants are based on the same occurrence. The cases were consolidated for purposes of hearing. On 20 December 1968, the county court found probable cause in case No. 3634 and bound the defendant over to the 6 January 1969 Session of Buncombe Superior Court. Case No. 3633 was continued to the February 1969 Session of county court.

On 27 February 1969, the defendant was tried in the General County Court and found guilty of the charge of assault on a female. From judgment imposed, defendant gave notice of appeal to the Superior Court of Buncombe County.

At the 19 February 1969 Session of Buncombe Superior Court, defendant was indicted for assault with intent to commit rape. On 15 March 1969, defendant was tried on this indictment. From a verdict of guilty and judgment entered thereon, defendant appealed. By opinion (5 N.C. App. 614), defendant was awarded a new trial on the felony charge.

On 10 December 1969, the felony charge was called for retrial at which time defendant moved to dismiss the misdemeanor charge pending against him in the Superior Court of Buncombe County. Upon argument on said motion, the solicitor announced the State would take a *nolle prosequi* in the misdemeanor case. Defendant then moved to dismiss the felony charge arguing former jeopardy. The court denied defendant's motion and proceeded to retry defendant on the felony charge. From a verdict of guilty and judgment entered thereon, defendant appeals.

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

Sanford W. Brown for defendant appellant.

MORRIS, J.

Defendant assigns as error the court's denying his plea of former jeopardy in the felony charge on the prior termination by *nolle prosequi* of the misdemeanor.

[1, 2] "The test (of former jeopardy) is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955). And ". . . jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case." *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962).

[3] Defendant's contention of former jeopardy is without merit. When the solicitor agreed to take a *nolle prosequi* for the State

on the misdemeanor charge, jeopardy had not attached and the *nolle prosequi* of the misdemeanor charge cannot serve as a basis for a plea of former jeopardy in the subsequent prosecution on the felony charge, defendant not having been put in jeopardy for the same offense previously.

[4] Defendant also contends that the court erred in finding ". . . that the original of the note was lost; that under the circumstances of its loss, a reasonable effort was made to locate the note . . . (and) that the contents of the note may be introduced into evidence by parol", such finding not being supported by competent evidence.

With regard to the loss of the note and the efforts made to determine its location, the record discloses the following:

"Q Why did you jump out?

Objection for Defendant.

Objection overruled. Exception.

A Because what the note said scared me.

Motion to strike.

Motion overruled. Exception.

Q Do you know whether or not a search has been made for the note that night?

Objection for Defendant.

Objection sustained, unless she did it herself.

A Yes, I went home. Pam Moss is a neighbor of mine. She lives at 7 Woodrow, about 2 blocks away. Yes, she visited in my home. Well, when I got home, I told mother what happened and me and her came straight on up to the police department.

Q Did you ever see the person called Joyce McMahan, which Horace Anderson told you was his sister?

Objection for defendant.

MR. BROWN: Objection, your Honor as to what he told her.

THE COURT: You have already asked that. Let's move on.

Yes, he was talking about the hippies and things like that and he said if his daughter did something like that, if he had a daughter, and they ever did anything like that, he would kill them. No, sir, I've never been in a car with Horace Anderson before. Yes, sir, I know where Weaverville is. Yes, sir, we went by Weaverville that night. No, I don't know which way he turned at Weaverville.

Q Do you know what was said and answer this yes or no, do you know what was said on the note?

Objection for defendant.

THE COURT: You may answer yes or no.

Exception.

A Yes.

Q What did it say?

Objection for defendant.

THE COURT: All right, now, wait just a minute. Let the jury go out.

(In the absence of the jury)

THE COURT: Now, what is the ground for your objection, Mr. Brown?

MR. BROWN: That the note is the best evidence and the proper foundation hasn't been laid.

THE COURT: Why hasn't it?

MR. BROWN: Because, your Honor, no search has been made for it.

THE COURT: Pardon?

MR. BROWN: No search has been made for it by this party and it is just that it is about a note on a piece of brown package paper of some sort and no search for it.

THE COURT: Well, the court finds that the original of the note was lost and that under the circumstances of its loss, a reasonable effort was made to locate the note and

holds that the contents of the note may be introduced in evidence by parol. Bring the jury back.

Exception for the defendant.
(In the presence of the jury)

THE COURT: Read the question to the witness.

REPORTER: 'What was said and answer this yes or no, do you know what was said on the note?'

'A Yes.

Q What did it say?'

THE COURT: Go ahead.

Objection. Objection overruled. Exception.

A It said, 'Keep quiet, don't say a word to the child.'

SOLICITOR: Go a little slower please.

WITNESS: 'Keep quiet, don't say a word to the child, and give me what I want or I will kill you.'

MR. BROWN: Motion to strike.

THE COURT: Motion overruled."

There is no evidence to support the court's finding that ". . . under the circumstances of its loss, a reasonable effort was made to locate the note . . .", there being no evidence a search had been made for the note that night or that the note could not be found after due diligence. In fact there is no evidence in the record that a search for the note had been conducted at any time or any other explanations for the absence of the note.

It is obviously necessary to reiterate the opinion of Britt, J., for the Court (5 N.C. App. 614, 169 S.E. 2d 38), when this case was previously appealed: "This rule appears to be well established in this jurisdiction. 'Evidence that a record or document has been lost and could not be found after due diligence, or had been destroyed, is sufficient foundation for the admission of secondary evidence thereof, either by introducing a properly identified copy thereof, or by parol evidence of its contents. But as a general rule parol evidence in regard to writings is properly excluded in the absence of a showing of any effort to procure the writings to offer them in evidence.' " Here, as in the first

trial of this case, the record of the proceedings in superior court is devoid of any explanation for the absence of the note itself. We may not speculate as to its whereabouts and disregard the rule.

Since defendant's intent at the time of the assault is an essential element of the offense charged, the contents of the note were a vital part of the State's evidence in showing such intent and since the contents of the note were directly in issue, the State was under an obligation to explain the absence of the note itself. *State v. Anderson, supra.*

Other questions brought forward by defendant will not be discussed as they may not occur on retrial.

New trial.

BROCK and GRAHAM, JJ., concur.

BROCK, J., concurring.

It seems that Britt, J., in writing the opinion for the Court after the first appeal in this case, clearly pointed to the necessity for some explanation of what happened to the original of the note. Yet, the State did not even ask the prosecuting witness what she did with the note. Her answer to that question would likely explain sufficiently the absence of the note.

BETSY C. HODGES, ADMINISTRATRIX D.B.N. OF ESTATE OF PATTIE BANKS DUNSTON, DECEASED, *v.* JAMES A. WELLONS, JR., TRUSTEE; SMITHFIELD SAVINGS & LOAN ASSOCIATION; AND JESSE GRISSOM AND WIFE, MILDRED GRISSOM

No. 7011SC269

(Filed 5 August 1970)

1. **Mortgages and Deeds of Trust § 40— action to set aside foreclosure sale — failure of mortgagee to collect and apply rents to debt**

Allegations that the mortgagee had been assigned all rents and income from the mortgaged property as further security for the indebtedness and that such sum was sufficient to cover the monthly payments due on the indebtedness plus a reasonable compensation for collecting the rent, *held* insufficient to state a cause of action to set aside foreclosure sale of the mortgaged property, where the mortgage

was made a part of the complaint and shows on its face that the mortgagee was under no obligation to collect the rents and apply them to the debt.

2. **Mortgages and Deeds of Trust § 26— foreclosure sale — notice to debtor, his heirs or personal representative**

In the absence of a valid contract to do so, there is no requirement that a creditor give personal notice of a foreclosure sale to a debtor who is in default or to his heirs or the representative of his estate.

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

A gross inadequacy of purchase price at a foreclosure sale, when coupled with any other inequitable element, will induce the court to interpose and do justice between the parties.

4. **Rules of Civil Procedure § 12— failure to state claim for relief — motion under Rule 12(b)(6)**

A motion under Rule 12(b)(6) performs substantially the same function as a demurrer for failure to state facts sufficient to constitute a cause of action.

5. **Rules of Civil Procedure § 12; Pleadings § 26— consideration of demurrers as motions under Rule 12(b)(6)**

The trial court did not err in considering demurrers filed prior to the effective date of the new Rules of Civil Procedure as motions under Rule 12(b)(6), where plaintiff was not taken by surprise because the grounds stated in the demurrers were grounds covered by Rule 12(b)(6).

6. **Rules of Civil Procedure § 12— motion to dismiss complaint — failure to state claim for relief**

A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.

APPEAL by plaintiff from *Carr, J.*, 13 February 1970 Session, JOHNSTON Superior Court.

Plaintiff, as administratrix *d.b.n.* of the Estate of Pattie Banks Dunston, instituted this action on 14 May 1969 to have the foreclosure of a deed of trust executed by decedent declared null and void.

The complaint, except where quoted verbatim, alleges in substance as follows:

1. That plaintiff is the duly qualified and acting administratrix *d.b.n.* of the estate of the mortgagor.

2. The residences of the various defendants.

3. That Pattie Banks Dunston died intestate on 30 March 1968 seized of the tract of land conveyed pursuant to the challenged foreclosure.

4. That on 28 July 1960 Pattie Banks Dunston, for value, executed and delivered a note for $1,000.00, payable in monthly installments of $10.00; that the note was secured by deed of trust which conveyed the tract of land which was in turn conveyed pursuant to the challenged foreclosure.

"5. That the said Pattie Banks Dunston made the said monthly payments each and every month until her death on the 30th day of March, 1968, at which time there was owing on said deed of trust the sum of $583.06.

"6. That on the 17th day of April, 1968, R. L. Cooper qualified as administrator of the Estate of said Pattie Banks Dunston, and served in that capacity until his death on the 24th day of August, 1968.

"7. That the said R. L. Cooper, administrator, kept the monthly payments current with Smithfield Savings & Loan Association until his said death.

"8. That on or about the 31st day of January, 1969, without any notice to any of the heirs of Pattie Banks Dunston and at a time when the said payments were in arrears not more than $60.00, the said James A. Wellons, Jr., trustee, advertised the property described in Book 352, Page 206, Johnston County Registry, for sale under the power of sale in said deed of trust, and on the 4th day of March, 1969, did offer the said lands for sale at public auction at the Courthouse door in Smithfield, when and where the defendants, Jesse Grissom and wife, Mildred Grissom, became the last and highest bidders in the amount of $625.00. That on March 18, 1969, the said James A. Wellons, Jr., trustee, executed and delivered a deed to the defendants, Jesse Grissom and wife, Mildred Grissom, said deed being recorded in Book 686, Page 435, Johnston County Registry.

"9. That the said foreclosure was made upon the demand of Smithfield Savings & Loan Association, although the said association under said deed of trust had been assigned all rents and income from said property, as further security for said indebtedness; that said Association knew that said property was

then being rented for $30.00 a month, and said sum was sufficient to cover said monthly payments plus a reasonable compensation for collecting said rent.

"10. That in violation of the said duty and obligation imposed by said deed of trust, the association demanded of the Trustee to foreclose said instrument without notice and at a time when there was no one to protect the rights of the other creditors of the estate, as well as her heirs.

"11. That said defendant Trustee, in violation of his duty, advertised said property without notification to the heirs or any other person having any interest in the estate of Pattie Banks Dunston.

"12. That all of the defendants knew that the bid of $625.00 was grossly inadequate, all of said parties being well aware that said property had a fair market value of at least $2,600.00.

"13. That there are numerous creditors of the estate of Pattie Banks Dunston who due to the wrongful foreclosure as aforesaid have been deprived of their right to payment of their said claims, and plaintiff is informed and believes and therefore alleges that said foreclosure should be set aside and the deed stricken from the record and the Court should order a sale of said property with the defendants, Jesse Grissom and wife, Mildred Grissom, being reimbursed first out of the proceeds of said sale with the balance to be paid to plaintiff for the payment of debts and the remainder thereafter to be distributed to the heirs at law of Pattie Banks Dunston."

The complaint thereafter prays that the trustee's deed be declared null and void, and that a Commissioner be appointed by the Court to sell said property and make appropriate distribution of the sale price.

Defendants filed separate demurrers on 25 and 26 June 1969. These demurrers were heard by Judge Carr at the February 1970 Session and considered by him as motions to dismiss for failure to state a claim upon which relief can be granted (G.S. 1A-1, Rule 12(b)(6)). As so considered, Judge Carr entered an Order 13 February 1970 dismissing the action upon the grounds that the facts alleged in the complaint do not state a claim upon which relief can be granted.

Plaintiff appealed.

T. Yates Dobson, Jr. and L. Austin Stevens for plaintiff.

Basil Sherrill and Wellons & Wellons, by Basil Sherrill, for defendants.

BROCK, J.

Plaintiff contends that the trial court erred in ruling the complaint failed to state a claim upon which relief can be granted.

[1] By stipulation the deed of trust was incorporated into the complaint. It shows upon its face that Smithfield Savings and Loan Association was under no obligation to collect the rents from the mortgaged property and apply them to the monthly payments on the note. It is true that the terms of the deed of trust undertake to assign the rents as further security, but clearly the terms impose no obligation upon the creditor to actually collect the rents. Therefore there has been no violation of legal duty in failing to collect the rents, and the allegations pertaining thereto fail to state a cause upon which relief can be granted.

[2] Plaintiff alleged that the trustee advertised and sold the property under the power of sale contained in the deed of trust at a time when payments on the note were in arrears; this alleges that the trustee acted in accordance with the contract and the law. Plaintiff only complains that the trustee did so "without any notice to any of the heirs of Pattie Banks Dunston." In the absence of a valid contract so to do, there is no requirement that a creditor shall give personal notice of a foreclosure by sale to a debtor who is in default. *Products Corp. v. Sanders,* 264 N.C. 234, 141 S.E. 2d 329; *Woodell v. Davis,* 261 N.C. 160, 134 S.E. 2d 160. The mortgagor could not demand notice of intention to sell under the power, and her heirs at law, and personal representative, stand in the same shoes. *Woodell v. Davis, supra.* It may well be appropriate, desirable, and courteous in many instances for a trustee to give actual notice to the debtor, the representative of his estate, or his heirs, of an intention to advertise and sell under a power of sale, nevertheless, such actual notice is not required as a matter of law. *Woodell v. Davis, supra.*

Therefore the allegations of failure to give notice fail to state facts upon which relief can be granted.

[3] A gross inadequacy of purchase price, when coupled with any other inequitable element, will induce the court to interpose and do justice between the parties. *Weir v. Weir,* 196 N.C. 268, 145 S.E. 281. However, no irregularity in the foreclosure sale is alleged here. The only obligation of the trustee to the heirs and estate of the debtor was to conduct and consummate the foreclosure sale in accordance with law. There is no suggestion that the trustee did otherwise.

We hold that the trial judge correctly concluded that the facts alleged in the complaint do not state a claim upon which relief can be granted.

Plaintiff contends that the trial judge committed error when he considered defendants' demurrers as motions made under Rule 12 (b) (6).

[4, 5] Defendants' demurrers were filed on 25 and 26 June 1969. The Rules of Civil Procedure became effective 1 January 1970. On 13 February 1970 Judge Carr considered the demurrers as motions under Rule 12(b) (6). A motion under Rule 12(b) (6) performs substantially the same function as a demurrer for failure to state facts sufficient to constitute a cause of action. Plaintiff was not taken by surprise because the grounds stated in the demurrers were grounds covered by Rule 12(b) (6). We hold that Judge Carr acted properly in considering the demurrers as he did.

Plaintiff contends that it was error for Judge Carr to dismiss the action; plaintiff argues that she should have been allowed to amend. This raises the question of whether the complaint contains a statement of a defective cause of action as opposed to a defective statement of a good cause of action.

[6] A complaint may be dismissed on motion filed under Rule 12(b) (6) if it is clearly without merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or absence of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. cf. 2A Moore's Federal Practice ¶ 12.08; *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211. In our opinion the trial judge ruled correctly.

Affirmed.

BRITT and HEDRICK, JJ., concur.

RESORT DEVELOPMENT COMPANY, INC. v. ILA FREEMAN PHILLIPS (WIDOW); LULA FREEMAN HILL AND HUSBAND, FRANK C. HILL; CELESTE BURNETT EATON AND HUSBAND, HUBERT A. EATON; FOSTER F. BURNETT, JR. AND WIFE, GLORIA M. BURNETT; MARIE GAUSE (WIDOW); VICTOR FREEMAN (SINGLE); VIOLA F. RODICK AND HUSBAND, LEWIS RODICK; GENEVA CROMARTIE (WIDOW); OLIVER DINKINS, JR. AND WIFE, MERCEDES DINKINS; MARTHA HOLIDAY HAWKINS AND HUSBAND, JESSE C. HAWKINS; JAMES H. DINKINS; MARY ELEANOR SPICER AND HUSBAND, HARLEE SPICER; ALICE LEOLA HANKINS AND HUSBAND, WADE HANKINS; VICTOR DINKINS (SINGLE); LORETTA DINKINS (SINGLE); ELECTA FREEMAN (WIDOW); RONALD FREEMAN AND WIFE, ————————; KATHERINE ONEDA FREEMAN AND HUSBAND, ————————; MARY ALWIDA FREEMAN FORD AND HUSBAND, WALTER LEE FORD; ARCHIE FREEMAN (SINGLE); AVIE FREEMAN WILSON AND HUSBAND, DOGAN H. WILSON; MILDRED FREEMAN (SINGLE); BERTHA MAE COLE AND HUSBAND, ROBERT L. COLE; LONICE FREEMAN (WIDOW OF WILLIAM GASTON FREEMAN); F. E. LIVINGSTON, TRUSTEE AND JOHN BRIGHT HILL, AND ALL OTHER PERSONS, FIRMS, CORPORATIONS WHO HAVE OR CLAIM ANY INTEREST IN LAND DESCRIBED HEREIN

No. 705SC420

(Filed 5 August 1970)

1. **Attorney and Client § 2— out-of-state attorney — procedure for admission to practice**

   New York attorney who had appeared for appellants throughout the trial was denied permission to argue the case in the Court of Appeals, where it appeared that the attorney had not complied with the statutory procedure for obtaining permission to appear in particular litigation in this State. G.S. 84-4.1.

2. **Appeal and Error § 39— docketing of appeal — responsibility of appellant**

   The responsibility of docketing the record on appeal in the form provided for by the Rules of the Court of Appeals is that of the appealing party, and the appeal is subject to dismissal *ex mero motu* for failure to comply with the Rules. Rule No. 48.

3. **Rules of Civil Procedure § 53; Reference § 11— compulsory reference — right to jury trial**

   A compulsory reference does not deprive a party of the right to trial by jury. G.S. 1A-1, Rule 53.

APPEAL by defendants from *Cowper, J.*, February 1970 Session of NEW HANOVER Superior Court.

This action to determine title and location of certain beach and marshland property in New Hanover County was instituted

in May of 1962. A reference was ordered on 18 September 1968. Upon application of defendants, *certiorari* was allowed by this court and the order of reference was affirmed. See *Development Co. v. Phillips,* 3 N.C. App. 295, 164 S.E. 2d 516.

The parties preserved their right to a jury trial by timely exceptions to the reference and to the referee's report and decision. The cause came on for hearing before Judge Albert W. Cowper and a jury, and at the conclusion of all the evidence, Judge Cowper allowed plaintiff's motion for a directed verdict on all issues. Defendants appealed.

Carr and Swails by James B. Swails for plaintiff appellee.

Pearson, Malone, Johnson & DeJarmon for defendant appellants.

GRAHAM, J.

Evelyn A. Williams, a resident of the State of New York, appeared as an attorney for defendants throughout the lengthy trial proceedings and apparently prepared and filed the record and defendants' brief on this appeal. Miss Williams is not a member of the Bar of North Carolina admitted and licensed to practice as an attorney in the courts of this State. G.S. 84-4. She represents that she is admitted to practice in the State of New York, but she has not applied for nor has she been granted permission to appear as an attorney in this case. In *Manning v. R.R.,* 122 N.C. 824, 28 S.E. 963, we find the following at p. 828:

> "In the present instance, the summons was sent to the general counsel of the defendant, resident in Norfolk, Va., who had no authority to practice in this State, not having obtained license so to do in the manner required by The Code, sec. 17, and, in fact, being debarred as a citizen of another State from so doing by section 19, which requires all attorneys to take an oath of allegiance to this State. That said nonresident had appeared in some causes in this State does not militate against this, since the appearance of such counsel is a matter of courtesy in each and every case, *and on motion in each case,* and only for the occasion on which it is allowed." (Emphasis added).

[1] After it came to our attention that Miss Williams was not properly appearing as an attorney, she was not permitted to participate in oral arguments. Associate counsel, being members

in good standing of the Bar of this State, argued the appeal for defendants.

Since 1967 the procedure whereby an out-of-state attorney may obtain permission to appear in particular litigation in this State has been set forth by statute. G.S. 84-4.1. This statute provides:

"Any attorney regularly admitted to practice in the courts of record of another state and in good standing therein, having been retained as attorney for any party to a legal proceeding, civil or criminal, pending in the General Court of Justice of North Carolina, may, on motion, be admitted to practice in the General Court of Justice for the sole purpose of appearing for his client in said litigation, but only upon compliance with the following conditions precedent:

(1) He shall set forth in his motion his full name, post-office address and status as a practicing attorney in such other state.

(2) He shall attach to his motion a statement, signed by his client, in which the client sets forth his post-office address and declares that he has retained the attorney to represent him in such proceeding.

(3) He shall attach to his motion a statement that unless permitted to withdraw sooner by order of the court, he will continue to represent his client in such proceeding until the final determination thereof, and that with reference to all matters incident to such proceeding, he agrees that he shall be subject to the orders and amenable to the disciplinary actions and the civil jurisdiction of the General Court of Justice in all respects as if he were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) He shall attach to his motion a statement to the effect that the state in which he is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) He shall attach to his motion a statement to the effect that he has associated and has personally appearing with him in such proceeding an attorney who is a resident of this State and is duly and legally admitted to

practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with such legal proceedings, with the same effect as if personally made on such foreign attorney within this State.

(6) Compliance with the foregoing requirements shall not deprive the court of the discretionary power to allow or reject the application."

Perhaps this case demonstrates the wisdom of restrictions with respect to appearances by out-of-state attorneys in this State's courts, for the record and defendants' brief illustrate an obvious unfamiliarity with the customs of the profession and the rules of this court. In the proceedings before the referee and the trial court numerous exhibits were introduced. These included deeds, grants, maps, surveys, and photographs essential to the determination of the issues of the case and the merits of defendants' appeal. None of the exhibits had been filed with this court when the case was called for argument. Rule 19(j) provides: "Three copies of every map, photograph, diagram, or other exhibit, which is a part of the record on appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court *before such appeal is called for argument*: Provided, however, the Court of Appeals may authorize a lesser number to be filed." (Emphasis added). Defendants' exceptions are grouped at the front of the record and again at the back of the record, but they are not clearly set out and numbered at the places in the record where it is contended they apply. The record comprises 280 pages, and it contains various unnecessary and irrelevant matter. The proceedings are not set forth in the order of the time in which they occurred as provided in Rule 19(a).

[2] The responsibility of docketing the record on appeal in the form provided for by the rules of this court is that of the appealing party. For failure to comply with the rules this appeal is subject to be dismissed and is hereby dismissed *ex mero motu*. Rule 48, Rules of Practice in the Court of Appeals of North Carolina.

[3] We have nevertheless reviewed, insofar as the state of the record permitted, arguments set forth in defendants' brief. Defendants argue in their first three designated arguments that the compulsory reference statute, G.S. 1A-1, Rule 53 (erroneously cited throughout defendants' brief as Rule 50) is

unconstitutional because it deprives the parties of a jury trial. Rule 53 was formerly G.S. 1-189. This same argument was made by these defendants when this case was previously before this court. At that time Mallard, C.J., speaking for the court, stated:

> "A compulsory reference does not deprive one of the right to trial by jury. The contention of the appellants that the compulsory reference has denied them the right to a trial by jury is without merit and requires no discussion." *Development Co. v. Phillips, supra,* at p. 299.

The question of whether the court erred in directing a verdict for plaintiff pursuant to G.S. 1A-1, Rule 50 is not properly presented. We further note that no contention is made in defendants' brief that plaintiff failed to prove title to the property or where it was located, nor is it contended in the brief that defendants presented any evidence to show that they have any interest whatsoever in the subject property.

Defendants' remaining arguments attack various discretionary orders entered by the court during these lengthy proceedings. No abuse of discretion has been made to appear.

Appeal dismissed.

BROCK and MORRIS, JJ., concur.

EVA HICKS FELDMAN v. TRANSCONTINENTAL GAS PIPE LINE CORPORATION (5456) AND EVA HICKS FELDMAN, INDIVIDUALLY, AND EVA HICKS FELDMAN, EXECUTRIX OF THE ESTATE OF EVA DEAN HICKS v. TRANSCONTINENTAL GAS PIPE LINE CORPORATION (5457)

No. 7021SC297

(Filed 5 August 1970)

1. **Gas § 6— pipeline easement — sufficiency of description**

An agreement giving a gas company the right to construct gas pipelines across a described tract of land is not void for vagueness in failing to define the line along which the pipes were to be laid where the agreement expressly gave the grantee the right to select the route.

2. **Gas § 6; Easements § 2; Wills § 41— pipeline easement — rule against perpetuities**

Gas pipeline easement agreement which gave the gas company the

right to lay additional pipelines across the grantor's land parallel to the first line laid by the company did not violate the rule against perpetuities since it created a presently vested interest and subjected the lands described in the agreement to an immediate servitude.

3. **Gas § 6; Easements § 7— pipeline easement — authority to lay additional parallel lines — construction**

Provision of gas pipeline easement agreement which gave the gas company the right to lay one or more additional pipelines across the grantor's land "parallel" to the first line laid by the company did not require the company to lay additional lines vertically parallel to the initial line but allowed the company to lay additional lines horizontally parallel to the first line.

4. **Eminent Domain § 5; Easements § 2— grant of right of way — compensation according to contract — condemnation proceedings**

A landowner who has granted a right of way over his land must look to his contract for compensation, as it cannot be awarded to him in condemnation proceedings, provided the contract is valid and all its conditions have been complied with by the grantee.

APPEAL by petitioners from *Exum, J.*, 19 January 1970 Civil Session of FORSYTH Superior Court.

These are special proceedings brought under G.S., Chap. 40, "Eminent Domain," to have commissioners of appraisal appointed to assess damages for the laying of certain gas pipe lines across lands of the petitioners. The two cases were consolidated for hearing and judgment and for purposes of this appeal. The facts are as follows:

Under date 5 October 1949 petitioners' predecessor in title, for a stated consideration of $110.00, executed and delivered to the respondent, Transcontinental Gas Pipe Line Corporation, a right-of-way agreement by which she conveyed to the respondent

> "a right of way and easement for the purposes of laying, constructing, maintaining, operating, repairing, altering, replacing and removing pipe lines (with valves, regulators, meters, fittings, appliances, tie-overs, and appurtenant facilities) for the transportation of gas, oil, petroleum products, or any other liquids, gases, or substances which can be transported through a pipe line, the Grantee to have the right to select the route (the laying of the first pipe line to constitute the selection of the route by the Grantee), under, upon, over, through and across the lands of Grantor, . . ."

The agreement then contained metes and bounds descriptions of the lands affected (stated to contain 106¾ acres, more or less).

After the description, the agreement contains the following:

"There is included in this grant the right, from time to time, to lay, construct, maintain, operate, alter, repair, remove, change the size of, and replace one or more additional lines of pipe approximately parallel with the first pipe line laid by Grantee hereunder; but for any such additional line so laid the Grantee shall pay Grantor, or the depository hereinafter designated, a sum equivalent to One Dollar ($1.00) per lineal rod of such additional line, or such proportionate part thereof as Grantor's interest in said lands bears to the entire fee, within sixty (60) days subsequent to the completion of the construction of such additional line."

This right-of-way agreement was recorded in the office of the register of deeds of Forsyth County, N. C., on 22 October 1949. Thereafter, respondent laid a pipe line across the subject lands. Subsequently, a second line was laid parallel to and beside the first pipe line. For these two lines respondent paid compensation to petitioners' predecessor in title, who was the original grantor of the right-of-way, as provided under the terms of the right-of-way agreement. When respondent attempted to construct a third pipe line across the property approximately parallel to the first and second lines and involving a wider area of land than involved in the first and second lines, petitioners refused to accept the payment which respondent made to the escrow account provided for in the agreement and which was in an amount equal to the figure established by the formula set out in the agreement. Instead, petitioners instituted these special proceedings under the provisions of G.S., Chap. 40, "Eminent Domain," contending they were being deprived of property without due process of law in that (1) the agreement is void for vagueness, (2) it is void for violating the rule against perpetuities, and (3) even if not void, the second and third pipe lines were laid outside of the easement granted by the agreement and consequently were a taking apart from the agreement.

The clerk of superior court, after hearing, entered an order finding the facts substantially as above set forth and concluding that the agreement is not void for vagueness, that it did not violate the rule against perpetuities, and that the additional lines

are within the easement granted. On these findings and conclusions the clerk ordered the proceedings dismissed. On appeal, the judge of superior court affirmed the clerk, and from this judgment the petitioners appealed to the Court of Appeals.

Hatfield, Allman & Hall, by James E. Humphreys, Jr., for petitioner appellants.

Charles F. Vance, Jr.; Kenneth A. Moser; and Womble, Carlyle, Sandridge & Rice for respondent appellee.

PARKER, J.

The sole assignment of error is directed to the entry of the judgment affirming the ruling of the clerk dismissing the proceedings. In this we find no error.

[1] The agreement is clear and unambiguous. It is not open to the objection that the line along which the pipes were to be laid is not defined in the grant. The agreement expressly gave the grantee the right to select the route. Petitioners' contention the grant is void for vagueness cannot be sustained. *Gas Co. v. Day,* 249 N.C. 482, 106 S.E. 2d 678.

[2] The right to lay the additional lines created a presently vested interest and subjected the lands described in the agreement to an immediate servitude. The rule against perpetuities was not violated. Courts of other states considering identical or similar agreements have reached the same conclusion. *Traywick v. Transcontinental Gas Pipe Line Corp.,* 277 Ala. 366, 170 So. 2d 802; *Texas Eastern Transmission Corporation v. Carman,* Ky. Ct. App., 314 S.W. 2d 684; *Sorrell v. Tennessee Gas Transmission Company,* Ky. Ct. App., 314 S.W. 2d 193; *Hamilton v. Transcontinental Gas Pipe Line Corp.,* 236 Miss. 429, 110 So. 2d 612; *Caruthers v. Peoples Natural Gas Co.,* 155 Pa. Super. 332, 38 A. 2d 713; *Baker v. Tennessee Gas Transmission Co.,* 194 Tenn. 368, 250 S.W. 2d 566; *Strauch v. Coastal States Crude Gathering Co.,* Tex. Civ. App., 424 S.W. 2d 677; *Williams v. Humble Pipe Line Company,* Tex. Civ. App., 417 S.W. 2d 453; *Phillips Petroleum Company v. Lovell,* Tex. Civ. App., 392 S.W. 2d 748; *Crawford v. Tennessee Gas Transmission Co.,* Tex. Civ. App., 250 S.W. 2d 237. The Restatement of the Law of Property, Sec. 399, p. 2339, is in accord.

[3] Petitioners' contention that the second and third lines were laid outside of the easement granted by the right-of-way

agreement is based upon their argument that the agreement granted the right to lay additional lines *vertically* parallel, but not horizontally parallel, to the initial line. Nothing in the language of the agreement requires such an unreasonable construction. The mechanical problem involved in laying and thereafter maintaining and servicing gas pipe lines in a vertical plane, one on top or below another, is manifest. A more reasonable construction of the language of the agreement is that the parties intended the word "parallel" in the sense of running in the same direction and side by side, using the surface of the ground as the plane of reference. The petitioners' predecessor in title, who was the grantor in the agreement, acquiesced in this reasonable interpretation when the second pipe line was laid along side of, not above or below, the first. Petitioners have cited no authority to support their contention and our research has found none. On the contrary, all of the cases cited above, in which identical or similar agreements were under consideration, have apparently assumed that the word "parallel" was being employed in the sense of side by side, not in the sense of one on top of the other.

[4] Petitioners acquired their interests in the lands subject to the rights of the respondent as set forth in the recorded right-of-way agreement. "Where a landowner has granted a right of way over his land, he must look to his contract for compensation, as it cannot be awarded to him in condemnation proceedings, provided the contract is valid, and all its conditions have been complied with by the grantee." 29A C.J.S., Eminent Domain, § 206, p. 924. Here, the agreement was valid and respondent has complied with its conditions. Petitioners must look to the agreement for their compensation. Their proceedings seeking additional compensation were properly dismissed.

Affirmed.

CAMPBELL and VAUGHN, JJ., concur.

SAMUEL MACON WHEELER v. JOHN WAYNE DENTON AND VESTER EARP

No. 709SC402

(Filed 5 August 1970)

1. **Rules of Civil Procedure § 50— motion for directed verdict — repeal of motion for nonsuit**

Although the statute providing for the motion for judgment as of nonsuit had been repealed by the Rules of Civil Procedure, the defendant's motion for "judgment of nonsuit" made at the close of plaintiff's evidence, and again at the close of all the evidence, was treated as a motion for a directed verdict under Rule 50. G.S. 1A-1.

2. **Rules of Civil Procedure § 50— motion for directed verdict — statement of specific grounds**

The statutory provision that "specific grounds" shall be stated in a motion for a directed verdict is mandatory. Rule 50(a), G.S. 1A-1.

3. **Appeal and Error § 59; Rules of Civil Procedure § 50— motion for directed verdict — review on appeal**

Appellant who failed to state "specific grounds" in his motion for directed verdict was not entitled on appeal to question the insufficiency of the evidence to support the verdict. Rule of Civil Procedure 50, G.S. 1A-1.

4. **Trial § 34— statement of contentions — waiver of objection**

Objections to the statement of contentions arising on the evidence must be made before the jury retires or they are deemed to have been waived.

5. **Trial § 34— statement of contentions — equal length of contentions**

It is not required that the statement of each party's contentions be of equal length.

6. **Torts § 7— settlement with one tort-feasor — rights of other tort-feasor**

Where a passenger injured in an automobile accident settled with one *tort-feasor* for $3,750, the other *tort-feasor*, who went to trial, was entitled to have judgment of $10,000 rendered against him reduced by $3,750, but he was not entitled to have judgment reduced to $3,750. G.S. 1B-4.

7. **Torts § 7— encouragement of settlements between injured party and tort-feasor**

The Uniform Contribution Among *Tort-feasors* Act contemplates that settlements are to be encouraged.

8. **Torts § 7— settlement between injured party and tort-feasor — showing of good faith — burden of proof**

The mere showing that there has been a settlement between an injured party and a *tort-feasor* is insufficient to show that there has

been a lack of good faith in the settlement; the burden of showing a lack of good faith is upon the party asserting it. G.S. 1B-4.

APPEAL by defendant Vester Earp from *Clark, J.*, February 1970 Session of Superior Court held in FRANKLIN County.

On 1 February 1968 at about 12:20 a.m., the plaintiff was a guest passenger in a car operated by John Wayne Denton (Denton). Denton was driving north on Highway #581 toward Louisburg. Defendant Vester Earp (Earp) was in his 1967 Plymouth headed north on Highway #581. Denton's car struck Earp's car in the rear, and as a result of the collision, the plaintiff was injured. Plaintiff alleged joint negligence on the part of Denton and Earp. Upon settlement with Denton for $3,750.00, the case proceeded against Earp.

From an adverse verdict and the judgment entered, Earp assigned error and appealed to the Court of Appeals.

Hubert H. Senter for plaintiff appellee.

Reynolds & Farmer by F. Alton Russell for defendant appellant.

MALLARD, C.J.

[1] The first contention of defendant is that the court erred in refusing to grant defendant's motion for judgment as of nonsuit. G.S. 1-183, which provided for the motion for judgment as of nonsuit, was repealed by the 1967 Legislature, effective 1 January 1970. The new procedure, effective 1 January 1970, substituted the motion for a directed verdict in its stead. G.S. 1A-1, Rule 50(a). In the comments under G.S. 1A-1, Rule 50, it is stated:

> "Under the rules, at the close of the claimant's evidence, the party defending in a jury trial will be restricted to the directed verdict motion—a motion that if granted will result in a judgment on the merits disposing of the case finally in the absence of reversal on appeal. * * *"

However, in our discretion, we shall treat the defendant's motion for "judgment of nonsuit" made at the close of plaintiff's evidence, and again at the close of all the evidence, as a motion for a directed verdict under G.S. 1A-1, Rule 50. The new rules contemplate that the name of the motion is not as important as the substance.

G. S. 1A-1, Rule 50(a) reads as follows:

"(a) *When made; effect.*—A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. *A motion for a directed verdict shall state the specific grounds therefor.* The order granting a motion for a directed verdict shall be effective without any assent of the jury." (Emphasis Added.)

[2, 3] The record before us reveals that the defendant did not state any grounds for his motion for judgment of nonsuit. Since the statute expressly requires that "specific grounds" shall be stated in a motion for a directed verdict, this provision of the rule is mandatory. The appellant, having failed to state "specific grounds," is not entitled upon this appeal to question the insufficiency of the evidence to support the verdict. *Budge Manufacturing Co. v. United States,* 280 F. 2d 414 (3rd Cir. 1960).

However, if the defendant had moved for a directed verdict on the grounds that the evidence failed to show negligence on his part, we think that there was ample evidence of the defendant's negligence to require submission of the case to the jury.

[4, 5] The defendant further assigns error to the judge's charge. Specifically, the defendant contends that certain of the plaintiff's contentions as given by the judge were not supported by the evidence. As a general rule, objections to the statement of contentions arising on the evidence must be made before the jury retires or they are deemed to have been waived. *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198 (1966); *In re* Will of Kemp, 236 N.C. 680, 73 S.E. 2d 906 (1953); *Powell v. Daniel,* 236 N.C. 489, 73 S.E. 2d 143 (1952). In addition, the defendant says that the court did not give "equal stress" to defendant's contentions because the defendant's contentions were not equal in length with the plaintiff's contentions. It is not required that the statement of contentions be of equal length. *Durham v. Realty Co.,* 270 N.C. 631, 155 S.E. 2d 231 (1967). We have reviewed the charge of the court, and no prejudicial error is made to appear.

[6] Plaintiff's complaint alleged joint and concurrent negligence of Denton and the defendant. Plaintiff settled with Denton, and Denton was released as a defendant by written instrument under the provisions of G.S. 1B-4. The case went to trial against the defendant Earp. The jury answered the issue of negligence in the affirmative and the issue of damages in the sum of $10,000.00. The judgment entered against the defendant for $6,250.00 contains the following:

> "It appearing to the court that the defendant John Wayne Denton was released as a defendant from this cause of action under GS 1B-4 upon the payment by said John Wayne Denton of $3,750.00 to the plaintiff on the 24th day of February, 1970, prior to the calling of this case for trial and that the defendant Vester Earp is entitled to a credit of $3,750.00 on the verdict rendered by the jury in the sum of $10,000.00 as provided in said statute.
>
> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant Vester Earp the sum of $6,250.00 together with the costs of this action to be taxed by the Clerk."

Earp contends that the trial judge committed error in entering the judgment for $6,250.00 and argues that the court should have reduced the amount of the recovery to $3,750.00 which was the amount paid by Denton.

G.S. 1B-4 reads as follows:

> "When a release or a covenant not to sue or not to enforce judgment is given in *good faith* to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other *tort-feasors* from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (2) *It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.*" (Emphasis Added.)

Earp contends that to permit a recovery against him of $6,250.00 when Denton is released for $3,750.00 denies his right

to contribution under the provisions of G.S. 1B-1. The provisions of G.S. 1B-1 provide for contribution under certain circumstances, but G.S. 1B-4 takes away this right of contribution when the provisions thereof are complied with. Judge Clark found, in substance, that the provisions of G.S. 1B-4 had been complied with by Denton and, pursuant to this statute, correctly reduced the judgment on the verdict when he allowed Earp credit for the $3,750.00 paid by Denton. 7 Strong, N.C. Index 2d, Torts, § 7.

Moreover, Earp is not in a position to complain that he has to pay more than Denton. The record reveals that prior to the beginning of the trial, Earp was given the same opportunity Denton had to settle upon the payment of $3,750.00. Earp refused to do so and took his chance with the jury. Earp knew that Denton had settled with the plaintiff and knew, or was chargeable with knowledge of, the consequences under G.S. 1B-4 of a decision to decline the offer of settlement. He cannot now justifiably complain because in retrospect, it appears that he made the wrong decision.

[7, 8] Defendant does not contend that the settlement between Denton was not paid but argues that the mere fact that settlement was made demonstrates a lack of good faith. We do not agree. The statute contemplates that settlements are to be encouraged. In the case of *Matthews v. Hill*, 2 N.C. App. 350, 163 S.E. 2d 7 (1968), it is said: "It is also desirable that settlements be made promptly and with finality." The mere showing that there has been a settlement is not enough to show there has been a lack of good faith. The burden of showing a lack of good faith is upon the party asserting it. 7 Strong, N.C. Index 2d, Torts, § 7.

We have reviewed all of defendant's assignments of error properly presented, and no prejudicial error is made to appear.

The judgment of the superior court is

Affirmed.

MORRIS and GRAHAM, JJ., concur.

ADOLPHUS JACKSON STEWART v. NATION-WIDE CHECK CORPORATION, A CORPORATION

No. 7026SC385

(Filed 5 August 1970)

1. **Libel and Slander § 14— qualified privilege — affirmative defense**

Qualified privilege is an affirmative defense and must be pleaded in order that it might be raised.

2. **Libel and Slander § 16— words actionable per se — proof — directed verdict**

Proof of the publication of false words which are actionable *per se* precludes the entering of a directed verdict.

3. **Libel and Slander § 2— words actionable per se — defamation of trade**

Words uttered which tend to defame a person in his trade or business are actionable *per se*, and the issue is for the jury.

4. **Libel and Slander §§ 5, 10, 16— slander action — charge that employee was "short" in accounts — qualified privilege — directed verdict**

In a slander action arising out of the corporate defendant's attempts to verify and collect an alleged arrearage in the accounts of the plaintiff, who was an employee of the defendant, a statement by the defendant's agent that the plaintiff was several thousand dollars "short" in his account, which statement was made to plaintiff's relatives during the agent's search for the plaintiff, is actionable *per se;* but the judgment of the trial court directing a verdict in favor of the corporate defendant is affirmed by the Court of Appeals, since the words of the agent, although shown to be false, were qualifiedly privileged and there was no showing of malice.

5. **Appeal and Error § 10.5— motion to amend answer in Court of Appeals**

In a slander action, the Court of Appeals granted defendant's motion for permission to file an amendment to the answer setting forth the defense of privilege. Rule of Practice in the Court of Appeals No. 20(c).

APPEAL by plaintiff from *Bryson, J.*, 19 January 1970 Schedule "B" Civil Session of MECKLENBURG County General Court of Justice, Superior Court Division.

This action arises from the activities of the defendant, Nation-Wide Check Corporation (Nation-Wide), in an attempt to verify and collect an alleged arrearage in the accounts of the plaintiff, one of its employees. The evidence tends to show that Nation-Wide was in the business of selling money orders which

were issued on behalf of Nation-Wide through agents in various businesses in North Carolina. The plaintiff, A. J. Stewart (Stewart), was employed by Nation-Wide as sales representative for the State of North Carolina. His duties included supplying the various agents with materials such as blank money orders and machines with which to make out the money orders, as well as collecting and remitting to Nation-Wide the amounts taken in by the agents from the sales of the money orders. Stewart had with him, in connection with his duties, some thirty to fifty thousand dollars worth of money orders which could readily be made negotiable. In July 1968, it was discovered that one Daughety, who operated Daughety Super Market in Kinston, North Carolina, and was an authorized agent to sell the money orders, had sold more money orders than the funds remitted through Stewart would cover. Daughety owed something over $300 and Stewart was supposed to collect and remit this shortage. Stewart collected $100 on July 10, 1968, but did not report this. In the meantime, the failure of Stewart to make any reports to his superiors (his supervisor was on vacation) had prompted Nation-Wide to send one John Gormley to contact Stewart for an explanation. Gormley went to Daughety Super Market on 17 July 1968, as Stewart was to be there that day. Stewart did not appear and Gormley ascertained from Daughety that Stewart had collected the $100 a week before. Gormley attempted to reach Stewart through telephoning relatives, Mr. & Mrs. I. A. McQueen, in Fayetteville. Stewart had given Nation-Wide their telephone number as being a place to reach him.

Gormley informed Daughety that Stewart had misappropriated funds other than the $100 which Stewart had collected from Daughety. Gormley telephoned Fayetteville repeatedly in an effort to reach him. Stewart's aunt, Mrs. I. A. McQueen, testified that Gormley told her that the reason that Gormley wanted to see Stewart was because of financial problems with the company and that Gormley had to see him immediately to save Stewart's job. Claude M. Stewart, Jr., testified that at the request of his aunt, Mrs. McQueen, he answered the telephone, and Gormley informed him that the Nation-Wide officials had instructed him (Gormley) to stop trying to locate Stewart and that a statewide alert would be sent out for him. Mr. McQueen, Stewart's uncle, testified that on another telephone call Gormley had told him that a man down in Kinston had receipts to show that Stewart had misappropriated "several thousand dollars."

Gormley finally reached Stewart in Fayetteville on 18 July 1968, and in due course of time Stewart accounted for all property belonging to Nation-Wide which he had. He was, however, discharged on 12 November 1968.

This slander action results from statements that Gormley allegedly made to relatives of Stewart and to Daughety. At the conclusion of the plaintiff's evidence, the defendant moved to amend its answer to plead privilege and for a directed verdict. This judgment was entered by Judge Bryson:

"* * *

THIS CAUSE being heard before the undersigned Judge Presiding at the January 19, 1970 Schedule " " [*sic*] Civil Session of the Superior Court Division of Mecklenburg County and a jury, and at the conclusion of the plaintiff's evidence the defendant having moved the Court to grant it leave to amend its Answer as set forth in the Motion appearing of record;

AND the Court being of the opinion that the allowing of the Motion to Amend is unnecessary for a decision by the Court as to the merits of this controversy and that the motion of the defendant for a directed verdict should be allowed,

IT IS, THEREFORE, ORDERED AND DECREED:

1. That the defendant's Motion to Amend its Answer in the manner appearing in the Motion of record be denied, and

2. That the defendant's motion for a directed verdict be allowed, that the plaintiff's action be and the same hereby is dismissed, and that the costs of this action be taxed against the plaintiff.

This 22nd day of January, 1970.

T. D. BRYSON, JR.
Judge Presiding"

From the entry of this judgment, plaintiff appealed.

B. Kermit Caldwell for plaintiff appellant.

Carpenter, Golding, Crews and Meekins by John G. Golding,

and Wardlow, Knox, Caudle and Wade, by Lloyd C. Caudle for defendant appellee.

CAMPBELL, J.

[1] Qualified privilege is an affirmative defense and must be pleaded in order that it might be raised. *Bouligny, Inc. v. Steelworkers,* 270 N.C. 160, 154 S.E. 2d 344 (1967). In view of the fact that the trial judge ruled, in his judgment dismissing the action, that the motion of the defendant to amend its pleadings to include the allegations of privilege was "unnecessary for a decision by the Court as to the merits of this controversy and that the motion of the defendant for a directed verdict should be allowed," we must conclude that Judge Bryson did not dismiss this action on the basis that any statements made by Gormley, if slanderous, were qualifiedly privileged.

[2, 3] Proof of the publication of false words which are actionable *per se* precludes the entering of a directed verdict (or a nonsuit under the old civil practice). *Gillis v. Tea Co.,* 223 N.C. 470, 27 S.E. 2d 283 (1943). Words uttered which tend to defame a person in his trade or business are actionable *per se,* and the issue is for the jury. *Bell v. Simmons,* 247 N.C. 488, 101 S.E. 2d 383 (1958).

[4] We feel, consistently with the authority referred to above, that the words allegedly uttered by the agent of the defendant while he was acting within the scope of his instructions, *Gillis v. Tea Co., supra,* that is, to find Stewart and determine why he had not reported to his superiors, were actionable *per se.* As such, in the absence of privilege, the only remaining theory on which to sustain the action of the trial judge is a finding on his part that in law the words were true. Mr. I. A. McQueen testified:

> "I answered the phone and he told me he was Mr. John Gormley with Nation-Wide Check Corporation and that it was urgent that he find Jack Stewart and that he had a man in Kinston who had receipts to prove that he had paid Jackie several thousand dollars that he was short. That it was urgent that he get ahold to him at once because he had thirty thousand dollars worth of negotiable funds with him and he didn't know what amount he might have spent of that. He did not say as to how much it was that he was short. As to his saying to who he was short he did not. He said that

it was a customer in Kinston. As to when he said to me that there was several thousand dollars short and did he say who was in the shortage, he did not. He said that Jackie had the money. The man in Kinston had receipts where he had paid Jackie the money. As to his saying what if anything had Jack done with the money, he did not say. . . ."

The words published to Mr. McQueen could not be true in view of the other testimony offered by the plaintiff. As such, we find no theory upon which to support the action of the trial court in dismissing the action and entering a directed verdict pursuant to Rule 50 of G.S. 1A-1.

[5] Prior to the argument in this Court, the defendant again moved for permission to file an amendment to the answer setting forth the defense of privilege. Pursuant to Rule 20(c) of the Rules of Practice in this Court, we have allowed the motion. On the authority of *Hartsfield v. Hines,* 200 N.C. 356, 157 S.E. 16 (1931), and *Bouligny, Inc. v. Steelworkers, supra,* the communications of Gormley were qualifiedly privileged, and no malice has been shown. For this reason, the judgment of the trial court is

Affirmed.

BRITT and VAUGHN, JJ., concur.

MARION R. HARRIS AND WIFE, ARONUL E. HARRIS v. MARGARET M. ADAMS, EXECUTRIX OF THE ESTATE OF NORMAN L. ADAMS, DECEASED, MARGARET M. ADAMS, INDIVIDUALLY, AND RICHARD M. WIGGINS, TRUSTEE FOR NORMAN L. ADAMS, DECEASED, AND MARGARET M. ADAMS, AND EDWIN M. ADAMS

No. 7012SC388

(Filed 5 August 1970)

Landlord and Tenant § 6; Vendor and Purchaser § 1— lease with option to purchase dry cleaning business — construction

Although the provisions of a lease of a dry cleaning establishment containing an option to purchase are ambiguous, reasonable construction of the lease is that the parties intended that payment by the lessees of any of the debts of the business over the amount of $106,785.05 was to be set off against a deed of trust for $15,000 given by the lessees when the option to purchase was exercised, and that the parties intended and agreed that the total purchase price was to be $121,785.05.

Harris v. Adams

APPEAL by defendants from *McKinnon, J.*, 23 February 1970 Civil Session of CUMBERLAND County Superior Court.

This action arises out of the sale by defendants of a laundry and dry cleaning establishment to the plaintiffs. A lease containing an option to purchase was executed by the parties on 1 May 1966 and plaintiffs exercised their option thereunder on 6 October 1966, within the time prescribed by the agreement. As a part of the consideration for closing the transaction, plaintiffs executed, on the day the option was exercised, a note and a deed of trust to the defendants in the amount of $15,000. Plaintiffs are seeking to enjoin the foreclosure of the deed of trust, alleging that under the terms of the lease, the deed of trust has been satisfied. The case was heard by the judge without a jury. Judgment was entered in favor of the plaintiffs. Pertinent portions of the judgment and the lease are set out in the opinion.

Pearson, Malone, Johnson & DeJarmon by M. E. Johnson, W. G. Pearson II, and C. C. Malone, Jr., for plaintiff appellees.

McCoy, Weaver, Wiggins, Cleveland & Raper by Richard M. Wiggins for defendant appellants.

MORRIS, J.

Appellants in their brief state:

> "The basic question herein involved is whether or not plaintiffs may introduce evidence tending to show that prior to the execution of a note secured by a deed of trust on October 6, 1966, in accordance with the terms of an option to purchase dated May 1, 1966, said note and deed of trust were paid.
>
> The second question involved is whether there were sufficient facts upon which the Court could have reached its conclusion concerning construction of the lease-option agreement and whether or not the conclusion of the Court was erroneous in view of the facts so found."

Appellants' brief does not contain, properly numbered, the several grounds of exception and assignments of error with reference to the pages of the record as required by Rule 28, Rules of Practice in the Court of Appeals of North Carolina. In fact, nowhere in the brief is there a reference of any sort to any exception.

However, we do find in the record what purports to be a grouping of exceptions and assignments of error. Number 1 thereunder is as follows: "The court erred in admitting into evidence Plaintiffs' Exhibit 1, *i.e.*, the lease-option agreement dated May 1, 1966, is Exception No. 1. (R p 22)." Referring to page 22 of the record, we find the following: "APPEAL ENTRY The defendants except to the findings of fact and conclusions of law in this cause and in open court give Notice of Appeal to the Court of Appeals of North Carolina for error of law, assigned and to be assigned. (PLAINTIFFS' EXCEPTION NUMBER 1)." A further voyage of discovery reveals that following the judgment and appeal entries, there appears a narration of the evidence. During the course of plaintiffs' evidence, this appears: "(Lease-Option Agreement marked Plaintiffs' Exhibit 1) (PLAINTIFFS' EXCEPTION NO. 2)." A diligent search of the record fails to reveal any objection by defendants to the introduction of the lease or to the admission of any evidence concerning it.

The question which defendants contend is basic to a determination of this cause is not properly before us. However, in an effort to determine what defendants' contentions are, we have carefully studied the record and are of the opinion that the lease agreement was properly admitted into evidence and further that the evidence supports the facts found by the court and that the facts found support the conclusions of law.

The pertinent portions of the lease are:

"5. The Lessee herein, hereby expressly agrees that upon his election to exercise the option granted in paragraph 4 above, he may exercise said option by assuming the then outstanding, recorded debts of the business known and designated as A. & H. CLEANERS as aforesaid, together with any outstanding recorded mortgage or deed of trust against the building and lot known and designated as 4515 Bragg Boulevard in the City of Fayetteville, State of North Carolina, the aggregate sum of which debts shall not exceed One Hundred Six Thousand Seven Hundred Eighty-Five and 05/100 ($106,785.05) dollars as shown by Schedule A herewith attached and that any amount paid upon said bills, as shown by Schedule A herewith attached from and after the date of this instrument shall be credited to the Lessee herein as a part of the purchase price of said business. That upon the exercise of the aforesaid option the Lessee herein hereby

further agrees to pay to Lessors as further consideration the sum of Fifteen thousand dollars ($15,000), said sum to be paid as follows:

1. Five thousand ($5,000) dollars to be paid twelve (12) months after the exercise of said option unless sooner paid, and a like sum, on or before the anniversary date of the exercise of said option for two consecutive years thereafter, until said sum of Fifteen thousand dollars is fully paid, however, nothing herein shall prevent Lessee from paying the full sum due upon said sum at any time within three (3) years of the exercise of said option.

6. If the recorded debts referred to in paragraph 5 above should exceed One hundred Six thousand seven hundred eighty-five and 05/100 ($106,785.05) dollars at the time of purchase, the Lessor herein hereby expressly agrees that said excess amount shall be deducted from the Fifteen Thousand ($15,000) dollars to be paid to Lessor at the time the option is exercised."

In construing these provisions the court made findings of facts, conclusions of law and rendered judgment as follows:

"6. That during the period from May 1, 1966 through October 1, 1966, the date that the plaintiffs exercised their option, the plaintiffs paid debts of A & H Cleaners in the amount of Twenty-Two Thousand Seven Hundred Nine and 15/100 ($22,709.15) Dollars.

7. That on October 1, 1966, the outstanding debts of A & H Cleaners were Ninety-Nine Thousand Three Hundred Forty-Six and 37/100 ($99,346.37) Dollars.

8. That as of this date, plaintiffs have paid all of said debts of A & H Cleaners except for One Thousand Eight Hundred Ninety-Two and 35/100 ($1,892.35) Dollars, which said sum remains unpaid.

9. That no cash payments were ever made by plaintiffs to defendants on said Note and Deed of Trust subsequent to the execution thereof by the plaintiffs.

BASED UPON THE STIPULATIONS, THE EVIDENCE AND THE RECORD, THE COURT CONCLUDES AS FOLLOWS:

1. That a proper interpretation of the agreement which the court has determined is pertinent on the issue of payment

of said Note and Deed of Trust, particularly paragraphs 4, 5 and 6 thereof hereinabove recited, is that the plaintiff Marion R. Harris had an agreement and option to purchase the business known as A & H Cleaners for a price of One Hundred Six Thousand Seven Hundred Eighty-Five and 05/100 ($106,785.05) Dollars plus Fifteen Thousand ($15,000.00) Dollars; that while paragraph 5 referred to the 'then outstanding record debts of the business' and paragraph 6 reads 'if the recorded debts referred to in paragraph 5 should exceed $106,785.05 at the time of purchase,' it is the opinion of the Court from the agreement as a whole and the conduct of the parties that it was contemplated that the debts existing as of the date of the agreement, May 1, 1966, whatever they might thereafter be accurately determined, were those to be assumed by Marion R. Harris upon the exercising of the option and that any excess of those debts above $106,785.05 so assumed were to be credited on the Fifteen Thousand ($15,000) Dollars Note and Deed of Trust.

2. That the Court further finds that the total debts of A & H Cleaners was not determined on the date of the exercise of the option and the execution of the Note and Deed of Trust, although plaintiffs' accountant informed all parties that the outstanding debts at that time were approximately One Hundred Thousand ($100,000.00) Dollars but that the Court concludes that such conduct indicated that upon a proper determination of such debts a credit would be allowed against said Note and Deed of Trust for such of said debts which might exceed $106,785.05 on May 1, 1966.

NOW, THEREFORE, it is ordered, adjudged and decreed that the Note and Deed of Trust recited herein is a cloud on plaintiffs' title, that the defendants have no interest therein, and that said Deed of Trust be cancelled as of record upon payment by the plaintiffs to the defendants of the sum of One Thousand Eight Hundred Ninety-Two and 35/100 ($1,892.35) Dollars."

We agree with counsel for plaintiffs that the provisions in the lease are ambiguous.

"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, and each clause and word must be considered with reference to the other provisions and be given effect if possible by any reasonable construction, . . ." 2 N.C. Index 2d, Contracts § 12, p. 315, and cases there cited.

Applying these well-known principles of construction to the evidence, we are of the opinion that a reasonable construction of the lease is that the parties intended any debts paid over $106,785.05 to be set off against the deed of trust. It is patently clear that the parties intended and did agree that the total purchase price was to be $121,785.05. Defendants argue that because plaintiffs executed the note and deed of trust that they are estopped to claim any setoff under the lease. This contention is without merit and is overruled.

Affirmed.

MALLARD, C.J., and GRAHAM, J., concur.

F-F MILLING CO., INC. v. GUY SUTTON

No. 708SC246

(Filed 5 August 1970)

1. **Corporations § 13— liability of directors to third persons — fraud — good faith judgment**

A corporation's directors may be held personally liable for gross neglect of their duties, mismanagement, fraud and deceit resulting in loss to a third person, but not for errors of judgment made in good faith.

2. **Corporations § 13— action to recover price of goods sold to corporation — liability of officer**

In a milling company's action to recover the purchase price of corn sold to a grain hauling firm, the milling company's evidence was insufficient to hold the defendant, an official of the hauling firm, personally liable for the purchase price on the ground that the defendant had wrongfully and fraudulently cashed five personal checks on the hauling firm and that the cashing of these checks resulted in the plaintiff's check from the firm being returned for insufficient funds, since the defendant had an agreement with the hauling firm to hold the personal checks until the firm was solvent, and since the firm had sufficient funds to pay the checks when the defendant presented them for payment.

3. Corporations § 13; Principal and Agent § 4— corporation as agent of officer — action to recover purchase price of goods — proof of agency

In a milling company's action to recover the purchase price of corn sold to a grain hauling firm, the milling company's evidence was insufficient to raise an inference that the hauling firm purchased the corn as the agent of the defendant, who was an official of the company, and that the defendant was personally liable to the milling company as a principal.

APPEAL from *Hubbard, J.*, October 1969 Session of GREENE County Superior Court.

This is a civil action instituted by the plaintiff, F-F Milling Co. (Milling), to recover the purchase price of corn sold to defendants, Kermit Tugwell, B. F. Wood, Wood & Tugwell Transport & Trading Co., Inc., and Guy Sutton. At the conclusion of plaintiff's evidence the defendants Sutton and Tugwell moved for judgment as of nonsuit as to (1) fraud and conspiracy, and (2) agency. Judge Hubbard treated the complaint as setting up a cause of action for (1) misconduct on the part of the officers and directors, and (2) agency, and granted the defendant's motion for judgment as of nonsuit as to misconduct and denied the motion as to agency. Following the completion of the defendants' evidence the plaintiff took a voluntary nonsuit as to all parties except the defendant Sutton. Sutton renewed his motion for judgment as of nonsuit at the end of all the evidence, which motion was granted. From the granting of defendant Sutton's motion for judgment as of nonsuit, the plaintiff appealed to the Court of Appeals.

Lewis and Rouse, by Robert D. Rouse, Jr., for the plaintiff appellant.

H. Horton Rountree, and Bridgers and Horton by Marvin V. Horton, Fountain and Goodwyn by George A. Goodwyn for the defendant appellee.

HEDRICK, J.

The appellant contends that the court below committed error in allowing the defendant Sutton's motion for judgment as of nonsuit. The evidence at the trial tended to show the following facts: In 1962 Tugwell and Wood organized a partnership to engage in the business of trucking and hauling grain. In 1964 the partnership was incorporated with the original shareholders of stock being Tugwell, Wood and Joyce Tugwell, sister of Wood. In 1965 Sutton acquired a one-third interest in the

corporation which interest was increased to 51% in March of 1966 when he purchased the operating rights to the business for $9,000.00. Sutton also provided the corporation with additional funds in the amount of $11,900.00. As evidence of this indebtedness, the corporation gave Sutton five checks totaling $11,900.00. Tugwell became president of the corporation at its inception and remained as president of the corporation until 1967 when Sutton became president after the corporation went out of business.

C. K. Tugwell testified that during the fall of 1966 most of the deliveries for storage were to Fred Webb, Inc., in the name of Guy Sutton. When Sutton received the bonded receipt he would deposit the funds in the corporation account at the First National Bank of Eastern North Carolina at Farmville, mail the deposit slips to the corporation and the corporation would then pay F-F Milling Company. He testified that the corporation had been doing business with F-F Milling Company on a continuous basis since 1962. After identifying several checks to the plaintiff and others which were written by the corporation, Tugwell stated:

> "I would characterize the course of dealing of Wood & Tugwell in the purchase of the grain represented by these checks as being in the normal course of business."

In early November 1966 Sutton, while a stockholder and a director of the corporation, cashed the five checks totaling $11,900.00 which he held from the corporation. The corporation's bank statement shows that these five checks cleared the corporation bank account on 7 November 1966. On 23 November 1966 the plaintiff received a check from the corporation in the amount of $14,472.34 which was deposited in their account with Wachovia Bank & Trust Company the same day. This check was subsequently returned to the plaintiff because of insufficient funds in the corporation's account.

Soon after this, an action was brought by one of the creditors of the corporation to have the corporation declared a bankrupt. After the initiation of the bankruptcy proceedings, Sutton agreed to put $11,900.00, the amount of the five checks, into the company in order to have the bankruptcy proceedings dismissed. Creditors of the corporation received 40% of their claims against the corporation with the plaintiff receiving $5,747.42.

The plaintiff contends that the action of the defendant Sutton in cashing the five checks from the corporation which he had held for several months was the cause of the loss suffered by the plaintiff when the corporation's check to the plaintiff in the amount of $14,472.34 was returned and not paid. The plaintiff further contends that Sutton's cashing the five checks constituted a breach of his agreement with the corporation to hold the checks, and was the cause of the insolvency of the corporation.

The bank statement for the corporation shows that on 7 November 1966, when Sutton cashed his five checks, the corporation had a balance of $9,919.45. The plaintiff received its check for $14,472.34 on 23 November 1966 and immediately deposited it in its account with Wachovia Bank and Trust Company. The check cleared the Federal Reserve Bank on 23 November 1966 and was then returned to the First National Bank of Eastern North Carolina at Farmville. The bank statement shows that the corporation's balance was as follows: (1) 25 November 1966, $253.47; and (2) 28 November 1966, $109.32. The evidence also reveals that on 11 November 1966 the corporation was indebted to F-F Milling Company in the amount of $29,134.27. On 14 November 1966 the plaintiff received a check from the corporation in the amount of $15,000.00 as partial payment of this balance. This check cleared the corporation's bank account on 17 November 1966.

[1, 2] In North Carolina a corporation's directors may be held personally liable for gross neglect of their duties, mismanagement, fraud and deceit resulting in loss to a third person, but not for errors of judgment made in good faith. *Bank v. Bridgers,* 207 N.C. 91, 176 S.E. 295 (1934); *Minnis v. Sharpe,* 198 N.C. 364, 151 S.E. 735, 202 N.C. 300, 162 S.E. 606, mod. on rearg. on other grounds 203 N.C. 110, 164 S.E. 625 (1932). We do not believe the plaintiff in the present case has shown sufficient facts to hold the defendant personally liable for the purchase price of the corn purchased by the corporation. The evidence does not disclose any bad faith on the part of the defendant nor does it disclose any fraud or misconduct on his part. The agreement between Sutton and the corporation was to the effect that Sutton would not cash the checks until the corporation was solvent. On the day the checks were cashed the bank statement shows a deposit in the amount of $31,428.03 and a balance left of $9,919.45. Between 7 November 1966 and 28 November 1966,

the earliest date the check to the plaintiff could have been received at the bank in Farmville, the statement reveals deposits totaling $92,518.10. The evidence is also clear that between 7 November 1966, the date of the alleged misconduct, and 28 November 1966 the plaintiff deposited a check from the corporation for $15,000.00 and that this check cleared the corporation's bank account. The evidence disclosed that when Sutton presented the five checks for payment there were sufficient funds in the corporation's account to pay them.

[3] The plaintiff further contends that the evidence was sufficient to raise an inference that the corporation purchased the corn from the plaintiff as the agent of the defendant Sutton, and that Sutton was liable to the plaintiff for the purchase price of the corn as a principal. We do not agree.

In *Simmons v. Morton,* 1 N.C. App. 308, 161 S.E. 2d 222 (1968), this Court set forth the standard to be used in proving agency as follows:

> " 'The plaintiff has the burden of proving that a particular person was at the time acting as a servant or agent of the defendant. An agent's authority to bind his principal cannot be shown by the agent's acts or declarations. This can be shown only by proof that the principal authorized the acts to be done or that, after they were done, he ratified them.' Lee, N. C. Law of Agency and Partnership, § 20. One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract. *Supply Co. v. Hight,* 268 N.C. 572, 151 S.E. 2d 50; *O'Donnel v. Carr,* 189 N.C. 77, 126 S.E. 112. . . ."

A careful examination of the evidence in the present case shows that the plaintiff has failed to carry the burden of proof on the question of agency. Indeed, the evidence has disclosed merely that it was dealing with the corporation as it had dealt with the corporation in the normal course of business since 1962.

Having considered all of the evidence in its light most favorable to the plaintiff, it is our opinion that the judgment of nonsuit ought to be affirmed.

Affirmed.

BROCK and BRITT, JJ., concur.

CECIL D. JERNIGAN, JR. v. ATLANTIC COAST LINE RAILROAD COMPANY

No. 706SC431

(Filed 5 August 1970)

1. **Railroads § 5; Evidence § 15— crossing accident — competency of evidence**

The trial court in a railroad crossing accident case properly excluded the testimony of a witness as to how far away he could see the railroad tracks at night, where the witness' testimony was very indefinite and amounted to no more than a guess.

2. **Damages §§ 3, 13— loss of earnings — requisite of proof**

A plaintiff who feels that he has suffered a decrease in his earning power by reason of the injuries complained of should be prepared to give detailed testimony as to his physical condition and prior earnings, and in what way and to what extent the injuries have decreased his ability to earn since the accident.

3. **Trial § 48— setting aside verdict — review on appeal**

The action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion.

4. **Trial § 48— setting aside verdict on issue of damages**

Trial court has the discretionary power to set aside the verdict on the issue of damages and order a new trial confined to that issue alone.

5. **Trial § 52; Railroads § 7— setting aside award — discretion of court**

In an action arising out of a railroad crossing accident, the trial court acted within its discretionary power in setting aside an award of $100,000 for plaintiff's personal injuries and in ordering a new trial solely on the issue of damages.

GRAHAM, J., concurs in separate opinion.

APPEAL by plaintiff and defendant from *Cohoon, J.*, 2 March 1970 Session, HALIFAX Superior Court.

Plaintiff was injured when the automobile he was driving struck defendant's parked locomotive at a grade crossing in the town of Weldon. The facts of the case are reviewed in *Jernigan v. R. R. Co.*, 275 N. C. 277, 167 S.E. 2d 269, and will not be repeated here.

The jury awarded plaintiff the sum of $2,000.00 for damages to his automobile, and the sum of $100,000.00 for injuries to his person. Judge Cohoon signed a judgment in favor of

plaintiff for the $2,000.00 damages to his automobile; but, in his discretion, set aside the verdict as to the issue of damages for personal injury, and ordered a new trial confined to the issue of damages for personal injury.

Plaintiff and defendant appealed.

Allsbrook, Benton, Knott, Allsbrook & Cranford, by Julian R. Allsbrook and Richard B. Allsbrook, for plaintiff.

Spruill, Trotter & Lane, by Charles T. Lane and John R. Jolly, for defendant.

BROCK, J.

DEFENDANT'S APPEAL

[1] Defendant assigns as error the exclusion of the testimony of the witness Charles Carr relating to how far away the witness could see defendant's tracks at night. The witness' testimony was very indefinite and clearly amounted to no more than a guess; he clearly stated he did not know whether he saw the tracks or not. We think the testimony was properly excluded.

[2] Defendant assigns as error that the trial judge allowed plaintiff to testify concerning his present salary. This testimony was offered on the issue of damages for personal injury and appears to be insufficient to show decrease in earning power. If plaintiff feels that he has suffered a decrease in his earning power by reason of the injuries complained of, he should be prepared to give more detailed testimony as to his physical condition and what he was able to earn before; and in what way and to what extent the injuries have decreased his ability to earn since the accident. However, since this assignment of error relates to the issue upon which Judge Cohoon ordered a new trial, if there was error in admitting the fragmentary evidence it has been cured.

Defendant assigns as error certain portions of the judge's charge to the jury. After a careful reading of the charge as a whole, it appears to us that the charge was fair to the defendant in all respects, and that the case was submitted to the jury upon appropriate principles of law.

Defendant assigns as error the failure of the Court to direct a verdict in defendant's favor and the Court's failure to enter judgment in defendant's favor notwithstanding the verdict. It

seems clear that these same issues were resolved against defendant in the earlier appeal of this case (*Jernigan v. R. R. Co.*, 275 N.C. 277, 167 S.E. 2d 269).

PLAINTIFF'S APPEAL

Plaintiff assigns as error the setting aside of the verdict on the issue of damages for personal injury.

[3-5] The action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion. *Goldston v. Chambers*, 272 N. C. 53, 157 S.E. 2d 676. And the trial court has the discretionary power to set aside the verdict on the issue of damages and order a new trial confined to that issue alone. *Branch v. Gurley*, 267 N.C. 44, 147 S.E. 2d 587. The record in this case discloses no abuse of discretion on the part of the trial judge.

On defendant's appeal, no error.

On plaintiff's appeal, no error.

MORRIS, J., concurs.

GRAHAM, J., concurs in separate opinion.

GRAHAM, J., concurring.

In my opinion plaintiff's testimony as to his present salary was properly admitted. There was ample evidence to show that as a result of his injuries, plaintiff could not engage in the type of occupation followed by him before he was injured. Testimony as to his subsequent salary was relevant on the question of his diminished earning capacity. *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163. It is my further opinion that the jury's award of damages was not excessive and was supported by the greater weight of the evidence. However, in view of the unbroken line of cases in which the appellate courts of this State have refused to question the exercise of discretion by trial courts in setting aside verdicts, I reluctantly concur in the results reached herein by the majority as to both appeals.

STATE OF NORTH CAROLINA v. LONNIE CLEARY

No. 7023SC424

(Filed 5 August 1970)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence**

The State's evidence, including testimony by an accomplice, was sufficient for the jury in this prosecution for breaking and entering and larceny.

2. **Burglary and Unlawful Breakings § 3— indictment for breaking and entering — sufficiency of description of the premises**

An indictment charging that defendant did feloniously break and enter "a certain storehouse, shop, warehouse, dwelling house and building" occupied by a named person is not fatally defective in failing to identify the premises with sufficient particularity, although the better practice would be to identify the location of the subject premises by street address, rural road address or some other clear description and designation.

3. **Burglary and Unlawful Breakings § 3— breaking and entering — sufficiency of indictment**

Bill of indictment sufficiently charged defendant with the felony of breaking and entering in violation of G.S. 14-54 as rewritten effective 23 May 1969.

4. **Larceny § 3— misdemeanor larceny — value of stolen property**

The larceny of property, nothing else appearing, of the value of "not more than two hundred dollars" is a misdemeanor. G.S. 14-72.

5. **Larceny § 4— felonious larceny without regard to value of property — sufficiency of indictment**

In order to properly charge the felony of larceny of property, without regard to the value of the property, the bill of indictment must contain one or more of the elements set out in G.S. 14-72(b).

6. **Larceny § 4— sufficiency of indictment to charge felonious larceny**

Second count of indictment charging larceny of property of the value of $100 "then and there being found," *held* insufficient to charge the felony of larceny.

7. **Indictment and Warrant § 9— several counts — necessity for completeness of each count**

In an indictment containing several counts, each count must be complete within itself.

8. **Criminal Law § 171; Larceny § 10— felonious breaking and entering — misdemeanor larceny — consolidation for judgment — sentence in excess of that allowed for misdemeanor**

Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny,

and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony.

APPEAL by defendant from *Beal, S.J.*, April 1970 Regular Mixed Session of Superior Court held in WILKES County.

The defendant was tried upon a bill of indictment which reads, in pertinent part, as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT: That Lonnie Cleary and Sebon Johnson late of the County of Wilkes on the 30th day of December, A.D. 1969 with force and arms at and in the County aforesaid, a certain storehouse, shop, warehouse, dwelling house and building occupied by one Clarence Hutchens wherein merchandise, chattels, money, valuable securities were and were being kept, unlawfully, willfully and feloniously did break and enter with intent to steal, take, and carry away the merchandise, chattels, money, valuable securities of the said Clarence Hutchens against the form of the Statute in such case made and provided and against the peace and dignity of the State.

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, that Lonnie Cleary and Sebon Johnson on the 30th day of December in the year of our Lord 1969, with force and arms, at and in the county aforesaid, one radio, one shotgun and shells of the value of $100.00 (One Hundred Dollars), of the goods, chattels and moneys of one Clarence Hutchens then and there being found feloniously did steal, take and carry away, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State."

The jury found the defendant guilty of breaking and entering and guilty of larceny.

From judgment of imprisonment, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Eatman for the State.

Moore & Rousseau by Larry S. Moore for defendant appellant.

MALLARD, C.J.

Defendant's counsel at the trial in the superior court was permitted to withdraw after the completion of the trial, and the above-named counsel was appointed to perfect this appeal. From the record in this case, it appears that defendant was ably represented by court-appointed counsel both in this court and at the trial in the superior court.

[1] Defendant assigns as error the failure of the trial judge to allow his motion for judgment of nonsuit. The defendant and Sebon Johnson (Johnson) were both charged in the same indictment. Upon motion of the State, the defendant was the only one tried. Together with other witnesses, Johnson was used by the State as a witness against the defendant. Recapitulation of the evidence is not deemed necessary. There was ample evidence of the defendant's guilt to require submission of the case to the jury.

Defendant assigns as error certain portions of the charge of the court and also contends that the court failed to properly instruct the jury in other respects. We have considered each of these assignments of error. When the record, evidence, and charge are read and considered together, no prejudicial error is made to appear. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966).

[2] At the time of the oral argument in this court, defendant filed a motion in arrest of judgment. Defendant asserted that the bill of indictment upon which the defendant was tried was defective because the identity of the building alleged to have been broken and entered was not alleged with sufficient particularity. The bill of indictment charged that the premises broken and entered was a "certain storehouse, shop, warehouse, dwelling house and building occupied by one Clarence Hutchens" in Wilkes County. The better practice would be for the prosecuting officers, in preparing bills of indictment, to identify the location of the subject premises by street address, rural road address, or some other clear description and designation. However, we hold that under the authority of *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105 (1968), and *State v. Sellers,* 273 N.C. 641, 161 S.E. 2d 15 (1968), the first count in the bill of indictment is sufficient in this case to charge the felony of breaking and entering.

[3] Defendant also included in the motion in arrest of judgment a motion to quash the bill of indictment. Defendant asserts that he was tried upon "a bill of indictment in conformity with the law of breaking and entering as it existed prior to May 23,

1969, and not in conformity with the provisions of G.S. 14-54 as it existed on and after May 23, 1969."

G.S. 14-54 as it "existed on and after May 23, 1969" reads as follows:

"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."

While the first count in the bill of indictment in this case is not considered a model one, we are of the opinion that it sufficiently charges the felony of breaking and entering in violation of G.S. 14-54 as "it existed on and after May 23, 1969." The case of *State v. Melton*, 7 N.C. App. 721, 173 S.E. 2d 610 (1970), cited by defendant in support of his contentions, is not in conflict with this holding. The motions of the defendant to quash the bill of indictment and in arrest of judgment are overruled.

[4-7] The second count in the bill of indictment is not sufficient to charge the defendant with the felony of larceny but is sufficient to charge the defendant with the misdemeanor of larceny. The value of the property alleged to have been stolen was $100.00. The larceny of property, nothing else appearing, of the value of "not more than two hundred dollars" is a misdemeanor. G.S. 14-72. In order to properly charge the felony of larceny of property, without regard to the value of the property, the bill of indictment must contain one or more of the elements set out in G.S. 14-72(b). The words "then and there being found" contained in the second count in this bill of indictment are insufficient to charge that the larceny in this case was a felony committed pursuant to a violation of G.S. 14-54. It is elementary that in an indictment containing several counts, each count should be complete within itself. *State v. Jones*, 275 N.C. 432,

168 S.E. 2d 380 (1969); *State v. McKoy*, 265 N.C. 380, 144 S.E. 2d 46 (1965).

[8] Both counts in the bill of indictment were consolidated for judgment. The defendant was sentenced to a term of ten years in the state prison to be assigned to serve under the supervision of the State Department of Correction. A sentence of ten years is not in excess of that permitted by the statute upon a conviction of the felony of breaking and entering in violation of G.S. 14-54(a). The punishment upon conviction of the misdemeanor of larceny may not exceed two years. G.S. 14-72(a); G.S. 14-3.

There was only one sentence imposed in this case on the felony and the misdemeanor. The fact that the sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial because the one sentence imposed is not in excess of that permitted by the statute upon conviction of the felony. *State v. Morgan*, 268 N.C. 214, 150 S.E. 2d 377 (1966); *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966); *State v. Slade*, 264 N.C. 70, 140 S.E. 2d 723 (1965).

We have considered all of the defendant's assignments of error and are of the opinion that the defendant has had a fair trial, free from prejudicial error.

No Error.

PARKER and HEDRICK, JJ., concur.

NATIONWIDE MUTUAL INSURANCE COMPANY AND TUX BOWERS MOTOR COMPANY, INC. v. FIREMAN'S FUND INSURANCE COMPANY; TERRY EUGENE CARSON; DOWNIE WOODROW CARSON; CHARLES P. MICHAELS, ADMINISTRATOR OF THE ESTATE OF GERALD D. MICHAELS; BIS RAY LEWIS; BARBARA ANN LEWIS; HOMER EPLEY; LENDY JAMES EPLEY; OLIVER DODSON McKINNEY; CLARA McKINNEY; ST. PAUL FIRE & MARINE INSURANCE COMPANY; MARYLAND CASUALTY COMPANY; AND NATIONAL GRANGE MUTUAL INSURANCE COMPANY

No. 7025SC429

(Filed 5 August 1970)

Insurance § 87— liability insurance — automobile owned and controlled by minor — title and insurance in father's name — operation by minor — non-coverage under omnibus clause

Although title to an automobile purchased by a minor was registered in the name of the minor's father, and the automobile was added

as an insured vehicle under a liability policy previously issued to the father as named insured, operation of the automobile by the minor did not come within the terms of the omnibus clause of the policy providing coverage for any person using the automobile with permission of the named insured, where the minor actually owned the automobile and the father, the named insured, had no possession or control nor the right to possession or control of the automobile.

BROCK, J., dissents.

ON *certiorari* to review judgment of *Ervin, J.*, November 1969 Session of BURKE County Superior Court.

Plaintiffs instituted this action under the Uniform Declaratory Judgment Act, G.S. 1-253, *et seq.*, seeking a determination as to whether a garage liability insurance policy issued by Nationwide Mutual Insurance Company (Nationwide) to Tux Bowers Motor Company, Inc. (Bowers) provided insurance coverage to the operator of a 1961 Oldsmobile automobile owned by Bowers and involved in a collision on 25 October 1966. Judgment was entered declaring that coverage was provided by the Nationwide policy. Plaintiffs gave notice of appeal and *certiorari* was allowed, 13 April 1970, permitting them to perfect their appeal late.

Patton, Starnes & Thompson by Thomas M. Starnes for plaintiff appellants.

Uzzell and DuMont by Harry DuMont for defendant appellee Fireman's Fund Insurance Company.

Mitchell & Teele by H. Dockery Teele, Jr., for defendant appellee St. Paul Fire & Marine Insurance Company.

Byrd, Byrd & Ervin by Robert B. Byrd for defendant appellee Charles P. Michaels, Administrator of the Estate of Gerald D. Michaels.

Roy Walton Davis for defendant appellees Barbara Ann and Bis Ray Lewis.

GRAHAM, J.

The Nationwide garage liability policy in question provides insurance coverage for any person using an automobile insured under the policy, ". . . but only if no other valid and collectible automobile liability insurance . . . is available to such person;

. . ." The sole question presented on this appeal is whether the court correctly determined, as a matter of law, that no other insurance was available to the operator of the 1961 Oldsmobile automobile owned by Bowers and insured under the Nationwide policy at the time of the collision.

The essential facts are as follows: Terry Eugene Carson (Terry) purchased a 1965 Oldsmobile automobile from Bowers, and because he was a minor, title was registered in the name of his father (Mr. Carson). By endorsement the automobile was added as an insured vehicle under a policy of liability insurance previously issued to Mr. Carson, as named insured, by Fireman's Fund Insurance Company (Fireman's Fund). Subsequently, Terry returned the automobile to Bowers because of defective paint. Bowers agreed to have the vehicle repainted and furnished Terry with a 1961 Oldsmobile to use while this was being done. While driving the 1961 Oldsmobile on 25 October 1966, Terry was involved in the collision that gives rise to this action.

Plaintiffs argue that valid and collectible insurance is available to Terry under the Fireman's Fund policy, contending that the 1961 Oldsmobile was a "temporary substitute automobile," and that it was being operated by Terry with the permission of his father, the named insured, within the meaning of the policy's omnibus provisions.

We are unable to distinguish this case from that of *Underwood v. Liability Co.*, 258 N.C. 211, 128 S.E. 2d 577. There, Mrs. Chaffin registered in her name title to an automobile purchased for the sole use of her minor son, Jerry. She obtained liability insurance in her name as owner, stating in her application that the automobile would be operated at all times by her minor son. Mrs. Chaffin thereafter moved from North Carolina. Her son remained here, residing with a Mrs. Underwood. Title to the automobile was transferred to Mrs. Underwood but no transfer of the insurance was effected. The automobile was thereafter involved in an accident while being operated by Jerry. The Supreme Court held that no coverage existed because the insurance did not automatically follow the transfer of title, and also because Mrs. Chaffin, even though the named insured, could not have given her son the required permission to operate the automobile since the son, and not Mrs. Chaffin, had the right to its possession and control. The following language in the opinion is particularly pertinent:

"It is not clear what significance the trial court placed upon its finding that Jerry Wayne Otwell was the beneficial owner of the automobile. If the import is that he was the owner and had right of possession and control, there was most certainly no coverage. The insurance contract was with Mrs. Chaffin and the policy covered the named insured, Mrs. Chaffin, and any other person while using the automobile, provided the actual use was with the *permission* of Mrs. Chaffin. In order to grant permission, as the word 'permission' is used in the policy, there must be such ownership or control of the automobile as to confer the *legal* right to give or withhold assent. It is something apart from a general state of mind. If Jerry actually owned the automobile and had the right to possession and control, or if Mrs. Chaffin parted with the title (and it is undisputed that she assigned to Mrs. Underwood on 9 June 1958 such title as she had) then, in either event, the operation of the car by Jerry on 4 August 1958 was not with the permission of Mrs. Chaffin within the purview of the omnibus clause of the policy. Insurer had no contract with or responsibility to or for Jerry apart from the ownership of the vehicle by Mrs. Chaffin. *Adkins v. Inland Mut. Ins. Co., supra; United States Casualty Co. v. Bain,* 62 S.E. 2d 814 (Va. 1951); *Mason v. Allstate Insurance Co.*, 209 N.Y.S. 2d 104 (1960); *Byrd v. American Guarantee and Liability Ins. Co.*, 180 F. 2d 246 (4 Cir. 1960).

Defendant insurer's defense of non-coverage is clearly sustained by the undisputed facts on this record. As to insurer the judgment below is reversed."

The Fireman's Fund policy, as required by statute, contains an omnibus clause identical to that of the policy involved in *Underwood.* It states in pertinent part: "With respect to the insurance for bodily injury liability . . . the unqualified word 'insured' includes the named insured [Mr. Carson] . . . and also includes any person while using the automobile . . . provided the actual use of the automobile is by the named insured . . . or with the permission of the [named insured]." The insurer here, as in *Underwood,* had no contract with or responsibility to Terry as beneficial owner of the insured vehicle, apart from the ownership of the vehicle by his parent. The undisputed facts conclusively establish that Terry actually owned the automobile and had the right to its possession and control. All of the acts

taken by Mr. Carson with respect to the automobile were for the sole purpose of accommodating his minor son. Mr. Carson testified:

> "The 1965 car was Terry's car. It was his car to use whenever, however, and wherever he wanted to use it. . . . I did not exercise any control over the 1965 Oldsmobile. . . . I did not know anything about the paint job on the 1965 Oldsmobile and did not have anything to do with taking the car back to get a new paint job. . . . I did not, at any time, have any possession or control of the 1961 Oldsmobile. I did not have anything to do with obtaining the 1961 Oldsmobile from Tux Bowers. . . . That was entered into privately by Terry and he was the one doing it."

Applying the clear and unambiguous language of the *Underwood* opinion, we must conclude, as did the trial court, that Terry was not operating the 1961 Oldsmobile with the permission of the named insured, Mr. Carson, for the reason that Mr. Carson had no possession or control nor the right of possession or control over its use and operation. Hence, the Fireman's Fund policy affords no coverage and the judgment must be affirmed.

Plaintiffs' brief reflects an awareness of the significance of the *Underwood* decision with respect to the facts of this case, but they contend that "fresh consideration should be given to the issue." The reasons they advance for urging this are indeed persuasive. However, it is not the prerogative of this court to do other than follow strictly what we interpret the meaning of the *Underwood* decision to be.

Affirmed.

MORRIS, J., concurs.

BROCK, J., dissents.

GORMAN Z. KEITH v. NORFOLK SOUTHERN RAILWAY COMPANY

No. 7010SC343

(Filed 5 August 1970)

1. **Master and Servant § 40— action under F.E.L.A. — contributory negligence of employee**

Under the provisions of the Federal Employers' Liability Act, contributory negligence is not a bar to recovery, but, in the event of recovery, the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff.

2. **Master and Servant § 38— liability under F.E.L.A. — negligence of employer**

The basis of liability under the Federal Employers' Liability Act is negligence proximately causing injury; the plaintiff must show something more than a fortuitous injury.

3. **Master and Servant § 38— employer's duty under F.E.L.A.**

The employer's duty under the F.E.L.A. is to use reasonable care in furnishing employees with a safe place to work and safe tools and appliances.

4. **Master and Servant § 38— F.E.L.A. — railway employer — standard of care**

Railway companies are held to a high standard of care commensurate with the attendant risks and dangers.

5. **Master and Servant § 36— liberal construction of F.E.L.A.**

The Federal Employers' Liability Act is to be construed liberally, and evidence of liability thereunder may be either direct or circumstantial.

6. **Master and Servant § 38— negligence of railway employer — sufficiency of evidence**

In an action under the Federal Employers' Liability Act by a railway employee against the employer railroad for recovery for injuries sustained during the course of employment, the issue of the employer's negligence was properly submitted to the jury, where there was testimony that the plaintiff was assigned to operate a dump truck alongside the tracks, that he collided with a work train operated by the defendant's employees, and that the defendant's other employees along the track knew of the approaching work train but failed to warn either the plaintiff or the train crew that the plaintiff was exposed to danger.

APPEAL by defendant from *Carr, J.*, at the December 1969 Civil Session of WAKE Superior Court.

This is a civil action brought by the plaintiff-employee against the defendant-employer to recover for injuries sustained in a collision by the plaintiff during the course of his employment.

Plaintiff alleges that defendant is engaged in intrastate and interstate commerce as a carrier of freight for hire. Plaintiff brought this action under the provisions of the Federal Employers' Liability Act for the recovery of damages for alleged negligence in maintenance and use of railroad property and for negligent operation by the defendant railway and its employees resulting in the injury herein complained of. The plaintiff alleges numerous acts and omissions constituting negligence on the part of the defendant, among them; failure to take precautions to insure plaintiff's safety, failure to provide signals or flagging, failure of Hollis to warn the engineer of plaintiff's presence on the tracks, failure to have the locomotive under control, failure to blow a whistle, ring a bell or sound any warning, and failure of the train crew to keep a proper lookout.

The defendant answered denying any negligence, asserting the sole negligence of the plaintiff or his contributory negligence in diminution of damages, and counterclaimed seeking to recover for damages to the dump truck caused by the negligent operation by the plaintiff.

The evidence tended to show that on 25 July 1966 plaintiff was a dragline operator and that he reported to Mr. Roy Leggett, bridge building foreman for defendant, who informed him they would have no work train that day and plaintiff would be assigned to other duties. Plaintiff was told to operate a "hy-rail" dump truck, used in this instance to haul dirt along the tracks between a three-fourths mile length of track. Plaintiff began work pursuant to these instructions going forward in a northerly direction to unload dirt at a bridge where Leggett was foreman and backing southerly to the loading point where his truck was loaded by L. T. Hollis, a dragline operator for defendant. At approximately 4:00 p.m. on that day, plaintiff was returning to the loading point and had reached a curve when, without notice or warning, a locomotive engine operated by a conductor, engineer and other employees of defendant, came around the curve proceeding in a northerly direction and struck the truck being operated by the plaintiff causing bodily injury.

At the close of the plaintiff's evidence, the defendant moved for judgment of nonsuit. The motion was denied and the defendant excepted. The defendant offered no evidence and renewed its motion which too was denied. The jury answered issues of negligence and contributory negligence in the affirmative and awarded plaintiff damages in the amount of $33,240.00. Defendant appealed.

R. Mayne Albright for plaintiff appellee.

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

VAUGHN, J.

The defendant brings forward but one exception and assignment of error. It contends that error was committed in the court's failure to grant its motion for nonsuit. The defendant contends that the negligence of the plaintiff was the sole proximate cause of his injury and that the defendant was without negligence contributing to the injury. We disagree.

The Federal Employers' Liability Act, as set forth in U.S.C.A., Vol. 45, § 51, (hereinafter referred to as the Act) provides that every common carrier by railroad while engaged in intrastate or interstate or foreign commerce, shall be liable in damages to any employee for injuries "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

[1] In determining whether or not error was committed in the denial of the defendant's motion for nonsuit, we are not concerned with the plaintiff's contributory negligence. Under the provisions of the Act, contributory negligence is not a bar to recovery, but, in the event of recovery, the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff. *Futrelle v. R. R.*, 245 N.C. 36, 94 S.E. 2d 899, reversed on other grounds, 353 U. S. 920, 1 L. Ed. 2d 718, 77 S. Ct. 682; *Graham v. R. R.*, 240 N.C. 338, 82 S.E. 2d 346; *Cobia v. R. R.*, 188 N.C. 487, 125 S.E. 18; *Davis v. R. R.*, 175 N.C. 648, 96 S.E. 41. Therefore, the sole question before us is whether or not the plaintiff's evidence was sufficient to take

the case to the jury on the question of actionable negligence on the part of the defendant railroad.

[2-4] The basis of liability under the Act is negligence proximately causing injury. The plaintiff must show something more than a fortuitous injury. *Battley v. Railway Co.*, 1 N.C. App. 384, 161 S.E. 2d 750; *Camp v. R. R.*, 232 N.C. 487, 61 S.E. 2d 358. The employer's duty under this Act is to use reasonable care in furnishing employees with a safe place to work and safe tools and appliances. *Battley v. Railway Co., supra.* Railway companies are held to a high standard of care commensurate with the attendant risks and dangers. *McGraw v. R. R.*, 206 N.C. 873, 175 S.E. 286.

[5] The Act is to be construed liberally and evidence of liability thereunder may be either direct or circumstantial. *Battley v. Railway Co., supra.*

[6] Without a lengthy recital of the evidence it suffices to say that the record is replete with evidence of defendant's negligence. The plaintiff was assigned to a new job without advice or instructions. He was told his crew would not have a work train that day. Employees of defendant were working at each end of the three-quarters of a mile section of track on which plaintiff was told to operate the truck. Defendant's employee Hollis, who was operating a dragline at plaintiff's loading point, saw the work train approach from the south, moved his dragline boom off the track and greeted the train crew with a wave. He was expecting plaintiff to come from the north at any moment. The evidence tends to show that he had ample opportunity to warn the train crew by handsignal and that, if he had done so, the train would have stopped. He did nothing and the collision between plaintiff's truck and the work train occurred shortly thereafter. There was also evidence tending to show that Hollis had a duty to post warning flags but failed to do so. R. B. Sauls, section foreman for defendant, was operating a hy-rail truck in a northerly direction along the track in front of the work train. He came up behind plaintiff as plaintiff was preparing to dump a load of dirt. Sauls and plaintiff talked and arranged for Sauls to get around plaintiff. Sauls did not advise plaintiff that a work train was also coming north behind him. Without any warning to plaintiff, Sauls observed him start south on a collision course with the work train which he knew was coming north.

There was evidence of other acts and omissions by defendant from which the jury could have properly found negligence on the part of defendant proximately resulting in plaintiff's injuries. Upon instructions not contained in the record, the jury so found. The jury also found contributory negligence on the part of plaintiff and presumably diminished his award accordingly. In this we find no error.

No Error.

CAMPBELL and PARKER, JJ., concur.

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., PETITIONER-APPELLANT v. JOHN R. KISER AND WIFE, EMMA DENEALE KISER, RESPONDENTS-APPELLEES

No. 7028SC314

(Filed 5 August 1970)

1. **Gas § 6; Eminent Domain § 5— gasline easement — measure of damages**

   The measure of damages to which landowners were entitled for the taking of a gas pipeline easement was the difference in the fair market value of the land immediately before the taking as compared to the fair market value of the land immediately after the taking.

2. **Eminent Domain § 5— determining market value**

   In determining market value, consideration of future uses to which the property is adapted and which are precluded by the taking should be limited to those uses which are so reasonably probable as to have an effect on the present market value of the land, and purely imaginative or speculative value should not be considered.

3. **Gas § 6; Eminent Domain § 6— condemnation of gasline easement — evidence of value — prejudice — instructions**

   In a proceeding to condemn a gasline easement across the respondents' land, the fact that the respondents' witness might have based his pre-condemnation valuation of the land upon the possibility of relocating a roadway easement on the land was not prejudicial to the gas company, where (1) the trial judge specifically instructed the jury to ignore the possibility of such relocation and (2) the jury's verdict indicated a thorough understanding of the instructions.

APPEAL by petitioner (Gas Company) from *Grist, J.*, 8 December 1969 Session of BUNCOMBE County Superior Court.

Gas Company instituted this special proceeding for the condemnation of a pipeline easement across the lands of the respondents (Landowners) in Buncombe County, North Carolina. Commissioners were appointed, and the Clerk of the Superior Court confirmed the award made by them. From the order of confirmation both parties appealed to the Superior Court upon the issue of damages.

The Landowners owned 21.5 acres of land in Upper Hominy Township, Buncombe County. This land was somewhat rectangular in shape, and there was located thereon an easement for a roadway. This easement was 16 feet in width, and extended across the property from east to west. On the eastern margin, the roadway was approximately 500 feet south of the northerly line and approximately 350 feet north of the southerly line. On the western margin of the tract of land, the roadway was approximately 200 feet south of the northerly line and approximately 550 feet north of the southerly line. The effect of the roadway was therefore to divide the property into two parts which were not equal and were described by some of the witnesses as being "pie-shaped." The Gas Company, exercising its right of condemnation, acquired an easement 50 feet in width and running with that width across the property and adjacent to the northerly edge of the 16-foot roadway. The Gas Company right of way contained 1.33 acres.

The Landowners offered testimony by six witnesses who gave their various opinions as to the fair market value of the entire tract of land before the taking by the Gas Company and their opinion as to the fair market value of the land after the taking by the Gas Company. The difference between these before and after values would be the damage sustained by the Landowners by the taking. The damage thus determined from the witnesses of the Landowners varied from a low of $10,800 as determined from the testimony of the witness Coggins to a high of $22,500 as determined by the witness Austin. The figure determined from the witness Thrash was $21,200.

The Gas Company offered two witnesses who testified as to the difference between the before and after values, and they arrived at a damage factor of a high of $2,650 and a low of $2,350.

After considering all of the evidence and the charge of the trial court (to which no exception has been taken), the jury

arrived at a verdict of $8,500. The judgment based upon this verdict sets out in detail the respective rights of the Gas Company in this 50-foot right-of-way and the rights which the Landowners retain therein. From the award of $8,500 as damages, the Gas Company appealed.

Bennett, Kelly & Long; Hendon & Carson by George Ward Hendon for petitioner-appellant.

Joseph C. Reynolds for respondents-appellees.

CAMPBELL, J.

[1, 2] The measure of damages to which the Landowners were entitled for the taking of the easement by the Gas Company was the difference in the fair market value of the land immediately before the taking as compared to the fair market value of the land immediately after the taking. 3 Strong, N. C. Index 2d, Eminent Domain, Sec. 5. In determining market value, consideration of future uses to which the property is adapted and which are precluded by the taking, should be limited to those uses which are so reasonably probable as to have an effect on the present market value of the land, and purely imaginative or speculative value should not be considered. *Light Co. v. Clark,* 243 N.C. 577, 91 S.E. 2d 569 (1956); *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10 (1941); *Crisp v. Light Co.,* 201 N.C. 46, 158 S.E. 2d 845 (1931).

[3] The Gas Company presents only one question for determination. The Gas Company argues that the witness Thrash and the witness Coggins based their respective opinions as to the before value of the tract of land on an assumption that the 16-foot roadway easement could be changed and by thus relocating the 16-foot roadway the land would be more adaptable for development as a subdivision, and that this relocation of the 16-foot roadway was now eliminated by the establishment of the Gas Company right-of-way along the northerly edge of the 16-foot roadway. The Gas Company argues that this permitted the establishment of a higher before value and that the property should have been valued in its existing condition with the 16-foot roadway established as it actually is and not based upon a possibility of changing it.

This is a valid argument, but we do not find that the Gas Company was prejudiced in the instant case. The witness

Coggins was actually the low man of the six witnesses testifying on behalf of the Landowners. In fact the witness Coggins testified with regard to the 16-foot roadway, "If that weren't a firm right-of-way there, I would think the property would have more value than I placed on it." It is thus obvious that the witness Coggins did not base his values upon the possibility of changing the roadway.

It is not so clear that the witness Thrash did not base his opinion as to the before value upon the possibility of changing the 16-foot roadway. Even assuming, however, that the witness Thrash did base his valuation upon this possibility, which would be an unacceptable and objectionable method, nevertheless, we do not think that the Gas Company has been prejudiced. The witness Thrash arrived at a damage figure of $21,200. The judge, in his charge to the jury, told the jury,

> ". . . The Court instructs you as a matter of law that you are not to consider a possibility of any change in the location of the roadway or power and light company easements. It is your duty to determine the value of the property immediately before the taking as it was at that time, and the value of the property immediately after the taking as it was at that time, and not to determine these values based on any possibility or assumption that some change in these easements might be made at a later date."

It is quite obvious that the jury was not confused and understood the judge's instructions because they did not find damages in keeping with what the witness Thrash had testified. The jury verdict of $8,500 would indicate a thorough understanding of the judge's instructions. We would suggest comparison with the case of *Shopping Center v. Highway Commission,* 265 N.C. 209, 143 S.E. 2d 244 (1965).

In the trial below we find no error sufficiently prejudicial to warrant a new trial.

No Error.

BRITT and VAUGHN, JJ., concur.

HENRY F. CARPENTER, CLAUDE K. PASSMORE AND WIFE, HENRIETTA C. PASSMORE v. NEWBY ROGER SMITH AND FRANK L. SANFORD III, TRADING AS WEATHER CONTROL PRODUCTS

No. 7022SC332

(Filed 5 August 1970)

1. **Mortgages and Deeds of Trust § 7— deed of trust to secure note for payment of contract price — damages for breach of contract — declaration of lien by court**

The trial court erred in declaring that a deed of trust on plaintiffs' home, given to secure a note for payment of the amount of a contract for the installation of electric heat in the home, was a valid lien to the extent of judgment rendered against plaintiffs for breach of the contract, since the deed of trust did not provide and was not intended to provide security for damages for breach of the contract.

2. **Mortgages and Deeds of Trust § 18— deed of trust declared to constitute lien for judgment — payment of judgment — cancellation — advertising expense**

Where provision entered in a judgment at defendants' request declared that a deed of trust on plaintiffs' home, given to secure a note for payment of the amount of a contract for installation of electric heat, was a valid lien to the extent of a judgment rendered against plaintiffs in favor of defendants for breach of the contract, the deed of trust was properly cancelled as provided by the judgment when the amount of the judgment was paid, notwithstanding defendants had incurred additional expense in advertising the property for sale prior to the time the judgment was paid, the laws generally governing the right of a creditor to cause a sale by the trustee under a power of sale in the deed of trust being inapplicable in this situation.

APPEAL by defendants from *Seay, J.*, 16 February 1970 Session, DAVIDSON Superior Court.

Plaintiffs instituted this action to have a contract between them and defendants declared null and void for fraud; and to have a deed of trust executed by plaintiffs for benefit of defendants declared void for forgery.

Plaintiffs alleged that they entered into a contract with defendants for the installation of electric heat in their home, but that their signatures were obtained by fraudulent representations. Plaintiffs also alleged that their names were forged as signatures to a note for the amount of the contract, and to the deed of trust on their residence property to secure payment of the note.

Defendants answered alleging that plaintiffs signed the contract, the note, and the deed of trust; and denied fraud and forgery. By way of counterclaim for damages for breach of contract, defendants alleged they attempted to install the electric heat contracted for but that plaintiffs ordered them from the premises. Defendants asked that the deed of trust be declared a lien on plaintiffs' property to the extent of any damages recovered by defendants on their counterclaim.

The case was tried before McConnell, J., and a jury, at the 17 February 1969 Session, Davidson Superior Court, at which time issues were submitted to and answered by the jury as follows:

"1. Was the contract between Claude K. Passmore and wife, Henrietta C. Passmore, and Weather Control Products entered into as a result of fraudulent representations on the part of defendants?

ANSWER: No.

"2. If not, what amount of damages are the defendants entitled to recover of the plaintiffs, Claude K. Passmore and wife, Henrietta C. Passmore?

ANSWER: $183.00.

"3. Did the plaintiffs, Claude K. Passmore and wife, Henrietta C. Passmore, sign a deed of trust dated May 17, 1967, as alleged in defendant's answer?

ANSWER: Yes."

Based upon the jury verdict judgment was entered decreeing that defendants recover from plaintiffs the sum of $183.00 and costs. The judgment contained an additional provision as follows:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the deed of trust dated May 17, 1967, by Claude K. Passmore and wife Henrietta C. Passmore, and recorded in Book 426, page 211 of the Davidson County Registry, is a valid and subsisting lien against the property described therein in favor of the defendants to the extent of the judgment recovered herein in the amount of $183.00 plus interest and cost, and upon the payment of the sum of $183.00 plus interest thereon and cost, the Register of Deeds for Davidson County,

upon evidence of said sum of $183.00 being paid in full with interest is herein authorized and directed to cancel said deed of trust of record which is recorded in Book 426, page 211, in the Davidson County Registry."

On 29 September 1969, the judgment not having been paid by plaintiffs, the Trustee in the deed of trust commenced advertisement of a sale under the power of sale contained in said deed of trust, the sale to be held at noon on 5 November 1969.

On 31 October 1969, plaintiffs paid to the Clerk of Superior Court, Davidson County, the judgment in the sum of $183.00, plus interest and costs; and, upon evidence of this payment furnished by the clerk, the Register of Deeds noted a cancellation of the deed of trust. Between 31 October 1969 and 5 November 1969, there was some conversation between counsel for the parties relating to payment by plaintiffs of the additional sum of $63.00 to cover advertising expenses incurred by the Trustee in advertising the foreclosure sale.

On 5 November 1969, the additional sum of $63.00 not having been paid by plaintiffs, the Trustee conducted the foreclosure sale and filed his report with the clerk showing a sale of the property described in the deed of trust for the sum of $500.00. The filing of this report brought on an exchange of vituperative correspondence between counsel for the parties which detracted from the dignity of the profession and contributed nothing to a solution of their clients' problems. The correspondence was included in the record on appeal.

On 1 December 1969, no upset bid having been filed, the Trustee executed and delivered a Trustee's Deed for the property sold under foreclosure, and collected the bid price of $500.00 from the high bidder. This deed was recorded in the Davidson County Registry on 4 December 1969.

Also, on 4 December 1969, counsel for defendants filed a motion in the Superior Court, substantially setting out what had transpired of record since entry of the judgment during the 17 February 1969 Session, and asking the Court to order the cancellation of the deed of trust expunged from the record, and asking the Court to confirm the sale by the Trustee on 5 November 1969.

This motion, along with plaintiffs' answer thereto, was heard by Judge Seay at the 16 February 1970 Session. From

Judge Seay's Order denying defendants' motion, defendants appealed.

William H. Steed, for plaintiffs-appellees.

Parker & Mozzoli, by Gerald C. Parker, for defendants' appellants.

BROCK, J.

[1] It appears that Judge McConnell committed error when he included in the February 1969 judgment the additional provision quoted in the foregoing statement of facts. Clearly the deed of trust did not provide, nor was it intended to provide, that it was security for damages that might be recovered for breach of contract. Therefore, the only lien defendants could claim with the deed of trust arose by virtue of the additional provision of the judgment; clearly defendants could not claim a balance due on the note, the payment of which the deed of trust was given to secure. It follows then that defendants' only remedy was under the terms of the judgment; and, because the additional provision was entered at defendants' instance, they are in no position to complain.

[2] The additional provision refers only to $183.00 plus interest and costs; and provides that, upon payment of $183.00 plus interest and costs, the deed of trust shall be cancelled of record. The $183.00, plus interest and costs, was paid, and the deed of trust was cancelled as required by the judgment; if defendants have incurred additional expense, it comes from their own conduct. This is not a situation where there has been a default in payment by the debtor of the debt which the deed of trust was given to secure; therefore the laws generally governing the right of the creditor to cause a sale by the Trustee under a power of sale contained in a deed of trust have no application.

The order of Judge Seay denying defendants' motion to expunge from the record the cancellation of the deed of trust, and refusing to confirm the sale by the Trustee, is

Affirmed.

BRITT and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. TONY LEON BARBER

No. 7023SC378

(Filed 5 August 1970)

1. **Criminal Law § 34— testimony that defendant was AWOL — mistrial — motion to strike**

Testimony that the defendant "is AWOL from the Army" does not warrant mistrial, where trial court allowed defendant's motion to strike and promptly instructed the jury to disregard the testimony.

2. **Criminal Law § 169— admission of objectionable evidence — prejudicial effect**

When objectionable evidence is stricken and the jury instructed not to consider it, any prejudice is ordinarily cured.

3. **Criminal Law § 115— lesser degrees of crime — instructions**

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when, and only when, there is evidence from which the jury could find that such included crime of lesser degree was committed.

4. **Rape § 18— assault with intent to commit rape — instructions on assault on female**

In a prosecution for assault with intent to commit rape, the trial court did not err in failing to submit to the jury the lesser included offense of assault on a female, where (1) defendant admitted the act of sexual intercourse but relied on the defense of consent and (2) there was no evidence of an assault except in connection with the evidence of sexual intercourse.

5. **Criminal Law § 160— correction of judgment — remand**

Case is remanded for correction of the judgment where judgment referred to "case No. 5" rather than to "case No. 7."

APPEAL by defendant from *Tillery, J.*, 16 February 1970 Session, WILKES Superior Court.

In case No. 6 defendant was charged in one bill of indictment, proper in form, with the capital felony of burglary. In case No. 7 he was charged in another bill of indictment, proper in form, with the capital felony of rape.

Upon calling the cases for trial, the Solicitor announced that in case No. 6 he would ask only for a verdict of guilty of a non-burglarious breaking and entering; and that in case No. 7 he would ask only for a verdict of guilty of assault with intent to commit rape. Defendant entered a plea of not guilty to each charge and was placed upon trial before judge and jury.

The State's evidence tended to show the following:

Defendant is a Negro male, age 20. The prosecuting witness is a Negro female, age 50. Defendant and prosecuting witness are cousins. The prosecuting witness lived with her uncle who was an invalid, and who was defendant's grandfather. Defendant lived only two doors from his grandfather's house, and he and the prosecuting witness had known each other all of defendant's life. Prosecuting witness slept in an upstairs bedroom and her invalid uncle (defendant's grandfather) slept in a downstairs bedroom. They were the only two persons living in the house.

During the early morning hours of 31 May 1969, prosecuting witness was awakened by a hand being placed over her mouth. It was dark in the room but defendant was identified by his voice and his statement as to whom he was; and later as it became light he was identified by sight. Without recounting prosecuting witness' description of sordid conduct of defendant, suffice to say the evidence was sufficient to justify the jury in returning a verdict of guilty of assault with intent to commit rape, and would have justified a verdict of guilty of rape if that charge had been submitted.

Defendant entered the house through the bathroom window which was not locked.

The defendant's evidence tended to show the following:

He first had sexual intercourse with prosecuting witness about two years before the night in question in this prosecution. He had been to her bedroom at her invitation about six times before, and at her invitation had had sexual intercourse with her about six times.

On the night in question he had been invited by prosecuting witness to come to her room, and she had left the bathroom window open for him to get in. He went in as planned and prosecuting witness was sitting up waiting for him. They had sexual intercourse with her consent and cooperation.

From verdicts of guilty of a felonious breaking and entering, and of assault with intent to commit rape, and judgments of confinement entered thereon, defendant appealed.

Attorney General Morgan, by Trial Attorney Parker, for the State.

McElwee, Hall & Herring, by John E. Hall, for defendant.

BROCK, J.

[1, 2] During the presentation of the State's evidence a witness volunteered the statement that defendant "is AWOL from the Army". Defendant's objection and motion to strike were allowed, and the trial judge promptly and clearly instructed the jury to disregard the statement. Defendant immediately moved for a mistrial upon the grounds that the volunteered statement was prejudicial, and assigns as error the failure of the trial judge to order a mistrial. When the objectionable evidence is stricken and the jury instructed not to consider it, any prejudice is ordinarily cured. *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512. This assignment of error is overruled.

[3, 4] Defendant assigns as error that the trial judge failed to submit to the jury the question of defendant's guilt or innocence of the offense of assault on a female as a lesser degree of the charge of assault with intent to commit rape. The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when, and only when, there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. *State v. Parker,* 7 N.C. App. 191, 171 S.E. 2d 665. In this case there is no evidence of an assault except in connection with the evidence of sexual intercourse. The defendant admits the act of sexual intercourse, and therefore it became only a question of whether there was consent. If there was consent, the evidence in this case would not justify a verdict of guilty of assault on a female, but would compel a verdict of not guilty. If there was no consent, the evidence in this case justifies a verdict of guilty of assault with intent to commit rape. It is clear the jury resolved the question of consent against defendant. This assignment of error is overruled.

We have carefully considered defendant's remaining assignments of error, and they are overruled. Defendant had a fair trial, free from prejudicial error.

[5] We note *ex mero motu* that the judgments as entered contain a clerical error. In case No. 6 defendant was charged with burglary; in case No. 7 he was charged with rape. However, judgment was entered as follows:

In Case #5, assault with intent to commit rape, let the defendant be committed to the State Department of Corrections for imprisonment for a period of ten years.

"In Case No. 6, non-burglarious breaking and entering, let the defendant be committed to the State Department of Corrections for imprisonment for a period of five years. This sentence to run concurrently with the sentence in Case No. 5."

It is obvious that the two references to case No. 5 were intended to be references to case No. 7. Therefore this case will be remanded for correction of the judgments to read as follows:

In Case #7, assault with intent to commit rape, let the defendant be committed to the State Department of Corrections for imprisonment for a period of ten years.

In Case No. 6, non-burglarious breaking and entering, let the defendant be committed to the State Department of Corrections for imprisonment for a period of five years. This sentence to run concurrently with the sentence in Case No. 7.

Remanded for corrections.

No Error in the trial.

MORRIS and GRAHAM, JJ., concur.

PERRY B. EARNHARDT v. RUTH N. EARNHARDT

No. 7026DC333

(Filed 5 August 1970)

Divorce and Alimony § 21; Contempt of Court § 6— enforcing alimony payment — contempt order — sufficiency of finding

An order for defendant's arrest for wilful contempt of earlier court order requiring him to make alimony payments must be remanded, where there was no evidence to support a finding that defendant presently possessed the means to comply with the alimony order.

APPEAL by plaintiff from *Gatling, District Judge,* 30 January 1970 Session of MECKLENBURG County General Court of Justice, District Court Division.

The plaintiff (Earnhardt) on 29 June 1966, instituted this action in the Superior Court of Mecklenburg County for an absolute divorce on the ground of one-year separation. Earnhardt alleged the marriage on 18 May 1929 and separation commencing on 20 June 1965.

The defendant (Mrs. Earnhardt) answered the Complaint and denied that the separation was voluntary; but on the contrary, she alleged in a cross action that Earnhardt willfully abandoned her, failed and refused to furnish her with necessary subsistence in accordance with his means and condition in life, and in accordance with her needs and requirements; and further alleged a course of conduct by Earnhardt which rendered her condition intolerable and life burdensome. She asked for alimony *pendente lite,* counsel fees and permanent alimony.

Various orders were entered requiring Earnhardt to show cause why he should not pay alimony *pendente lite.* He claimed as a defense thereto that he was physically unable to work. Consequently, an order was issued on 23 November 1966 by Judge Riddle requiring Earnhardt to subject himself to a physical examination. A physical examination by a qualified physician was had; and thereafter under date of 17 January 1967, Judge Clarkson entered an order requiring Earnhardt to pay Mrs. Earnhardt $30 a week pending further orders of the court, and a $100 attorney fee. This order was based upon adequate findings of fact. Pursuant to this order, Earnhardt made four payments, the last one being on 3 March 1967.

On 14 April 1967 Judge Clarkson issued an order to show cause as to why Earnhardt should not be held in contempt of court. This order was made returnable 24 April 1967. The matter came on to be heard before Judge Latham, Earnhardt did not appear, and his attorney of record at that time announced that Earnhardt was confined in the Veterans Hospital at Mountain Home, Tennessee. Judge Latham entered an order continuing the matter until such time as Earnhardt was released from the hospital. Thereafter, Earnhardt's counsel of record withdrew as his attorney pursuant to an order of Judge Grist entered 22 April 1968.

On 15 January 1970 Mrs. Earnhardt filed a petition and motion in the cause setting forth the receipt of four payments pursuant to the order of Judge Clarkson in January 1967, and

that Earnhardt was in arrears in the amount of $4,020.00; that the defendant, while confined in the Veterans Hospital at Mountain Home, Tennessee, had perpetrated a fraud upon the courts of the State of Tennessee and pursuant thereto had obtained a fraudulent divorce from Mrs. Earnhardt; that after obtaining the fraudulent divorce, Earnhardt had purportedly married a Mrs. Holden in the State of South Carolina on 13 April 1968; that Mrs. Holden had died during the year 1969, and at the time of her death, had left funds in trust for Earnhardt. Mrs. Earnhardt requested an order to show cause. Judge Abernathy issued such an order on 15 January 1970, returnable 26 January 1970. This order to show cause was personally served upon Earnhardt on 16 January 1970.

On 20 January 1970 Earnhardt, through his present counsel of record, made a motion to continue the hearing, as he was returning to the Veterans Hospital in Tennessee. He further requested that the order for support be abated or suspended due to his ill health and inability to earn money with which to make support payments.

The cause came on to be heard and was heard before Judge Gatling on 27 January 1970, having been continued by consent from 26 January 1970. Under date of 30 January 1970 Judge Gatling entered an order containing numerous findings of fact, including that Earnhardt was in arrears in the amount of $4,290 in his alimony payments; that Earnhardt was in willful contempt for failure to abide by and comply with the order of Judge Clarkson entered 17 January 1967; that Mrs. Earnhardt was entitled to a monetary judgment in the amount of $4,290, together with interest and costs, and he further adjudged that Earnhardt should pay Mrs. Earnhardt's attorney the sum of $750.

This order of Judge Gatling further provided:

"4. The plaintiff shall be arrested immediately by the Sheriff of Mecklenburg County, North Carolina, or the Sheriff of any other county in the State of North Carolina in which the plaintiff may be found to be a resident and shall be committed forthwith to the jail of any such Sheriff, pursuant to the provisions of Article 34 of Chapter 1 of the General Statutes of North Carolina. The plaintiff's bail is set, in the discretion of the undersigned, at Two Thousand Five Hundred ($2,500) Dollars."

The present appeal was taken from this order.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston by W. Samuel Woodard for plaintiff appellant.

Cole and Chesson by James L. Cole for defendant appellee.

CAMPBELL, J.

The evidence before Judge Gatling as shown by the record in this case amply supports the findings of fact, and the conclusions of law based thereon are proper, with the exception of the provision (Paragraph No. 4) quoted above providing for the arrest of Earnhardt.

In the instant case the court made numerous findings of fact and incorporated all of the findings of fact previously made by Judge Clarkson, but there was no evidence to support a finding that Earnhardt "presently possesses the means to comply" and, therefore, the order of arrest was improperly entered. The Supreme Court in *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391 (1966) stated:

> "The court entered judgment as for civil contempt, and the court must find not only failure to comply but that the defendant presently possesses *the means* to comply. The judgment committing the defendant to imprisonment for contempt is not supported by the record and must be set aside."

To the same effect, see *Willis v. Willis,* 2 N.C. App. 219, 162 S.E. 2d 592 (1968) and compare *Peoples v. Peoples,* 8 N.C. App. 136, 174 S.E. 2d 2 (1970).

The monetary judgment entered against Earnhardt is affirmed. The case is remanded for further hearing and findings of fact with regard to the civil contempt.

Affirmed in Part, and Error and Remanded in Part.

BRITT and VAUGHN, JJ., concur.

FRANCES CROSS WATSON, PLAINTIFF v. WILBUR AUGUSTA CARR AND WIFE, SHIRLEY VIOLA CARR, ORIGINAL DEFENDANTS AND K. R. HOYLE, TRUSTEE, LILLIAN CROSS THORPE, JOHN WILLIAM THORPE, ADDITIONAL DEFENDANTS

No. 7011SC263

(Filed 5 August 1970)

1. **Tenants in Common § 3; Interest § 2; Judgments § 55— contribution by cotenant — mortgage payments — interest on judgment**

Where it was determined by the jury that original defendants in this action to remove cloud from title were entitled to contribution and a lien against the interests of plaintiff and additional defendant in the subject property for payments made by original defendants on notes secured by deeds of trust on the property, the trial court did not err in entering judgment which allowed original defendants to recover interest from the dates of the payments made on the notes.

2. **Tenants in Common § 3— right to accounting — rents and profits actually received**

Where the evidence established that plaintiffs and defendants owned the land in controversy as cotenants, plaintiffs were entitled to an accounting from defendants who have been in possession of the land, not for the reasonable rental value of the property, but for the rents and profits actually received from the land.

APPEAL from *McKinnon, J.*, 25 November 1969 Regular Civil Session, LEE County Superior Court.

This case was before this Court at the Spring Session 1969 where the facts are set forth sufficiently for an understanding of this appeal in an opinion written by Britt, J., reported in 4 N.C. App. 287, 166 S.E. 2d 503 (1969).

At the trial before McKinnon, J., and a jury, on 25 November 1969, evidence was offered which tended to prove the allegations set forth in the pleadings, and that the defendants actually rented the land during the years 1964 and 1965 to one H. M. Jackson for $600.00 per year, and during 1966, 1967, 1968, and 1969, they rented the land to Henry Frank McIver for $200.00 per year.

At the close of the evidence the plaintiff and additional defendant were permitted to amend their pleadings so as to pray for the recovery of a reasonable annual rental from the defendants Carr for their use and occupation of the land since 2 December 1963. The motion of the plaintiff and additional

defendant for a judgment as of nonsuit as to the defendants Carr's counterclaim was denied and the following issues were submitted to the jury and answered as indicated:

1. Are the defendants, Carr, entitled to contribution and lien against the interest of the plaintiff, Frances Cross Watson, and the additional defendant, Lillian Cross Thorpe, for payments on mortgage indebtedness made as alleged in the answer?

Answer: Yes

2. What amount, if any, have the defendants Carr paid on the mortgage indebtedness due to the Farm Home Administration:

Answer: $6,507.63

3. What amount, if any, have the defendants Carr paid on the note secured by mortgage of Walter Cross and wife, Gladys M. Cross to Palmer-Reeves Company, Inc.?

Answer: $760.87

4. What amount, if any, have the defendants Carr paid on the note of Frances Cross Watson and husband and secured by mortgage to Palmer-Reeves Company, Inc.?

Answer: $181.48

5. What was the reasonable rental value of the lands described in the complaint during the period they were held by the defendants Carr?

Answer: $3,000.00

From the entry of the judgment on the verdict, the plaintiff and the additional defendant, and the original defendants, Carr, appealed assigning error.

Pittman, Staton and Betts, and Ronald T. Penny, by J. C. Pittman, for plaintiff and additional defendant, appellants, appellees.

Harold W. Gavin for defendants Carr, appellants, appellees.

HEDRICK, J.

APPEAL OF PLAINTIFF WATSON AND ADDITIONAL DEFENDANT THORPE

[1] The plaintiff and the additional defendant contend that the court below erred in that part of the judgment entered which required them to pay interest to the defendants Carr on amounts owed under the deeds of trust prior to 14 August 1968, the date this action was instituted.

The judgment entered by Judge McKinnon, in pertinent part, is as follows:

"3. That the defendants Wilbur Augusta Carr and wife, Shirley Viola Carr, have and they are hereby granted a lien upon the four-ninths undivided interest of Frances Cross Watson in the aforesaid described land for the following:

"(a) $2,892.28 with interest until paid at the rate of 3% on
$19.48 from December 30, 1963
$84.54 from December 11, 1964
$84.18 from November 30, 1965
$83.82 from November 7, 1966
$1,201.39 from November 1, 1967

Interest until paid at 5% on
$182.13 from December 11, 1964
$293.60 from November 30, 1965
$360.62 from November 7, 1966
$582.51 from December 1, 1967

"This covers the liability of the four-ninths undivided interest of Frances Cross Watson in said land for amounts paid by the defendants Carr to Farm Home Administration on the deeds of trust recorded in Book 156, at page 298 and Book 128 and page 601, Lee County Registry.

"(b) $338.17 with interest at the rate of 6% on
$24.18 from December 30, 1963
$266.67 from March 6, 1964
$47.32 from July 20, 1964

"This covers the liability of the four-ninths undivided interest of Frances Cross Watson in said land for amounts paid by the defendants Carr to Palmer-Reeves Company, Inc., on deed of trust recorded in Book 175, at page 233, Lee County Registry."

The court did not commit error in allowing the defendants Carr to recover interest from the dates of the payments of the notes secured by the deeds of trust. This assignment of error is overruled.

APPEAL OF ORIGINAL DEFENDANTS CARR

[2] The defendants Carr upon this appeal contend that the court below committed error in submitting the fifth issue to the jury in regard to the reasonable rental value of the land.

The evidence presented at the trial was sufficient to establish as a fact that the plaintiff and the defendants owned the land as co-tenants, thereby entitling the plaintiff and the additional defendant to an accounting from the defendants Carr for rents actually received. *Hunt v. Hunt and Lucas v. Hunt,* 261 N.C. 437, 135 S.E. 2d 195 (1964). The evidence that the original defendant actually received rent for the property during the years 1964, 1965, 1966, 1967, 1968, and 1969 was sufficient to bring the plaintiff's and additional defendant's case within the rule announced by Conner, J., in *Whitehurst v. Hinton,* 209 N.C. 392, 184 S.E. 66 (1936), as follows:

> "One who has received more than his share of the rents and profits from lands owned by him and others as tenants in common is accountable to his cotenants for their share of such rents and profits. In the absence of an agreement or understanding to the contrary, he is ordinarily liable only for the rents and profits which he has received. He is not liable for the use and occupation of the lands, but only for the rents and profits received. 47 C.J., 465."

The facts of the instant case are distinguishable from the facts in the case of *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479 (1954).

It was error for the court to submit the issue of reasonable rental to the jury as the rule announced in *Whitehurst, supra,* limits the recovery in the instant case to rents actually received. Therefore, that portion of the judgment of the court below which pertains to the fifth issue is vacated and the case is remanded to the Superior Court of Lee County for further proceedings. The plaintiff and the additional defendant will be permitted to amend their pleadings to allege a claim for their portion of the rents actually collected by the defendants Carr. The remainder of the judgment is affirmed.

Appeal of Plaintiff Watson and Additional Defendant Thorpe—Affirmed.

Appeal of Original Defendants Carr—Error and remanded.

BROCK and BRITT, JJ., concur.

GARFIELD OLIVER AND RICHARD A. SUTTON v. FRED ERNUL, LUZZIE ERNUL AND GRACE STAMPS

No. 703DC377

(Filed 5 August 1970)

1. **Easements §§ 2, 8— creation of easement by writing — extent of easement**

In plaintiffs' action to have defendants restrained from obstructing plaintiffs' right-of-way through lands owned and occupied by the defendants, plaintiffs' paperwriting exhibit, which was described as a "Rightaway Deed" and which was purportedly executed by one of the plaintiffs and by the defendants, *held* sufficient to create a twenty-foot easement through the lands in question, thereby allowing plaintiffs to reach a highway; although the public generally would have no rights in the twenty-foot right-of-way, the plaintiffs and their respective successors in title have the right to use the easement as a means of ingress and egress to and from their properties.

2. **Easements § 1— creation of easement**

Easements may be acquired by grant, dedication, or prescription.

APPEAL by plaintiffs from *Roberts, District Judge,* 15 December 1969 Session, CARTERET District Court.

This action was instituted by plaintiffs to have defendants restrained and enjoined from obstructing a right-of-way which plaintiffs allege they own over lands owned by defendants Ernul and occupied by defendant Stamps.

Admissions in the pleadings and plaintiffs' evidence tended to show: Prior to June 1954 Ernul acquired Lots 1, 2 & 3 of the Mike Ebron Subdivision west of Morehead City. The property is located between U. S. Highway No. 70 and the A. & E. C. Railroad, with approximately 68 feet frontage on the north side of said highway, approximately the same frontage on the south side of the railroad and a depth of approximately 634 feet. In June 1954 Ernul conveyed the northern portion of the property adjoining the railroad to one Mansfield and the center

portion to plaintiff Oliver and wife, retaining the southern portion on which he constructed a dwelling house now occupied by defendant Stamps. Plaintiffs' exhibit No. 1 is a paperwriting purportedly executed by plaintiff Oliver and wife, Mansfield and wife, and Ernul and wife in words and form in pertinent part as follows:

> "This Rightaway Deed Made this 19th day of December, A.D. 1964 by and between Garfield Oliver and wife, Grace Oliver; Melvin Mansfield and wife, Edna Mansfield; Fred Ernul and wife, Luzie Ernul.
>
> We, the undersigned, do hereby give, grant, bargain and convey a 20-foot rightaway for public use for now and for ever more.
>
> Described as follows:
>
> In Morehead Township, in the Mansfield Section, lying between A. and E. C. Railway on the North Hwy 70 on the South. The Mike Ebron Subdivision Running a Southerly direction Bounded on the East by George Huntley line and on the West, by Fred Ernul, Garfield Oliver and M. L. Mansfield line."

The instrument was recorded in Carteret County Registry on 8 February 1965.

In March 1969 Mansfield conveyed his lot to plaintiff Sutton. Plaintiffs have built houses on their respective lots and prior to July 1969 used a small road leading from U. S. Highway 70 to plaintiff Sutton's lot. About half of the road was on the eastern side of the original Ernul property and the other half on the adjoining property now or formerly owned by George Huntley. In July 1969 the owner or lessee of the Huntley property installed a chain-link fence along their western boundary, thereby taking approximately half of the road theretofore used by plaintiffs. Ernul's house was located approximately 15 feet from his eastern line. After the fence was installed, plaintiffs began using all the space between Ernul's house and the fence in getting to and from their homes. Defendant Stamps placed obstructions in the space and made threats to plaintiffs to prevent them from traveling between the house occupied by her and the fence.

At the close of plaintiff's evidence, defendants' motion for involuntary nonsuit was allowed and from judgment predicated thereon plaintiffs appealed.

Boshamer & Graham by Otho L. Graham for plaintiff appellants.

Thomas S. Bennett for defendant appellees.

BRITT, J.

Did the trial court err in granting defendants' motion for judgment as of involuntary nonsuit (this action being tried prior to 1 January 1970) ? Considering the evidence and the admissions in the pleadings in the light most favorable to plaintiffs, we hold that it did.

[1] We hold that plaintiffs' exhibit No. 1, although poorly drafted, if proven over defendants' denial is sufficient as a deed creating a twenty-foot easement extending from U. S. Highway No. 70 to the A. & E. C. Railroad and adjacent to the eastern line of the land originally owned by Ernul. In *Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458, our Supreme Court, as stated in the ninth headnote of the opinion, held:

> "The conveyance of an easement will be construed to effectuate the intent of the parties as expressed in the instrument, and if the language is ambiguous the court will give it an interpretation which will effect a rational purpose and not one which will produce an unusual and unjust result."

But, defendants contend that an offer of dedication of land to the public must be followed by an acceptance on its part in some recognized legal manner and cite *Wright v. Lake Waccamaw,* 200 N.C. 616, 158 S.E. 99. We recognize that principle and do not hold that the public generally has any rights in the twenty foot right-of-way, but we do hold that the owners of the three parcels of land involved in this action and their respective successors in title have the right to use said right-of-way as a means of ingress and egress to and from their properties.

Our search has failed to reveal a court decision directly in point but we think the following language in *Hine v. Blumenthal, supra,* is analogous:

> "In this jurisdiction it is well settled that when land is subdivided into lots and a map is made thereof, showing streets and alleys, and lots are sold with reference to such map, the owner of the subdivision thereby dedicates the streets and alleys to the use of those who purchase the lots;

and it makes no difference whether the streets and alleys be in fact opened or accepted by the governing board of the town or city in which the property lies. *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664; *Russell v. Coggin,* 232 N.C. 674, 62 S.E. 2d 70 * * *."

[2] Easements may be acquired by grant, dedication, or prescription. *Green v. Barbee,* 238 N.C. 77, 76 S.E. 2d 307, 46 A.L.R. 2d 455. It would appear that if the owners of lots in a subdivision under the conditions above quoted acquire by dedication the right to use streets and alleys then plaintiffs herein, by virtue of their exhibit No. 1, would acquire by grant the right to use the twenty-foot right-of-way in question.

We note that defendants deny the execution of plaintiffs' exhibit No. 1 and, of course, they are entitled to have that question properly passed upon.

For the reasons stated, the judgment appealed from is

Reversed.

CAMPBELL and VAUGHN, JJ., concur.

FISHEL AND TAYLOR, ARCHITECTS v. GRIFTON UNITED METHODIST CHURCH, AN UNINCORPORATED RELIGIOUS ASSOCIATION

No. 7038SC394

(Filed 5 August 1970)

1. **Rules of Civil Procedure § 12— judgment on the pleadings**

Judgment may not be entered on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition.

2. **Rules of Civil Procedure § 12— judgment on the pleadings — consideration of pleadings**

Judgments on the pleadings are not favored and a motion for judgment on the pleadings admits for the purpose of the motion the allegations of the adverse party and requires that such allegations be liberally construed.

3. Architects; Contracts § 18— written contract — subsequent parol agreement — issue for jury

In this action to recover for architectural services rendered, defendant's pleadings raised a legitimate issue of fact as to whether, subsequent to the execution of the written contract sued on, the parties entered a parol agreement that defendant would not abandon the building project as the written contract gave it a right to do upon assurance by plaintiff architects that the total cost of the project would not exceed a specified amount, and the trial court erred in rendering judgment on the pleadings in favor of plaintiffs.

APPEAL by defendant from *Parker, J.*, 2 March 1970 Civil Session, PITT Superior Court.

This is an action by plaintiffs to recover for architectural services rendered. In their complaint they allege, in material part, the following: In January 1969 plaintiffs and defendant entered into a written contract, a copy being attached to and made a part of the complaint, whereby plaintiffs agreed to render certain professional services pertaining to a new sanctuary proposed to be constructed by defendant, and defendant agreed to pay specified compensation for said services. After conferences with defendant's officials, plaintiffs prepared certain plans and specifications which were approved by said officials. The plans were submitted to numerous contractors for bids and the lowest bona fide bid received was for $288,700. Plaintiffs are entitled to compensation based in part on the low bid received and after allowing all credits are entitled to recover $8,588.48 plus interest from defendant.

Defendant filed answer and counterclaim in which it admitted the execution of the written contract but alleged that the contract was subject to certain representations made by plaintiffs as to maximum cost of the project; that the lowest bid received greatly exceeded the cost represented by plaintiffs causing defendant to abandon the project; and that not only are plaintiffs not entitled to recover from defendant but defendant is entitled to recover $4,152.00 from plaintiffs on its counterclaim. Plaintiffs filed a reply generally denying the additional allegations of the answer and counterclaim.

When the case came on for trial, plaintiffs moved for judgment on the pleadings. Following a hearing, the trial court allowed the motion and from judgment predicated thereon defendant appealed.

R. Mayne Albright for plaintiff appellees.

White, Hooten & White and Wallace, Langley & Barwick for defendant appellant.

BRITT, J.

The sole question for our determination is: Did the trial court err in granting judgment for plaintiffs on the pleadings? We hold that it did.

[1] In *Jones v. Warren*, 274 N.C. 166, 161 S.E. 2d 467 (1968), it is said: "* * * The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. [Citations]"

[2] Judgments on the pleadings are not favored and a motion for judgment on the pleadings admits for the purpose of the motion the allegations of the adverse party and requires that such allegations be liberally construed. *Tilley v. Tilley*, 268 N.C. 630, 151 S.E. 2d 592 (1966).

[3] We think at least one issue arises on the pleadings. Article 6.4 of the contract provides as follows:

> "If the Project is suspended for more than three months or abandoned in whole or in part, the Architect shall be paid his compensation for services performed prior to receipt of written notice from the Owner of such suspension or abandonment, together with Reimbursable Expenses then due and all terminal expenses resulting from such suspension or abandonment."

In its further answer and counterclaim, defendant alleges that prior to the execution of the contract, defendant advised plaintiffs that the most it could afford for the total project was $175,000; that plaintiffs assured defendant they could develop the plans and specifications so that the total cost of the project would not exceed said amount; that after the contract was executed and plaintiffs had made further studies and calculations, they advised defendant that the project could not be completed for $175,000 but could be completed for $200,000; that relying on said assurance defendant advised plaintiffs to proceed to prepare the plans and specifications; that after the plans and specifications were completed they were submitted to contractors for bids and the lowest bid received, plus architectural fees and certain furnishings, amounted to $325,000.

Defendant contends that had it not been for the representations made by plaintiffs after the contract was executed that the total cost of the project under the plans and specifications they would prepare would not exceed $200,000, defendant would have abandoned the project at that point and not only would not be involved in the claim now made by plaintiffs but would have saved $4,152.00 paid to plaintiffs; that its decision to continue with the project provided a new consideration for plaintiffs' subsequent agreement that the total cost of the project would not exceed $200,000.

Plaintiffs contend that the written contract specifically rules out guaranteed estimates of cost and provides that "[t]his Agreement may be amended only by written instrument signed by both Owner and Architect."

In *Childress v. Trading Post,* 247 N.C. 150, 100 S.E. 2d 391 (1957), our Supreme Court said:

> " 'The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. *Mfg. Co. v. Lefkowitz,* 204 N.C. 449, 168 S.E. 517; *Bixler v. Britton,* 192 N.C. 199, 134 S.E. 488. *This principle has been sustained even where the instrument provides for any modification of the contract to be in writing. Allen v. Bank,* 180 N.C. 608, 105 S.E. 401.' *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 2d 34." (Emphasis added.)

We hold that defendant's contention discussed above, fully supported by allegations in the pleadings, raises a legitimate issue rendering judgment on the pleadings in favor of plaintiffs' error.

We do not say what other issues, if any, arise on the pleadings but leave that question for later determination by the appropriate tribunal.

For the reasons stated, the judgment appealed from is

Reversed.

CAMPBELL and VAUGHN, JJ., concur.

HARWELL ENTERPRISES, INC. v. CLARENCE E. STEVENS, TRADING AS STEVENS ENGINEERING COMPANY

No. 7027SC426

(Filed 5 August 1970)

1. **Pleadings § 23; Judgments § 13— default judgment — frivolous demurrer**

In this action for breach of an alleged contract to design, fabricate, test and deliver a silk screen machine to plaintiff's specifications, demurrer by defendant on the ground the complaint failed to state a cause of action because it did not allege a written contract signed by defendant as required by G.S. 25-2-201 was not clearly and palpably frivolous and interposed only for the purpose of delay, and the trial court did not err in the denial of plaintiff's motion for judgment on the pleadings.

2. **Contracts § 27— action for breach of contract — failure to prove valid contract**

In this action for breach of an alleged contract to design, fabricate, test and deliver a silk screen machine to plaintiff's specifications, plaintiff's evidence was insufficient to show a valid contract between the parties resulting from a meeting of the minds as to all the terms thereof.

APPEAL by plaintiff from *Falls, J.*, 6 April 1970 Civil Session of GASTON County Superior Court.

Plaintiff alleges that "defendant entered into an agreement and contract with plaintiff whereby defendant agreed 'to design, fabricate, functionally test and deliver an automatic silk screen machine to specifications as written by Harwell Enterprises, Inc., dated April 18, 1968, supplemented by specifications received from Arrow Metal Products (via telephone and recorded April 17, 1968, to be confirmed via letter) subject to approval or modification by Harwell Enterprises, Inc.' "; that defendant agreed to deliver the machine on or before 22 May 1968; that defendant was to be paid a total of $4500; that on 17 April 1968, plaintiff paid to defendant, by check, $1500 as partial payment; that in late May or early June defendant notified plaintiff that he would not perform his contract and plaintiff had to employ personnel and take over the building of the machine. Plaintiff seeks to recover the difference between the original price agreed upon and the amount allegedly spent by plaintiff in completing the production of the machine. This action came on for trial on 6 April 1970. At the close of the plaintiff's evidence, defendant

in effect moved for a directed verdict "by reason of the fact that the plaintiff's evidence is totally failing in proving a contract between Harwell Enterprises, Inc., the Plaintiff, and the Defendant." This motion was allowed, the court concluding as a matter of law that the plaintiff failed to prove a claim for relief and ordered that the action be "dismissed as of non-suit."

Whitener & Mitchem by Basil L. Whitener and Anne M. Lamm for plaintiff appellant.

Frank P. Cooke by James C. Gray for defendant appellee.

MORRIS, J.

[1] Plaintiff's first assignment of error is directed to the overruling of its motion for judgment on the pleadings. Plaintiff earnestly contends that a demurrer interposed by defendant on 11 September 1969 and overruled was a sham and frivolous pleading, for the sole purpose of delaying the plaintiff in procuring judgment. The ground stated for the demurrer was that the complaint failed to state a cause of action because it does not allege a written contract signed by defendant as required by G.S. 25-2-201. We hold that the raising of the question by defendant by demurrer in this case was not clearly and palpably frivolous and interposed only for the purpose of delay. This assignment of error is overruled.

[2] Plaintiff next contends that the granting of defendant's motion at the close of plaintiff's evidence constituted reversible error. We do not agree. Plaintiff's evidence, in our judgment, is not sufficient to support a finding that a valid, enforceable contract existed between plaintiff and defendant. Plaintiff's evidence was that on 17 April 1968, a conversation was had between plaintiff's general manager, Mr. Andrew Furyk, and defendant; that on 18 April 1968, plaintiff sent defendant a "confirmed written purchase order signed by Mr. Furyk which confirmed the verbal purchase order". The president of plaintiff testified: "I say that the basis of our contract with Stevens was that on or about the 18th of April 1968, Stevens entered into an agreement and contracted with our company whereby he agreed to 'design, fabricate, functionally test and deliver an automatic silk screen machine to specifications as written by Harwell Enterprises, Inc., dated April 18, 1968, supplemented by specifications received from Arrow Metal Products (via tele-

phone and recorded April 17, 1968, to be confirmed via letter) subject to approval or modification by Harwell Enterprises, Inc.' That is what I say is the basis of our contract.", and further "As to your question as to whether there was 'some sort of oral contract between me and Mr. Stevens on that date' I say that we entered into the contract on April 17, verbally, and no specifications had been sent to him at that time." Mr. Furyk, who had conducted the negotiations, did not testify. The written purchase order referred to specifications dated 18 April 1968, supplemented by specifications received from Arrow to be confirmed by letter, subject to approval or modification by Harwell Enterprises, Inc. Plaintiff's evidence was that the original specifications called for a minimum rate of continuous production of 15 shelves per minute but this was subsequently changed to 20 shelves per minute "after the original agreement," that the change was initialed by Mr. Furyk. Although plaintiff's president testified there was an oral agreement, there was no evidence as to what that agreement was, other than the written purchase order which specifically stated that the specifications submitted were subject to modification. If at any point there was actually a valid contract resulting from a meeting of the minds as to all of the terms thereof, the evidence does not disclose it.

The evidence does not meet the test set out in *Thompson-McLean, Inc. v. Campbell,* 261 N.C. 310, 314, 134 S.E. 2d 671 (1964), where the Court said:

> " 'To constitute a valid contract the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms are not settled, there is no agreement.' *Goeckel v. Stokely,* 236 N.C. 604, 73 S.E. 2d 618. 'Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation.' 1 Elliott on Contracts, § 175; *Croom v. Lumber Co.,* 182 N.C. 217, 108 S.E. 735."

Affirmed.

BROCK and GRAHAM, JJ., concur.

L. H. WALL, ADMINISTRATOR OF THE ESTATE OF GENEVA E. WALL, DECEASED v. DIAMOND STATE LIFE INSURANCE COMPANY, A CORPORATION AND FAMILY FINANCE AND ACCEPTANCE CORPORATION OF WINSTON-SALEM, N. C.

No. 7025DC346

(Filed 5 August 1970)

Insurance §§ 18, 64— accident and life policy — incontestability clause — age exclusion clause

A provision in a life and accident indemnity policy that the policy shall not cover any person over sixty-five years of age controls over another policy provision that any misstatement in the application of the policy shall become incontestable by the company after one year from date of issue; consequently, where a 72-year-old insured misstated her age as 52 years, recovery under the policy was limited to the return of premiums paid.

APPEAL by plaintiff from *Whitener, District Judge,* 2 February 1970 Session, CALDWELL District Court.

This case was heard by the trial judge upon an agreed statement of facts which, except as the same may have been incorporated in the judge's findings of fact, was not brought forward in the record on appeal. The pertinent facts as they appear in the judgment and in the policy in question may be stated as follows: On 6 October 1967 Diamond State Life Insurance Company, hereinafter called Insurance Company, issued a policy providing accident and health indemnity and life insurance for Geneva E. Wall, hereinafter referred to as the insured. The premium for the full twenty-five month term of the policy was paid. Family Finance and Acceptance Corporation of Winston-Salem, hereinafter called Finance Company, procured the policy and was named first beneficiary to the extent of any indebtedness owed it by the insured. The Finance Company acted as agent for the Insurance Company in procuring the policy which it required before making the loan to insured. The insured's age was misstated in that it was stated in the policy to be 52 when, in fact, it was 72. The insured died on 18 November 1968. More than one year after the issuance of the policy, the insurance company denied the claim for the face value of the policy and tendered the amount of the premium paid by the insured. The second beneficiary having predeceased the insured, the administrator of the insured's estate instituted this action to

recover $747.91, the amount alleged to be due upon the death of the insured.

The two provisions of the policy which are relevant here are as follows:

"TIME LIMIT ON CERTAIN DEFENSES: (a) After one year from the date of issue of this Policy, no misstatements made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after expiration of such one-year period. (b) No claim for loss incurred or disability (as defined in the policy) commencing after one year from the date of issue of this Policy shall be reduced or denied on the ground a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this Policy."

* * *

"AGE LIMIT: The Insurance in this Policy shall not cover any person over sixty-five years of age. Should the sixty-sixth birthday fall within a period for which the premium is accepted by the Company or, if the Company accepts the premium after such date, coverage provided by this Policy shall continue in force subject to any right of cancellation to the end of such period for which the premium has been accepted. In the event the age of the Insured has been misstated and if, according to the correct age of the Insured, the coverage provided by the Policy would have become effective, or would have ceased prior to the acceptance of such premium or premiums, then the liability of the Company shall be limited to the refund, on request, of all premiums paid for the period not covered by the policy."

The trial judge made the following conclusions of law, among others:

"3. That the incontestable clause does not preclude defendant from asserting the limitation on benefits payable under the policy due to the age of the insured.

4. That the insured being over sixty-five years of age was, according to the terms of the policy, uninsurable on the date the policy was issued.

* * *

6. That with the provision relating to age in the policy of insurance herein, plaintiff's recovery is limited to a return of the premiums paid while the insured was over the age of sixty-five years.

"7. That the plaintiff is entitled to recover of defendant the sum of $52.97."

The court had previously sustained a demurrer filed by the Finance Company on the ground that no cause of action was stated against that defendant. From the judgment sustaining the demurrer and from the judgment denying recovery against the Insurance Company except for the sum representing the amount of premiums paid, plaintiff appealed.

L. H. Wall for plaintiff appellant.

Wilson and Palmer by Hugh M. Wilson for defendant appellees.

VAUGHN, J.

The only real question presented by the appeal is whether the provisions of the policy contained in the "AGE LIMIT" clause are rendered inoperative by the provisions contained in the "TIME LIMIT ON CERTAIN DEFENSES" clause. To this question our answer is no.

Where a policy provides that in the event of misrepresentation as to age, the contract will be adjusted so as to pay the amount actually due under the insured's correct age. It is generally held that this provision relates not to the efficacy of the contract, but to the benefits due, and is not affected by the incontestable clause. 1 Appleman, Insurance Law and Practice, Sec. 334, p. 606; 43 Am. Jur. 2d, Insurance, § 1169; Annot., 135 A.L.R. 445. It is our opinion that the age limit clause in the policy in question should, for similar reasons, be given effect. "With this provision in the face of the policy, plaintiff's recovery is limited to a return of the premiums paid while the insured was over the age of 65 years." *McCabe v. Casualty Co.*, 209 N.C. 577, 183 S.E. 743. The "AGE LIMIT" clause in the policy is almost identical to G.S. 58-259.1 which requires the same result as to all policies to which it is applicable.

We have carefully considered all of the assignments of error brought forward and argued by plaintiff as to each defendant. The judgments, as to each defendant, are affirmed.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

MRS. W. P. (DONA) HULL v. WINN-DIXIE GREENVILLE, INC.

No. 7029SC324

(Filed 5 August 1970)

1. **Negligence § 1— negligence defined**

Negligence is the failure to exercise that degree of care which a reasonable and prudent man would have exercised under like circumstances, and may consist of acts of commission or omission.

2. **Negligence §§ 5.1, 53— duties of store proprietor to invitee — safe condition of premises**

Defendant supermarket proprietor had the duty to exercise reasonable care to keep the premises in a reasonably safe condition so as not to expose the plaintiff invitee unnecessarily to danger, and to give warning of hidden conditions and dangers of which he had knowledge, or in the exercise of reasonable supervision and inspection should have had knowledge, and of which the plaintiff had less or no knowledge.

3. **Negligence §§ 5.1, 53— unsafe premises — notice charged to proprietor**

A proprietor is charged with notice of an unsafe condition arising from dangerous substances on the floor of the aisles of its store if the unsafe condition has remained for sufficient time for the proprietor to know, or by the exercise of reasonable care to have known, of its existence.

4. **Negligence §§ 5.1, 57— fall by store customer — condition of premises — res ipsa loquitur**

A store proprietor is not an insurer of the safety of his premises.

5. **Negligence §§ 5.1, 57— fall by customer on oily substance — negligence by proprietor — insufficiency of evidence**

Evidence that plaintiff customer slipped and fell on an oily substance believed to be cooking oil on the floor of defendant's supermarket was insufficient to be submitted to the jury on the issue of defendant's negligence, the doctrine of *res ipsa loquitur* being inapplicable, and there being no evidence tending to show that defendant knew or should have known of the dangerous condition or that it was created by defendant's own negligence.

Hull v. Winn-Dixie Greenville, Inc.

APPEAL by plaintiff from *Snepp, J.*, January 1970 Session of RUTHERFORD Superior Court.

Plaintiff's complaint alleges that on 1 May 1965 plaintiff entered the defendant's establishment in Morganton, N. C., as an invitee for the purpose of buying groceries; that an area of the floor was covered by an oily substance believed to be cooking oil; that the substance was not discernible to the plaintiff; that the defendant corporation through its employees and agents negligently caused and permitted the oily substance to remain on the floor and thereby did not provide a safe passageway for customers; that the oily substance had been on the floor for such a period of time that the defendant's employees knew or should have known of its presence and should have removed it; that no warning was given the plaintiff of the dangerous condition of which defendant had actual or constructive notice; and that plaintiff slipped, fell and was injured as a result of the defendant's negligence.

The defendant answered denying the allegations of the complaint. At the close of plaintiff's evidence, the defendant moved for a directed verdict pursuant to Rule 50, Rules of Civil Procedure on the grounds that there was no evidence of negligence on the part of defendant. The motion was granted and plaintiff appealed.

Carroll W. Walden, Jr., for plaintiff appellant.

J. Nat Hamrick for defendant appellee.

VAUGHN, J.

Plaintiff's evidence, when considered in the light most favorable to her and giving her the benefit of every reasonable inference of fact which can be drawn therefrom, as we are required to do, was insufficient to withstand defendant's motion for a directed verdict.

The evidence favorable to the plaintiff tended to show that the plaintiff entered the defendant's establishment at approximately 9:30 a.m. on 1 May 1965 accompanied by her daughter Carol Hull who was 17 years old at that time. The plaintiff proceeded to the end of the frozen food counter to purchase bread. Carol Hull was close behind pushing a grocery cart. At this time the plaintiff fell in a substance that caused "greasy spots" on her clothing. The plaintiff testified that she received no warning

of the substance being on the floor prior to her fall nor was there any sign indicating its presence. Carol Hull testified that she saw her mother fall in what appeared to her to be clear cooking oil which was spattered over an area about five or six feet long; that the floor was clean except for the big spot of oil. This was the extent of the evidence relating to condition of the premises.

[1, 2] The failure to exercise that degree of care which a reasonable and prudent man would have exercised under like circumstances is negligence, and this may consist of acts of commission or omission. 6 Strong, N. C. Index 2d, Negligence, § 1, pp. 3, 4; *Lanier v. Roses Stores, Inc.*, 2 N.C. App. 501, 163 S.E. 2d 416; *Forrest v. Kress & Co.*, 1 N.C. App. 305, 161 S.E. 2d 225. The plaintiff's status as an invitee, 6 Strong, N. C. Index 2d, Negligence, § 59, p. 129; *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408, placed upon the defendant the duty to exercise reasonable care to keep the premises in a reasonably safe condition so as to not expose the plaintiff unnecessarily to danger, and to give warning of hidden conditions and dangers of which it had knowledge, or in the exercise of reasonable supervision and inspection should have had knowledge and of which the plaintiff had less or no knowledge. *Hedrick v. Tigniere*, 267 N.C. 62, 147 S.E. 2d 550; *Quinn v. Supermarket, Inc.*, 6 N.C. App. 696, 171 S.E. 2d 70, *cert. den.*, 276 N.C. 184; *Brady v. Coach Co.*, 2 N.C. App. 174, 162 S.E. 2d 514; *Britt v. Mallard-Griffin, Inc.*, 1 N.C. App. 252, 161 S.E. 2d 155.

[3] The plaintiff failed to offer any evidence tending to show that the defendant's employees or agents had knowledge of the unsafe condition or that defendant, by the exercise of reasonable care, could have known of the condition. There is no evidence of how the oily substance came to be on the floor or how long it had been there. A proprietor is charged with notice of an unsafe condition arising from dangerous substances on the floor of its aisles of its store, if the unsafe condition has remained for sufficient time for the proprietor to know, or by the exercise of reasonable care to have known, of its existence. *Long v. Food Stores*, 262 N.C. 57, 136 S.E. 2d 275.

[4, 5] The defendant is not an insurer of the safety of his premises, *Bowden v. Kress*, 198 N.C. 559, 152 S.E. 625, nor does the doctrine of *res ipsa loquitur* apply. *Harris v. Montgomery Ward & Co.*, 230 N.C. 485, 53 S.E. 2d 536. The plaintiff failed to offer evidence tending to show that defendant knew or should

have known of the dangerous condition or that the dangerous condition was created by defendant's own negligence. Under very similar circumstances nonsuit was held proper in *Pratt v. Tea Co.*, 218 N.C. 732, 12 S.E. 2d 242. The judgment of the trial court directing a verdict in favor of the defendant is

Affirmed.

CAMPBELL and BRITT, JJ., concur.

GOLDEN B. WISE AND WIFE, HELEN O. WISE v. CARL L. ISENHOUR AND ISENHOUR REAL ESTATE AND CONSTRUCTION COMPANY, INC.

No. 7026SC416

(Filed 5 August 1970)

1. **Venue § 5— local or transitory action**

   The form of the action alleged in the complaint determines whether an action is local or transitory.

2. **Venue § 5— transitory action — contract to construct house — notice of lien**

   An action to recover monetary damages for breach of a contract to construct a house is transitory, and the action may not be transferred as a matter of right to the county wherein the house is located; plaintiff's motion to remove defendant's notice of claim of lien upon the house does not make the action local. G.S. 1-76(1).

3. **Judgments § 48— judgment lien — interests created**

   A lien created by a docketed judgment does not confer an estate or interest in real estate within the meaning of the venue statute, G.S. 1-76, but it merely confers the right to subject the realty to the payment of the judgment by sale of the same under execution.

APPEAL by defendants from *Clarkson, J.*, 13 April 1970 Session, MECKLENBURG Superior Court.

Plaintiffs, residents of Mecklenburg County, instituted this action against defendant Carl L. Isenhour, a resident of Rowan County, and Isenhour Real Estate and Construction Company, Inc., a North Carolina corporation with its principal office and place of business in Rowan County, to recover damages for breach of a construction contract. The complaint alleges in summary the following:

On 7 October 1968, plaintiffs and defendants entered into a contract whereby defendants agreed to construct a dwelling for plaintiffs according to plaintiffs' plans and specifications and situate on a tract of land owned by plaintiffs located in Rowan County. Defendants failed to carry out the construction in conformity to plaintiffs' plans and specifications and refused to make the proper corrections. Plaintiffs seek the sum of $13,463.00 for losses and damages resulting from defendants' failure to perform the contract, and for removal and termination of a notice of claim of lien which defendants had placed on record in Rowan County.

Before the time for answering expired, defendants filed a motion to remove the cause to Rowan County as a matter of right, for that the action involves a right or interest in real property and damages for injuries to real property situate in Rowan County.

After reading the pleadings and hearing arguments of counsel, Judge Clarkson denied defendants' motion. From the denial of said motion, defendants appeal.

Williams, Willeford & Boger, by Thomas M. Grady, for appellants.

Craighill, Rendleman & Clarkson, by Hugh B. Campbell, Jr., for appellees.

BROCK, J.

Defendants made a motion for change of venue as a matter of right, by virtue of G.S. 1-76, before time for answering expired.

The pertinent portion of G.S. 1-76 reads:

> "Where subject of action situated.—Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:
>
> (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property."

The sole question presented by this appeal is whether the action is removable as a matter of right to the county in which the land is situate.

[1] The form of the action alleged in the complaint determines whether an action is local or transitory. *Thompson v. Horrell,* 272 N.C. 503, 158 S.E. 2d 633.

"The test is this: If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action." *Thompson v. Horrell, supra.*

[2] Plaintiff's action is to recover monetary damages for breach of the contract; and to remove the notice of lien defendant has filed in Rowan County. An action to recover monetary damages for breach of a contract to construct a house is transitory and is not a local action within the meaning of G.S. 1-76(1); plaintiff's purpose is not to recover real property, not to determine an estate or interest in land, and not to recover for damages to realty. *Thompson v. Horrell, supra.*

Defendants contend, however, that since plaintiffs also request the court to remove the notice if lien, this makes the action local and removable as a matter of right pursuant to G.S. 1-76(1).

[3] It is well settled that a lien created by a docketed judgment does not confer an estate or interest in real estate within the meaning of G.S. 1-76, but merely the right to subject the realty to the payment of the judgment by sale of the same under execution. *Baruch v. Long,* 117 N.C. 509, 23 S.E. 447. This being so, mere notice of a claim of lien would not confer a greater right or interest in the real estate than a docketed judgment and would not bring this action within the purview of G.S. 1-76(1).

[2] "Title to realty must be directly affected by the judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein, . . . It is the principal object involved in the action which determines the question, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone *in personam*

against the parties, the action will be held local." *Rose's Stores v. Tarrytown Center,* 270 N.C. 201, 154 S.E. 2d 320. The principal object involved in the present action is monetary damages. Plaintiffs do not seek a judgment that would affect an interest in land, but seek a judgment *in personam.* It is not, therefore, a local action within the meaning of G.S. 1-76(1), and defendants are not entitled to have the action removed to Rowan County as a matter of right.

Affirmed.

MORRIS and GRAHAM, JJ., concur.

MILTON GRAGG AND WIFE, RUBY GRAGG v. D. R. BURNS AND WIFE, FRANCES BURNS

No. 7025SC345

(Filed 5 August 1970)

1. **Rules of Civil Procedure § 1— date of application**

An action tried subsequent to 1 January 1970 is subject to the Rules of Civil Procedure.

2. **Rules of Civil Procedure § 50; Appeal and Error § 59— motion for directed verdict — waiver — review**

Where defendants failed to renew their motion for a directed verdict following plaintiffs' additional evidence, the Court of Appeals will not pass upon the sufficiency of the evidence to survive a motion for a directed verdict.

3. **Highways and Cartways § 11— neighborhood public roads — sufficiency of pleadings**

In plaintiff's action seeking to enjoin defendants from obstructing an alleged public road, defendants were not entitled to a dismissal of the action on the ground that the action was one to establish a neighborhood public road under G.S. Ch. 136 and the clerk therefore had original jurisdiction over the action, where the complaint did not allege that the road in controversy was a neighborhood public road nor did it refer to G.S. 136, Art. 4.

4. **Evidence § 25— aerial photographs — admissibility — authentication**

Where an aerial photograph was not properly authenticated for introduction into evidence, its admission over objection was prejudicial to defendants in an action to restrain them from obstructing a public road.

APPEAL by defendants from *Martin (Harry C.), J.*, 26 January 1970 Civil Session, CALDWELL Superior Court.

This is an action in which plaintiffs seek to enjoin defendants from obstructing an alleged public road. Plaintiffs allege that the road leads from a state maintained highway, across defendants' lands and through plaintiffs' lands; that the road goes by plaintiffs' residence and provides the only access to and from their property. In their answer defendants deny that the road is a public road, that they have obstructed any public road and that the road in question provides the only access to and from plaintiffs' property.

One issue was submitted to and answered by the jury as follows:

"1. Is there a public road leading from the end of the Highway 1361 through the defendants' property to the southern boundary line of the plaintiffs' property as alleged in the complaint?

ANSWER: YES."

From judgment in favor of plaintiffs entered on the verdict, defendants appealed.

No counsel for plaintiff appellees.

Louis H. Smith for defendant appellants.

BRITT, J.

[1, 2] Defendants assign as error the failure of the trial court to grant their motions to dismiss interposed when plaintiffs first rested and renewed at the conclusion of defendants' evidence. It will be noted that this action was tried subsequent to 1 January 1970, thereby making it subject to the new Rules of Civil Procedure. Treating defendants' motion as one for a directed verdict under Rule 50 (a), we do not think the assignment of error is well taken. After plaintiffs rested their case and defendants offered evidence, plaintiffs offered further evidence but defendants did not renew their motion following plaintiffs' additional evidence. Under the former practice, if the motion to nonsuit was not renewed at the close of *all* the evidence, the sufficiency of the evidence was not presented on appeal. 7 Strong, N.C. Index 2d, Trial, § 20, p. 292. Rule 50(a) contemplates that a motion for directed verdict shall be made "at the close of the

evidence offered by an opponent," which was not done in this case. Therefore, we do not pass upon the sufficiency of the testimony to survive a proper motion for a directed verdict.

[3] Defendants contend that their motions to dismiss should have been granted for the reason that this is an action to establish a neighborhood public road under G.S. 136-67, *et seq.*, and that the clerk of superior court has original jurisdiction over that type of action or proceeding. The case of *Edwards v. Hunter*, 246 N.C. 46, 97 S.E. 2d 463 (1957), appears to be similar but not identical to the case at bar. We quote from that opinion written by Bobbitt, J. (now C.J.):

> "If it appeared from the complaint that the sole purpose of this action was to establish a neighborhood *public* road as defined by G.S. 136-67, defendants' motion to dismiss on the ground that the statutory procedure therefor vests original jurisdiction in the clerk would be well taken. However, the segment of old road in controversy is not referred to in the complaint or in plaintiff's affidavits as a neighborhood *public* road, but as a neighborhood road; nor does plaintiff refer to any of the provisions of G.S. Ch. 136, Art. 4."

The segment of the old road in controversy here is not referred to in the complaint as a *neighborhood* public road but as a public road; nor do plaintiffs in this action refer to any of the provisions of G.S. Ch. 136, Art. 4 in their complaint. The assignment of error relating to plaintiffs' motions to dismiss is overruled.

[4] Defendants assign as error the introduction over their objection of a large aerial photograph, also referred to as a tax map from the Caldwell County Tax Office, purportedly portraying the section of Caldwell County in which the road in controversy is located. The assignment of error is well taken for the primary reason that the photograph or map was not properly authenticated for introduction into evidence. Stansbury, N.C. Evidence 2d, § 153, p. 383. We think defendants were sufficiently prejudiced by this error to warrant a new trial.

Defendants assign as error certain portions of the trial judge's charge to the jury. We do not pass upon these assignments as the objections raised may not occur upon a retrial.

New trial.

CAMPBELL and VAUGHN, JJ., concur.

Cagle v. Robert Hall Clothes and Beaty v. Robert Hall Clothes

REECE W. CAGLE, by HIS NEXT FRIEND, JUDY H. BEATY, v. ROBERT HALL CLOTHES AND JUDY H. BEATY v. ROBERT HALL CLOTHES

No. 7027SC335

(Filed 5 August 1970)

1. **Negligence §§ 5.1, 57— business places — injury to 5-year-old child — directed verdict**

   Plaintiff's evidence that she and her five-year-old son were shopping in defendant's clothing store and that the son was injured when he fell through the plate glass entrance door, *held* insufficient to withstand defendant's motion for a directed verdict.

2. **Negligence § 5.1— business places — liability of proprietor to customer**

   The proprietor of a store is not an insurer of the safety of his customers, and no inference of negligence on his part arises from the mere fact of a customer's injury on his premises.

3. **Negligence § 5.1— liability of store proprietor — actionable negligence**

   Any liability on the part of a store proprietor for injuries suffered by his customers attaches only for such injuries as result from his actionable negligence.

APPEAL by plaintiffs from *Martin (Robert M.), S.J.*, 18 February 1970 Session, GASTON Superior Court.

These cases were consolidated for trial. In the first case Reece W. Cagle, (the minor plaintiff) sought to recover damages for personal injuries caused by the alleged negligence of the corporate defendant, Robert Hall Clothes. In the second case, Judy H. Beaty, mother of the minor, seeks to recover damages for hospital expenses and for loss of the child's services and income during his minority as a result of his permanent disability.

At the conclusion of the plaintiffs' evidence, the defendant's motion for a directed verdict, pursuant to Rule 50 of the Rules of Civil Procdure, was allowed. Plaintiffs appealed.

Joseph B. Roberts III, for plaintiff appellants.

Mullen, Holland and Harrell by James Mullen for defendant appellee.

VAUGHN, J.

[1] The sole question presented by this appeal is whether plaintiffs' evidence was sufficient to withstand defendant's

motion for a directed verdict. Plaintiff's evidence is to be taken as true and considered in the light most favorable to him, giving him the benefit of every fact and inference pertaining to the issues which may be reasonably deduced from the evidence. *Magnolia Apartments, Inc. v. P. Huber Hanes,* 8 N.C. 394, 174 S.E. 2d 828.

Plaintiffs alleged, in pertinent part, that on 2 August 1968, Judy H. Beaty and her son, Reece Walter Cagle, and other relatives went to the defendant's store located on Wilkinson Boulevard, Mecklenburg County, North Carolina, and that while Judy H. Beaty shopped and purchased merchandise, Reece Walter Cagle, age five years, entertained himself. The child then sought his mother's permission to leave the store and return to their automobile which was parked in a lot nearby. The mother agreed and the child proceeded to the door of the store. He was unable to open the door and related his difficulties to an employee of defendant. When the child again tried to open the door an unanchored rug located next to the door suddenly slipped and caused the child to fall through the door, severely cutting his right leg. The plaintiffs further alleged: that the defendant failed to keep its premises in a safe condition; that it failed to use due care owed to patrons and particularly this minor invitee in failing to warn of a dangerous condition; that it negligently installed and maintained glass of insufficient strength in the door; that it failed to exercise due care in the failure of defendant's employees to assist the minor in leaving the building; and that it allowed and permitted an unanchored rug to be placed in close proximity to the door creating a hazard.

In the light most favorable to the plaintiffs the evidence tended to show that Judy H. Beaty and a saleslady of the defendant were standing at a rack of clothes near the double doors that provided the only entrance and exit for the store. The minor sought permission from his mother to go to their automobile. Consent was granted and initial efforts to open the door were in vain whereupon the minor returned to his mother and stated, "Mommy, I can't get out," and his mother responded, "Well, son, push on the door." The child returned to the door and moments later a crash was heard, the glass of the door was broken and the minor was lying injured on the outside of the door. There were no eyewitnesses to the accident. Judy H. Beaty testified that the door was constructed of aluminum and plate glass "similar to those you see in supermarkets and like the doors

in the courthouse." There was no evidence with respect to a rug. Defendant sold children's clothing and other items ordinarily purchased by and for children.

[2, 3] It is well established that the proprietor of a store is not an insurer of the safety of his customers and that no inference of negligence on his part arises from the mere fact of a customer's injury on his premises, the doctrine of *res ipsa loquitur* not being applicable. *Routh v. Hudson-Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1; *Gaskill v. A & P Tea Co.*, 6 N.C. App. 690, 171 S.E. 2d 95. Any liability on the part of the proprietor for injuries suffered by his customers attaches only for such injuries as result from his actionable negligence. *Pratt v. Tea Co.*, 218 N.C. 732, 12 S.E. 2d 242.

When plaintiffs' evidence is considered in the light of the applicable well-established principles, we are of the opinion that the trial court properly entered directed verdicts for defendant. There was no evidence tending to show that defendant failed to do anything which a storekeeper of ordinary care and prudence would have done under the same circumstances. Plaintiffs alleged but failed to offer evidence tending to show a defect in the premises which proximately resulted in the injury. Plaintiffs alleged but failed to offer evidence tending to show a breach of duty on the part of defendant's employees.

The judgments appealed from are

Affirmed.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES W. LEDFORD

No. 7023SC389

(Filed 5 August 1970)

1. **Escape § 1— felonious escape — service of sentence for felony — State's burden of proof**

In order to convict defendant of the offense of felonious escape as charged in the bill of indictment, the State had to prove, among other things, that at the time of the escape defendant was in the lawful custody of the State Department of Correction and was serving a sentence imposed upon a plea of guilty, a plea of *nolo contendere*, or a conviction for a felony.

2. **Escape § 1— proof of lawfulness of custody — competency of commitment**

A properly certified copy of the commitment is competent in an escape prosecution to show the lawfulness of the custody and the type of offense for which defendant was committed.

3. **Escape § 1— felonious escape — failure to require jury to find defendant in custody for felony**

In this prosecution for felonious escape, the trial court erred in failing to instruct the jury that in order to convict defendant of the felony of escape it must find that defendant was imprisoned or in lawful custody serving a sentence imposed after conviction, a plea of guilty or a plea of *nolo contendere* to a felony.

4. **Escape § 1— custody of Highway Commission foreman — prosecution under G.S. 148-45**

Defendant's contention that he should have been tried for escape under G.S. 14-255 rather than under G.S. 148-45 is without merit where the evidence shows that when he escaped defendant was in the custody of the State Department of Correction and was under the supervision of a foreman for the State Highway Department, and there is no evidence that defendant was being hired out by a county, city or town under the provisions of G.S. 14-255.

APPEAL by defendant from *Beal, S.J.*, April 1970 Regular Mixed Session of Superior Court held in WILKES County.

Defendant was convicted upon a bill of indictment charging the offense of felonious escape on 15 July 1969 from custody of the Wilkes County Subsidiary No. 6557 of the State Department of Correction. The indictment contains the allegation that defendant was serving a sentence imposed at the March 1966 Term of Superior Court held in Mecklenburg County for the felony of breaking and entering with intent to commit a felony. From a sentence of six-months imprisonment, the defendant assigned error and appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Safron for the State.

Julius A. Rousseau, Jr., for defendant appellant.

MALLARD, C.J.

[1, 2] In order to sustain a conviction of this defendant for the offense of escape charged in the bill of indictment, the State must prove, among other things, from the evidence and beyond a reasonable doubt that at the time of the escape the defendant was in the lawful cusody of the State Department of Correction

(G.S. 148-6) and was serving a sentence imposed upon a plea of guilty, a plea of *nolo contendere,* or a conviction for a felony. *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266 (1969); *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252 (1966). A properly certified copy of the commitment is competent, when introduced into evidence, to show the lawfulness of the custody and the type of offense for which he was committed. *State v. Cooper, supra*; *State v. Vaillancourt,* 268 N.C. 705, 151 S.E. 2d 610 (1966).

The defendant excepts to the following portion of the charge:

> "* * * (I)f you find from the evidence and beyond a reasonable doubt that the defendant, James W. Ledford was in lawful custody of the North Carolina Department of Correction on the 15th day of July, 1969, and if you further find that he was in the custody of Mr. L. L. Yates, Superintendent of the Wilkes County Subsidiary No. 6557 of the North Carolina State Prison System or the North Carolina Department of Correction, and if you further find that while in such lawful custody that he was serving a sentence which was imposed in the Superior Court of Mecklenburg and if you further find that he did willfully and unlawfully escape or attempt to escape from the custody of the said L. L. Yates, Superintendent of the Wilkes County Subsidiary No. 6557 of the North Carolina Department of Correction at Wilkesboro, N. C., and if you so find from the evidence and beyond a reasonable doubt, then and in that event, it would be your duty to return a verdict of guilty."

[3] This exception is well taken. The vice in the foregoing instruction is that the court instructed the jury that if the defendant was in the lawful custody of the North Carolina Department of Correction serving a sentence imposed upon him in the Superior Court of Mecklenburg County and that if he unlawfully escaped or attempted to escape, he would be guilty. The defendant in this case was charged with the felony of escape. The court did not require the jury to find that the defendant was imprisoned or in lawful custody serving a sentence which was imposed in the Superior Court of Mecklenburg County after a conviction, a plea of guilty, or a plea of *nolo contendere* to a felony. There are two classes of escape from the State prison system. One is a felonious escape and the other is a mis-

demeanor. G.S. 148-45(a). The defendant was entitled to have his case submitted to the jury on the question of whether he was imprisoned while serving a sentence imposed for a felony or for a misdemeanor. The court in the above portion of the charge did not distinguish between felonious escape and a non-felonious escape. The defendant was entitled to have the case so presented. Moreover, in the record in this case the commitment does not appear, and the evidence does not show whether the defendant was serving a prison term imposed for a felony or a misdemeanor. The commitment is referred to in the evidence and was offered into evidence but was not brought up on this appeal.

[4] Defendant also contends that the sentence imposed was excessive because he should have been tried under G.S. 14-255 rather than G.S. 148-45. There is no merit in this contention. G.S. 14-255 relates to a prisoner escaping from a person having him in custody after such prisoner shall have been hired out by a county, city or town. There is absolutely no evidence in this case that the defendant was being hired out by a county, city or town under the provisions of G.S. 14-255. The evidence is that the defendant was in the custody of the North Carolina Department of Correction and was under the supervision of a foreman for the State Highway Department. *State v. Whitley,* 264 N.C. 742, 142 S.E. 2d 600 (1965).

The defendant has other assignments of error which we do not deem necessary to discuss since they may not recur on a new trial.

New Trial.

PARKER and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. LEE McQUEEN, JR.

No. 7019SC304

(Filed 5 August 1970)

1. **Criminal Law § 87— allowance of leading questions — discretion of court**

The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings thereon will not be reviewed on appeal absent a showing of abuse of discretion.

2. **Criminal Law § 87— contention that court allowed leading questions**

Defendant's contention that the court erred in permitting the solicitor to ask leading questions is without merit where the record shows that most of the questions objected to were proper, and that when one leading question was asked by the solicitor, the court permitted the solicitor to rephrase the question so as to place it in proper form.

3. **Automobiles § 46— opinion testimony as to speed**

Any person who has had an opportunity for observation is competent to testify as to the rate of speed of a moving automobile.

4. **Automobiles §§ 46, 112— manslaughter prosecution — opinion testimony as to speed**

In this manslaughter prosecution, the trial court did not err in allowing three witnesses for the State to testify as to their opinion of the speed of defendant's car, where each of the three witnesses testified that he observed defendant's car for a sufficient length of time and moving over a sufficient distance to render competent his opinion as to its speed, discrepancies in their testimony as to the opportunity each had to observe defendant's car and as to his opinion of its speed being for the jury to resolve.

APPEAL by defendant from *Kivett, J.*, 26 January 1970 Criminal Session of RANDOLPH Superior Court.

Defendant was tried on his plea of not guilty to an indictment charging him with manslaughter. The State's evidence tended to show that defendant was intoxicated and was driving his automobile at high speed when it collided with an automobile being driven by Randy Keith Harvell, who was killed as result of the collision. The jury found defendant guilty of involuntary manslaughter, and from judgment imposing prison sentence, defendant appealed.

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

Walker, Bell & Ogburn by John N. Ogburn, Jr., for defendant appellant.

PARKER, J.

[1, 2] Two highway patrolmen who observed defendant at the scene of the collision testified for the State that in their opinion defendant had been drinking and was under the influence of some type of alcoholic beverage. Appellant's first nine assignments of error are directed to the trial court's rulings with reference to this testimony, appellant contending the court

erred in permitting the solicitor to ask leading questions. "The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion." Stansbury, N.C. Evidence 2d, § 31, at p. 59; *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225. Examination of the record in the present case reveals that most of the questions objected to were in all respects proper. When one leading question was asked by the solicitor, the court, without expressly ruling upon defendant's objection, permitted the solicitor to rephrase the question so as to place it in proper form. In this there was manifestly no abuse of discretion. Appellant's first nine assignments of error are overruled.

[4] Appellant contends the trial court erred in allowing three witnesses for the State to testify as to their opinion of the speed of defendant's car. One witness, a passenger in the car which was struck by defendant's automobile, testified that he first saw defendant's automobile when it was about 245 yards away and observed it from that point on until the collision. This witness stated that in his opinion defendant was going 95 to 100 miles an hour. A second witness, who was riding in a car traveling in the same direction as defendant, testified that from the time he first saw defendant's car until it went out of sight was "probably a minute," and that his best estimate of the distance over which he observed defendant's car moving "would be a quarter of a mile or maybe half a mile." This witness placed the speed of defendant's car at 75 miles per hour. A third witness said he observed defendant's car for "about a minute and for a distance of a quarter to a half mile," and placed the speed at between 60 and 70 miles per hour.

[3, 4] "It is a general rule of law, adopted in this State, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile." *Lookabill v. Regan,* 247 N.C. 199, 100 S.E. 2d 521. Each of the three witnesses in this case testified that he observed defendant's car for a sufficient length of time and moving over a sufficient distance to render competent his opinion as to its speed. Discrepancies in their testimony, both as to the opportunity each had to observe defendant's car and as to his opinion of its speed, were for the jury to resolve.

We have carefully reviewed the entire record and find No error.

CAMPBELL and VAUGHN, JJ., concur.

JOHN RALPH GIBSON v. ELMER J. MONTFORD AND DURWOOD AMAN

No. 703SC318

(Filed 5 August 1970)

1. **Automobiles § 50— nonsuit as to driver of third vehicle not involved in collision**

In this action for personal injuries sustained by plaintiff in a collision between automobiles operated by plaintiff and first defendant, the trial court did not err in granting motion for nonsuit by second defendant who was the operator of a third vehicle which did not come in physical contact with the colliding vehicles.

2. **Evidence § 14— exclusion of hospital record**

In this action for personal injuries sustained in an automobile accident, the trial court did not err in the exclusion of a hospital record indicating that an examination of defendant's blood a short while after the collision disclosed the presence of a substantial quantity of ethyl alcohol.

3. **Automobiles § 47— description of accident scene by investigating officer**

In this action arising out of an automobile accident, no prejudicial error appears in the admission of testimony by a highway patrolman with respect to tire marks and the position of the cars when he arrived at the accident scene.

4. **Appeal and Error § 45— abandonment of assignment of error**

Assignment of error not brought forward and argued in the brief is deemed abandoned. Court of Appeals Rule No. 28.

5. **Trial § 33— instructions — explaining law arising on the evidence**

In this action for personal injuries sustained in an automobile accident, the trial court sufficiently declared and explained the law arising on the evidence as to all the substantial features of the case.

APPEAL by plaintiff from *Copeland, S.J.*, November 1969 Civil Session, CARTERET Superior Court.

This is an action to recover for personal injuries sustained by plaintiff in a collision between automobiles operated by

plaintiff and defendant Montford. Plaintiff alleged that defendant Aman was the operator of a third vehicle, the negligent operation of which was one of the proximate causes of the collision although there was no physical contact between the Aman vehicle and either of the others.

At the conclusion of plaintiff's testimony, defendant Aman's motion for nonsuit as to him was allowed. Issues of negligence, contributory negligence and amount of damages as to plaintiff's claim against defendant Montford were submitted to the jury. The issue of negligence was answered in the negative and from judgment allowing him no recovery, plaintiff appealed.

Hamilton, Hamilton & Phillips by Luther Hamilton, Sr., for plaintiff appellant.

Wheatly & Mason by C. R. Wheatly for defendant appellee Aman.

George H. McNeill and Boshamer & Graham by Otho L. Graham for defendant appellee Montford.

BRITT, J.

[1] Plaintiff assigns as error the granting of defendant Aman's motion for nonsuit at the close of plaintiff's evidence. Suffice to say, we have carefully reviewed the evidence in the light most favorable to plaintiff but find that it fails to disclose any act or omission by defendant Aman which constituted actionable negligence and was a proximate cause of plaintiff's injury and damage. For that reason we hold that the trial court did not err in granting defendant Aman's motion for nonsuit. The assignment of error is overruled.

[2] Plaintiff assigns as error the failure of the court to admit in evidence, over defendant Montford's objection, a record from the Carteret General Hospital indicating that an examination of Montford's blood a short while after the collision disclosed the presence of a substantial quantity of ethyl alcohol in his blood. Plaintiff's able counsel concedes that by reason of the decision in *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326, and G.S. 8-53 this evidence was not admissible over defendant Montford's objection unless the trial judge should rule that in his opinion the evidence was necessary to a proper administration of justice; but, plaintiff contends that the trial judge abused his discretion in not ordering the admission of the evidence.

We disagree with this contention and do not think any abuse of discretion is shown. The assignment of error is overruled.

[3] Plaintiff assigns as error the testimony of Highway Patrolman Jones with respect to tire marks, position of cars, etc., at the time the patrolman arrived at the scene. We have scrutinized the patrolman's testimony in light of the other testimony introduced and perceive no prejudicial error in any part of it. The assignment of error is overruled.

[4, 5] Finally, plaintiff assigns as error the failure of the trial judge in his charge to the jury to "declare and explain the law arising on the evidence" as required by applicable statutes and decisions. We note that plaintiff's assignment of error No. 13 based upon exception No. 13 to a specific portion of the charge is not brought forward and argued in his brief, therefore, it is deemed to be abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Considering the charge contextually, as a whole, we think the court sufficiently declared and explained the law arising on the evidence as to all the substantial features of the case. The assignment of error is overruled.

No error.

CAMPBELL and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES HAROLD JOHNSON

No. 7028SC298

(Filed 5 August 1970)

Criminal Law § 26— plea of former jeopardy

A judgment of dismissal in a prior prosecution charging defendant with the felonious breaking and entering of the premises occupied by one Lloyd R. Montgomery will not support defendant's plea of former jeopardy in a new prosecution charging defendant with the felonious breaking and entering of premises occupied by one Elvira C. Montgomery, the prosecutions having charged different offenses.

APPEAL by defendant from *Grist, J.*, 26 January 1970 Criminal Session of BUNCOMBE Superior Court.

At the 3 November 1969 Session of Buncombe Superior Court defendant was brought to trial upon an indictment charg-

ing him with having committed on 7 July 1969 the offense of breaking and entering "a certain storehouse, shop, warehouse, dwelling house and building occupied by one Lloyd R. Montgomery, 648 Swannanoa River Road, Asheville, N. C., wherein merchandise, chattels, money, (etc.), . . . were being kept, . . . with intent to steal, take, and carry away the merchandise, (etc.), . . . of the said Lloyd R. Montgomery, 648 Swannanoa River Road, Asheville, N. C." At the close of the State's evidence, defendant's motion to dismiss was granted on the grounds that there was a variance between the allegations in the indictment and the evidence as to ownership of the property involved, the court finding that it was alleged in the indictment that the property was owned by Lloyd R. Montgomery and the evidence showing that it was owned jointly with his wife, Elvira Lucile Montgomery. The motion to dismiss was granted "with leave of the Solicitor to draw another bill." Thereafter at the 3 December 1969 Session, the grand jury returned a true bill charging defendant with having committed on 7 July 1969 the offense of breaking and entering "a certain dwelling house and building occupied by one Elvira L. Montgomery, 438 Swannanoa River Road, Asheville, North Carolina wherein merchandise, chattels, money, (etc.), . . . were being kept, . . . with intent to steal, take and carry away the merchandise, chattels, money, valuable securities and other personal property of the said Elvira L. Montgomery. . . ." Defendant was brought to trial upon this latter bill of indictment at the 26 January 1970 Session of Buncombe Superior Court. He pleaded not guilty, was found guilty by the jury, and from judgment imposing prison sentence on the verdict, he appealed to the Court of Appeals.

Attorney General Robert Morgan and Trial Attorney Fred P. Parker III, for the State.

Sanford W. Brown for defendant appellant.

PARKER, J.

Appellant assigns as error the refusal of the trial court to sustain his plea of former jeopardy. There is no merit to this assignment of error. Evidence for the State, both at the November 1969 trial and at the subsequent January 1970 trial from which this appeal was taken, was to the effect that defendant had broken and entered premises at 438 Swannanoa River Road in Asheville which was occupied by one Elvira L. Montgomery,

who was engaged in business under the name of "Cat and Fiddle Restaurant." The indictment under which defendant had been tried at the November 1969 Session of court charged a different offense, having charged the defendant with breaking and entering premises located at 648 Swannanoa River Road, Asheville, N. C., occupied by one Lloyd R. Montgomery. The prior prosecution, having been for a different offense, judgment of dismissal therein would not sustain a plea of former jeopardy when defendant was brought to trial upon a new bill of indictment charging him with felonious breaking and entering of premises at a different location. *State v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558; *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871. The fact that the trial judge at the first trial granted nonsuit by reason of a fatal variance between the allegations in the indictment and the proof as to "ownership of the property involved," rather than for fatal variance between the allegations in the indictment and the proof as to the location of the premises which had been broken and entered, is not material. In any event the two indictments charged different offenses, and a judgment of dismissal for whatever reason entered after a trial on the first indictment would not sustain a plea of former jeopardy when defendant was brought to trial on the charge contained in the second indictment.

We have examined appellant's remaining assignments of error, most of which relate to the judge's charge to the jury, and find them to be without merit.

No error.

CAMPBELL and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. EDWIN J. LASSITER AND STATE OF NORTH CAROLINA v. JAMES HENRY BURGESS

No. 701SC413

(Filed 5 August 1970)

1. **Hunting § 3— hunting deer by artificial light — prosecution — sufficiency of warrants**

Warrants charging that defendants unlawfully and wilfully attempted to take deer with the aid of an artificial light between the hours of sunset and sunrise in an area known to be inhabited and

frequented by deer, *held* sufficient to charge the offense defined by G.S. 113-104; the words "in an area known to be inhabited and frequented by deer" are mere surplusage and may be disregarded.

2. **Hunting § 3; Indictment and Warrant § 13— hunting deer by artificial light — prosecution — bill of particulars**

In a prosecution charging defendants with the unlawful hunting of deer by artificial light, a violation of G.S. 113-104, it was incumbent upon the defendants to ask for a bill of particulars if they desired to know what area of the county the offense took place.

APPEAL by the State from *Hubbard, J.*, March 1970 Criminal Session, GATES Superior Court.

Separate warrants against defendants charged that on or about 29 November 1969 they "did unlawfully and wilfully attempt to take deer with the aid of an artificial light between the hours of sunset and sunrise in an area known to be inhabited and frequented by deer * * * in violation of law G.S. 113-104 and G.S. 113-109."

Defendants were convicted in district court and appealed to superior court. Before pleading to the warrants in superior court, defendants moved to quash the warrants. The motions were allowed and the State appealed pursuant to G.S. 15-179(3).

Attorney General Robert Morgan by Staff Attorney Mrs. Christine Y. Denson for the State.

Jones, Jones & Jones by A. B. Harrington for defendant appellees.

BRITT, J.

G.S. 113-104 provides in pertinent part that "[g]ame birds and game animals shall be taken only in the daytime, between sunrise and sunset * * *" and that "[n]o person shall take any game animals or game birds * * * by aid of or with the use of any jacklight, or other artificial light * * *." By G.S. 113-83, deer is defined as a "game animal." G.S. 113-109(a) provides penalties for violation of Chapter 113 "unless a greater penalty be prescribed for the specific act or acts."

G.S. 113-109(b) provides as follows:

"Any person who takes or attempts to take deer between sunset and sunrise with the aid of a spotlight or other artificial light on any highway or in any field, woodland, or forest, in violation of this article shall, upon conviction, be

fined not less than two hundred fifty dollars ($250.00) or imprisoned for not less than ninety days. In any locality or area which is frequented or inhabited by wild deer, the flashing or display of any artificial light from roadway or public or private driveway so that the beam thereof is visible for a distance of as much as fifty feet from such roadway or driveway, or the flashing or display of such artificial light at any place off such roadway or driveway, when either of such acts is accompanied by the possession of a firearm or a bow and arrow during the hours between sunset and sunrise, shall constitute *prima facie* evidence of a violation punishable under the provisions of the preceding sentence."

[1] We think the warrants were sufficient to survive motions to quash and the trial judge erred in granting said motions. The warrants did not charge an offense under G.S. 113-109(b) because they did not allege that the acts complained of occurred on a highway or in a field, woodland, or forest. (See *State v. Gibbs*, 234 N.C. 259, 66 S.E. 2d 883.) But, under G.S. 113-104, the taking of deer between the hours of sunset and sunrise with the aid of an artificial light is unlawful and an attempt to commit a crime is an indictable offense. *State v. Parker*, 224 N.C. 524, 31 S.E. 2d 531. The words "in an area known to be inhabited and frequented by deer" set forth in the warrants are mere surplusage and may be disregarded.

[2] The record discloses that the trial judge allowed the motions to quash for that the defendants "are entitled to know the area [in Gates County] in which they are charged with having attempted to take deer with the aid of an artificial light." We disagree with this conclusion. For the reasons stated, we think the warrants are sufficient in law. If defendants desire further information, it is incumbent on them to request bills of particulars. *State v. Everhardt*, 203 N.C. 610, 166 S.E. 738.

Reversed.

BROCK and HEDRICK, JJ., concur.

KENNETTE FRAZIER PANHORST v. GEORGE M. PANHORST, JR.

No. 7028SC306

(Filed 5 August 1970)

Appeal and Error § 31— assignment of error to the charge — contentions of appellant

Appellant's challenge to the charge of the trial court was insufficient to merit consideration on appeal, where appellant did not set out in her exception and assignment of error her contention as to what the court should have charged.

APPEAL by defendant from *McLean, J.*, 16 February 1970 Regular Session, BUNCOMBE Superior Court.

This is an action instituted on 14 February 1969 in the General County Court of Buncombe County in which plaintiff wife seeks to recover subsistence and counsel fees from defendant husband. No child was born to the marriage. Trial was by jury in the county court (the district court to become operative in Buncombe County in December 1970), and issues were submitted to and answered by the jury as follows:

"1. Did the defendant abandon the plaintiff, as alleged in the Complaint?

ANSWER: No.

2. If so, was such abandonment without adequate cause or provocation on the part of the plaintiff, as alleged in the Complaint?

ANSWER: _____"

Judgment was entered on the verdict denying plaintiff any recovery and she appealed to superior court where the case was reviewed on the record on errors assigned by plaintiff. The superior court entered judgment allowing certain of plaintiff's assignments of error, vacating the verdict and judgment of the county court, and remanding the case for a new trial and further appropriate proceedings. Defendant appealed to this Court from the superior court judgment.

S. Thomas Walton and William J. Cocke for plaintiff appellee.

Robert E. Riddle for defendant appellant.

BRITT, J.

We have carefully reviewed the record of the trial of this action and are of the opinion that it was free from prejudicial error and that the superior court erred in vacating the county court judgment and ordering a new trial.

Although we have duly considered each of the assignments of error brought forward in the briefs, we deem it necessary to discuss only one of them. On her appeal to superior court, by her assignment of error No. 6, based upon her exception No. 16, plaintiff challenged a portion of the trial judge's jury charge relating to abandonment. It is evident that in this part of the charge the trial judge was following the legal principles declared in *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923, but plaintiff insists that the court did not charge as fully as *Caddell* requires. The record discloses that plaintiff indicated the portion of the charge that she assigned as error, but she did not set out in her exception and assignment of error her contention as to what the court should have charged.

In 1 Strong, N.C. Index 2d, Appeal and Error, § 31, pp. 166, 167, we find the following (references to citations omitted):

> "An assignment of error to the court's failure to charge the law and explain the evidence as required by statute is a broadside exception and will not be considered. And an exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or any other aspect of the case. The exception and assignment of error to the failure of the court to charge the law arising on the evidence on a particular aspect should set out the appellant's contention as to what the court should have charged, or the particular matters which the appellant asserts were omitted. Where the exception fails to specify the matters omitted, it cannot be aided by an assignment of error, since the appellee is entitled to be apprised of the theory of the appeal."

The record further discloses that when the trial judge concluded his charge, he inquired of counsel if further instructions were desired, to which inquiry plaintiff's counsel replied: "You covered it very well, Your Honor." We do not think

plaintiff's challenge of any portion of the jury charge was sufficient.

We hold that the superior court erred in allowing either of plaintiff's assignments of error. The judgment appealed from is reversed and this action is remanded to the Superior Court of Buncombe County for entry of judgment affirming the judgment of the General County Court.

Reversed and remanded.

CAMPBELL and VAUGHN, JJ., concur.

ELIZABETH R. TAYLOR v. RICHARD F. TAYLOR

No. 7016DC358

(Filed 5 August 1970)

Divorce and Alimony §§ 18, 22— alimony and child support — sufficiency of evidence — remand

In the wife's action seeking alimony *pendente lite*, alimony without divorce, and child custody and support, the wife presented no evidence to support her demands for alimony and for custody and support; and the action is remanded for a new hearing on the questions of child custody and support.

APPEAL by defendant from *Floyd, District Judge,* 5 February 1970, Non-jury Session of ROBESON County District Court.

On 23 December 1969 plaintiff instituted this action seeking alimony *pendente lite,* alimony without divorce, custody of minor children born of her marriage to defendant and child support. Plaintiff's complaint contained allegations of adultery, abandonment and indignities to the person of the plaintiff. Defendant answered and denied the material allegations of the complaint. Defendant alleged that when the parties separated, approximately two years prior to the institution of this action, they mutually agreed to live separately and apart from each other. Apparently there was no hearing on the question of alimony *pendente lite.* The case was heard on its merits by the trial judge without a jury.

Both parties offered evidence. The judge made the following "findings of fact":

". . . [T]he defendant has offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome. The plaintiff is a dependent spouse and the defendant owes an obligation of support to the plaintiff and to the children of the marriage, named in the Second Cause of Action in the Complaint herein. The defendant is a person of means and is able physically and financially to provide alimony for the plaintiff and support for the children named in the complaint. Both of the parties are fit and proper persons to have the care, custody and control of the children of the marriage, and it is in the best interests of said children that their primary care, custody and control be placed with the plaintiff, subject to the right to the defendant to reasonable visitation privileges. . . ."

The judgment then ordered that plaintiff be given custody of the minor children; defendant transfer certain cash and property to plaintiff; plaintiff transfer certain property to defendant; defendant pay a fixed sum monthly as alimony to plaintiff; defendant pay a fixed sum for child support and pay plaintiff's attorney a fixed sum for representing plaintiff.

Defendant appealed.

Johnson, Hedgpeth, Biggs and Campbell by John W. Campbell for plaintiff appellee.

McLean, Stacy, Henry & McLean by H. E. Stacy, Jr., for defendant appellant.

VAUGHN, J.

Plaintiff's complaint contained allegations which, if proven, would have entitled her to alimony. G.S. 50-16.2. Plaintiff offered no evidence tending to show the existence of any grounds for alimony. All the evidence was devoted to the financial circumstances of the parties. The record is void of a scintilla of evidence as to the conduct of the defendant or the cause of the separation. Plaintiff, throughout her testimony, referred to "our separation" and at one point "since our mutual separation." There is no evidence to support the court's conclusion that the defendant had offered such indignities to the person of plaintiff as to render her condition intolerable and life burdensome. Plaintiff's action for alimony without divorce should have been dismissed and judgment rendered for defendant. There is also a complete absence of any evidence in the record to support the

court's conclusion as to the best interests of the children with respect to custody.

The judgment entered by the district court judge is reversed. The case is remanded for a new hearing on the question of custody and child support to the end that an order, based on proper findings of fact which are supported by competent evidence, may be entered.

Reversed and Remanded.

CAMPBELL and PARKER, JJ., concur.

DOWD H. PRICE FIXTURE COMPANY v. FLOWERS AND MONROE, INC., HORACE M. FLOWERS, WILLIAM K. MONROE, JR., AND JAMES N. BRITT, JR.

No. 7026DC277

(Filed 5 August 1970)

1. **Pleadings § 25— demurrer for misjoinder of parties and causes**

Where complaint alleged an obligation by the individual defendants and the assumption of this obligation by the corporate defendant, the trial court erred in sustaining the demurrer of the corporate and individual defendants because of misjoinder of causes and parties.

2. **Landlord and Tenant § 7— improvements by lessees — liabilities of owner for payment**

Mere knowledge by the owner that his lessee is causing improvements to be made to the property does not obligate the owner to the person furnishing the labor or materials, absent evidence that the owner allowed the improvements to be made after having reason to believe that such person was looking to him for payments.

APPEAL by plaintiff from *Stukes, District Judge,* 11 December 1969 Civil Session, MECKLENBURG County District Court.

This is an action to recover an unpaid balance of $3,090.23 due for certain cabinet fixtures which were installed by plaintiff pursuant to a contract which called for the payment of a total of $22,000.00. The defendants are James N. Britt, Jr., the building owner, Horace M. Flowers and William K. Monroe, Jr., as individuals and Flowers and Monroe, Inc., a corporation. Defendant Britt, the owner of the building in which the fixtures were installed, demurred on the ground that the complaint

failed to state a cause of action against him. His demurrer was sustained. The court sustained the demurrer of the remaining defendants because of misjoinder of parties and causes of action. From judgments sustaining each of the demurrers, plaintiff appeals.

William D. McNaull, Jr., for plaintiff appellant.

Ervin, Horack and McCartha and Lee and Lee by W. Osborne Lee, Jr., for defendant appellee Flowers and Monroe, Inc.

McLean, Stacy, Henry and McLean by Everett L. Henry for defendant appellees Horace M. Flowers and William K. Monroe, Jr.

L. J. Britt and Son and Haynes and Baucom by Lloyd F. Baucom for defendant appellee Britt.

VAUGHN, J.

[1] The judgments appealed from were entered on 11 December 1969, prior to the effective date of the repeal of Articles 12, 13 and 14 of Chapter 1 of the General Statutes of North Carolina. In view of the repeal of these statutes which formerly governed complaints, answers and demurrers, we do not deem it necessary to review them in order to dispose of the present case. It suffices to say that the trial court erred in sustaining the demurrer of the corporate defendant Flowers and Monroe, Inc., and Horace M. Flowers and William K. Monroe, Jr., individual defendants, because of misjoinder of causes and parties. Among other things the complaint alleges an obligation by the individual defendants and the assumption of this obligation by corporate defendant.

[2] Even when we give the complaint its most liberal construction, no cause of action is stated against defendant Britt. In effect plaintiff alleges that Britt was the owner of the building and knew plaintiff was making the improvements at the instance of the other defendants. Mere knowledge by the owner that his lessee is causing improvements to be made to the property does not obligate the owner to the person furnishing the labor or materials, absent evidence that the owner allowed the improvements to be made after having reason to believe that such person was looking to him for payments. *Air Conditioning*

Co. v. Douglass, 241 N.C. 170, 84 S.E. 2d 828; *Brown v. Ward,* 221 N.C. 344, 20 S.E. 2d 324.

The judgment of the district court is affirmed as to James N. Britt, Jr., and is reversed as to defendants Flowers and Monroe, Inc., Horace M. Flowers and William K. Monroe.

Affirmed in part.

Reversed in part.

CAMPBELL and BRITT, JJ., concur.

CELESTIA S. SMITH v. DR. JOHN W. FOUST AND THE NALLE CLINIC COMPANY, A CORPORATION

No. 7026SC250

(Filed 5 August 1970)

1. **Negligence § 31; Physicians and Surgeons § 16— malpractice action — res ipsa loquitur — instructions**

   Failure of the trial court in a malpractice action to instruct the jury on the doctrine of *res ipsa loquitur* was not erroneous where plaintiff made no request for such instruction.

2. **Trial § 51— setting aside verdict in discretion of court — review**

   Motion to set the verdict aside as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court, whose refusal to grant the motion is not appealable in the absence of manifest abuse of discretion.

APPEAL by plaintiff from *Anglin, J.,* 1 December 1969 Schedule "B" Civil Session, MECKLENBURG Superior Court.

Plaintiff appeals from a jury verdict that defendants were not negligent in her malpractice action against defendant Foust, who performed a tonsillectomy upon her, and his then employer, the Nalle Clinic Company.

Bailey & Davis by Gary A. Davis for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by John G. Golding and James R. Carpenter for defendant appellees.

BRITT, J.

[1] Plaintiff first assigns as error the failure of the trial judge to instruct the jury with reference to the application of the doctrine of *res ipsa loquitur*.

The record reveals that plaintiff did not request instructions on this point. It discloses that after the trial judge completed his charge and held a brief conference with all attorneys appearing in the case he ordered that the record show that no request for further instructions was made by counsel for plaintiff or counsel for defendants. In *Lyles v. Carbonating Co.*, 140 N.C. 25, 52 S.E. 233 (1905), our Supreme Court held, as stated in the second headnote of the opinion: "An exception that the court failed to explain fully to the jury the doctrine of *res ipsa loquitur* cannot be sustained, where the appellant failed to hand up a prayer for instruction to that effect." This ruling was followed in *Isley v. Bridge Co.*, 141 N.C. 220, 53 S.E. 841 (1906). The assignment of error is overruled. We do not hold, or even imply, that the instruction plaintiff now contends for should have been given if requested; we hold only that in view of the cited cases, in the absence of request, plaintiff was not entitled to the instructions.

[2] Plaintiff's other assignment of error is to the failure of the trial judge to grant plaintiff's motion to set the verdict aside as being contrary to the greater weight of the evidence. Plaintiff concedes that 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 appealable in the absence of manifest abuse of discretion. 7 Strong, N.C. Index 2d, Trial, § 51, p. 369. We hold that no abuse of discretion is shown in this case, therefore, the assignment of error is overruled.

Although plaintiff sustained an unfortunate injury, determination of the question of negligence was for the jury and in a trial free from prejudicial error it resolved the issue against her.

No error.

CAMPBELL and VAUGHN, JJ., concur.

EDWIN H. VOORHEES AND WIFE, MILDRED B. VOORHEES v. VERNON C. GUTHRIE AND WIFE, ELMA W. GUTHRIE

No. 703SC423

(Filed 5 August 1970)

1. **Appeal and Error § 50; Trial § 36— statement of contentions — expression of opinion — new trial**

Where trial court inadvertently expressed its opinion in stating the contentions of the parties, the cause must be remanded for a new trial. G.S. 1-180.

2. **Appeal and Error § 31— exception to the charge — statement of contentions**

Exceptions to an expression of opinion in the statement of contentions may be taken by the aggrieved party for the first time on appeal.

APPEAL by defendants from *Parker (Joseph W.), J.*, 9 February 1970 Session, CARTERET Superior Court.

Defendants own three contiguous parcels of land situate on the Atlantic Beach Causeway between the towns of Morehead City and Atlantic Beach. In February 1964 defendants and plaintiffs executed a lease agreement which contained a description of two parcels of land. The lease agreement contained an option to purchase. In 1969 a dispute arose as to whether the third parcel should have been included in the lease agreement. This action was commenced to reform the lease to include the third parcel.

From an adverse verdict and judgment reforming the lease to include the third parcel, defendants appealed.

Nelson W. Taylor for plaintiff.

Boshamer & Graham, by Otho L. Graham, for defendant.

BROCK, J.

[1, 2] The charge of the court to the jury contains inadvertent expressions of opinion which entitle defendants to a new trial. The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of G.S. 1-180. *Bailey v. Hayman,* 220 N.C. 402, 17 S.E. 2d 520. And exceptions to an expression of opinion in the statement of contentions may be taken by the aggrieved party for the first time upon appeal. *State v. Powell,* 6 N.C. App. 8, 169 S.E. 2d 210.

We do not quote the lengthy statement of contentions given by the trial judge because they would not be understandable without our also setting out a full review of the evidence. We conclude that neither would give any particular aid to the bar or the trial bench, and could not serve as a precedent in the future. Suffice to say, in our opinion the warmth and vigor of the trial judge's expressions, although couched in the form of contentions, were effective to impress the jury with the strength of plaintiffs' position and the weakness of defendants'; and undoubtedly conveyed to the jury the impression that the trial judge was of the opinion plaintiffs should prevail in this lawsuit.

It may well be that plaintiffs are entitled to have the lease reformed in accordance with their contentions. Nevertheless, defendants are entitled to have the case presented to the jurors without their being subjected to the opinion of the trial judge upon what the facts of the case are or what the verdict should be.

New Trial.

MORRIS and GRAHAM, JJ., concur.

SADIE C. TAYLOR v. FRANK THOMAS WRIGHT AND AMBROSE TAYLOR

No. 7019SC361

(Filed 5 August 1970)

Damages §§ 10, 13— evidence of hospital and medical expenses — exclusion — payment by insurance

Where, in a personal injury action, it was stipulated that all of plaintiff's medical and hospital expenses had been paid by the defendant's insurance carrier, it was not reversible error for the trial court to exclude from jury consideration the plaintiff's evidence of her hospital and medical expenses.

On *certiorari* to review trial before *Lupton, J.*, 2 June 1969 Session, RANDOLPH Superior Court.

Because of the absence of the court reporter for the 19th District and the consequent inability of counsel to timely obtain a verbatim transcript of the record of trial, this Court allowed *certiorari* to perfect a late appeal.

Plaintiff brought this action to recover for personal injuries alleged to have been suffered in an automobile accident

on 20 March 1967 by reason of the joint and concurring negligence of defendants.

The jury answered that defendant Wright was not negligent, that defendant Taylor was negligent, and awarded damages in the sum of $500.00. Plaintiff appealed.

John Randolph Ingram for plaintiff.

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

Perry C. Henson and Daniel W. Donahue for defendant Taylor.

BROCK, J.

During the course of the presentation of plaintiff's evidence, it was stipulated by plaintiff "that all of the plaintiff's medical and hospital expenses had been paid by the defendant Taylor's insurance carrier." Based upon this stipulation, the trial judge would not allow plaintiff to offer evidence of the amount of the medical and hospital expenses; and he instructed the jury that medical and hospital expenses were not involved in the case. Plaintiff assigns this as error.

In this jurisdiction plaintiff is not entitled to a double recovery, *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754; and plaintiff would therefore have had to submit to a reduction in the verdict by the amount paid by defendant's insurance carrier had the trial judge allowed the evidence to be considered by the jury.

Although we do not consider that it would have necessarily constituted reversible error had the trial judge allowed plaintiff to offer evidence of her medical and hospital expenses, and then to have reduced the verdict by the amount already paid by defendant's carrier, we hold that it was not reversible error in this case for the trial judge to exclude the evidence from consideration by the jury.

Plaintiff's remaining assignments of error have been considered and are overruled.

No Error.

BRITT and HEDRICK, JJ., concur.

JOE PARTIN, ON BEHALF OF HIMSELF AND OTHER INTERESTED TAXPAYERS OF THE CITY OF RALEIGH v. THE CITY OF RALEIGH

No. 7010SC357

(Filed 5 August 1970)

Taxation § 14; Municipal Corporations § 39— municipal privilege license taxes — retailers of sandwiches, soft drinks, cigarettes — service station operator renting space to vending machine company — exemption from tax

Service station operator who, in return for rents and commissions, furnishes space and performs certain other services for the operation of sandwich, open cup soft drink, and cigarette vending machines owned by a vending company is not engaged in the business of retailing such products and is exempt from municipal privilege license taxes imposed upon retailers of such products as a person at whose place of business sandwiches, soft drinks in open cups and cigarettes are sold exclusively through vending machines owned and operated by vendors licensed under G.S. 105-65.1 and paying gross receipts tax thereunder.

APPEAL by defendant from *Bailey, J.*, February 1970 Civil Session, WAKE Superior Court.

The following quotation from the judgment is deemed sufficient to delineate the controversy:

"The defendant seeks to collect privilege license taxes from the plaintiff and others of like class under authority of Raleigh City Ordinances embodied in the Raleigh City Code as Sections 14-159, Restaurants, 14-167, Soft Drinks, Soda Fountains, Soft Drink Stands, and 14-174, Tobacco and Cigarette Retailers and Jobbers. Copy of the pertinent sections of the Code is attached to the complaint as Exhibit A. Each such Ordinance begins 'every person engaged in the business of' and thereafter describes the business or operation sought to be taxed. Defendant conceded in open Court that such Ordinances would apply to the plaintiff and others in similar business only upon a showing that such persons were 'engaged in the business of operating' the particular business sought to be taxed.

"Plaintiff through stipulation offered evidence tending to show and showing that the vending machines located in plaintiff's place of business purveying prepared sandwiches, soft drinks in open cups and cigarettes were owned by Macke Vendapak Co. and the stipulation further set forth and the Court has found such facts by the evidence and its greater weight that those facets of ownership and operation em-

bodied in Paragraph 9 of the Finding of Fact hereinabove set out constitute 'engaging in the business of operating' (a) a place where prepared sandwiches are served (b) the sale of soft drinks in open cup dispensers (it being conceded that there is no statutory exemption under G.S. 105-65.1 with respect to bottle soft drinks), and (c) the retailing of cigarettes, by Macke.

"The defendant has offered testimony tending to show that the plaintiff furnished to Macke Vendapak space for the operation of its vending machines and furnished certain other services as set out in Paragraphs 4, 5, 6, 7, and 8 for which Macke Vendapak periodically paid to the plaintiff certain commissions or rents. The Court determines and so finds as a matter of law that such services rendered as a consideration for the payment of commissions or rents do not constitute engaging in the business of the retailing of sandwiches, soft drinks in open cups and cigarettes by the plaintiff and others of like class. The Court therefore concludes that the plaintiff (and others of like class) are exempt from taxation under Raleigh City Ordinances 14-159, 14-167, and 14-174 as a person or persons at whose place of business sandwiches, soft drinks sold in open cup containers and/or tobacco are sold exclusively through vending machines owned and operated by vendors licensed under N.C.G.S. 105-65.1, and paying gross receipts tax thereunder. Having reached such conclusion based upon the facts submitted, the Court does not deem it necessary to pass on the constitutional questions embodied in the complaint.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The defendant City of Raleigh be and hereby is permanently enjoined from seeking to collect or collecting from the plaintiff and others so described privilege licenses set out in Raleigh Ordinance 14-159, 14-167, and 14-174, as now written."

Defendant excepted to the entry of the judgment and appealed.

Henderson, Henderson and Shuford by David H. Henderson for plaintiff appellee.

Donald L. Smith and Broxie J. Nelson for defendant appellant.

VAUGHN, J.

The only assignment of error brought forward by appellant is that the trial court erred in the signing and entry of the judgment. This presents the face of the record proper for review. The facts were stipulated. We hold that they support the judgment which is regular in form. The judgment is affirmed.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. A. C. WALKER

No. 7023SC408

(Filed 5 August 1970)

Criminal Law § 23— voluntariness of guilty pleas

Record on appeal shows that defendant's pleas of guilty to forgery and to uttering forged checks were freely and voluntarily made.

APPEAL from *Beal, J.*, April 1970 Criminal Session of WILKES Superior Court.

The defendant, A. C. Walker, was charged in nine two-count bills of indictment, proper in form, with forgery and uttering forged checks and in one indictment with larceny of property of less than $200.00 in value, a misdemeanor. At his trial the defendant, an indigent, was represented by his court-appointed attorney, T. R. Bryan.

The record discloses that the defendant entered pleas of guilty to all the bills of indictment charging forgery and uttering forged checks, and that he entered a plea of *nolo contendere* to the bill of indictment charging larceny. No sentence was imposed on the plea of *nolo contendere* to the charge of larceny. The court continued prayer for judgment in seven of the nine cases wherein the defendant had pleaded guilty to forgery and uttering forged checks, and on case number 62, wherein the defendant had pleaded guilty to the indictment charging forgery and

uttering forged checks, the court entered judgment that the defendant be imprisoned for a period of ten years, and on case number 63, wherein the defendant had pleaded guilty to the charge of forgery and uttering forged checks, the court entered judgment that the defendant be imprisoned for a period of two years, said prison sentences to run consecutively. From the entry of the judgment the defendant appealed to this Court.

Robert Morgan, Attorney General, Sidney S. Eagles, Jr., Assistant Attorney General, and Russell G. Walker, Jr., Staff Attorney, for the State.

Joe O. Brewer for the defendant appellant.

HEDRICK, J.

The defendant's sole contention on this appeal is that his pleas of guilty to the nine two-count bills of indictment charging him with forgery and uttering forged checks were not freely, understandingly and voluntarily entered. This contention is without merit. The "Transcript of Plea", which is a part of the record in this case, shows clearly that the defendant, through his court-appointed attorney, did in fact enter pleas of guilty to nine bills of indictment charging him with forgery and uttering forged checks; furthermore, the record reveals that the court carefully questioned the defendant in open court as to whether he freely, understandingly and voluntarily entered the pleas of guilty in each case charging him with forgery and uttering forged checks.

On 14 April 1970, Judge Beal entered the following:

> "And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of (guilty) (*nolo contendere*), by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of (guilty) (*nolo contendere*) be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded."

We have carefully reviewed the record on appeal and find no error.

No error.

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

STATE OF NORTH CAROLINA v. CARL WESLEY SHOEMAKER

No. 7022SC384

(Filed 5 August 1970)

Criminal Law § 154— case on appeal — extension of time — improper signing of order

Criminal appeal is subject to dismissal when the order granting the extension of time to serve the case on appeal was not signed by the trial judge who signed the original order appealed from. Rules of Practice in the Court of Appeals Nos. 5 and 50.

APPEAL by defendant from *Martin (Robert M.), S.J.*, 19 January 1969 Session of IREDELL County Superior Court.

Defendant pleaded guilty to a charge of breaking and entering. He was sentenced to serve not less than 8 nor more than 10 years. Sentence was suspended and defendant placed on probation for 5 years, subject to the conditions set out in the probation judgment.

Defendant's probation was revoked after a hearing on 5 February 1968, and defendant served until 10 January 1969 on his original sentence. On 10 January 1969, a post-conviction hearing was held resulting in a finding that defendant's constitutional rights had been violated at the hearing when his probation was revoked because he had not been advised of his right to counsel. The revocation order was set aside and defendant released from custody subject to a rehearing when a bill of particulars was filed. A rehearing was never held subject to that order. Defendant later was found to have violated the provisions of the original probation judgment when he was arrested on 19 September 1969 for driving under the influence and while his license was suspended. On 8 December 1969, defendant entered a plea of guilty in each of these cases and received sentences. As a result of these convictions, defendant's probation under the original judgment was revoked and his original sentence reinstated, with credit allowed for the year he had served. This order was dated 19 December 1969, was signed by Robert M. Martin, presiding judge, and is the basis of this appeal. Defendant's former attorney was permitted to withdraw from the case on 18 March 1970, and his present attorney was appointed on 19 March 1970. Both of these orders were signed by Robert A. Collier, Jr., Resident Judge. On 19 March 1970, Judge Collier also signed an order granting defendant an extension of

time within which to prepare his case on appeal. The case on appeal was filed within the time permitted by the extension.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

Paul Swanson for defendant appellant.

MORRIS, J.

The order granting the extension of time to serve the case on appeal was not signed by the trial judge who signed the order which is the basis of this appeal as required by Rules 5 and 50 of the Rules of Practice in the Court of Appeals of North Carolina. The appeal is, therefore, subject to dismissal.

We have nevertheless examined defendant's assignments of error and are of the opinion that they are without merit.

Appeal dismissed.

BROCK and GRAHAM, JJ., concur.

JAMES BRADY BROOKS v. CURTIS CAIN

No. 7026SC371

(Filed 5 August 1970)

Abatement and Revival § 6— priority of institution of actions

Where plaintiff had failed to keep up the chain of summonses in his original action, but on 20 February 1969 plaintiff had an endorsement made on the original summons and thereafter kept the summons alive until service was had on defendant on 11 November 1969, plaintiff's action was commenced on 20 February 1969, prior to the action commenced by defendant on 10 March 1969.

APPEAL by defendant from *McLean, J.*, 12 February 1970, Schedule "D" Session, MECKLENBURG Superior Court.

Defendant appeals from an order denying his plea to dismiss plaintiff's action. The plea was made on the grounds that there was a prior action pending between the same parties for the same cause.

B. Kermit Caldwell for plaintiff appellee.

Ottway Burton for defendant appellant.

VAUGHN, J.

The order appealed from is affirmed for the reason that it does not appear that a prior action was pending between the same parties for the same cause. Plaintiff failed to keep up the chain of summonses in his original action. On 20 February 1969, however, plaintiff had an endorsement made on the original summons and thereafter kept the summons alive until service was had on defendant on 11 November 1969. Plaintiff's action was therefore commenced on 20 February 1969. The trial judge correctly held that plaintiff's action was commenced prior to one commenced by defendant in Randolph County on 10 March 1969.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

WHITFORD BROTHERS, INC. v. ROSS A. CANNON, LARRY M. CANNON AND A. E. CANNON, TRADING AS CANNON BOAT WORKS

No. 703SC28

(Filed 5 August 1970)

APPEAL by plaintiff from *Fountain, J.*, August 1969 Session, CARTERET Superior Court.

In this action plaintiff seeks to recover $36,000 in damages allegedly sustained by its 54-foot yacht as the result of a fire which occurred in the engine room of the vessel while in possession of defendants for purpose of being repaired. Issues of (1) negligence and (2) damage were submitted to the jury who answered the issue of negligence in the negative. From judgment in favor of defendants entered on the verdict, plaintiff appealed.

Harvey Hamilton, Jr., for plaintiff appellant.

Wheatly & Mason by C. R. Wheatly, Jr., for defendant appellees.

BRITT, J.

Plaintiff contends that the trial court erred in the admission of certain evidence offered by defendants, the rejection of cer-

tain evidence offered by plaintiff, and in its instructions to the jury. We have carefully reviewed the record, with particular reference to the assignments of error discussed in plaintiff's brief, but conclude that the trial was free from error that would warrant a new trial.

No Error.

BROCK and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES DANIEL WALKER, JR.

No. 708SC379

(Filed 5 August 1970)

APPEAL by defendant from *Bowman, S.J.*, 25 February 1970 Special Session of WAYNE Superior Court.

The defendant was arrested on 20 June 1969 for operating a motor vehicle "on the premises of a public Drive-In Restaurant, to wit: corner of Ash and Slocumb Streets while under the influence of some intoxicating liquor."

The State presented evidence that the defendant had bumped another car while backing out of his parking space; that the defendant, was, at the time, under the influence of some intoxicating liquor and that the parking lot was one used by the public generally. The defendant offered evidence that he was not, at the time, under the influence. The jury returned a verdict of guilty. From the judgment imposed, defendant appealed.

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

Braswell, Strickland, Merritt and Rouse by David M. Rouse for defendant appellant.

VAUGHN, J.

The defendant's sole assignment of error is to a portion of the judge's charge to the jury. We are of the opinion that the charge, when read in its entirety, correctly presented the law

to the jury, and that the trial judge correctly applied the law to the facts of the case. We find no prejudicial error.

No Error.

CAMPBELL and PARKER, JJ., concur.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1970

STATE OF NORTH CAROLINA v. CHARLES G. HILL III

No. 7012SC338

(Filed 26 August 1970)

1. **Arrest and Bail § 9— bail bond — defendant's right to release — misconduct of jailer**

An accused is to be released when the required bail bond is given and approved; the conduct of the jailer who refuses to release a defendant after the proper bail is given violates the statute and is indefensible. G.S. 15-47.

2. **Constitutional Law §§ 32, 33— right to counsel — self-incrimination**

Every person in North Carolina has the right to have counsel for his defense and not to be compelled to give self-incriminating evidence. N. C. Constitution, Art. I, § 11; U. S. Constitution, Amendment VI.

3. **Constitutional Law § 31— right of confrontation**

A defendant in a criminal prosecution has the constitutional right to confront his accusers with other testimony.

4. **Constitutional Law § 31— right to prepare defense**

Every defendant is entitled under the Constitution to have a reasonable opportunity to prepare his defense, which includes the right to consult with his counsel and to have a fair and reasonable opportunity, in the light of all attendant circumstances, to investigate, to prepare, as well as to present his defense. N. C. Constitution, Art. I, § 11; U. S. Constitution, Amendment XIV.

5. **Constitutional Law § 32— denial of right to counsel — confinement in jail — absence of prejudice**

The refusal of the jailer to permit defendant's attorney to confer with defendant during his overnight stay in the jail on a charge of

drunken driving was a denial of a constitutional right; however, defendant failed to establish that this denial of the right to counsel irreparably prejudiced his defense and that he was entitled to a dismissal of the charges against him, since the evidence tended to show that defendant's request to contact counsel came *only* after the police had completed the investigation of the offense, and since defendant failed to offer any evidence showing how he had been prejudiced.

6. **Constitutional Law § 32; Arrest and Bail § 9; Criminal Law § 84 — denial of right to bail and to counsel — effect on validity of evidence**

The refusal of the jailer to release the defendant on the night that defendant had given bail bond for the offense of drunken driving, and the jailer's refusal to permit defendant's attorney to confer with defendant during the night in jail, *held* not to destroy the validity of the police officers' observations and tests on defendant's intoxication, although the jailer's conduct violated defendant's rights to counsel and to bail, where the officers' observations and tests were completed prior to the denial of these rights, and where the record failed to show that defendant was prejudiced in his defense on the trial.

7. **Arrest and Bail § 3— arrest without warrant — misdemeanor**

G.S. 15-41 does not permit a police officer to arrest a person for a misdemeanor without a warrant unless it is committed in his presence or unless the officer has reasonable grounds to believe that it was committed in his presence.

8. **Criminal Law § 64— breathalyzer test — admissibility of results**

The results of a breathalyzer test made in compliance with G.S. 20-139.1 are properly admitted in evidence upon a showing that the defendant voluntarily submitted to the test.

9. **Criminal Law § 158— record on appeal — sound motion pictures — admissibility**

Where sound motion pictures showing defendant's intoxication were not made a part of the record on appeal, the question of the pictures' admissibility on the trial was not presented on appeal.

10. **Criminal Law § 154— record on appeal — duty of appellant**

It is the appellant's duty to see that the record on appeal is properly made up and presented to the appellate court.

APPEAL by defendant from *Johnston, J.*, 19 January 1970 Session of Superior Court held in FORSYTH County.

Defendant was tried upon a warrant, proper in form, in the Municipal Court, City of Winston-Salem, charging that he did, on 14 March 1968, operate a motor vehicle upon the public highways while under the influence of intoxicating liquor. On 22 March 1968 in the Municipal Court, City of Winston-Salem, the

defendant entered a plea of not guilty, was adjudged to be guilty, and "ordered to pay $100.00 and costs of court." Defendant appealed and was tried in superior court. The jury returned a verdict of guilty as charged, and the defendant was ordered to pay a fine of $100.00 and the court costs. The defendant appealed to the Court of Appeals.

Attorney General Morgan, Assistant Attorney General Melvin, and Staff Attorney Costen for the State.

Craige, Brawley, Horton & Graham by Hamilton C. Horton, Jr., and Alvin A. Thomas for defendant appellant.

MALLARD, C.J.

The evidence tended to show that about 10:45 p.m. on the night of 13 March 1968, the defendant's automobile was involved in a collision with another automobile on Reynolda Road in Winston-Salem. The defendant's automobile crossed the center line of the road and struck the other vehicle at the front hinge of the front door.

William E. Stroupe testified he was the driver of the car that the defendant struck, that before the police officer arrived the defendant approached him, and that "(a)s he approached me I know that it was more than once and I know that it was more than twice he kept repeating, 'I don't think I hit you, but if I did I'm sorry. I don't think I hit you, but if I did I'm sorry.' "

One of the police officers of the City of Winston-Salem arrived at the scene at 10:47 p.m. The officer testified that in his opinion the defendant was under the influence of intoxicating liquor. The defendant stated to the police officer that he "was operating the 1964 Lincoln Continental." The record does not otherwise reveal the make of the automobiles involved. The police officer arrested defendant for operating a motor vehicle under the influence of intoxicating liquor "and advised him of his rights." After being arrested the defendant was taken to the police station, and sound motion pictures were taken of him during a sobriety test. At about 11:45 p.m. after voluntarily consenting thereto, the defendant was given a breathalyzer test which "indicated a reading between .23 and .24%." After these tests were made and just a few minutes after midnight, the defendant was served with a warrant charging him with operating an automobile under the influence of intoxicating liquor.

The arresting officer informed the defendant's attorney, over the telephone after the defendant had called him, that the defendant had been charged with operating an automobile under the influence of intoxicating liquor. The attorney testified upon a pretrial hearing, upon certain motions made by the defendant, that the officer said "that if I would come down there I could take him on home, that he could go home."

The uncontradicted evidence on this record tends to show that thereupon the attorney went to the police station and was told by the arresting officer that the defendant had already been booked and was across the street in jail. The attorney went to the jail and was informed that the defendant was locked up and was under a $300.00 bond. The record does not reveal at what time the attorney arrived at the jail. The attorney testified that the following transpired between him and the jailer with respect to permission to see the defendant and the release of the defendant:

> "The jailer stated that Mr. Hill was there, that he was locked up, and that he was under $300.00 bond. So I sat down in the jailer's office and called one of the local bondsmen and he sent a man down there to get Mr. Hill out on bond. I was not permitted to see my client at that time. The bondsman came down within ten or fifteen minutes and bond was posted and given to the deputy sheriff and I said, 'Well, let's have him so we can get out of here,' and it was getting after midnight.
>
> The jailer said, 'No, we are not going to let him out' and when I asked him why, he said, 'The four hour rule.' I said, 'What are you talking about?' and the jailer said, 'Well, we can't let the man out until he has been locked up here for four hours.' I said, 'Well, bond has been posted. The arresting officer called me and said to come down here and get him out.' The jailer said, 'Well, I am running this jail and you are not going to get him out of here until the four hours are up.'
>
> I was not permitted to see my client.
>
> * * *
>
> The deputy who was acting as jailer was Weldon Keyser. There was another assistant or two whom I did not know. Mr. Keyser said, 'Chief Tucker said it was up to me, that I could do what I wanted to do.' I said, 'Well, what are you going to do?'

Keyser went on back to where Mr. Hill was locked up around the corner from the jailer's office. You cannot see down this corridor. I heard him walking down the corridor, heard him rattle the bars or something, and then I heard Mr. Hill say, 'What do you want?' Keyser said, 'Nothing, I just wanted to see if you were here.'

Deputy Keyser came back and then I said, 'Okay, let me have him.' He said, 'I am not going to do it.' I said, 'Why?' Mr. Keyser said, 'The son-of-a-bitch is so drunk he can't stand up.'

It must have been after 2:00 a.m. by this time.

I said, 'If you are not going to let me take him, let me see him.' The deputy sheriff said, 'You are not going to see him, git.' And I got, and that is the end of it.

I understand that Mr. Hill was released at about 7:00 a.m. and I saw him later on that day."

G.S. 15-47 provides, among other things, that a person arrested shall be permitted to give bail bond, except in capital cases. Operating a motor vehicle under the influence of intoxicating liquor is a misdemeanor and is not a capital case. The uncontradicted evidence in this case indicates that the defendant was permitted by proper authority to give bail, but after doing so, the jailer refused to release him. The evidence that the defendant was not released by the jailer until the next morning at about 7:00 a.m. is also uncontradicted. This was approximately five hours after the defendant had given the bail bond required.

[1] G.S. 15-47 means that when the required bail bond is given and approved, the accused is to be released. The conduct of a jailer who refuses to release a defendant, after the proper bail bond is given and he is informed thereof, violates the statute and is indefensible. However, in this case we approve of that portion of the dissenting opinion of Judge Finley in *City of Tacoma v. Heater,* 409 P. 2d 867 (1966), in which it is stated:

"(T)he courts do have a responsibility and the authority for taking corrective action respecting over-zealous, overly aggressive police practices which complicate and negate the prosecution of law violations and/or may unreasonably deprive the law violator of life, liberty, and the pursuit of happiness without due process of law. Corrective action, however, *does not necessitate turning criminal offenders*

loose as a form of shock treatment for the police. Such judicial experimentation has too little, if any, propensity to produce the intended results; and furthermore, in my judgment, such experimentation is too inimical to other social values and too dangerous to society and law-abiding citizens to be indulged by the judiciary."

[2] It is elementary law that every person in North Carolina has the right to have counsel for his defense and not be compelled to give self-incriminating evidence. N. C. Const. art. I, § 11; U. S. Const. amend. VI. Also, G.S. 15-4 provides that:

"Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense."

[3, 4] A defendant has the constitutional right, in a criminal prosecution, to confront his accusers with other testimony. Every defendant is entitled under the Constitution to have a reasonable opportunity to prepare his defense. This includes the right to consult with his counsel and to have a fair and reasonable opportunity, in the light of all attendant circumstances, to investigate, to prepare, as well as to present his defense. This right must be accorded every person charged with a crime. N. C. Const. art. I, § 11; U. S. Const. amend. XIV; *State v. Whisnant,* 271 N.C. 736, 157 S.E. 2d 545 (1967); *State v. Graves,* 251 N.C. 550, 112 S.E. 2d 85 (1960); *State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778 (1954); *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294 (1949); *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948); *State v. Whitfield,* 206 N.C. 696, 175 S.E. 93 (1934), *cert. denied,* 293 U.S. 556 (1934).

In the case of *State v. Speller, supra,* Justice Ervin, speaking for the Court, said:

"Both the State and Federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains. N. C. Const., Art. I, sec. 11; U. S. Const., Amend. XIV. This right is not intended to be an empty formality. It would be a futile thing, indeed, to give a person accused of crime a day in court if he is denied a chance to prepare for it, or to guarantee him the right of representation by counsel if his counsel is afforded no opportunity to ascertain the facts or the law of the case. As the Supreme Court of Georgia declared in *Blackman v. State,* 76 Ga. 288: 'This constitutional privilege would amount to nothing if the counsel for the accused are not

allowed sufficient time to prepare his defense; it would be a poor boon indeed. This would be "to keep the word of promise to our ear and break it to our hope." ' Since the law regards substance rather than form, the constitutional guaranty of the right of counsel contemplates not only that a person charged with crime shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare, and present his defense. *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520; *S. v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322."

[5] The refusal of the jailer to permit the defendant's attorney to confer with him that night while he was there in the jail was a denial of a constitutional right. *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S.Ct. 1758 (1964). The defendant contends that this denial of his constitutional right resulted in irreparable prejudice to his defense and that, therefore, this court should vacate the judgment and dismiss the charges against him.

In support of his contentions, the defendant cites and relies mainly upon the cases of *City of Tacoma v. Heater, supra; State v. Krozel,* 24 Conn. Sup. 266, 190 A. 2d 61 (1963); *Winston v. Commonwealth,* 188 Va. 386, 49 S.E. 2d 611 (1948).

In City of *Tacoma v. Heater, supra,* the defendant denied he was under the influence of intoxicating liquor and upon arrival at the jail requested and was denied permission to telephone his attorney. Thereafter, certain physical and coordination tests were made by the police officers to ascertain his sobriety. The defendant's attorney stated that if he had been called, he would have arranged for a blood test to determine the defendant's condition. The Supreme Court of Washington, with three members dissenting, held that the defendant was prevented from obtaining evidence which might tend to prove his innocence. In the instant case the testimony of the defendant's attorney tended to show that the request to contact counsel came *after* the police had completed their investigation. Also, it is significant that the testimony of the defendant's attorney does not reveal in what way the defense of the defendant was prejudiced by the failure to release the defendant on bail that night or the failure to permit counsel to talk with the defendant that night.

In the case of *Winston v. Commonwealth, supra,* the defendant was arrested without a warrant for operating an auto-

mobile on a state highway while under the influence of intoxicating liquor. At the time of his arrest, the defendant protested and continued to protest to the arresting officer that he had not taken anything intoxicating that day and that he was not intoxicated. He repeatedly asked to be taken to a physician in order that he might be examined and his true condition medically determined. These requests were refused. When he was taken to the jail, the defendant requested that he be taken before a proper official in order that he might be admitted to bail. This request was denied. Shortly after the defendant arrived at the jail, an acquaintance of the defendant also requested that the defendant be granted the opportunity of applying for bail. This request was refused. The defendant had been arrested and taken to the jail where he was locked up at 4:30 p.m. About 9:00 p.m. the defendant was taken to an assistant trial justice, and a warrant was issued for him, after which he was admitted to bail. Another person was arrested with the defendant and testified that the whiskey found in the car did not belong to defendant and that the defendant had drunk no intoxicating liquor that day. The Court found that the failure of the officers to take the defendant to a physician was not such a violation of his rights as to require a new trial. However, the Court held that the failure to take the defendant "forthwith" before a judicial officer to determine his eligibility for bail as required by statute was prejudicial. The Court held that the failure of the arresting officer and the jailer to perform their duties was such as to deprive the defendant of his constitutional right to call for evidence in his favor; that his subsequent conviction lacked the required due process; and that since the opportunity denied the defendant of producing such evidence could not be remedied at a new trial, the judgment was reversed and the prosecution dismissed.

The Heater case and the Winston case are distinguishable from the case at bar.

In *State v. Krozel, supra,* after the defendant was arrested for operating an automobile under the influence of intoxicating liquor and after the interrogation of the defendant by the officers had been concluded and sobriety tests had been administered, defendant requested and was denied permission to call either his lawyer or his wife. He was arrested at 10:50 p.m. The policy of the State Police in Connecticut was to deny a person access to a telephone during the time when, in the opinion of the police, he was intoxicated. The trial court found that the

defendant was capable of using the telephone. The defendant was released from custody at 8:00 a.m. on the following day. The Circuit Court of Connecticut in the Twelfth Circuit, with one judge concurring and one judge dissenting, ordered the judgment of conviction set aside and remanded the case with direction that a judgment of not guilty be entered. While the facts in the majority opinion in Krozel, the correctness of which are challenged in the dissenting opinion, appear to be somewhat similar to the case at bar, and the majority opinion is in point with the contentions of the defendant as to the law involved, we are not persuaded that the majority opinion is a correct statement of the law applicable to the case before us.

In the case before us the defendant did not testify and offered no evidence at his trial, but he did testify on *voir dire* as follows:

"My name is Charles G. Hill III. I am the defendant in this case.

I was jailed on the night of March 13, and on into the morning of March 14 in the county jail. I was released at approximately 7:00 a.m. in the morning of March 14.

I had been arrested approximately around 10:30 or so. After my arrest I requested the right to see and have the advice of counsel. The reason I felt I needed counsel was that I guess I was nervous and I was around a lot of police officers, and I felt like I needed to call somebody to know what is right, the right thing to do. During all of my questioning and all of my tests, the only ones around me were police officers.

I finally was permitted to call a lawyer around 12:00 or maybe a little after 12 midnight. At no time from the time at which I made that telephone call until I finally walked out of the jail at 7:00 the next morning did I have the opportunity to consult with counsel.

I never told the police that I did not want an attorney. I cannot say for certain what time it was when they advised me that I could have an attorney if I wanted one. They only offered me the right to make a telephone call one time. That is the time I did make the call: They did not permit me access to a telephone while I was up there taking the breathalyzer tests and all.

CROSS EXAMINATION:

I remember Officer Tierney advising me of my rights at the scene of the accident. I remember him saying something about a right to counsel. He asked me something about whether I wanted to go to the hospital and whether I was hurt and I told him that I didn't think I was hurt real bad: I knew I was bleeding. So I said I didn't want to have any medical attention. At the police station I was brought in and they took a film of me. Then I believe they took a breathalyzer test. I did not say that I wanted to take the breathalyzer test but I did not refuse it and I took a breathalyzer test. It was after this that I made my telephone call. The telephone call was after the investigation had been concluded, and the warrant had been issued, and the bond had been set. I may have signed something in the process of whatever it was when they were putting me through the tests. The investigation had already been conducted when I made the telephone call to get my attorney. I called my brother-in-law and he was supposed to come down.

REDIRECT EXAMINATION:

My brother-in-law is also my attorney. He had represented me in a number of other times as my attorney, and I considered him as my attorney."

It is significant that the testimony of the defendant does not reveal in what way his defense was prejudiced by the failure to release him on bail that night or the failure to permit counsel to talk with him that night.

Defendant's testimony does not indicate at what time after his arrest he requested the right to see and have counsel. The evidence of the State was that the defendant was told on several occasions that he had the right to have an attorney and that the defendant told one of the police officers that "(h)e didn't need one." After the *voir dire*, the trial judge found that the warrant was served on the defendant, the bond was fixed, and thereafter, he requested and was granted the privilege of contacting his attorney.

The testimony of the defendant also does not show that on that night there was any interrogation or further investigation of the defendant after he requested an attorney or after the jailer refused to release him on bail and refused to permit his attorney to confer with him. Neither does the record show that

the violation of these rights resulted in any evidence being obtained against him.

[6] On this record the denial by the jailer to release the defendant that night after bail bond had been given and the refusal of the jailer to permit defendant's counsel to confer with him that night, did not eliminate or destroy the validity of what the police officers had theretofore observed and the tests made. There is nothing in this record which indicates that the defendant was denied the effective assistance of counsel at the trial because the jailer refused to release the defendant that night and refused to permit his lawyer to confer with him that night. There is nothing in this record to indicate that these denials of his rights in any way impaired his defense. See 5 A.L.R. 3d 1360, 1383; see also *Coleman v. Alabama,* 26 L. Ed. 2d 387, 90 S. Ct. ..... (1970).

The defendant was arrested on 13 March 1968, was first tried in the Municipal Court of the City of Winston-Salem on 22 March 1968, and upon appeal, he was tried at 19 January 1970 Session of Superior Court held in Forsyth County. No contention is made in this record that he did not have time to prepare his case for trial.

We hold that the factual situation presented on this record does not reveal that the defendant was prejudiced to the extent of infecting his trial with an absence of fundamental justice.

[7] The defendant was arrested without a warrant for the misdemeanor of operating an automobile on a public highway while under the influence of intoxicating liquor. The evidence reveals that the offense was not committed in the presence of the arresting officer. The statute does not permit a police officer to arrest a person for a misdemeanor without a warrant unless it is committed in his presence or unless the officer has reasonable grounds to believe that it was committed in his presence. G.S. 15-41. We are not here concerned with whether the defendant could have or should have been arrested for public drunkenness. The record is silent on the subject. Neither are we here concerned with whether a police officer who arrives at the scene of an automobile collision should be permitted to arrest, without a warrant, a person who is under the influence of intoxicating liquor and who informs the officer that he was the operator of one of the vehicles involved—that is a matter for the Legislature to determine. Also, we are not here concerned with what remedy the defendant has, if any, against those who violated his rights.

Defendant argues and contends that the court committed error in admitting the results of the breathalyzer test and the sound motion pictures taken of him after his illegal arrest and before the warrant was served on him.

[8] The applicable statute provides that a person who operates a motor vehicle on the highways in North Carolina is deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of intoxicating liquor. G.S. 20-16.2(a). The breathalyzer test is a chemical test for the testing of a person's breath for the purpose of determining the alcoholic content of his blood. There is no contention made that the test itself was improperly administered. The defendant testified on *voir dire* that he was advised of his rights by the officer at the scene of the accident and that he did not refuse to take the breathalyzer test. The trial judge on the *voir dire* made no findings that the arrest of the defendant or the giving of the breathalyzer test and taking of the pictures was accompanied by violent or oppressive circumstances; neither does the evidence indicate that it was. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969). On the contrary, the trial judge found that the defendant "voluntarily submitted to the State's Breathalyzer test." The results of the breathalyzer test made in compliance with G.S. 20-139.1 are properly admitted in evidence upon a showing that the defendant voluntarily submitted to the test. 2 Strong, N.C. Index 2d, Criminal Law, § 64.

[9, 10] The sound motion pictures were not made a part of the record on appeal; therefore, the competency as to the admissibility thereof is not presented on this appeal. It was appellant's duty to see that the record was properly made up and presented to the appellate court. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262 (1965). On this record no prejudicial error is made to appear by the admission of the sound motion pictures, which evidence was offered for the purpose of illustrating the testimony of the arresting officer.

We have carefully considered all of defendant's assignments of error that have been properly presented and hold that on this record no prejudicial error has been made to appear of such nature as to entitle him to a new trial or to vitiate the criminal

proceedings against him and entitle him to a dismissal of the charges. We do not believe that the result here reached is violative of the principles enunciated in *State v. Speller, supra.*

In the trial we find no error.

No Error.

MORRIS and GRAHAM, JJ., concur.

ERNEST PAUL PRIDDY v. BLUE BIRD CAB COMPANY, INC., AND AETNA CASUALTY AND SURETY COMPANY

No. 7021IC366

(Filed 26 August 1970)

1. **Master and Servant § 66— workmen's compensation — total disability — loss of mental capacity from brain injury — mental capacity defined**

As used in the statutes relating to compensation for total disability from loss of mental capacity resulting from injury to the brain, G.S. 97-29 and G.S. 97-41, the words "mental capacity" mean that quality of mind which enables a person to act with reasonable discretion in the ordinary affairs of life and to comprehend in a reasonable manner the nature, scope and effect of his acts and conduct.

2. **Master and Servant § 66— workmen's compensation — total disability — award for life — loss of mental capacity from brain injury**

In order to sustain an award for life for total disability from loss of mental capacity resulting from injury to the brain, it is not required that there be a total loss of mental capacity, but only that there be a total and permanent disability resulting from a loss of mental capacity by an injury to the brain.

3. **Master and Servant § 69— workmen's compensation — disability defined**

As used in the Workmen's Compensation Act, "disability" means impairment of wage earning capacity rather than physical impairment.

4. **Master and Servant § 66— workmen's compensation — determination of total and permanent disability from brain injury**

The question of whether there has been a total and permanent disability resulting from a loss of mental capacity caused by or resulting from an injury to the brain is one of fact.

5. **Master and Servant § 66— workmen's compensation — mental incapacity from brain injury — control of temper**

The control of one's temper is a mental function within the meaning of the statutes relating to lifetime compensation for total dis-

ability from loss of mental capacity resulting from injury to the brain. G.S. 97-29, G.S. 97-41.

6. **Master and Servant § 94— workmen's compensation — duty of Commission to find facts**

The Industrial Commission is the judge of the credibility of the evidence and is the fact finding body in a workmen's compensation proceeding. G.S. 97-84.

7. **Master and Servant § 96— workmen's compensation — appellate review of findings of fact**

Where the evidence before the Industrial Commission is contradictory, the nonjurisdictional findings of fact by the Commission are conclusive on appeal to the Court of Appeals.

8. **Master and Servant §§ 66, 69— workmen's compensation — total disability — mental incapacity from brain injury — inability to control temper — award for lifetime of claimant**

In this proceeding for workmen's compensation instituted by a former cab driver who suffered a brain injury when a passenger struck him on the back of the head with a pipe, claimant's evidence, including medical testimony that claimant is totally and permanently disabled because of his inability to control his temper since his brain injury, *held* sufficient to support findings by the Commission that claimant is now totally and permanently disabled from loss of mental capacity resulting from injury to the brain and the award of compensation for the lifetime of claimant pursuant to G.S. 97-29 and G.S. 97-41.

APPEAL by defendant Blue Bird Cab Company, Inc., from opinion and award of the North Carolina Industrial Commission (Commission) of 19 February 1970.

It was stipulated that Ernest Paul Priddy (plaintiff) was an employee of the Blue Bird Cab Company, Inc. (defendant); that the parties were subject to the North Carolina Workmen's Compensation Act (Act); that the Aetna Casualty and Surety Company (Aetna) was the "carrier on the risk"; that the plaintiff sustained an injury by accident arising out of and in the course of his employment on 2 February 1963; and the amount of the weekly payments received by plaintiff from defendant was also stipulated.

Plaintiff's evidence tended to show that on 2 February 1963 he was working for the defendant as a cab driver. On that date around 2:00 a.m., he had a passenger in the back seat of the cab he was operating. The passenger pointed to a house and plaintiff looked in that direction. At that time plaintiff was struck on the back of the head with a pipe with such force that his brain

was injured and a portion thereof had to be removed. He was unconscious for several days. He remained in the hospital for twenty days at that time before he was discharged. Plaintiff testified that prior to this occasion he had a "normal temper" but that "since then there has been a change." He sustained other severe injuries, including a partial loss of vision. During the time he was in the hospital, he was first seen by Dr. Ernesto de la Torre in the emergency room on 2 February 1963. Dr. de la Torre, a medical expert specializing in the field of neurosurgery, testified with respect to plaintiff's injuries that:

> "He was brought to the emergency room with no blood pressure that could be taken. He had bleeding through his jaw, through the back of his head, cuts in the back of his head, and X-rays showed that he had multiple fractures, also pieces of bone pushing into his brain on the back side, broken jaw, completely unconscious. After that we did a tracheotomy, put a tube down his windpipe so he could breathe and not choke and operated on his head, closed all the lacerations, took all the pieces of bone from within his brain. A lot of his brain was bruised, cut and necrotic—bad brain tissue—and that was removed. That was the first time that I saw him. He healed from all these and he was discharged on the 22nd, 20 days later. By that time, Dr. Alsup and Dr. Weiss had operated on his jaw. He kept on improving so he was discharged. Later we admitted him again and did a craneoplasty in which we put a plastic material to cover up the hole that was there from the previous surgery. No part or portion of the brain was removed during the second operation. At the time of the first surgery, we took a part of the occipital of the brain, which is the back portion of the brain on the right side which has to do with vision, and I would say we took 30 grams. I have seen this patient many, many times.
>
> * * *
>
> As for Mr. Priddy's prognosis, I think Mr. Priddy has done an amazing recovery in many respects, but I think Mr. Priddy has had severe and permanent damage to his brain. There are three explicit indicating factors on him. For one thing, he cannot see to the left and down. With that so, I wouldn't trust him driving because he can't see to the left well. Because of his severe brain injury, he is also susceptible in the future to have convulsions and seizures.
>
> I have heard that he has had some small seizures, but I

have never seen any one of them, so I can't testify that they ever existed.

The third other possible conflicting thing, he has very little control of his temper. Whenever he is denied something or arguing something, he cannot hold his temper. He has no control.

'Q. And do you have an opinion satisfactory to yourself, doctor, that there has been mental changes in Mr. Priddy?

* * *

A. I think Mr. Priddy, since I have known him, he has been very easy to lose control of his temper and that is what I call mental changes.'

When I first examined and performed surgery on Mr. Priddy, I found foreign substances in his brain. I found hair, little pieces of bone, dirt. I was able to completely remove these foreign substances as far as I could see them.

I don't remember how many factures of the skull I found there at that time. There were many lines of fracture, many little fragments of bone pushed in so I couldn't tell. I didn't count them.

The skull of a human being is in more than one piece.

I did not find any dislocation of the cranium.

'Q. Now, doctor, do you have an opinion satisfactory to yourself as to whether Ernest Paul Priddy is permanently and totally disabled due to the injury to the brain which has resulted in mental incapacity?

* * *

A. I do have an opinion.

Q. And what is that opinion, doctor?

A. I think he is permanently disabled.

Q. Because of the brain damage?

A. That's right.

Q. And do you have an opinion satisfactory to yourself that there has been a mental loss of incapacity *(sic)* because of the brain damage?

A. I think they can be due to brain damage, his mental changes.' "

On cross-examination Dr. de la Torre testified:

"As to whether my testimony is that he is permanently and totally disabled to perform any gainful employment or just the job he was performing at the time he was injured, my impression has been that Mr. Priddy could do some activity of some kind. My only reserve or reservation about this thing and that is who's he going to work for because if I were going to be personnel manager it would be very difficult to hire him because of his ill temper and getting mad very easily. He gets mad with his wife and even myself and friends and people who have been good to him and that is disabling and his visual difficulties disable him from driving. I was trying to get all the things together. In any point of view, I can't testify to his mental status because I'm not a psychiatrist. However, I do have an opinion with all things put together and that's my consideration making him totally disabled, putting all these things together.

I don't know whether his temper pre-existed the accident.

As for whether he has diminished capacity to read, write and think, and ability to analyze his problems, I haven't done psychological testing on him. I think whoever has and measured his eyesight should be able to do that.

Just completely disregarding his temper, the flaring up of it, he would not be permanently disabled because of his other injuries to gain employment. I'd say he would be employable in the sense there are some jobs that can be done. In other words, the distinguishing factor is the personality and temper opposed to any loss of ability or loss of ability to reason and that kind of thing. As I have said before, except for his temper or personality problem, he would not be totally and permanently disabled, but I would like a psychiatrist or psychologist with psychological testing, rather than me, to say. To me his main problem is temper.

Anyone who suffers a major blow to his head such as Priddy suffered is subject to seizure and possible epilepsy."

On redirect examination Dr. de la Torre testified that "(t)hroughout my reports I have stated that in my opinion he was unable to work."

Dr. de la Torre was asked the following question by the hearing commissioner:

"Based on the history that you obtained and your personal knowledge as a result of this injury Mr. Priddy received on February 2, 1963, and your long course of treatment and the operation that you performed on his brain, do you have an opinion satisfactory to yourself from a medical standpoint whether or not Mr. Priddy is permanently and totally disabled due to an injury to the brain and that as a result of said injury he has loss of mental capacity, do you have?"

Dr. de la Torre replied that he did have such opinion and stated, "I think he is permanently and totally disabled from employment."

The evidence of Dr. Courtland H. Davis, Jr., who examined the plaintiff upon order of Deputy Commissioner W. C. Delbridge, tended to show that plaintiff has some partial permanent disability but that in his opinion the plaintiff "is not totally and permanently disabled from loss of mental capacity resulting from an injury to the brain."

The Commission found and concluded that by reason of the plaintiff's injury by accident arising out of and in the course of his employment on 2 February 1963, he is now totally and permanently disabled resulting from loss of mental capacity resulting from the injury to his brain. From an award by the Commission "continuing for the lifetime of the plaintiff" pursuant to the provisions of G.S. 97-29 and G.S. 97-41, the defendant appealed to the Court of Appeals.

Robert M. Bryant for plaintiff appellee.

Allan R. Gitter and Jimmy H. Barnhill for defendant appellant.

MALLARD, C.J.

The main question for decision in this case is whether there was sufficient competent evidence to support the finding of the Commission that the plaintiff was entitled to an award for life under the provisions of G.S. 97-29 and G.S. 97-41 because of total and permanent disability resulting from loss of mental capacity resulting from an injury to the brain.

The pertinent part of G.S. 97-29 reads:

"In cases in which total and permanent disability results from * * * loss of mental capacity resulting from an injury

to the brain, compensation * * * shall be paid during the life of the injured employee * * *."

The pertinent part of G.S. 97-41 reads:

"In cases where permanent total disability results from * * * loss of mental capacity caused by an injury to the brain * * * compensation shall be payable for the life of the injured employee as provided by G.S. 97-29."

[1] In their briefs and upon the oral argument in this court, the parties agree that the words "mental capacity" as used in these statutes have not been defined in the statutes or in the cases handed down by the appellate courts of this State, and our research has found none. We are of the opinion that the words "mental capacity" as used in the two statutes under consideration are properly defined as that quality of mind which enables a person to act with reasonable discretion in the ordinary affairs of life and to comprehend in a reasonable manner the nature, scope and effect of his acts and conduct. Black's Law Dictionary, 4th Ed.; *Gillikin v. Norcom,* 197 N.C. 8, 147 S.E. 433 (1929); 26 C.J.S., Deeds, § 54(b), p. 720; 44 C.J.S., Insane Persons, § 2, p. 39.

[2-4] The statutes do not require that there be a total loss of mental capacity. What the statutes do require in order to sustain an award for life thereunder, is that there be a total and permanent disability resulting from a loss of mental capacity caused by an injury to the brain. " 'Disability' as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment." *Morgan v. Furniture Industries, Inc.,* 2 N.C. App. 126, 162 S.E. 2d 619 (1968). The question of whether there has been a total and permanent disability resulting from a loss of mental capacity caused by or resulting from an injury to the brain is one of fact.

[5, 8] The evidence in this case is contradictory. Dr. Davis' reports tended to show that the plaintiff was only partially permanently disabled and that in his opinion the plaintiff was not totally and permanently disabled from loss of mental capacity resulting from an injury to the brain. The testimony of Dr. de la Torre tended to show that the plaintiff is totally and permanently disabled and revealed that the reason the plaintiff is totally and permanently disabled is because of his inability or capacity to control his temper since his brain injury. The evidence tended to show that prior to his brain injury, plaintiff was able to work

and after the brain injury was not able to work because of his inability to control his temper. When considered in the light of the above definition of "mental capacity," the control of one's temper is a mental function.

[6, 7] The Commission is the judge of the credibility of the evidence and is the fact finding body under the Act. G.S. 97-84. *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439 (1958). Where the evidence before the Commission is contradictory, the findings of fact by the Commission, which are nonjurisdictional, are conclusive on appeal to the Court of Appeals. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968); *Evans v. Topstyle, Inc.*, 270 N.C. 134, 153 S.E. 2d 851 (1967); *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963).

[8] We hold that there was sufficient competent evidence before the Commission to support its findings, that by reason of the plaintiff's injury by accident arising out of and in the course of his employment on 2 February 1963, he is now totally and permanently disabled resulting from loss of mental capacity resulting from an injury to the brain, and the award of compensation "continuing for the lifetime of the plaintiff" pursuant to G.S. 97-29 and G.S. 97-41.

No prejudicial error is made to appear in appellant's other assignments of error.

The award of compensation herein is affirmed.

Affirmed.

PARKER and HEDRICK, JJ., concur.

CHARLES WAYNE MAY, BY AND THROUGH HIS NEXT FRIEND, MARY MAY v. HENRY W. MITCHELL, JR.

No. 7017SC442

(Filed 26 August 1970)

1. Negligence § 29— evidence of negligence — directed verdict — consideration of evidence

In determining whether a judgment directing verdict for the defendant may be sustained on the ground of insufficient evidence to show defendant's actionable negligence or because the evidence estab-

lishes the plaintiff's contributory negligence as a matter of law, all of the evidence which tends to support plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom.

2. Negligence § 35— contributory negligence — sufficiency of the evidence

Unless plaintiff's own evidence so clearly establishes his contributory negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn therefrom, the issue of contributory negligence is for the jury.

3. Negligence § 29— towing tractor — injury to plaintiff — negligence in hooking tow chain

In an action by a 17-year-old plaintiff to recover for injuries sustained when the tractor on which he was driving at defendant's request overturned while he was attempting to tow another tractor belonging to defendant, there was ample evidence to support a jury finding that defendant's negligence in hooking the tow chain to the rear axle of the tractor driven by plaintiff, rather than to a tow-bar, proximately caused plaintiff's injuries, there being expert testimony that hooking the chain to the axle increased the likelihood that the towing tractor would turn over.

4. Evidence § 19— proof of prior facts by existing facts

In an action by a 17-year-old plaintiff to recover for injuries sustained when the tractor on which he was driving at defendant's request overturned while he was attempting to tow another tractor belonging to defendant, testimony by plaintiff's brother that when he observed the tractor some three to three and one-half hours after the accident the towing chain was attached around the axle housing of plaintiff's tractor, *held* sufficient under the evidence of this case to support a reasonable inference that the tow chain had been attached around the axle at the time of the accident.

5. Negligence § 35— towing tractor — injury to plaintiff — contributory negligence

In an action by a 17-year-old plaintiff to recover for injuries sustained when the tractor on which he was driving at defendant's request overturned while he was attempting to tow another tractor belonging to the defendant, the evidence was insufficient to establish the plaintiff's contributory negligence as a matter of law, where (1) the defendant gave plaintiff no warning as to how the towing chain was attached to plaintiff's tractor, (2) the plaintiff did not observe the manner in which the chain was attached, and (3) the plaintiff's previous experience in operating the tractor was questionable, while the defendant was an expert in the operation of farm machinery.

6. Master and Servant §§ 25, 26— youthful farm employee — farm machinery — duty of owner

If by reason of youth and inexperience the operator of farm machinery does not realize or is not aware of the danger to which he is exposed, it is the duty of the employer to warn him of his peril.

APPEAL by plaintiff from *McConnell, J.*, 9 March 1970 Civil Session of ROCKINGHAM County Superior Court.

This action was instituted 21 August 1967 to recover damages for injuries sustained by the minor plaintiff in an accident involving a farm tractor on 19 January 1967.

At the conclusion of plaintiff's evidence defendant moved for a directed verdict on the grounds that the evidence failed to show any actionable negligence on the part of the defendant and established, as a matter of law, the negligence of the minor plaintiff as a proximate cause of his injuries. This motion was denied. At the conclusion of all the evidence an identical motion was made and was allowed. Plaintiff appealed.

Gwyn, Gwyn & Morgan by Allen H. Gwyn, Jr., for plaintiff appellant.

W. T. Combs, Jr., for defendant appellee.

GRAHAM, J.

[1, 2] In determining whether a judgment directing verdict for the defendant may be sustained on the grounds of insufficient evidence to show actionable negligence on the part of defendant or because the evidence establishes the plaintiff's contributory negligence as a matter of law, we are guided by the same principles that prevailed under our former procedure with respect to judgments of nonsuit. See *Musgrave v. Savings & Loan Association*, 8 N.C. App. 385, 174 S.E. 2d 820. All of the evidence which tends to support plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47. And unless plaintiff's own evidence so clearly establishes his contributory negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn therefrom, the issue of contributory negligence is for the jury. *Jernigan v. R.R. Co.*, 275 N.C. 277, 167 S.E. 2d 269.

[3] The evidence here, taken in the light most favorable to the plaintiff, tends to show the following:

On 19 January 1967 defendant, a farmer and an experienced mechanic, was the owner of two farm tractors. One was a Farmall Super-A (Farmall) designed for cultivation of crops.

The second was a much heavier Ford diesel tractor (Ford) which was built lower to the ground and was designed for heavier pulling. After unsuccessfully attempting to crank the Ford, defendant employed the minor plaintiff, a 17 year old neighbor, to assist him in getting it started. Defendant, outside the presence of the plaintiff, hooked the front of the Ford to the rear of the Farmall with a chain. His plan was to have plaintiff operate the Farmall and pull the Ford which defendant would attempt to start by letting out the clutch and engaging the gears, once the tractors had reached a sufficient speed. Following defendant's instructions, the minor plaintiff drove the Farmall tractor to level ground where it started spinning because of sleet and ice. Defendant then directed plaintiff to drive the tractor to the edge of a field to avoid the ice. When the Farmall had traveled about 10 to 15 feet in the field, its front suddenly reared up and completely over, causing the tractor to fall backward on the minor plaintiff and resulting in his serious injury. The accident occurred about 8:30 or 9:00 a.m.

The minor plaintiff's brother (who was also defendant's brother-in-law) testified that near lunch time on the day of the accident he observed the tractors. There was no draw bar on the Farmall and the chain was hooked to the rear axle housing on its left side. "[I]t was wrapped around the axle housing on the left side and hooked back into the chain. . . ." The other end of the chain was hooked to the front bumper of the Ford.

J. N. Perkins, a farm implement dealer in Reidsville, was properly qualified as an expert in the operation of tractors. He claimed extensive experience with the type of Farmall tractor owned by defendant. In answer to a properly phrased hypothetical question, Perkins expressed the opinion that under the recited evidentiary circumstances, the hooking of the tractors by attaching the tow chain around the left rear axle housing of the Farmall could have caused the Farmall to turn over. He explained his answer as follows:

> "The basis for my opinion is that hooking the chain around the rear axle housing is above the center of gravity, it is up high and the chain would have to come down to the Ford diesel and it would be above the center of gravity and could easily cause it to turn over and it is dangerous to hook it that way. As to how much lower the draw bar is than the axle on a Farmall Super-A, it is approximately ten inches. The purpose of a draw bar is to pull a heavy load by. The purpose of a draw bar is really to attach things to tow with.

> The draw bar's function is to pull things by. The draw bar can be taken off the tractor, and it also can be put back on."

Defendant admitted in his adverse examination and in his testimony at the trial that the draw bar was not on the Farmall at the time of the accident, and also that it would be dangerous to put a tow chain around the rear axle housing of the Farmall. He denied, however, that he had hooked the chain in such a manner, contending that he had hooked it to the bolts where the draw bar ordinarily fastens.

[4] Nowhere in defendant's brief does he contend that hooking the tow chain to the rear axle housing of the Farmall would not, under the circumstances here presented, constitute evidence of actionable negligence on his part. He argues, however, that there is no evidence that he connected the chain in this manner, contending that no inference can be drawn from the position of the tow chain after the accident as observed by the minor plaintiff's brother.

It is generally true "that mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion." *Childress v. Nordman,* 238 N.C. 708, 712, 78 S.E. 2d 757. However, this general rule is not of universal application. *Jenkins v. Hawthorne,* 269 N.C. 672, 153 S.E. 2d 339; *Miller v. Lucas,* 267 N.C. 1, 147 S.E. 2d 537. In Stansbury, N. C. Evidence, 2d Ed., § 90, we find the following:

> "Whether the existence of a particular state of affairs at one time is admissible as evidence of the same state of affairs at another time, depends altogether upon the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime. The question is one of the materiality or remoteness of the evidence in the particular case, and the matter rests largely in the discretion of the trial court. . . . There has been some reference in recent cases to a 'general rule' that inferences 'do not ordinarily run backward'; but so much depends upon circumstances that it seems a mistake to think in terms of a 'rule' with respect to this or any other of the many factors that must be considered."

In *Jenkins v. Hawthorne, supra,* and *Miller v. Lucas, supra,* the following is quoted with approval from 31A C.J.S., Evidence, § 140, pp. 306-307 (1964):

"Whether the past existence of a condition or state of facts may be inferred or presumed from proof of the existence of a present condition or state of facts, or proof of the existence of a condition or state of facts at a given time, depends largely on the facts and circumstances of the individual case, and on the likelihood of intervening circumstances as the true origin of the present existence or the existence at a given time.

Accordingly, in some circumstances, an inference as to the past existence of a condition or state of facts may be proper, as, for example, where the present condition or state of facts is one that would not ordinarily exist unless it had also existed at the time as to which the presumption is invoked."

[3] The testimony of the minor plaintiff's brother, taken in the light most favorable to plaintiff, shows that when he observed the tractors some three to three and a half hours after the accident, the chain was attached around the axle housing of the Farmall. His testimony was corroborated by photographs taken by defendant's business partner on the same day. At that time the two tractors were still hooked together with the chain. They were still in the field where the accident occurred. The Farmall was still overturned. There is nothing in the evidence to indicate the likelihood that they had been moved since the accident, or that anyone had removed the chain from the point of the bar bolts, where defendant contends it had been attached, and reattached it around the rear axle housing. The jury could reasonably infer from such evidence that when defendant attached the chain to the Farmall immediately before the accident, he did so by hooking it around the rear axle housing. In our opinion there was ample evidence to support a finding that defendant's negligence proximately caused the minor plaintiff's injuries.

[5] It is our further opinion that the evidence fails to establish conclusively the minor plaintiff's contributory negligence as a matter of law. The record reflects that no warning was given the minor plaintiff by defendant as to how the chain was attached or as to any of the incidental dangers resulting therefrom, and that the minor plaintiff did not himself observe the manner in which the chain was attached. "It has been stated generally that a farm employee, before he may be treated as assuming the risks of his employment, must (or reasonably should) have been aware of the dangers involved and, in addition, must (or reasonably should) have appreciated the danger and risk connected with the defective conditions leading to his injury; *and*

that in case of any doubt the question is ordinarily one for the jury." Annot., 67 A.L.R. 2d 1120, 1142-1144 (1959). (Emphasis added).

At the time of the accident, the minor plaintiff was 17 years of age and the extent of his previous experience in operating the Farmall tractor was questionable. Defendant, who was 41 years of age at the time of trial, admitted that he was an expert in the operation of farm machinery. Whether, as contended by defendant in its motion for a directed verdict, and as recited in the court's judgment, the minor plaintiff was negligent in failing to push in the clutch and release the gears, to put on the brakes, to close the throttle, to put the tractor out of gear with his hand, or to cut off the ignition when the tractor started to raise, is not a matter to be determined by the court. The minor plaintiff testified: "I felt a jerk and I looked back and he hollered and that is all I remember about it. It all happened so fast." Defendant testified: "[A]bout the time the Ford diesel got in the field good the Super-A started to rise and that is when I hollered at him, just hollered at him to hold it, to hold it, or something like that. He came off it and landed on his feet behind it and that is when he put up his hands, I reckon, I'm not sure. It was so quick, he put up his hands like he was going to catch it, the right hand." This evidence certainly does not establish, as a matter of law, any reasonable opportunity for the minor plaintiff to take any of the necessary acts to extricate himself from danger before the tractor turned over.

[6] We further note that the evidence does not show that the minor plaintiff was advised by defendant as to what action to take in the event the tractor started to overturn in the manner described. If by reason of youth and inexperience, the operator of farm machinery does not realize or is not aware of the danger to which he is exposed, it is the duty of the employer to warn him of his peril. *Lund v. Knoff,* 85 N.W. 2d 676 (N.D. 1957). 67 A.L.R. 1110, 1134; *Cathey v. DeWeese,* 289 S.W. 2d 51 (Mo. 1956); *Shaw v. Kendall,* 114 Mont. 323, 136 P. 2d 748; *Ludwig v. Kirby,* 13 N.J. Super. 116, 80 A. 2d 239.

Whether the minor plaintiff had independent knowledge as to what to do to bring the Farmall under control if it started to rear up and had reasonable time and opportunity under the circumstances to take the necessary action are questions to be resolved by a jury.

For the reasons set forth, the judgment must be reversed.

Reversed.

BROCK and MORRIS, JJ., concur.

SOUTHERN RAILWAY v. CITY OF RALEIGH

No. 7010SC329

(Filed 26 August 1970)

1. **Municipal Corporations § 24— railroad right-of-way property — exemption from local improvement assessments**

G.S. 160-521 prohibits defendant municipality from imposing assessments for street paving upon abutting railroad right-of-way property on which no building is located.

2. **Statutes §§ 5, 11— special or local act — subsequent general act — legislative intent**

A special or local act must yield to a later general or broad act where there is a manifest legislative intent that the general act shall be of universal application notwithstanding the prior or special act.

3. **Municipal Corporations § 24— railroad right-of-way property — exemption from local improvement assessments by G.S. 160-521 — conflicting municipal charter provisions**

The language employed by the Legislature in G.S. 160-521 clearly manifests that it be of general application; consequently, the statute applies to prohibit a municipality from imposing an assessment for street paving on railroad right-of-way property on which no building is located notwithstanding provisions of the municipal charter require abutting property owners to pay the entire cost of street improvements.

4. **Municipal Corporations § 24; Taxation § 19— statute exempting railroad right-of-way property from local improvement assessments — constitutionality**

Statute exempting railroad right-of-way property from assessment for local improvements is not unconstitutional on the ground it was not authorized by Article V, §§ 3 and 5 of the Constitution of North Carolina, those sections dealing with the power of taxation and not with assessments for local improvements.

5. **Municipal Corporations § 24— property benefited by local improvements — legislative determination**

The Legislature has the power to determine what property is and what property is not benefited by local improvements, and such legislative declaration is conclusive in the absence of arbitrary action.

6. Municipal Corporations § 24— statute exempting railroad right-of-way property from local improvement assessments — validity

The General Assembly did not act arbitrarily when, by enactment of G.S. Ch. 160, Art. 42, it determined that railroad right-of-way property on which there is located a main line or through railroad track or tracks and on which no building is located was not benefited by and should not be assessed for certain local improvements.

7. Municipal Corporations § 25— evidence that railroad's property not benefited by local improvements — irrelevancy — prejudice

Even if evidence that railroad's property was not benefited by local improvements be considered irrelevant in view of court's holding that legislative determination of the matter was valid and controlling, the admission of such evidence was not prejudicial to defendant municipality.

APPEAL by defendant from *Bailey, J.*, February 1970 Session of WAKE Superior Court.

Southern Railway Company (Southern) leases from North Carolina Railroad Company, under a long-term lease, a right-of-way for railroad purposes over which it maintains its main line track running from Goldsboro to Greensboro. South Blount Street in Raleigh crosses this right-of-way. At this location the railroad right-of-way extends 100 feet on either side of the center line of the railroad's main line track. There is no building on the portion of the railroad right-of-way with which this litigation is concerned.

In August, 1965, the Raleigh City Council, acting under a section of its City Charter (Sec. 105, Chap. 1184, 1949 Session Laws), adopted a resolution, without petition of property owners, authorizing the paving of South Blount Street and directing that the entire cost of the improvement be assessed against abutting property owners. The paving was done in 1966, and in March, 1967, the City Council adopted a resolution confirming the assessment roll, which included assessments against lots over which Southern leases its right-of-way. Southern appealed the assessments to the Superior Court of Wake County, where the City's motion to dismiss the appeal was denied by order of Judge McKinnon dated 8 April 1969. The matter came on for hearing before Judge Bailey on 27 February 1970, the parties agreeing that it might be heard by the court without a jury. After hearing evidence and receiving a stipulation of the parties, the court entered judgment finding the following facts:

"1. The railroad right-of-way property of the plaintiff, not having a building on it nor used for any purpose

other than a right-of-way for the track running through the property as stipulated to by the parties, is not benefited by the paving done by the defendant, City of Raleigh;

"2. Article 42 of Chapter 160 of the General Statutes of North Carolina applies to the paving assessments in this case; and

"3. Said Article is not unconstitutional or otherwise invalid."

On these findings the court adjudged and decreed that the paving assessments by the City against Southern in this case "are unauthorized, illegal and unlawful" and ordered the assessments canceled. From this judgment the City of Raleigh appealed.

Joyner & Howison, by W. T. Joyner, Jr., for plaintiff appellee.

Donald L. Smith and Broxie J. Nelson for defendant appellant.

PARKER, J.

Effective 8 June 1965 the General Assembly enacted Article 42 of Chapter 160 of the General Statutes, which reads as follows:

"Article 42

"Assessments Against Railroads

"Sec. 160-520. Definitions. For the purposes of this subchapter the following definitions shall be applicable:

"(1) The term 'local improvement' shall include sidewalk improvements and street improvements as those terms are defined in G.S. 160-78 and shall include the laying, installing, improving, enlarging, altering or repairing of any sewer or water line or system.

"(2) The term 'right of way' shall mean any land or interest in land owned, leased or controlled by a railroad company on which there is located a main line or through railroad track or tracks together with adjoining land owned, leased or controlled by such railroad company within 100 feet of the center line of such track or tracks.

"Sec. 160-521. Power to Assess for Local Improvements. No municipality shall assess any railroad company

on account of any local improvement made on or abutting railroad right of way unless there is a building on such right of way owned, leased or controlled by the railroad, in which event the front footage to be used as a basis for such assessment against the railroad shall be the actual front footage occupied by such building plus 25 feet on each side thereof, but not to exceed the amount of land owned, leased or controlled by the railroad. In the event a building is placed on such property by the railroad subsequent to the time a local improvement is made, then the railroad company shall be subject to an assessment without interest on the same basis as if the building had been located on the property at the time the local improvement was made."

[1] These statutes were in effect at all times pertinent to this litigation. The parties have stipulated and the trial court has found that there is no building on the railroad right-of-way here involved. Therefore, the language of G.S. 160-521 applies to the factual situation here presented and prohibits the defendant City from making the contested assessments against plaintiff railroad.

[2, 3] There is no merit in the City's contention that G.S. 160-521 does not apply because it conflicts with the provisions of the City Charter (Sec. 105, Chap. 1184, 1949 Session Laws) under which the assessments were made and which required the abutting property owners to pay the entire cost of street improvements. In support of this contention the City cites the general rule that a special or local statute is not repealed by a subsequent general statute of statewide application. However, "[t]he question is always one of legislative intention, and the special or specific act must yield to the later general or broad act, where there is a manifest legislative intent that the general act shall be of universal application notwithstanding the prior special or specific act." 50 Am. Jur., Statutes, § 564, p. 565. In this case it is our opinion, and we so hold, that the language employed by the Legislature in G.S. 160-521 does clearly manifest a legislative intent that it be of general application. Accordingly, we hold that G.S. 160-521 applies to prohibit the assessments here contested.

[4-6] We also find no merit in appellant's contention that G.S. 160-521 is unconstitutional because not authorized by Article V, Sections 3 and 5, of the Constitution of North Carolina. These sections deal with the power of taxation. We are not here con-

cerned with a tax but with an assessment for a local improvement, and our Supreme Court has recognized a distinction between the two. In *Tarboro v. Forbes,* 185 N.C. 59, 61, 116 S.E. 81, 82, the law is stated as follows:

> "But there is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public. They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but upon a limited class in return for a special benefit. These assessments, it has been suggested, proceed upon the theory that when a local improvement enhances the value of neighboring property, it is reasonable and competent for the Legislature to provide that such property shall pay for the improvement."

Our Supreme Court has also recognized the power of the Legislature to determine by statute what property is benefited by local improvements, *Goldsboro v. R.R.,* 241 N.C. 216, 85 S.E. 2d 125; *Gunter v. Sanford,* 186 N.C. 452, 120 S.E. 41, and has recognized that the legislative declaration on the subject, in the absence of arbitrary action, is conclusive. *Kinston v. R.R.,* 183 N.C. 14, 110 S.E. 645. The recognition of the legislative power to determine what property is benefited by local improvements implies a recognition of the corollary power to determine what property is not benefited by such improvements. This, in effect, is what the General Assembly did when it enacted Article 42 of Chapter 160 of the General Statutes. In view of the peculiar nature of railroad right-of-way property "on which there is located a main line or through railroad track or tracks," as defined in G.S. 160-520, and on which no building is located, it is difficult to see how such property would in fact be benefited by the local improvements referred to. It is our opinion, and we so hold, that the General Assembly did not act arbitrarily when, by enactment of Article 42 of Chapter 160 of the General Statutes, it determined that such railroad right-of-way property was

not benefited by and should not be assessed for the described local improvements.

[7] Appellant assigns as error the admission of certain evidence, over its objection, which tended to show that the plaintiff's property was not benefited by the local improvements here involved. Even if, in view of our holding that the legislative determination on the matter was valid and controlling, such evidence be considered irrelevant, its admission could not have prejudiced the appellant, and the assignments of error directed to the admission of evidence are overruled.

The judgment appealed from is

Affirmed.

CAMPBELL and VAUGHN, JJ., concur.

MARY HOOVER v. WILLIAM DAVIS HOOVER AND CROWDER CONSTRUCTION COMPANY, INC.

No. 7026SC412

(Filed 26 August 1970)

1. **Appeal and Error § 24— exception to judgment — necessity for assignment of error**

No assignment of error is necessary where the sole exception is to the judgment as it appears in the record and the appeal itself is an exception thereto.

2. **Rules of Civil Procedure § 8; Pleadings § 26— demurrer sustained under former statute — motion to dismiss amended complaint — applicability of new Rules — res judicata**

Where demurrer to the original complaint was sustained under [former] G.S. 1-122(2), and motion to dismiss the amended complaint for failure to state a claim for relief was filed after the effective date of the new Rules of Civil Procedure, the sufficiency of the amended complaint is to be tested against the standard provided in Rule 8(a) (1), and the order sustaining the demurrer to the original complaint could not be *res judicata* when considering the question of the sufficiency of the amended complaint under the new Rules.

3. **Rules of Civil Procedure § 8— sufficiency of complaint — objective of Rule 8(a)(1)**

One of the objectives of enactment of Rule 8(a)(1) was to eliminate discussion as to whether a particular allegation states an "ultimate" fact or an "evidentiary" fact or conclusion of law.

4. **Highways § 7; Railroads § 7— construction of railroad bridge over highway — duty to travelers on highway**

When the corporate defendant undertook to construct a railroad bridge over a public highway, the positive legal duty devolved upon it to exercise ordinary care for the safety of the general public traveling over the road on which it was working.

5. **Highways § 7; Railroads § 2— column of railroad bridge under construction struck by car — negligence by contractor — sufficiency of complaint**

In this action for personal injuries received by plaintiff when the automobile in which she was riding as a passenger ran into a concrete column supporting a railroad overpass then being constructed by defendant over the highway, plaintiff's amended complaint gave ample notice of the occurrences she intended to prove to show a breach of duty on the part of corporate defendant and that she is entitled to relief. Rule of Civil Procedure No. 8(a)(1).

APPEAL by plaintiff from *Clarkson, J.*, 6 April 1970 Special Civil Session of MECKLENBURG Superior Court.

In this civil action plaintiff seeks recovery of damages for personal injuries received by her on 24 April 1966 when the automobile in which she was riding as a passenger ran into a concrete column supporting a railroad overpass then being constructed over highway 74 by the corporate defendant for the Seaboard Airline Railroad Company. In her complaint filed 18 April 1969 plaintiff alleged: The corporate defendant, in constructing the overpass, built nine cement columns, each about 40 inches in diameter, which were placed under the overpass; three of these columns were erected on the south side of the road, three in the middle of the road, and three on the north side of the road; the three columns on the north side of the highway divided the eastbound traffic from the westbound traffic, the westbound traffic running off of the main traveled portion of the road just north of the three columns located on the north side of the highway; the accident occurred when the driver of the car in which plaintiff was riding in a westerly direction, on meeting a vehicle with bright lights traveling in an easterly direction, abruptly turned to the right and struck one of the columns in the middle of the road. Plaintiff alleged that the individual defendant, who was driver of the automobile in which she was riding, was negligent in driving too fast, in failing to keep a proper lookout, and in other respects. She alleged that the corporate defendant was negligent in failing to use any method to control the dust that was pervading the area, in failing to keep its warning signals visible and in proper

repair, in failing to maintain any physical barrier which could keep the traffic in the two traffic lanes separated through the point on the road where the construction was under way, and in failing to provide an officer or other person to direct traffic where danger was imminent along the roadway. Plaintiff further alleged that the concurring negligence of the two defendants was the proximate cause of her injuries.

On 30 June 1969 the corporate defendant filed demurrer to the complaint for failure to state facts sufficient to constitute a cause of action. Hearing on the demurrer was held before Judge Falls at the 24 November 1969 Non-Jury Civil Session of Mecklenburg Superior Court and on 25 November 1969 Judge Falls entered an order sustaining the demurrer and granting plaintiff 30 days within which to amend her complaint. Plaintiff filed amended complaint on 11 December 1969, and on 22 December 1969 submitted to judgment of voluntarily nonsuit as against the individual defendant. On 9 January 1970 the corporate defendant filed a motion for an order dismissing plaintiff's action for failure to state a claim upon which relief can be granted for that: (1) Judge Falls had previously sustained defendant's demurrer to the original complaint for failure to state a cause of action, "and the ultimate facts alleged in the plaintiff's Amended Complaint are identical to those in the original Complaint and his Honor's sustaining of the Demurrer therefore constitutes the law of the case," and (2) "[h]is Honor's ruling on the Demurrer to the original Complaint is *res judicata* as to the plaintiff's Amended Complaint for the reason that no new matter is alleged in the Amended Complaint." A hearing was held on defendent's motion before Judge Clarkson at the 6 April 1970 Special Civil Non-Jury Session of Mecklenburg Superior Court, and on 10 April 1970 Judge Clarkson entered an order allowing the motion to dismiss. Plaintiff excepted to this order and appealed to the Court of Appeals.

W. B. Nivens for plaintiff appellant.

Marvin K. Gray; and Carpenter, Golding, Crews & Meekins, for defendant appellee.

PARKER, J.

[1] No assignment of error appears in the record. None is necessary, however, where, as here, the sole exception is to the judgment as it appears in the record and the appeal itself is

an exception thereto. *Hall v. Robinson,* 228 N.C. 44, 44 S.E. 2d 345.

Comparison of plaintiff's amended complaint with her original complaint, demurrer to which was sustained by Judge Falls with leave granted plaintiff to amend, reveals that the two pleadings are substantially the same. Each contains 22 paragraphs. Nineteen of the paragraphs in the amended complaint are identical with the corresponding paragraphs in the original complaint. In three paragraphs slight changes have been made. In paragraph 7 of the original complaint plaintiff alleged that a dusty detour sign located at the base of one of the concrete columns was "not visible"; in the amended complaint the words "not visible" were changed to "completely covered with dust." In paragraph 11 of the original complaint plaintiff alleged that certain of the blinker lights located east of the point of construction were out and "the dust was so heavy until the visibility was poor and the warning signs were not clearly visible"; in the amended complaint the quoted words were changed to the simple statement that "the dust was heavy." In paragraph 15 of the original complaint plaintiff alleged that the corporate defendant failed to keep its warning signals "visible"; in the amended complaint she alleged it failed to keep its warning signals "clean."

[2] The corporate defendant moved to dismiss the amended complaint on the grounds that the "ultimate facts" alleged in the amended complaint are identical to those in the original complaint and therefore the court's ruling sustaining the demurrer to the original complaint is *res judicata* as to the amended complaint. This contention ignores the impact of the new Rules of Civil Procedure which became effective on 1 January 1970, and apply to actions pending on that date. 1969 Session Laws, Chap. 803.

At the time Judge Falls sustained the demurrer to the original complaint the applicable law required that a complaint contain a "plain and concise statement of the facts constituting a cause of action." G.S. 1-122(2). Effective 1 January 1970 this was repealed and replaced by G.S. 1A-1, Rule 8(a)(1), which provides that a pleading which sets forth a claim for relief shall contain a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or ocurrences, intended to be proved showing that the pleader is entitled to relief." The sufficiency of plaintiff's amended complaint in this

case is to be tested against the standard provided in the new Rules. Therefore, the order sustaining the demurrer to the original complaint for failure to comply with the now repealed requirements of the old statute could not be *res judicata* when considering the question of the sufficiency of the amended complaint under the new Rules.

[3] The amendments which plaintiff made in her complaint were apparently made in an effort to allege "ultimate" facts rather than "evidentiary" facts or conclusions of law. We need not here be concerned with whether she succeeded. One of the objectives sought to be attained by enactment of G.S. 1A-1, Rule 8(a)(1) was to eliminate this sometimes troublesome and often sterile discussion as to whether a particular allegation states an "ultimate" fact or an "evidentiary" fact or conclusion of law. Tested by the standard now provided by Rule 8(a)(1), it is our opinion, and we so hold, that plaintiff's amended complaint does contain a "plain statement of the claim sufficiently particular to give the court and the parties notice of the . . . transactions or occurrences, intended to be proved," showing that she is entitled to relief.

[4, 5] When the corporate defendant undertook to construct the railroad bridge over the public highway on which plaintiff was traveling, the positive legal duty devolved upon it to exercise ordinary care for the safety of the general public traveling over the road on which it was working. *White v. Dickerson, Inc.* 248 N.C. 723, 105 S.E. 2d 51; *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551. Plaintiff's amended complaint gave ample notice of the occurrences she intended to prove to show a breach of this duty on the part of the corporate defendant and that she is entitled to relief. The judgment dismissing her complaint is

Reversed.

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

STATE OF NORTH CAROLINA v. JONAS FLOYD REAVES

No. 7015SC326

(Filed 26 August 1970)

1. Robbery § 4— armed robbery prosecution — sufficiency of evidence — formation of intent to take patrol car

In an armed robbery prosecution wherein the evidence of the State tended to show that defendant drove away in a patrol car after he had murderously assaulted the patrolman with a pistol and left the patrolman seriously wounded in an embankment, there is no merit to the defendant's contention that the prosecution should be dismissed for reason that the intention to take the patrol car and the revolver arose in his mind only after the assault was completed and defendant had found his own car locked, where all of the evidence established one continuing transaction amounting to armed robbery, with the elements of violence and of taking so joined in time and circumstance as to be inseparable.

2. Robbery § 5— armed robbery — instructions on lesser included offense

In an armed robbery prosecution, there is no necessity for the trial judge to instruct the jury as to an included crime of lesser degree where the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of the crime charged.

3. Criminal Law § 116— instruction on defendant's right not to testify — absence of request by defendant

The trial court in its discretion properly instructed the jury upon the right of defendant not to testify in his own behalf, even though defendant made no request for such an instruction; the fact that the trial court mistakenly prefaced the instruction with the statement that it was given at defendant's request, *held* not prejudicial.

APPEAL by defendant from *Copeland, J.*, 12 January 1970 Criminal Session of ORANGE Superior Court.

Defendant was charged in a bill of indictment with the felony of armed robbery. He pleaded not guilty. The jury returned a verdict of guilty as charged. Judgment was imposed sentencing defendant to prison for a term of thirty years, and defendant appealed.

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

Winston, Coleman & Bernholz, by Steven A. Bernholz for defendant appellant.

PARKER, J.

[1] The charge of armed robbery against defendant, Jonas Floyd Reaves (Reaves), was consolidated for trial with a similar charge made in a separate bill of indictment against Chris Roland Elliott (Elliott). The charges against both defendants arose out of the same events. Each defendant was found guilty, was sentenced to prison, and each filed a separate appeal to this Court. Upon Elliott's appeal this Court found no error in the trial. (See *State v. Elliott,* 9 N.C. App. 1, 175 S.E. 2d 12. The facts shown by the State's evidence are set forth in the opinion in *State v. Elliott, supra.* Insofar as pertinent to the questions raised by this appeal, the facts shown by the State's evidence may be briefly summarized as follows (defendant Reaves offered no evidence at the trial):

At 1:15 a.m. on 15 November 1969 a highway patrolman stopped a station wagon on Interstate 85 in Orange County. Reaves was the driver and Elliott was a passenger in the station wagon. The patrolman arrested Reaves for operating an automobile upon a highway while under the influence of an intoxicating liquor and placed Reaves in the passenger side of the front seat of the patrol car. Elliott got into the back seat of the patrol car. The patrolman then went to the station wagon, locked it, and took the keys. When the patrolman returned to the patrol car and started to use the radio, Reaves pointed a .25 automatic at him and told the patrolman he was going to kill him. Reaves held the automatic in his right hand and appeared to reach with his left hand for the patrolman's service revolver, which was in a holster worn on the patrolman's right side. As the patrolman lunged for Reaves' gun, the gun discharged, striking the patrolman in the stomach. At the same time the patrolman was struck on the top of the head by some instrument. As the patrolman and Reaves struggled for the automatic, Elliott, in the back seat, left the patrol car. The patrolman managed to take the automatic away from Reaves and found it had become jammed. Reaves then snatched the patrolman's service revolver and its holster free from the patrolman's belt. The patrolman knocked the revolver and holster from Reaves' hand to the floorboard of the patrol car. Reaves retrieved the pistol and holster from the floorboard, removed the pistol from the holster, and started swinging it toward the patrolman. The patrolman lunged for Reaves and again struck the pistol from his hand to the floorboard on the right side of the patrol car. The door to the driver's side of the patrol car was open, and the patrolman fell out onto

the pavement. The patrolman got up, saw Reaves scrambling in the right front of the car, and immediately went around the patrol car to the edge of the embankment at the side of the road, where he fell and rolled approximately 50 feet down the embankment. The patrolman then saw Reaves get out of the patrol car and search the embankment with the patrolman's flashlight. Reaves then moved from the rear of the patrol car and went to the driver's side of the station wagon, but could not get in because the patrolman had locked it and removed the keys. Reaves then returned to the patrol car and got in, and the patrolman observed the patrol car move approximately 300 feet west and stop. A voice called out, "Chris." The patrol car remained stopped ten or fifteen seconds, and then moved away out of sight on I-85. The patrol car was later found abandoned in Durham. The patrolman's service revolver was found nearby, off of Elba Street in Durham behind a big tree.

Appellant contends that the State's evidence, while sufficient to support a conviction for larceny or assault with a deadly weapon, or both, was not sufficient to support a conviction for armed robbery. This contention is based upon appellant's argument that the intent to take the patrol car and the patrolman's revolver arose in defendant's mind only after defendant found his own automobile locked, and therefore there was not the necessary coincidence in time between the use or threatened use of a deadly weapon and the felonious taking of personal property from the person of the patrolman so as to make the crime armed robbery. There is no merit in this contention.

The uncontradicted evidence clearly shows that at the very moment defendant drove away in the patrol car, taking the patrolman's revolver with him, the patrolman lay wounded at the bottom of the embankment, hiding from the armed defendant, and fearing for his life. The car and gun were not abandoned or left unattended when they were taken by the defendant; defendant had driven their custodian away by a vicious and murderous assault. Defendant's use of his automatic in shooting the patrolman and his threatened use of the patrolman's revolver in a further deadly assault upon the patrolman, clearly continued to be operative at the time he actually drove away the patrol car, taking the patrolman's revolver with him. The evidence shows one continuing transaction amounting to armed robbery, with the elements of violence and of taking so joined in time and circumstance as to be inseparable.

[2] The fact that defendant may have taken the patrol car and the revolver for temporary use, and, after they had served his purpose for escape may have intended to abandon them at the first opportunity lest they lead to his detection, does not change the result. "When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal *(animus furandi)*." *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194. In the present case all of the evidence for the State, which was uncontradicted by any evidence for defendant, if believed by the jury, shows that defendant committed the crime of armed robbery as charged in the indictment. There was no evidence to support a contention that defendant, if not guilty of the crime charged in the indictment, was guilty of a crime of less degree. There is no necessity for the trial judge to instruct the jury as to an included crime of lesser degree where, as in this case, the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545. On the evidence in this case the trial court correctly submitted the case to the jury on the single issue of defendant's guilt or innocence of the crime of armed robbery as charged in the indictment.

[3] Appellant also assigns as error that the court instructed the jury as to the right of defendant not to testify and as to how his failure to testify was to be considered. In this connection appellant admits the instruction was contextually correct, but appellant contends it was error for the court to charge at all on this aspect of the case absent a specific request from defendant's attorney to do so. "The trial judge in his discretion *may* give such an instruction, but, absent a proper request, is not *required* to do so." (Emphasis added.) *State v. Powell,* 6 N.C. App. 8, 169 S.E. 2d 210. The giving of the instruction in the present case was within the trial court's discretion, no abuse of which has been shown.

Defendant further complains that the court prefaced the instruction with the statement that it was given at the request of defendant, whereas no such request had been made. Even so, this did not amount to a prejudicial comment by the court upon defendant's failure to testify, particularly in view of the court's correct substantive instruction on the matter. *State v. McNeill,*

229 N.C. 377, 49 S.E. 2d 733, relied on by appellant, is clearly distinguishable.

We have carefully examined all of appellant's remaining assignments of error which have been brought forward in his brief, all of which relate to the court's charge to the jury, and find in them no merit. In the trial and judgment appealed from we find

No error.

CAMPBELL and VAUGHN, JJ., concur.

CARL R. GRAY v. JESSE B. CLARK AND WIFE, JEANNE W. CLARK

No. 7026SC415

(Filed 26 August 1970)

1. **Animals § 2; Municipal Corporations § 37— ordinance making it unlawful to keep dog which habitually chases persons and vehicles — validity**

   Ordinance of the City of Charlotte making it unlawful to keep within the city a dog which habitually or repeatedly chases, snaps at, attacks or barks at pedestrians, bicycles or vehicles was a valid exercise of the city's police power.

2. **Animals § 2— collision between dog and motorcycle — violation of municipal ordinance in keeping dog which chases vehicle — negligence — proximate cause**

   In this action for personal injuries resulting from a collision between a dog owned by defendants and a motorcycle operated by plaintiff, plaintiff's evidence presented jury questions as to whether defendants violated a municipal ordinance making it unlawful to keep within the municipality any dog which habitually or repeatedly chases, snaps at, attacks or barks at pedestrians, bicycles or vehicles, which would be negligence *per se*, and whether such violation was a proximate cause of plaintiff's injuries.

APPEAL from *Jackson, J.*, 9 March 1970 Schedule "A" Civil Jury Session, MECKLENBURG Superior Court.

This action was instituted by the plaintiff, Carl R. Gray, to recover damages for personal injuries allegedly sustained as the result of a collision between a dog owned by the defendants, Jesse B. Clark and wife, Jeanne W. Clark, and a motorcycle being driven by Gray.

The plaintiff alleged and offered evidence tending to show that about six o'clock p.m. on 9 September 1966, while riding his neighbor's motorcycle on Galway Drive near the defendants' home within the corporate limits of the City of Charlotte, the defendants' dog ran into and upset the motorcycle causing severe personal injuries to the plaintiff. The plaintiff alleged, among other things, that the defendants were negligent in that they violated Section 3-22 of the Code of the City of Charlotte which required certain dogs to be kept under restraint, and that such violation on the part of the defendants was the proximate cause of the collision between the motorcycle being operated by the plaintiff and the defendants' dog, and the resulting injuries to plaintiff.

The defendants answered denying negligence and alleged contributory negligence upon the part of the plaintiff, and alleged that Section 3-22 of the Code of the City of Charlotte was ". . . unconstitutional and beyond the power granted by the Legislature of North Carolina to the City of Charlotte, vague, and not an ordinance creating a standard of care such as would impose civil liability on these defendants as to the plaintiff."

At the close of all the evidence the defendants' motion for a directed verdict was allowed and the court entered judgment, in pertinent part, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the motion of the defendants for a directed verdict be allowed, the court holding as a matter of law that the plaintiff has failed to introduce evidence of negligence on the part of the defendants proximately causing his injuries, that the plaintiff have and recover nothing of the defendants in this action and that the same be dismissed, and that the costs of this action be taxed against the plaintiff."

From the entry of the judgment, the plaintiff appealed to the Court of Appeals.

Don Davis for the plaintiff appellant.

Carpenter, Golding, Crews and Meekins, by John G. Golding, for the defendant appellees.

HEDRICK, J.

The sole question presented on this appeal is whether there was sufficient evidence of the defendants' negligence to require

the submission of the case to the jury over the defendants' motion for a directed verdict.

In *Sink v. Moore* and *Hall v. Moore*, 267 N.C. 344, 148 S.E. 2d 265 (1966), our Supreme Court held that evidence that a small dog frequently dashed into the street to bark at and pursue motorcycles, automobiles, and other noisy vehicles was not sufficient to justify classifying him as a "vicious" animal and did not make him "a menace to the public health," within the meaning of G.S. 106-381. The Court pointed out, however, that the accident there involved occurred outside the corporate limits and that no municipal ordinance requiring dogs to be kept under restraint was involved.

Section 3-22 of the Code of the City of Charlotte, introduced into evidence by the plaintiff, provides:

"ACTS DEEMED PUBLIC NUISANCE

It shall be unlawful for any dog owner to keep or have within the City a dog which habitually or repeatedly chases, snaps at, attacks or barks at pedestrians, bicycles or vehicles or turns over garbage pails or damages gardens, flowers or vegetables, or conducts itself so as to be a public nuisance or permits a female dog to run at large during the erotic stage of copulation."

In *State v. Harrell*, 203 N.C. 210, 165 S.E. 551 (1932), we find the following:

"In Vol. 3 (2d ed.), sec. 1004, McQuillan on Municipal Corporations, is found, the law in regard to the Regulation of Dogs, as follows: 'To safeguard and promote the public health, safety and convenience municipal power to regulate the keeping and licensing of dogs within the corporate area is generally recognized. Accordingly ordinances regulating dogs and requiring them to be registered and licensed, and at times muzzled and prevented from going at large, are within the police powers usually conferred upon the local corporation. Such ordinances are authorized by virtue of general powers and the usual general welfare clause. . . .' "

[1] From the foregoing, it appears that the City of Charlotte had the authority to pass an ordinance regulating the keeping and licensing of dogs and that Section 3-22 of the Code of the City of Charlotte is within the police power of the municipality.

In *Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967), Bobbitt, J., now C.J., speaking for the Court, said:

"The violation of a municipal ordinance imposing a public duty and designed for the protection of life and limb is negligence *per se*. However, to impose liability therefor it must be established that such violation proximately caused the alleged injury. . . ."

See also *Reynolds v. Murph,* 241 N.C. 60, 84 S.E. 2d 273 (1954); *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333 (1955); 38 Am. Jur., Negligence, sec. 158.

The plaintiff testified: ". . . as I came up to approximately the front or just before I got to the front of Mrs. Clark's house (I know where Mr. and Mrs. Clarks' house is now) a dog ran at my right leg and tried to bite at it. It barked at it. I jerked my right leg up and he darted off to the right, then darted right back in front and hit the front wheel. When he hit the front wheel that knocked the front wheel over to the left and threw the bike over on my right leg and threw me into the street, approximately the middle of the street."

Jimmie K. Price, a witness for the plaintiff, testified that on two occasions prior to the date of the plaintiff's accident, while riding by the defendants' home on his motorcycle, he was chased by the same dog.

Edward Thompson testified for the plaintiff that he had gone down Galway Drive on his motorcycle prior to the collision involved in this case, and that he had been chased several times by a dog which he described as being similar to Bubba, the defendants' dog.

The defendant, Jesse B. Clark, by adverse examination, stated that he was the owner of a black and white or brown and white bird dog at the time of the accident.

Mrs. Clark, on direct examination, testified that their dog, Bubba, was involved in the collision and that she told the plaintiff, after he got out of the hospital, that they had to have the dog put to sleep.

[2] We hold that the evidence, when considered in its light most favorable to the plaintiff, is sufficient to raise an inference that the defendants violated Section 3-22 of the Code of the City of Charlotte by keeping within the corporate limits of the municipality a dog which habitually or repeatedly chased, snapped at, attacked or barked at pedestrians, bicycles or vehicles, and that such violation was a proximate cause of the injuries sustained

by the plaintiff as a result of the collision between the defendants' dog, Bubba, and the motorcycle being ridden and operated by the plaintiff. For the reasons stated, the judgment allowing the defendants' motion for a directed verdict is reversed.

Reversed.

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

STATE OF NORTH CAROLINA v. ALBERT JOHNSON LEWIS

No. 7021SC507

(Filed 26 August 1970)

1. **Criminal Law § 146; Appeal and Error § 24— mandatory appellate rules**

   The rules governing appeals are mandatory, not directory.

2. **Criminal Law § 154— improper service of case on appeal — extension of time — trial judge**

   Criminal appeal was improperly before the Court of Appeals where the service of case on appeal was not made within the 30 days allowed by the trial judge; purported extension of time by a judge other than the trial judge was ineffectual to comply with the statutes and the Rules of the Court of Appeals. G.S. 1-282, G.S. 15-180, Rule of Practice No. 50.

3. **Criminal Law § 154— case on appeal — extension of time — trial judge**

   Only the judge who tried the case can extend the time for serving the statement of the case on appeal. G.S. 1-282, G.S. 15-180.

APPEAL by defendant from *Johnston, J.*, 2 March 1970 Two-Week Session of Superior Court held in FORSYTH County.

Defendant was tried upon a bill of indictment, proper in form, charging him with committing, on 25 October 1969, the felony of assault upon Ronald T. McHam with a deadly weapon, with intent to kill, inflicting serious bodily injuries.

The evidence for the State tended to show that on 25 October 1969 McHam was standing on a street in Winston-Salem talking to and holding hands with Margie Rice (Margie), who was a friend of both defendant and McHam. The defendant came down the street in his car, stopped, and said to McHam,

"Go ahead Mack." A few words were exchanged between defendant and McHam; whereupon, defendant shot McHam four times with what McHam thought was a .22 calibre pistol. The first shot struck him in the stomach above his navel. McHam testified, "The next shot was to the right side on the front. I was also shot in the back and under my shoulder blades in the middle of my back, and through the left arm." Defendant told Margie to get in his car, which she did. After defendant shot him, McHam, who had a .22 calibre pistol with him, shot at the defendant as he drove off. McHam was taken to the hospital where he remained over a month recovering from the wounds inflicted on him by defendant.

Defendant did not testify but offered Margie as a witness. She testified that in her opinion McHam was drunk. She and McHam were standing on the sidewalk when defendant drove up and told her to come get in his car. As she started to get in, McHam started walking towards the car when defendant said, "You'd better go on." McHam came up to the car and leaned on the door on the driver's side. After defendant and McHam talked to each other, McHam pulled a gun out, defendant hit McHam's hand, and then the shooting started. She got in the back seat of the car on the floorboard. She heard eight or nine shots. The car rolled down the street while shots were still being fired. Neither Margie nor the defendant were hit by any of the shots.

The jury found the defendant guilty of an assault with a firearm inflicting serious injury which is a felony. From judgment of imprisonment of not less than three years nor more than five years, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Assistant Attorney General Rich for the State.

Wilson, Morrow & Boyles by John F. Morrow for defendant appellant.

MALLARD, C.J.

[1] The case is not properly before us. Therefore, the questions set forth in the assignments of error are not properly presented. It is established law in North Carolina that the rules governing appeals are mandatory, not directory. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970).

[2, 3] Judge Johnston, the trial judge, on the date of the

judgment, 12 March 1970, gave the defendant thirty days to prepare and serve his statement of case on appeal and allowed the State thirty days thereafter to serve countercase. On 10 April 1970 Judge Crissman entered an order, upon defendant's motion, allowing the defendant an additional thirty days in which to serve his statement of case on appeal. Thereafter, on 12 May 1970, upon defendant's motion, Judge Crissman entered another order allowing the defendant an additional thirty days in which to serve his statement of case on appeal. Defendant did not serve his statement of case on appeal but tendered it, and service thereof was accepted by the district solicitor on 9 June 1970. This was not within the time allowed by the order of Judge Johnston. Judge Crissman, who was not the trial judge, did not have authority to enter either of these orders allowing the defendant additional time in which to serve the statement of his case on appeal. Under the applicable statutes, G.S. 15-180 and G.S. 1-282, only the judge who tried the case can extend the time for serving the statement of the case on appeal. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969). The statutes do not authorize the trial judge to grant appellant another extension of time to serve statement of case on appeal after the expiration of the session at which the judgment was entered. *State v. Atkinson, supra.* However, the *trial judge* is given authority to do this under Rule 50 of the Rules of Practice in the Court of Appeals which reads as follows:

> "If it appears that the case on appeal cannot be served within the time provided by statute, rule, or order, the trial judge (or the Chairman of the Industrial Commission or the Chairman of the Utilities Commission as the case may be) may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and counter-case or exceptions to the case on appeal, provided this does not alter the provisions of Rule 5 relating to the docketing of the record on appeal."

In the case of *Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58 (1968), *cert. denied,* 275 N.C. 137, this court said:

> "In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine

whether errors of law are disclosed on the face thereof. * * * "

We have reviewed the record proper, and no prejudicial error is disclosed on the face thereof.

No Error.

PARKER and HEDRICK, JJ., concur.

IN THE MATTER OF: ANNIE LAURIE GREEN, ADMINISTRATRIX OF ESTATE OF WILLIE LOU CANNADY

No. 709SC349

(Filed 26 August 1970)

1. **Clerks of Court § 4; Executors and Administrators § 37— award of administrator's commissions — discretion of court**

Commissions of an administrator of the estate of a decedent are to be fixed in the discretion of the clerk of superior court subject to the maximum provided by statutes; this requires exercise of judicial discretion and judgment by the clerk, who has original jurisdiction in the matter. G.S. 28-170.

2. **Clerks of Court § 4; Executors and Administrators § 37— commissions and attorneys' fees — jurisdiction of clerk**

Administratrix' petition for allowance of commissions and attorneys' fees was initially properly brought before the clerk of superior court. G.S. 7A-241, G.S. 2-1.

3. **Courts § 6— appeal from order of clerk — exception to the order — scope of review**

On appeal to the judge of superior court from an order of the clerk of court awarding administratrix' commissions and attorneys' fees, respondent's general exception to the clerk's order presented only the question whether the facts found support the conclusions of law.

4. **Executors and Administrators § 37— award of commissions and attorneys' fees — sufficiency of findings**

In an order of the clerk of court awarding administratrix' commissions and attorneys' fees out of the assets of the estate, findings of the clerk that the administratrix did not waive her commissions and has not forfeited them by neglect or malfeasance, and that the administratrix in good faith employed counsel to defend the estate, *held* sufficient to support the order.

APPEAL by respondent, Louise Cannaday Brown, from an order of *Hobgood, J.*, dated 29 November 1969, VANCE Superior Court.

This appeal concerns the same estate which was involved in the litigation previously before this Court in the case of *Brown v. Green,* 3 N.C. App. 506, 165 S.E. 2d 534 (1969). Following that appeal a second trial resulted in the plaintiff in that case, Louise Cannady Brown, recovering verdict and judgment against the estate in the amount of $13,500.00 plus interest, which judgment became final when the estate failed to perfect an appeal. The present controversy was commenced when the petitioner, who is administratrix of the estate, filed a petition with the clerk of Superior Court of Vance County seeking an allowance of commissions for her services as administratrix and approval of attorneys' fees for the attorneys who had represented her in connection with administration of the estate and in the *Brown v. Green* litigation. Respondent, who was the successful plaintiff in that litigation and who is both a creditor of the estate and an heir of the decedent, filed a reply to the petition and a motion to dismiss, alleging that the petitioner had agreed to serve as administratrix without remuneration and that petitioner had wasted assets of the estate by denying respondent's claim without sufficient grounds and by failing properly to preserve assets of the estate. Respondent also alleged that the services rendered by the attorneys had not benefited the estate, that the assets of the estate were insufficient to pay her claim in full, and that any commissions and fees allowed would necessarily be paid out of funds which would otherwise be applicable to her claim. On these grounds the respondent opposed the allowance of any commissions to the administratrix and opposed payments of fees to the attorneys for the estate out of assets of the estate.

The matter was heard by the clerk of superior court, the petitioner being present in person and being represented by her attorneys and the respondent being represented by her attorney. After hearing the sworn testimony of the petitioner and of a witness presented by her, and after reviewing the file in the estate and the pleadings in the action entitled *"Brown v. Green,"* the clerk entered an order finding as facts that the administratrix "did not waive her commissions by agreement or otherwise and has not forfeited the same by neglect or malfeasance," and that she in good faith employed counsel to defend the action entitled *"Brown v. Green."* The clerk's order also made detailed findings as to the nature and extent of the legal services which had been rendered by the attorneys for the estate. On these findings the clerk concluded as a matter of law that the

administratrix was entitled to commissions and the attorneys were entitled to compensation for services rendered and ordered these commissions and fees to be paid from the assets of the estate. The respondent excepted to this order and appealed to the resident judge of the superior court.

After hearing the parties, Judge Hobgood entered an order making the same findings of fact as had been made by the clerk and approving payment of the administratrix's commissions and fees for her attorneys out of assets of the estate. (Judge Hobgood's order did modify the clerk's order to the extent of denying any commissions to the administratrix on the disbursement of that portion of the attorneys' fees attributable to the performance of services by them in connection with the previous litigation; no question is raised on this appeal as to this modification of the clerk's order.) Respondent excepted to Judge Hodgood's order and appealed to the Court of Appeals.

Sterling G. Gilliam and Frank Banzet for petitioner appellee.

Vaughan S. Winborne for respondent appellant.

PARKER, J.

[1, 2] Commissions of an administrator of the estate of a decedent are to be fixed in the discretion of the clerk of superior court subject to the maximum provided by statute. G.S. 28-170. This requires exercise of judicial discretion and judgment by the clerk, who has original jurisdiction in the matter. *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151. In other matters relating to the administration of decedents' estates the clerk also exercises jurisdiction as ex officio judge of probate according to the practice and procedure provided by law. G.S. 7A-241; G.S. 2-1. Under these statutes the petition in the present case for allowance of commissions and attorneys' fees was initially properly brought before the clerk of superior court.

[3, 4] After hearing testimony of witnesses and examining the official records in his office, the clerk entered his order making findings of fact upon which he based his conclusions of law and judgment. The respondent took no exception to any specific finding of fact made by the clerk but took only a general exception to the judgment entered by the clerk. On appeal to the judge of superior court, respondent's general exception to the clerk's order presented only the question whether the facts found support the conclusions of law. *In re Estate of Lowther,*

271 N.C. 345, 156 S.E. 2d 693. The judge of superior court, by entering an order making the same findings of fact and conclusions of law as had been made by the clerk, in effect ruled that the facts found support the conclusions of law. We agree with that ruling. The order appealed from is

Affirmed.

CAMPBELL and VAUGHN, JJ., concur.

ALLIED CONCORD FINANCIAL CORPORATION v. FRED H. LANE, TRADING AND DOING BUSINESS AS LANE'S

No. 703SC396

(Filed 26 August 1970)

Landlord and Tenant § 5— action for breach of lease of business equipment — directed verdict

In this action for breach of an agreement for the lease of a charge posting cash register which provided that in the event of a breach of said agreement by the lessee, the lessor would be entitled to recover in full for the unpaid rent that accrued prior to the date of repossession of the equipment and, as liquidated damages, all unpaid rentals reserved under the lease less the unexpired rental value of the equipment, the actual date plaintiff lessor repossessed the leased equipment would be critical in determining defendant lessee's liability, if any, to plaintiff for alleged breach of the agreement, and the trial court erred in allowing defendant's motion for a directed verdict where the only evidence as to the time of repossession was that plaintiff repossessed the property in the fall of 1967. Rule of Civil Procedure No. 50(a).

APPEAL from *Parker, J.*, 23 February 1970 Civil Session of PITT County Superior Court.

This was a civil action instituted by the plaintiff, Allied Concord Financial Corporation (Allied), to recover from the defendant, Fred H. Lane, trading as Lane's (Lane), rental due under a lease agreement to the date of repossession and the aggregate amount of remaining rental due less the amount received from sale of the equipment at public auction. The evidence presented at the trial tended to establish the following facts: On 9 March 1967 an agreement was executed between Allied and Lane under which Lane was to lease a NCR charge posting cash register from Allied. Lane was to make an advance payment of $78.19 and 59 subsequent payments of $78.19 each.

The lease agreement also provided for liquidated damages in the event of a breach of the agreement by Lane as follows:

> "14. Default: This Lease shall be breached if: (a) lessee shall default in the payment of any rent hereunder and such default shall continue for ten days; . . . . In the event of a breach of this Lease: (1) All sums to become due hereunder shall, at Lessor's option, become due and payable forthwith. (2) The equipment shall upon lessor's demand forthwith be assembled and delivered to lessor at lessee's expense at such place as lessor shall designate and lessor and/or its agents may, without notice or liability or legal process, enter into any premises . . . of lessee . . . where the equipment may be . . . and repossess all or any part of the equipment. . . . Lessee hereby expressly waives all further rights to possession of the equipment and all claims for injuries suffered through or caused by such repossession. If lessor takes possession, Lessor shall give Lessee credit against Lessee's liability for Lease rentals for an amount equal to the difference between the aggregate rent reserved hereunder for the unexpired term of this Lease after such taking of possession (hereinafter called 'Unexpired Rentals') and the then aggregate rental value of all equipment for the unexpired original term of this Lease (hereinafter called 'unexpired Rental Value of Equipment'); provided, however, that any statute providing a lesser amount of damages shall control, if applicable and not subject to agreement of the parties. The foregoing provisions shall be without prejudice to any greater rights given to Lessor by any such statute. Lessor, upon any breach of this Lease, may sell the equipment or may re-lease such equipment for a term and a rental which may be equal to, greater than or less than the rental and term herein provided, and any proceeds of such sale received within sixty days after Lessor receives possession of the equipment or any rental payments received under a new lease made within such sixty days for the period prior to the expiration of this Lease, less Lessor's expenses of taking possession, storage, reconditioning and sale or re-leasing, shall be deemed and considered for the purposes of this paragraph as being the Unexpired Rental Value of Equipment. If the Unexpired Rental Value of Equipment exceeds the Unexpired Rentals, Lessor shall be entitled to the excess. The provisions hereof entitling Lessor to collect all unpaid rentals

reserved under this Lease less the Unexpired Rental Value of Equipment is agreed on as a liquidated damage provision and not as a penalty. The provisions of this paragraph shall be without prejudice to Lessor's right to recover in full for unpaid rent that accrued prior to the taking of possession of the equipment. . . ."

In Paragraph 8 of its complaint, the plaintiff alleged:

"8. On 30 October 1967 the plaintiff, pursuant to the provisions of paragraph 14 of the lease agreement, took possession of the leased equipment; further pursuant to the provisions of said paragraph 14, the plaintiff did offer said equipment for sale at public auction at its offices in Raleigh, North Carolina, on 12 December 1967, at which sale the said equipment was purchased by NCR Co. at a price of $824.34."

The defendant answered Paragraph 8 of the plaintiff's complaint as follows:

"As to the allegations to paragraph VIII, it is admitted that the plaintiff took possession of the leased equipment, but as to the other allegations of said paragraph, the defendant has no knowledge sufficient to form a belief thereon and therefore denies the same."

All of the evidence tended to show that the leased equipment was repossessed or reclaimed by the plaintiff "in the fall of 1967."

At the close of plaintiff's evidence the court allowed the defendant's motion for a directed verdict and entered judgment in pertinent part as follows:

". . . at the conclusion of the evidence for the plaintiff, the defendant moved for a directed verdict on ground that the plaintiff had failed to prove any damages beyond those for the rental reserved in the lease for the machine described in the pleadings during the period of time that the defendant had the machine, to wit, $469.14, and that the plaintiff was not entitled to damages beyond the date it accepted surrender of this machine, in the absence of proof of damages after such surrender, and the Court being of the opinion that said motion should be allowed and judgment should be issued thereon;

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

that the plaintiff recover of the defendant the sum of $469.14 together with interest from October 30, 1967, and the costs be taxed against the defendant, and that this judgment be with prejudice to both parties."

From the entry of the judgment, the plaintiff appealed to the North Carolina Court of Appeals.

Harris, Poe, Cheshire and Leager, by Samuel R. Leager, for plaintiff appellant.

Nelson W. Taylor for defendant appellee.

HEDRICK, J.

The question presented on this appeal is whether the court committed reversible error in allowing the defendant's motion for a directed verdict. G.S. 1A-1, Rule 50(a), Rules of Civil Procedure, provides:

"(a) *When made; effect.*—A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order granting a motion for a directed verdict shall be effective without any assent of the jury."

The lease agreement entered into between the plaintiff and the defendant provided in substance that in the event of a breach of the said agreement by the lessee, the lessor would be entitled to recover in full for unpaid rent that accrued prior to the date of the repossession of the equipment, and, in addition thereto, as liquidated damages, all unpaid rentals reserved under the lease less the unexpired rental value of the equipment. Thus, we find that the actual date that the plaintiff repossessed the leased property would be critical in determining the defendant's liability, if any, to the plaintiff for the alleged breach of the agreement. The only evidence regarding the time that the plaintiff actually repossessed the property was to the effect that the property was reclaimed or repossessed in the fall of 1967.

We hold, therefore, that under the evidence and under Rule 50(a), Rules of Civil Procedure, the court was without authority to allow the defendant's motion for a directed verdict.

The judgment appealed from is reversed, and a new trial is ordered.

New trial.

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

STATE OF NORTH CAROLINA v. KEITH WAYNE CRABB

No. 7023SC375

(Filed 26 August 1970)

1. **Criminal Law § 161— appeal as exception to judgment**

An appeal itself is an exception to the judgment and presents for review error appearing on the face of the record.

2. **Criminal Law § 157— record proper**

The record proper in a criminal case consists of the bill of indictment or warrant, the plea on which the case is tried, and the verdict and the judgment from which appeal is taken.

3. **Criminal Law § 139— sentence with minimum and maximum terms— maximum penalty**

Where the sentence is to maximum and minimum terms, the maximum may not exceed the maximum provided by statutory limit even though the minimum is within the statutory limit.

4. **Criminal Law § 138— single judgment for two counts — presumption of consolidation**

Where there is a verdict or plea of guilty to more than one count in a warrant or bill of indictment and the court imposes a single judgment thereon, a consolidation for the purpose of judgment will be presumed.

5. **Criminal Law § 138— cases consolidated for judgment — maximum penalty**

When cases are consolidated for judgment, the court has no authority to enter a judgment in excess of the maximum statutory penalty applicable to any of the offenses for which there has been a conviction or a plea of guilty.

6. **Criminal Law § 139; Burglary and Unlawful Breakings § 8; Larceny § 10— nonfelonious breaking and entering and nonfelonious larceny — consolidation for judgment — sentence to maximum and minimum terms — excessive maximum penalty — correction by appellate court**

Where defendant pleaded guilty to nonfelonious breaking and

entering and nonfelonious larceny, judgment imposing a sentence of "not less than two nor more than three years" is erroneous insofar as it purports to impose a maximum term of three years, since neither offense is punishable by imprisonment for a term in excess of two years, and the judgment is modified by striking therefrom the words "nor more than three" so that the sentence is two years.

APPEAL by defendant from *Beal, S.J.*, April 1970 Criminal Session of WILKES County Superior Court.

Defendant was brought to trial under a single bill of indictment containing separately stated counts charging felonies of breaking and entering, larceny and receiving. He tendered pleas of guilty to the lesser included offenses of non-felonious breaking and entering and non-felonious larceny. After extensively examining defendant relating to the voluntariness of his pleas, the court accept the pleas and entered the following judgment:

> "The judgment of the court is that the defendant be confined in the State's Prison for a period of not less than two nor more than three years, it being the intent of this court that this sentence be served as a youthful offender in the Youthful Offender's Camp."

Defendant, in apt time, appealed and the record was docketed in this court. The record contains no exceptions or assignments of error.

Robert Morgan, Attorney General, by Harrison Lewis, Deputy Attorney General, for the State.

Ferree & Osborne by Samuel L. Osborne for defendant appellant.

GRAHAM, J.

Defendant's court appointed counsel has filed a brief in which he sets forth no arguments and states that he does not contend the appeal has merit. He does request, however, that this court review the record and award a new trial if any error is found.

[1, 2] An appeal itself is an exception to the judgment and presents for review error appearing on the face of the record.

State v. Ayscue, 240 N.C. 196, 81 S.E. 2d 403; *State v. Williams,* 235 N.C. 429, 70 S.E. 2d 1; *State v. Hitchcock,* 4 N.C. App. 676, 167 S.E. 2d 545. The record proper in a criminal case consists of the bill of indictment or warrant, the plea on which the case is tried, the verdict and the judgment from which appeal is taken. *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262; *State v. Moore,* 6 N.C. App. 596, 170 S.E. 2d 568.

[3, 6] In reviewing the face of the record it is noted that the judgment contains error. Defendant pleaded guilty to non-felonious breaking and entering (G.S. 14-54(b)) and non-felonious larceny (G.S. 14-72(a)). Neither offense is punishable by imprisonment for a term in excess of two years. G.S. 14-3(a). Therefore, the judgment is erroneous insofar as it purports to impose a maximum term of imprisonment of three years. Where the sentence is to maximum and minimum terms, the maximum may not exceed the maximum provided by statutory limit even though the minimum is within the statutory limit. 3 Strong, N.C. Index 2d, Criminal Law, § 139.

[4, 5] The court could have entered separate judgments and provided for the sentences imposed to run consecutively. If that had been done the maximum limit would have been two years on each count or a total of four years. However, "[i]n cases in which there is a verdict or plea of guilty to more than one count in a warrant or bill of indictment, and the Court imposes a single judgment (sentence, or fine, or both) a consolidation for the purpose of judgment will be presumed." *State v. McCrowe,* 272 N.C. 523, 158 S.E. 2d 337. Further, when cases are consolidated for judgment a court has no authority to enter a judgment in excess of the maximum statutory penalty applicable to any of the offenses for which there has been a conviction or a plea of guilty. *State v. McCrowe, supra; State v. Tolley,* 271 N.C. 459, 156 S.E. 2d 858; *State v. Austin,* 241 N.C. 548, 85 S.E. 2d 924; *State v. White,* 2 N.C. App. 398, 163 S.E. 2d 82.

The Attorney General has filed a brief and with commendable candor has called attention to the authorities cited herein and conceded that he is unable to distinguish the instant case.

[6] For the reasons set forth herein the judgment is modified by striking therefrom the words "nor more than three," so that the sentence provided by the judgment is two years. See *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765; *State v. Evans,* 8 N.C. App. 469, 174 S.E. 2d 680.

We have reviewed the other portions of the record proper and conclude that no prejudicial error appears therein. The judgment as modified is therefore affirmed.

Modified and affirmed.

BROCK and MORRIS, JJ., concur.

ANNA W. TURNER v. JOSEPH R. TURNER, SR.

No. 7021DC380

(Filed 26 August 1970)

1. **Rules of Civil Procedure § 50— motion for directed verdict — mandatory rule**

A motion for a directed verdict shall state the specific grounds therefor; this rule is mandatory. G.S. 1A-1, Rule 50(a).

2. **Rules of Civil Procedure § 50; Appeal and Error § 59 — motion for directed verdict — review**

Since the Rules of Civil Procedure are only so recently effective in this State, the Court of Appeals reviews the question whether there was sufficient evidence to require submission of the issues to the jury, even though appellant failed to state specific grounds for his motion for a directed verdict.

3. **Divorce and Alimony § 18— alimony — child support — indignities to the wife — instructions**

In the wife's action against her husband to obtain child custody and support, temporary and permanent alimony, and counsel fees, trial court's instructions on the issue as to whether the husband had offered such indignities to the wife as to render her condition intolerable and her life burdensome, *held* reversible error, since the jury was left to determine for itself, without adequate explanation from the court, what law arose on the evidence and how that law should be applied to the evidence.

4. **Rules of Civil Procedure § 51— instruction — application of law to the evidence**

The trial court is required to declare and explain the law arising on the evidence given in the case and to state the evidence to the extent necessary to explain the application of the law thereto. G.S. 1A-1, Rule 51(a).

APPEAL by defendant from *Clifford, District Judge,* 19 January 1970 Session of FORSYTH District Court.

Plaintiff wife brought this civil action against her husband to obtain an order awarding to her custody of their three minor children, temporary and permanent alimony and child support, possession of their homeplace, use of one automobile, and counsel fees. The case was submitted to the jury which returned a verdict finding plaintiff to be the dependent spouse and defendant to be the supporting spouse as alleged in the complaint, and finding that defendant had offered such indignities to the person of plaintiff as to render her condition intolerable and her life burdensome. Upon the verdict and upon findings of fact by the court as to the earnings of the respective parties and as to the best interests of the children, judgment was entered awarding custody of the minor children to the plaintiff, awarding her possession of the homeplace, and ordering defendant to make monthly payments for child support and alimony and to pay a fee to plaintiff's counsel. From this judgment defendant appealed to the Court of Appeals, assigning errors.

Pettyjohn & Dunn, by H. Glenn Pettyjohn for plaintiff appellee.

White, Crumpler & Pfefferkorn, by Fred G. Crumpler, Jr., and Joe P. McCallum, Jr., for defendant appellant.

PARKER, J.

[1, 2] Appellant assigns as error the refusal of the trial court to allow his motion for a directed verdict made at the close of all the evidence. The record before us reveals that the appellant did not state the specific grounds for his motion. "A motion for a directed verdict shall state the specific grounds therefor." G.S. 1A-1, Rule 50(a). This provision of the rule is mandatory. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769. The appellant, having failed to state specific grounds for his motion, is not entitled upon this appeal to question the sufficiency of the evidence to support the verdict. Nevertheless, because the Rules of Civil Procedure are only so recently effective in this State, we have reviewed the record and are of opinion there was sufficient evidence to require submission to the jury of the issues which it answered in plaintiff's favor.

[3] Appellant assigns as error portions of the court's charge to the jury. A number of appellant's exceptions to the charge have merit. As an example, on the issue as to whether defendant had offered such indignities to the person of plaintiff as to ren-

der her condition intolerable and her life burdensome, the court charged:

> "To entitle the wife to the relief the indignities offered by the husband must be such as may be expected seriously to annoy a woman of ordinary sense and temperament, and must be repeated or continued so that it may appear to have been done wilfully and intentionally or at least consciously by the husband to the annoyance of the wife.
>
> "Mrs. Turner has testified to certain indignities, and two of her children have also. It is up to you to decide the credibility of that testimony and whether or not she has sustained that burden."

[3, 4] A reading of the charge as a whole leads to the conclusion that the court failed to "declare and explain the law arising on the evidence given in the case" and failed to state the evidence "to the extent necessary to explain the application of the law thereto." This the court was required to do by G.S. 1A-1, Rule 51(a) (formerly G.S. 1-180).

> "The chief purpose of a charge is to aid the jury to understand clearly the case and arrive at a correct verdict. For this reason, the Court has consistently held that G.S. 1-180 confers a substantial legal right, and imposes upon the trial judge a positive duty, and his failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error, and this is true even without prayer for special instructions." *Bulluck v. Long,* 256 N.C. 577, 587, 124 S.E. 2d 716, 723.

In the case before us the jury was left to determine for itself, without adequate explanation from the court, what law arose on the evidence in the case and how that law should be applied to the evidence.

For the court's failure properly to instruct the jury as required by G.S. 1A-1, Rule 51(a), defendant is entitled to a

New trial.

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

LAWRENCE E. BRIXEY v. THOMAS H. CAMERON AND FRANK W. CAMERON, D/B/A LORIS LIVESTOCK MARKET

No. 7016SC292

(Filed 26 August 1970)

1. **Evidence § 48— competency of witness as expert — discretion of court**

The competency of a witness to testify as an expert is addressed primarily to the discretion of the trial court, and its determination is ordinarily conclusive unless there be no evidence to support the finding or unless there is an abuse of discretion.

2. **Evidence § 48— refusal to rule witness as expert in psychiatry — testimony as expert in general medical practice**

Where the court ruled that plaintiff's witness was qualified to testify as a medical expert in the field of general practice of medicine, and in that capacity the witness testified fully as to his opinion concerning the effects of the collision in question upon plaintiff's physical and mental health, the court did not abuse its discretion in refusing to rule the witness also qualified as an expert in the specialized field of psychiatry.

3. **Appeal and Error § 30— exclusion of evidence — failure to show what evidence would have been**

Exceptions to the exclusion of evidence will not be considered on appeal when the record fails to show what the excluded evidence would have been.

4. **Damages § 16— instructions — loss of earnings and earning ability**

In this action for injuries sustained in an automobile accident, the charge of the court adequately instructed the jury that plaintiff's loss of earning ability and loss of past, present and future earnings should be considered as an element of damages.

5. **Trial § 51— motion to set aside verdict — discretion of court**

Plaintiff's motion to set aside the verdict and for a new trial was addressed to the discretion of the trial court, and denial of the motion is not reviewable on appeal absent a showing of abuse of discretion.

APPEAL by plaintiff from *Clark, J.*, December 1969 Civil Session of ROBESON Superior Court.

Plaintiff brought this civil action to recover damages for personal injuries and property damages suffered by him when defendants' truck collided with the rear of plaintiff's automobile. The jury answered issues of negligence and contributory negligence in plaintiff's favor and awarded $6,500.00 for personal injuries and $600.00 for property damages. From judgment on the verdict, plaintiff appealed.

Joseph C. Ward, Jr., and J. H. Barrington, Jr., for plaintiff appellant.

Anderson, Nimocks & Broadfoot, by Henry L. Anderson, for defendant appellees.

PARKER, J.

[1, 2] Plaintiff assigns as error that the court declined to qualify his witness, Dr. Timothy H. Gridley, as a medical expert specializing in the field of psychiatry. "[T]he competency of a witness to testify as an expert is a question primarily addressed to the court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuse his discretion." *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548. In the present case the court did rule that the witness was qualified to testify as a medical expert in the field of general practice of medicine. In that capacity the witness was allowed to testify fully as to his opinion concerning the effects of the collision upon plaintiff's physical and mental health. No abuse of the court's discretion has been shown in refusing to rule the witness also qualified as an expert in the specialized field of psychiatry.

[3] Plaintiff assigns as error that the court excluded from evidence certain hospital records and a bill rendered plaintiff by the Veterans Hospitals. However, nothing in the record before us shows what these excluded records and this bill would have disclosed had they been admitted. Exceptions to the exclusion of evidence will not be considered on appeal 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; *Stith v. Perdue,* 7 N.C. App. 314, 172 S.E. 2d 246.

[4] Plaintiff complains that the court failed to instruct the jury that plaintiff's loss of earning ability and loss of earnings past, present and future, should be considered as an element of damages. In his brief, plaintiff contends that "a careful examination of His Honor's Charge in its entirety fails to disclose any mention that the jury might consider as an element of damages '[t]he nature and extent of his business, the value of his services, or whether he was employed or unemployed.'" We do not agree. Examination of the charge reveals that the court clearly instructed the jury that plaintiff was "entitled to recover his damages in one compensation, present worth, all in-

juries; past, present and future, directly and proximately resulting from the negligence of the defendant," and that in determining this recovery the jury should "take into consideration the age of the plaintiff, his occupation and nature of his work, and business, if any. . . ." In our view the charge adequately instructed the jury in the respect in which plaintiff now complains there was an omission. If plaintiff desired greater elaboration, it was his duty to tender an apt request therefor at the trial. 7 Strong, N.C. Index 2d, Trial, § 33, p. 324, at p. 329.

[5] Plaintiff's motion to set aside the verdict and for a new trial was addressed to the sound discretion of the trial court, and the court's refusal of this motion will not be reviewed on appeal, the record disclosing no abuse of discretion. In the trial and judgment appealed from we find

No error.

CAMPBELL and VAUGHN, JJ., concur.

DONNA COLMAN HARPER v. JOSEPH NORMAN HARPER

No. 7010DC428

(Filed 26 August 1970)

1. **Divorce and Alimony § 18— subsistence pendente lite — counsel fees**

Subsistence and counsel fees *pendente lite* are within the discretion of the court, whose decision thereon is not reviewable except for abuse of discretion or for error of law.

2. **Divorce and Alimony § 18— denial of alimony pendente lite — sufficiency of findings**

The court properly denied plaintiff wife's motion for an interim award of alimony *pendente lite* and counsel fees in her suit for alimony without divorce, where there were findings that (1) the plaintiff and her husband had separated by mutual agreement, (2) the husband did not abandon the wife, and (3) the husband was guilty of no misconduct that would support an award of alimony. G.S. 50-16.3(a)(1).

APPEAL by plaintiff from *Preston, District Judge,* 13 April 1970 Non-Jury Civil Session of WAKE District Court.

This is an appeal by plaintiff wife from an order denying her motion for an interim award of alimony *pendente lite* and counsel fees entered in her suit for alimony without divorce.

Plaintiff alleged in her complaint that her husband, without provocation, had failed to provide her with necessary subsistence, had offered such indignities to her person as to render her condition intolerable and life burdensome, and had abandoned her. She prayed for an award of alimony, both *pendente lite* and permanent, custody of and support for the minor children, and counsel fees. Defendant husband answered and denied misconduct on his part, alleged facts in recrimination, and counterclaimed for a divorce *a mensa et thoro.*

Plaintiff's motion for alimony *pendente lite* and counsel fees was heard upon the pleadings, affidavits, oral testimony, and other evidence presented by the parties. Following the hearing, the court entered an order finding facts as to the marriage and birth of the children, finding plaintiff to be the dependent spouse in that she had not earned an income except for brief periods during the course of the marriage, finding plaintiff capable of earning a livelihood, and finding defendant capable of and currently earning a substantial income. The court found no abandonment of plaintiff by defendant sufficient to constitute grounds for alimony *pendente lite* in that the separation of the parties was by mutual consent, and found that the competent evidence presented to the court was not adequate to show either misconduct on the part of defendant sufficient to support an order for alimony *pendente lite* or to show misconduct on the part of plaintiff sufficient to support the defense of recrimination. The court found plaintiff to be a fit and proper person to have custody of the minor children and defendant a fit and proper person to have visitation rights.

On these findings the court's order awarded custody of the children to plaintiff, gave defendant visitation rights, awarded plaintiff temporary possession of the home as the place where she and the children should live pending final hearing of this matter, and directed defendant to support the minor children by making monthly mortgage payments on the home, paying utility bills, paying medical and clothing expenses for the children, providing the educational expenses for the daughter, and paying to plaintiff specified monthly payments for the support and maintenance of the children. The court denied plaintiff's motion for alimony *pendente lite* and counsel fees. From that portion of the order denying alimony and counsel fees *pendente lite,* plaintiff appealed.

Emanuel & Emanuel, by Robert L. Emanuel for plaintiff appellant.

Eugene Boyce for defendant appellee.

PARKER, J.

[1, 2] The sole question presented by this appeal is the correctness of the court's order denying plaintiff's motion for an interim award of alimony and counsel fees *pendente lite*. "Subsistence and counsel fees *pendente lite* are within the discretion of the court. Decision is not reviewable except for abuse of discretion or for error of law." *Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589. In the case before us we find no abuse of discretion or error of law.

By G.S. 50-16.3(a) a dependent spouse who is a party to an action for divorce, annulment, or alimony without divorce, is 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."

In this case the District Judge, as trier of the facts, has found that the parties separated by mutual agreement, there was no abandonment of plaintiff by defendant, and the competent evidence presented to the court failed to show misconduct on the part of defendant sufficient to support an order for alimony. On these findings plaintiff has failed to show at this stage of the proceeding that she is entitled to the relief demanded in her action. Such a showing is one of the statutory prerequisites to an award of alimony *pendente lite*. G.S. 50-16.3(a) (1).

The order appealed from, which is not a final determination and does not affect the final rights of the parties, is

Affirmed.

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

STATE OF NORTH CAROLINA v. CHARLES FORD

No. 7017SC448

(Filed 26 August 1970)

APPEAL by defendant from *Bowman, S.J.*, 30 March 1970 Criminal Session of ROCKINGHAM County Superior Court.

Defendant was charged in a bill of indictment with the felony of assault with intent to commit rape. He entered a plea of guilty and now appeals from judgment entered on his plea imposing a prison sentence of not less than five nor more than seven years.

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

J. Hoyte Stultz, Jr. for defendant appellant.

GRAHAM, J.

Two assignments of error are set forth in the record. However, defendant's court appointed counsel candidly concedes in his brief that the assignments of error are without merit. We agree. We have also reviewed the record proper and conclude that no prejudicial error appears on the face thereof.

No error.

BROCK and MORRIS, JJ., concur.

HOLLY FARMS POULTRY INDUSTRIES, INC. v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 7022SC541

(Filed 16 September 1970)

1. Taxation § 28— allowance of income tax deductions — matter of grace

The allowance of a deduction in the computation of taxable income is a privilege granted as a matter of grace.

2. Taxation §§ 28, 38— tax deduction — burden of proof

One claiming a tax deduction must bring himself within the statutory provisions authorizing it, and in general the deduction may be taken only by the taxpayer to whom it accrues.

3. Taxation § 29— income taxation — loss carry-over of merged corporation — continuity of business enterprise

A corporation resulting from a merger may not deduct from its post-merger income the loss carry-over of one or more of its constituent corporations unless there is a continuity of business enterprise—that is, unless the income producing business has not been altered, enlarged or materially affected by the merger.

4. Taxation § 29— loss carry-over of merged corporations — continuity of business enterprise

There was no "continuity of business enterprise" where the net worth of the surviving corporation into which two other corporations were merged was increased substantially by each merger, and the surviving corporation was transformed from a manufacturer of poultry feeds into a combined manufacturing and feeding operation; consequently, the surviving corporation is not entitled under G.S. 105-147(9)d to carry over and deduct for North Carolina income tax purposes the pre-merger net economic losses of the two submerged corporations from the post-merger income earned by the combined corporate businesses.

5. Taxation § 29— continuity of business enterprise after merger — vertical or horizontal merger

In determining whether there is a "continuity of business enterprise" after a merger, it makes no difference that there was a "vertical type" merger in which the several merged corporations were doing jobs in one continuous chain of processing, rather than a "horizontal type" in which each of the corporations was doing basically the same job.

6. Taxation § 29— loss carry-over of merged corporation — merger not for purpose of avoiding taxes

The fact that mergers were made in pursuance of an overall plan to bring into being an "integrated" operation and were not for tax avoidance purposes is not determinative of the question of whether the surviving corporation can carry forward and deduct from its own gross income pre-merger losses incurred by corporations with which it merged.

APPEAL by defendant from *Collier, J.*, 14 May 1970 Session of DAVIE Superior Court.

This is an action to recover income taxes paid under protest. The parties waived trial by jury and agreed that the court should draw its conclusions of law and enter judgment based on an agreed statement of facts. The pertinent facts as stipulated by the parties are summarized as follows:

Plaintiff, Holly Farms Poultry Industries, Inc. (Holly Farms) was incorporated as a North Carolina corporation on 4 December 1961 for the purpose of organizing and carrying on an integrated poultry operation and to be a parent corporation of a large number of separate corporate entities, all of which were engaged in the poultry industry or in business directly connected with the poultry industry. One of the purposes of the integrated operation was to so manage and operate the poultry business that one corporation could manage and control the production of poultry from the breeder hens through the hatchery, feed mills, broiler farms, feed out operations, processing plants, and transportation to the retail outlets. Pursuant to this plan of an integrated operation, Holly Farms acquired, either by direct merger into it or indirectly by merger into a wholly-owned subsidiary and then into it, thirty-two corporations. Included among these were: Mocksville Feed Mills, Inc. (Mocksville Feed), Lovette Poultry Company, Inc. (Lovette Poultry), Lovette Feed Company, Inc. (Lovette Feed), Blue Ridge Hatchery, Inc. (Blue Ridge), and Davie Poultry Company, Inc. (Davie Poultry). As a part of the plan for a completely integrated operation, on 30 September 1963, Blue Ridge and Lovette Feed merged with Lovette Poultry, with the latter as the surviving corporation, and on 2 May 1964 Lovette Poultry merged into and became part of Mocksville Feed. At the time of this latter merger Lovette Poultry had a net economic loss of $604,967.89, included in which was $200,239.04 attributable to Blue Ridge and $65,670.05 attributable to Lovette Feed prior to their merger with Lovette Poultry. On 2 November 1964 Davie Poultry also merged into Mocksville Feed, with the latter being the surviving corporation. For its fiscal year ending 31 October 1964 Davie Poultry had a net operating loss of $19,299.88.

Prior to the mergers of Lovette Poultry and Davie Poultry into Mocksville Feed, all three of these corporations were wholly-owned subsidiaries of Holly Farms and had identical directors and officers. Prior to the mergers Mocksville Feed was engaged

in the manufacture of feeds, principally poultry feed. The business of Lovette Poultry at the time of its merger with Mocksville Feed was that commonly referred to as a feed out operation, the nature of the business being to furnish feed to farmers to enable them to grow chickens to a weight suitable for the processing plant. Davie Poultry was engaged in a similar business and, in addition, operated an experimental farm for the exclusive benefit of Mocksville Feed, enabling Mocksville Feed to conduct experiments with live poultry with respect to new formulas and feeds developed by it. Prior to the mergers, Lovette Poultry handled no feed other than feed manufactured by Mocksville Feed, and 90% of the production of Mocksville Feed was sold through Lovette Poultry and Davie Poultry, with the latter handling only a small amount. Prior to the mergers all three corporations conducted their principal business within Davie and Wilkes Counties, North Carolina, and since all three were managed and owned by Holly Farms, none of the three were competitors with each other. Subsequent to the mergers, the same type and kind of business was carried on in the same manner and with the same management, officers and personnel, and the mergers effected no basic change in the administration or operation of any one of the three, Mocksville Feed, Lovette Poultry, or Davie Poultry. Both before and after the mergers all chickens grown with feed manufactured by Mocksville Feed and distributed by Lovette Poultry and Davie Poultry were processed exclusively at the processing plant operated by Holly Farms.

At the time of the merger of Lovette Poultry into Mocksville Feed on 2 May 1964, Mocksville Feed had a net worth of $2,057,204.94 and Lovette Poultry had a net worth of $960,209.84. After giving effect to that merger, Mocksville Feed, the surviving corporation, had a net worth of $3,017,414.78. The net worth of Davie Poultry at the time of its merger into Mocksville Feed on 2 November 1964 was $76,935.66. After giving effect to that merger, the net worth of Mocksville Feed was $3,376,051.56.

In its North Carolina corporate income tax return for its taxable year ending 31 December 1964, Mocksville Feed carried forward a net operating loss of the submerged corporation, Lovette Poultry, to the extent of $411,200.15 and this amount was claimed as a deduction on its return for that year. The entire amount of the net economic loss attributable to Lovette Poultry could not be deducted in a single year due to the fact

that it exceeded the earnings of Mocksville Feed for its taxable year ending 31 December 1964. As a result, the balance of $193,767.74 of the net economic loss attributable to Lovette Poultry was claimed as a deduction on the corporate income tax return of Mocksville Feed for its next succeeding taxable year, which ended 31 October 1965. (Subsequent to the year 1964 the fiscal year of Mocksville Feed was changed to end on 31 October.) In addition, Mocksville Feed also carried forward and claimed as a deduction for its year ending 31 October 1965 the $19,299.88 net operating loss which had been incurred by Davie Poultry during its taxable year ending 31 October 1964, the period immediately prior to its merger with Mocksville Feed.

Defendant Commissioner of Revenue denied the deductions claimed by Mocksville Feed attributable to the net economic losses carried forward from the operations of the two submerged corporations, Lovette Poultry and Davie Poultry, and assessed deficiencies against Mocksville Feed in the amount of $26,843.77 for its taxable year ended 31 December 1964 and in the amount of $13,295.42 for its taxable year ended 31 October 1965. Mocksville Feed paid these assessments under protest and in apt time made demand for refund. The demand being refused by the defendant, Mocksville Feed instituted this suit on 18 January 1967 to recover the amounts of the deficiencies which it had paid under protest, together with interest from the dates of payment. After institution of this action and on 28 January 1967, Mocksville Feed was merged into Holly Farms. The parties stipulated that by this merger Holly Farms became the real party in interest in this action, and by agreement of the parties the court ordered Holly Farms substituted as party plaintiff.

Based on the stipulated facts, the trial court concluded as a matter of law that there was a continuity of business enterprise between the taxpayer, Mocksville Feed, and the two corporations, Lovette Poultry and Davie Poultry, with which it merged; that Mocksville Feed was the same taxable entity as those two corporations which had suffered net economic losses; and that the taxpayer, Mocksville Feed, was entitled to the claimed deductions. In accord with these conclusions of law, the court entered judgment that plaintiff recover of defendant the amount of the deficiency assessments which had been paid under protest, plus interest from the dates of payment. Defendant appealed.

McElwee, Hall & Herring, by W. H. McElwee and Jerone C. Herring for plaintiff appellee.

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

PARKER, J.

[4] The issue before us is whether under the circumstances disclosed by the stipulated facts, a surviving corporation (Mocksville Feed Mills, Inc.) which resulted from the merger into it of two other corporations (Lovette Poultry Company, Inc., and Davie Poultry Company, Inc.) is entitled under G.S. 105-147(9)d to carry over and deduct for North Carolina income tax purposes the pre-merger net economic losses of the two submerged corporations from the post-merger income earned by the combined corporate businesses. We hold that it is not.

(No question is presented on this appeal as to the right of one of the submerged corporations, Lovette Poultry Company, Inc., to carry forward and deduct from its own income losses previously incurred by two other corporations which had been submerged into it as a result of earlier corporate mergers. We express no opinion on that question.)

[1, 2] The allowance of a deduction in the computation of taxable income is a privilege granted as a matter of legislative grace. One claiming the deduction must bring himself within the statutory provisions authorizing it, and in general the deduction may be taken only by the taxpayer to whom it accrues. 85 C.J.S., Taxation, § 1099. The North Carolina Income Tax Statutes formerly required all taxpayers to account strictly on an annual basis, reporting for each taxable year all items of gross income and claiming as deductions for that year only items properly pertaining to that accounting period. For the purpose of "granting some measure of relief to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income," our Legislature added a loss carry-over provision to our State income tax statute. This provision first appeared in the Revenue Act of 1943, Chap. 400, Sec. 4, Subsection (g)(4), Session Laws 1943, and, as amended from time to time, has remained a part of our income tax statutes to the present time. G.S. 105-147(9)d, formerly codified as G.S. 105-147(6)d. This section permits, under certain conditions, a deduction of a prior year's net economic loss from current gross

income in order to determine taxable income. "Our Legislature was under no constitutional or other legal compulsion to allow any carry-over to be deducted from taxable income in a future year. It enacted the carry-over provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income." *Rubber Co. v. Shaw, Comr. of Revenue,* 244 N.C. 170, 174, 92 S.E. 2d 799, 802.

[3] The question of whether a corporation surviving a merger is entitled to carry forward and deduct from its own gross income pre-merger losses incurred by other corporate taxpayers with which it had merged, was first presented to the North Carolina Supreme Court in *Distributors v. Shaw, Commissioner of Revenue,* 247 N.C. 157, 100 S.E. 2d 334. In that case our Supreme Court approved and adopted the reasoning in *Libson Shops v. Koehler,* 353 U.S. 382, 1 L. Ed. 2d 924, 77 S. Ct. 990, in which the United States Supreme Court, construing the loss carry-over provisions of the Federal Internal Revenue Code of 1939, held that a corporation resulting from the merger of 17 separate incorporated businesses was not entitled to carry over and deduct the pre-merger net operating losses of three of its constituent corporations from the post-merger income attributable to the other businesses, since the income against which the offset was claimed was not produced by substantially the same businesses which incurred the losses. On a second appeal of *Distributors v. Currie, Com'r. of Revenue,* reported in 251 N.C. 120, 110 S.E. 2d 880, the North Carolina Supreme Court continued to adhere to the reasoning in the *Libson Shops* case, though at the same time the opinion of the Court expressly refrained from rejecting the theory that the deduction might also be disallowed on the grounds that the corporation which survived the merger was not the "same taxable entity" as the corporations which had suffered the losses. The Court, however, chose to base its decision, which denied the deduction, on the ground that there was in that case a lack of "continuity of business enterprise." Defining these words, Moore, J., speaking for the North Carolina Supreme Court said (at page 126):

> "This expression has a definite and well defined meaning. There is continuity of business enterprise when the income producing business has not been altered, enlarged or materially affected *by the merger.*"

The opinion then expressly held (page 127):

> "Where there has been a merger of corporations, the resulting corporation may not deduct from its post-merger net income the pre-merger economic loss of its constituent corporations unless there is a 'continuity of business enterprise' as above defined."

[4] In the case now before us the trial court concluded as a matter of law that there had been a "continuity of business enterprise" between the taxpayer, Mocksville Feed Mills, Inc., and the two corporations, Lovette Poultry Company, Inc., and Davie Poultry Company, Inc., with which it merged. The facts do not support this conclusion. Immediately before the merger of Lovette Poultry into Mocksville Feed, the latter corporation had a net worth of $2,057,204.94 and was engaged in the manufacture of feeds. Immediately after the merger Mocksville Feed had a net worth of $3,017,414.78 and was engaged not only in the manufacture of feeds but, in addition, was engaged in the business of "feeding-out" chickens. The income producing business was thus both substantially enlarged and materially affected by the merger. The subsequent merger of Davie Poultry into Mocksville Feed further increased the net worth of the enterprise by $76,935.66 and added an experimental farm as well as additional "feed out" operations to the combined enterprise. Thus, each merger both substantially enlarged and materially affected the income producing business of the surviving corporation. The businesses of each of the submerged loss corporations were even more dramatically affected. By the miracle of a merger each was transformed in an instant from a relatively small chicken feeding operation, which was losing money, into a much larger and financially stronger combined manufacturing and feeding operation, which operated at a profit. To find here any continuity of business enterprises requires either that the three businesses be considered as though they had always been one or that the mergers be ignored. However, the fact is that the three separate businesses were not always one and the mergers did in fact occur. In our opinion, and we so hold, each merger so substantially enlarged and materially affected the income producing business that there was not here a "continuity of business enterprise" within the definition laid down in *Distributors v. Currie, Com'r. of Revenue, supra.*

[5, 6] Appellee seeks to distinguish the present case from *Distributors v. Currie, Com'r. of Revenue, supra,* by pointing out

there was here a "vertical type" merger, in which the several merged corporations were doing different jobs in one continuous chain of processing, while the mergers before the Court in that case were of a "horizontal type," in which each of the corporations involved were doing basically the same job. In our opinion this distinction, if any, is without a difference. Furthermore, the fact that the mergers in the present case may have been made in pursuance of an overall plan to bring into being an "integrated" operation, and were not for tax avoidance purposes, is, in our opinion, simply not determinative of the question before us.

We also note that while Congress changed the *Libson Shops* doctrine by enactment of § 381 of the Internal Revenue Code of 1954, no similar amendment to the North Carolina Revenue Act has been enacted by the North Carolina General Assembly. Five regular biennial sessions of the North Carolina General Assembly have occurred since our Supreme Court rendered its decision in *Distributors v. Currie, Com'r. of Revenue, supra.* The absence of any pertinent amendment for so long a period would indicate approval by the Legislature of the Court's construction of its statute.

The judgment appealed from is

Reversed.

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

STATE OF NORTH CAROLINA v. GEORGE EVERETT HATCHER

No. 7018SC534

(Filed 16 September 1970)

1. Criminal Law § 21; Arrest and Bail § 9— preliminary hearing — bail — delays

In a prosecution charging defendant with felonious assault and with armed robbery, defendant's motion to dismiss the prosecution on the ground that he was held from 31 October 1969 until 11 December 1969 without a preliminary hearing and without bail, *held* properly denied by the trial court, where it appeared from the record that (1) a major reason for the delay in holding the preliminary hearing was that the prosecuting witness spent 28 days in a hospital intensive care unit recovering from the assault, (2) the defendant and his family were financially unable to post the bail bond, (3) defendant's

counsel was unable to get bail reduced because of the seriousness of the charge and the condition of the victim, and (4) defendant's counsel advised defendant against a hearing on the matter of bail when the solicitor told counsel that he would recommend an increase in bail.

2. Criminal Law § 29— commitment of defendant for psychiatric evaluation

There was no merit to defendant's contention that he was committed to a State hospital for psychiatric evaluation without his consent, where in fact the record gives rise to the inference that defendant was committed as a result of his own suggestion and on request of his counsel.

3. Constitutional Law § 30— right to speedy trial — length of delay — absence of prejudice to defendant

A defendant who was tried in April 1970 following his arrest on 31 October 1969 and his commitment on 11 December 1969 to a State hospital for a 77-day psychiatric examination, *held* not deprived of the right to a speedy trial, where there was no showing that the delay was due to the neglect or wilfulness of the prosecution, or that witnesses were unavailable or memories impaired by reason of any delay.

4. Criminal Law § 66; Indictment and Warrant § 6— validity of arrest — contention of illegal photographic identification

There is no merit to defendant's contentions that his arrest was based on an illegal photographic identification by the prosecuting witness—the photograph having carried the notation "Greensboro Police Department 1967"—and that the evidence obtained as a result of the arrest was inadmissible, where the evidence of the circumstances surrounding the arrest established that (1) the prosecuting witness had described the defendant to a police officer and had told him that a certain waitress knew the defendant's name, (2) the officer ascertained the name of defendant from the waitress, and (3) only thereafter did the officer show the photograph to the prosecuting witness.

5. Robbery § 5— armed robbery prosecution — instruction on recent possession doctrine

In a prosecution charging defendant with the felonious taking of an automobile during an armed robbery, the State's evidence justified an instruction on the doctrine of recent possession, where the evidence was to the effect that the prosecuting witness' automobile was parked at defendant's residence, and the prosecuting witness' automobile key was found on the person of defendant.

6. Criminal Law § 66— police photograph of defendant — admissibility

Where the trial court, out of the presence of the jury, directed that the words "Police Department, Greensboro" be removed from a photograph of defendant, the words appearing on a plaque around defendant's neck, the subsequent admission of the photograph into evidence was not erroneous.

7. **Criminal Law § 127— arrest of judgment**

A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record.

8. **Robbery § 6; Criminal Law §§ 26, 127— arrest of judgment — conviction of two offenses arising out of the same occurrence**

A defendant who was convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction, where both offenses arose out of the same occurrence.

9. **Robbery § 5— armed robbery — evidence of alibi — submission of lesser included offense**

Where all of the State's evidence tended to show the commission of an armed robbery, and the defendant's alibi evidence put him at some place other than the scene of the robbery, the trial court correctly charged the jury that they could find the defendant guilty of armed robbery or not guilty, and there was no necessity to charge on defendant's guilt of common law robbery.

APPEAL by defendant from *Collier, J.*, 20 April 1970 Session, Superior Court of GUILFORD County.

Defendant was charged in one bill of indictment with feloniously assaulting one James Edward Brown with a deadly weapon with intent to kill, inflicting serious injury. In another bill of indictment, he was charged with armed robbery of James Edward Brown and the felonious taking of a 1962 Pontiac automobile valued at $500. Both charges arose out of the same occurrence. Defendant entered a plea of not guilty to each charge. The cases were consolidated for trial, and the jury returned as its verdict guilty of assault with a deadly weapon and guilty of armed robbery.

The facts necessary for a determination of the appeal are set out in the opinion.

Attorney General Morgan by Staff Attorney Eatman, for the State.

Wallace C. Harrelson, Public Defender Eighteenth Judicial District, for defendant appellant.

MORRIS, J.

[1] Prior to entering a plea, defendant moved to dismiss both cases on the ground that he was held from 31 October 1969 until

11 December 1969 without a preliminary hearing and without bail and on the ground that defendant was committed to Cherry Hospital for psychiatric evaluation without his consent. He also moved to quash the bills of indictment. Both motions were denied. The denial of these motions forms the basis for defendant's assignments of error Nos. 1 and 2.

From the evidence taken prior to arraignment it appears that defendant was served with warrants at approximately 6 o'clock a.m. on 31 October 1969. He testified that he was then under the influence of alcohol. He further testified that he was not questioned by anyone from that time until his preliminary hearing on 11 December. After his preliminary hearing, he was sent to Cherry Hospital for 77 days. He testified that he made every effort possible to obtain a preliminary hearing. He had privately retained counsel, but stated that he did not talk to counsel about a preliminary hearing, and on 23 March 1970 the Public Defender was appointed by the court to represent him.

The arresting officer, a deputy sheriff, testified that the prosecuting witness was in the hospital for 28 days, that he did talk with defendant's privately retained counsel about having a preliminary hearing and getting the prosecuting witness into court.

Defendant's privately retained counsel testified that he was employed to represent defendant very shortly after defendant's arrest, that he looked into the desirability of having a preliminary hearing, concluded that it would be desirable to have the prosecuting witness present in person and discussed that with defendant. He further testified that the prosecuting witness was in the intensive care unit at the hospital for about 28 days and from the hospital went to the home of a relative in Rockingham County, that as soon as he was able to travel, a preliminary hearing was arranged and held during December. He testified that on one occasion while the prosecuting witness was still in the hospital, the deputy sheriff had him brought to court, but the witness was then himself involved in a matter in superior court and was unable to be there, so the sheriff returned the prosecuting witness to the hospital. He further testified that the deputy sheriff approached him on three other occasions about a preliminary hearing but each time he was involved in a jury trial and could not be present. The witness testified that defendant's parents were informed of the amount of bond defendant

was under and they could not arrange to post bond. Witness tried to get the bond reduced, but because of the seriousness of the charges and the fact that notice of revocation of probation had been filed for offenses prior to these alleged offenses, and the serious condition of the victim, the solicitor would not recommend a reduction in bond. At the revocation of probation hearing, defendant asked for permission to speak for himself and did so. During the course of his testimony he stated to the court that he had never had what he considered to be an adequate psychiatric examination anywhere. Whereupon, counsel requested the solicitor to petition the court for a psychiatric examination. This was done, and the order committing him to Cherry for examination was signed on 16 December 1969. After the defendant was returned from Cherry, he called his counsel. Counsel went to see defendant and advised him that his parents had not been able to pay his fee and suggested that he attempt to secure the services of the Public Defender. Counsel subsequently, on his own motion, was allowed to withdraw and turned his file over to the Public Defender.

The prosecutor testified that a hearing on the bond was never asked for but that he had advised defendant's counsel that his recommendation would be an increase rather than reduction. That Judge Alexander kept insisting that the man be brought before her for a speedy hearing, but that "we kept explaining that the man was in the hospital." During the 40-day period the prosecuting witness was brought to court one time by ambulance, but defendant's counsel was not available.

We perceive no error in the court's denial of defendant's motions. It appears unquestionably that defendant was represented by counsel from very shortly after his arrest. It also appears unquestionably that no request for a hearing on his bond was made. His counsel, after investigation, wisely decided not to attempt a vain thing. The circumstances were that the solicitor would not recommend reduction, the probation officer would not recommend bond at all, and defendant's parents had stated their inability to post bond. It appears that in this case, a preliminary hearing was afforded this defendant just as soon as feasible under the circumstances.

[2] It also appears that the order committing him to Cherry Hospital for psychiatric evaluation was entirely proper. In fact, the inference is that it was done as a result of his own suggestion and on request of his counsel.

[3] The record is silent as to the date of his return from Cherry Hospital and the date of his admission there. He says and the record shows that the order was signed on 16 December 1969 and that he stayed there for 77 days. He was tried at the April 1969 Session of the Guilford Superior Court. Justice Sharp, in *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969), set out the following principles established by decisions of the Supreme Court of this State applicable to determination of whether a defendant has been denied a speedy trial:

> "1. The fundamental law of the State secures to every person *formally accused* of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution (made applicable to the State by the Fourteenth Amendment, *Klopfer v. North Carolina,* 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967)).
>
> 2. A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him.
>
> 3. Undue delay cannot be categorically defined in terms of days, months, or even years; the circumstances of each particular case determine whether a speedy trial has been afforded. Four interrelated factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.
>
> 4. The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State; prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.
>
> 5. The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870, *appeal dismissed,* 382 U.S. 22, 15 L. Ed. 2d 16, 86 S. Ct. 227 (1965); *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891, *cert. denied,* 376 U.S. 956, 11 L. Ed. 2d 974, 84 S. Ct. 977 (1964); *State v. Webb,* 155 N.C. 426, 70 S.E. 1064."

Applying these principles to the circumstances of this case, we come to the inescapable conclusion that the trial court did not commit error in denying defendant's motions. Certainly defendant has not shown that any delay was due to the neglect or willfulness of the prosecution, nor is there any showing that witnesses were not available or memories impaired by reason of any delay.

[4] Assignments of error Nos. 5, 8, 11 and 12 are addressed to the court's allowing testimony and the introduction of exhibits all pertaining to evidence obtained at the time of defendant's arrest. Defendant contends that the arrest was based on an illegal identification and the search was, therefore, illegal and no evidence obtained incident to the arrest admissible. The arresting officer testified that he talked with the prosecuting witness at the hospital, at which time the prosecuting witness stated that he had picked up the man who shot and robbed him at the General Greene, that he gave him a general description of the man, said he did not know his name but could identify him. He further testified that a waitress at the General Greene whose name was Doris would know who the man was with whom he left the General Greene. On *voir dire,* the officer testified that he then went and talked with the waitress who told him that the prosecuting witness and Bobby Hatcher left the General Greene together. The officer then obtained a photograph of Hatcher from the Greensboro Police Department and returned to the hospital. He told the prosecuting witness he had a picture he would like him to look at and when he looked at the picture he said "That is the man who shot and robbed me." The photo bore the notation "Greensboro Police Department 1967." The officer further testified that the prosecuting witness identified Hatcher at the preliminary hearing.

Defendant contends that the arrest was based on the identification of the photograph by Brown and was, therefore, illegal, and the evidence obtained incident to the arrest excludable. We do not agree. The victim described his assailant and his stolen automobile to the officer and told the officer whom to contact to obtain the assailant's name. The officer did in fact obtain his name from the waitress. As a matter of fact, the prosecuting witness testified, prior to *voir dire* and without objection, that he told the officer that the waitress called his assailant Bobby Hatcher. After the officer had determined who the assailant was, he exhibited the photograph to the prosecuting witness. He then went to defendant's home, saw the automobile of the

victim there, and went and obtained a warrant for defendant's arrest. It seems obvious that the officer was only taking every precaution to be certain that he arrested the right man. The precautions taken were for defendant's protection. In-court identification is not the question before us. Here there was no in-court identification as such. The question is whether the arrest was legal. If there was probable cause for the arrest of defendant, the arrest was legal.

> "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States,* 267 US 132, 162, 69 L ed 543, 555, 45 S Ct 280, 39 ALR 790." *Draper v. U.S.*, 358 U.S. 307, 313, 3 L. Ed. 2d 327, 332, 79 S. Ct. 329 (1959).

Under the facts and circumstances of this case, the officer had probable cause for the issuance of a warrant. Nor do we think that the use of the photograph in this case "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. U.S.*, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). We are not here dealing with proof of guilt. In dealing with probable cause, the law enforcement officers necessarily deal with probabilities. "These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Draper v. U.S., supra.*

Finding, as we do, that the arrest was legal, and the search incident thereto valid, it follows that the evidence seized as the result of the search was competent evidence lawfully received at trial and properly referred to in the charge of the court. These assignments of error are overruled.

[5] Defendant also contends that the court erred in charging the jury on the "doctrine of recent possession." The basis for this contention, which is defendant's assignment of error No. 22, is that the State had not shown defendant in possession of the automobile. This contention is untenable. The uncontradicted evidence was that the automobile of prosecuting witness had been stolen, that some four or five hours later the automobile was found parked at defendant's residence, that an automobile key and chain were found on his person, that the key and chain were identified by the prosecuting witness as being his,

and the key fitted the automobile's ignition and the motor started when the key was inserted and turned. In our opinion the evidence was sufficient to place the automobile in the exclusive possession, custody, and control of defendant. This assignment of error is overruled.

[6] By assignment of error No. 10, defendant insists that the trial court committed prejudicial error in admitting into evidence and allowing to be exhibited to the jury a photograph of defendant which was the property of the Greensboro Police Department. On *voir dire,* the arresting officer testified that when showed to the prosecuting witness the picture showed a board or plaque around the subject's neck which gave a date, that the date on this picture was 11/67, and the words "Police Department, Greensboro" appeared thereon. The court allowed the photograph in evidence, but while the jury was still out, directed that the words on the board or plaque around the subject's neck be cut off and the photograph then returned to the courtroom. This effectively removed defendant's objection.

[7, 8] After the jury returned its verdict, defendant moved in arrest of judgment. "A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record." *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966). The record shows that defendant was convicted of armed robbery and assault with a deadly weapon. We are of the opinion that the judgment on the verdict of guilty of assault with a deadly weapon should have been arrested. See *State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66 (1967). "An indictment for robbery with firearms will support a conviction of a lesser offense such as common law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *S. v. Holt,* 192 N.C. 490, 135 S.E. 324." *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906 (1955). The defendant, having been convicted of armed robbery, could not be convicted of the lesser offense of assault with a deadly weapon where, as here, both offenses arose out of the same act or occurrence. *State v. Midyette, supra.*

[9] Assignment of error No. 23 is directed to the failure of the court to charge the jury on common law robbery. Defendant testified that he hit the prosecuting witness on the head with a

7-Up bottle when the prosecuting witness had pulled a gun on him and while prosecuting witness had his hand on defendant's leg. He further testified that after he used the bottle to defend himself and after the ensuing scuffle, he ran from the scene and as he ran he heard some shots; that Larry Wilson, who was in the rear seat of the car, must have driven the car from the scene, because Wilson picked up defendant and they later returned to ascertain whether the prosecuting witness had been hurt but could not find him. Defendant's evidence, if believed, furnishes an alibi. His testimony, if believed, puts him somewhere away from the scene of the shooting and the robbery. Under this evidence the court correctly charged the jury that they could find defendant guilty of armed robbery or not guilty. There was no evidence necessitating or justifying a charge on common law robbery. *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965); *State v. Parker*, 7 N.C. App. 191, 171 S.E. 2d 665 (1970).

Defendant's remaining assignments of error are directed to the charge of the court with respect to the assault charge. In view of the fact that judgment on this charge has been arrested, we deem it unnecessary to discuss them.

The verdict of guilty of assault with a deadly weapon (No. 69Cr66541) is set aside and the judgment arrested.

Armed robbery charge (No. 69Cr66542)—no error.

BROCK and GRAHAM, JJ., concur.

JEANE H. LITTLE v. JUNE C. LITTLE

No. 7022SC560

(Filed 16 September 1970)

1. **Appeal and Error § 57; Rules of Civil Procedure § 48— sufficiency of evidence to support findings — appellate review**

Where the trial court finds the facts, the question of the sufficiency of the evidence to support the findings may be raised on appeal. Rule of Civil Procedure No. 48.

2. **Divorce and Alimony § 18— award of possession of home to wife pendente lite**

There was sufficient evidence to support findings by the trial court that defendant husband was in lawful possession as lessee of

the house in which the parties were living at the time of their separation, and it was not error for the court, under the provisions of G.S. 50-16.7, to order defendant to put plaintiff wife in possession of the house pending trial on the merits of plaintiff's action for alimony without divorce.

3. **Divorce and Alimony § 18— finding that wife was dependent spouse — sufficiency of evidence**

Trial court's finding of fact that plaintiff wife was a dependent spouse and that defendant husband was the supporting spouse was supported by competent evidence, including evidence that defendant's adjusted gross income for the previous year was $55,704 and that plaintiff's adjusted gross income for the same year was $1,281. G.S. 50-16.1(3) and (4).

4. **Divorce and Alimony § 18— finding that husband maliciously turned wife out of doors — sufficiency of evidence**

There was competent evidence to support findings of fact by the trial court that defendant husband maliciously turned plaintiff wife out of doors and that plaintiff was entitled to alimony *pendente lite* and counsel fees, although there was some evidence that plaintiff may have contributed substantially to the marital difficulties between the parties.

5. **Divorce and Alimony § 18— amount of alimony pendente lite — discretion of court**

The amount of alimony *pendente lite* is to be determined in the discretion of the trial judge in the same manner as the amount of alimony is determined. G.S. 50-16.3(b).

6. **Divorce and Alimony § 18— award of alimony pendente lite — requirement that husband pay wife's motel bill**

No abuse of discretion is shown in the award to plaintiff wife of $400 per month as alimony *pendente lite* and in requiring defendant husband to pay a motel bill incurred by the wife and the children of the parties after they left the home occupied by defendant.

7. **Divorce and Alimony § 18— amount awarded for counsel fees pendente lite**

There was no abuse of discretion in the award of $2,500 counsel fees *pendente lite* to counsel representing plaintiff wife.

8. **Appeal and Error § 45— abandonment of assignment of error**

Assignment of error not brought forward and argued in the brief is deemed abandoned. Court of Appeals Rule No. 28.

9. **Divorce and Alimony § 22— joinder of child custody action with action for alimony without divorce**

It was permissible under G.S. 50-13.5(b)(3) for the wife to join with her action for alimony without divorce an action for custody and support of the minor children of the parties.

10. **Divorce and Alimony § 23— amount awarded for child support**

There was competent evidence to support an award to plaintiff wife from defendant husband for the support and maintenance of their

children, and no abuse of discretion has been shown in the award of $150 per month for the support of each of three of the children and $100 per month for the support of each of two of the children.

APPEAL by defendant from *Seay, J.*, 22 June 1970 Civil Session of Superior Court held in DAVIDSON County.

Plaintiff seeks alimony without divorce, custody and support of the minor children born of the marriage of the parties, alimony *pendente lite,* and counsel fees. Plaintiff alleges that the parties live in Davidson County; that she is the dependent spouse; that defendant maliciously turned her out of doors; that defendant has by cruel and barbarous treatment endangered her life; that defendant has offered such indignities to her person, and has become an excessive user of alcohol and drugs, so as to render her condition intolerable and life burdensome; that defendant owns substantial property and is worth in excess of one million dollars; that she lacks the income and assets to provide for her maintenance and support and the maintenance and support of the minor children; that she is a fit and suitable person to have the custody of the minor children of the parties, and the defendant is not; that she lacks sufficient funds to employ and compensate counsel to represent her in this action; and that all of the alleged acts of the defendant were without any fault or provocation on her part. No formal answer to the complaint appears in the record. Summons was issued on 8 June 1970 and served on 9 June 1970.

The matter was heard at the 22 June 1970 Session of Superior Court of Davidson County, after notice, upon motion of plaintiff for alimony *pendente lite,* counsel fees, custody of the children, and maintenance and support of the children *pendente lite.*

There was evidence for the plaintiff which tended to show that plaintiff and defendant were married on 17 June 1950 and that six children were born of the marriage, the oldest being 18 years of age and the youngest being 12 years of age. Over the years the parties experienced many marital problems and difficulties. The evidence tended to show that defendant was an habitual and excessive user of alcoholic beverages and sometimes used barbiturate drugs and sleeping pills. The parties first separated in 1959. After reconciliation, they again separated in 1965.

There was another reconciliation, after which the defendant continued to pay plaintiff $1,000 per month which was the

amount provided for in a separation agreement they entered into after the separation in 1965. This amount was intended to cover the household expenses for plaintiff and the children. It was not enough, and the plaintiff, a registered nurse, took a part-time job at a hospital. When the children entered private school, she took a full-time job to cover this added expense and the expense of providing transportation to and from school for the children. The plaintiff's evidence also tended to show that she had no property of her own except a house which she rents in Lexington, but she does not receive enough from the rentals to keep up the payments on it. That the defendant is a wealthy man and has a substantial annual income. Plaintiff testified that the marriage was a long history of confrontations and arguments culminating in a final argument on the night of 4 June 1970. On that night the defendant, who had been drinking excessively for a period of two days, awakened plaintiff and five of their six children after they had retired for the night and, using profane and obscene language, told them to get out of the house and not to come back and that "if they did, he would throw them out bodily"; that plaintiff and the children left and went to a motel because they had no other place to go; and that the acts and conduct of defendant were without any fault or provocation on the part of the plaintiff.

The evidence offered by the defendant contradicted that of the wife and tended to show that she had a high and uncontrollable temper; that on one occasion plaintiff shot the defendant with a shotgun; and that the plaintiff's improper conduct was the cause of the separations and the problems and troubles between the parties.

After hearing the evidence, Judge Seay found facts and entered judgment that pending the trial of the action, plaintiff have primary custody of the five younger children; that plaintiff have possession of the house that the parties had lived in; that defendant pay a motel bill incurred by plaintiff and the children from 4 June 1970 to 1 July 1970 after they were told to leave home by defendant on the night of 4 June 1970; that defendant pay $400 per month for the maintenance and support of the plaintiff; that defendant pay to plaintiff $150 per month for the support of three of the children and $100 per month for two of them, these amounts to be reduced on certain conditions; that defendant would have visitation rights; that defendant provide a policy of hospitalization for the wife and children; that, in addition, defendant pay the tuition fees for the three

children attending college; and that the defendant pay $2,500 counsel fees *pendente lite* to the plaintiff's attorneys.

From this order, defendant gave notice of appeal to the Court of Appeals.

Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for plaintiff appellee.

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

MALLARD, C.J.

[1] Where the trial court finds the facts, it is the rule in North Carolina that the question of the sufficiency of the evidence to support the findings may be raised on appeal. See G.S. 1A-1, Rule 52 of the Rules of Civil Procedure. It is also a well-established rule in North Carolina that:

> "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, or even though some incompetent evidence may also have been admitted. * * *" 1 Strong, N.C. Index 2d, Appeal and Error, § 57, pp. 223, 224.

[2] The defendant's first two assignments of error challenge the award of the possession *pendente lite* of the house in which the parties were living at the time of the separation of the parties and the factual findings upon which the award was based. The court found as a fact that the defendant leased or rented this house from the Grubb Oil Company, a corporation of which the defendant was the president, general manager, and majority stockholder. In his affidavit the defendant asserted that he was still living in the house in question, in which the parties lived together for many years, and that it "has been open as it has been *for the many years we have lived there.* She left on her own free will and she can return at her own free will. Two of the children *are living there.*" (Emphasis Added.) There was other evidence that the defendant was in lawful possession of the house. The circumstantial evidence was ample to support the findings of the trial judge that the defendant was in the lawful possession of the house as lessee. It was not error for the court, under the provisions of G.S. 50-16.7, to order the defendant to put the plaintiff in possession of the house pending the trial of this action on its merits.

[3] Defendant's third and fourth assignments of error question the sufficiency of the evidence to support the finding of fact by the trial judge that the plaintiff was a dependent spouse and the defendant was the supporting spouse. In this case the evidence tended to show that the defendant was a wealthy man; that in 1969 the defendant reported to the State of North Carolina an "adjusted gross income" of $55,704.00 and a "net taxable income" of $48,931.00; that in 1969 the plaintiff reported to the State of North Carolina an "adjusted gross income" of $1,281.00 and a "net taxable income" of $281.00. In his affidavit the defendant stated that for some years prior to the separation, he had been paying his wife $1,000 per month, out of which she was to support the children; that in addition to the monthly payments, he had provided a home, utilities, meat and other foods for the family; and that he had also provided his wife with adequate transportation. There was competent evidence to support the finding by the trial judge that the plaintiff was a "dependent spouse" within the meaning of G.S. 50-16.1(3) which reads:

> "(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."

There was also competent evidence to support the finding by the trial judge that the defendant was a supporting spouse within the meaning of G.S. 50-16.1(4) which reads:

> "(4) 'Supporting spouse' means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife."

[4] By assignments of error five, six, and seven, defendant contends that the trial court erred in finding as facts that on 4 June 1970 the defendant maliciously turned the plaintiff out of doors and that plaintiff was entitled to alimony *pendente lite* and counsel fees. Where the court finds the facts, as here, the duty of resolving conflicts in the evidence is for the court. *Wall v. Timberlake,* 272 N.C. 731, 158 S.E. 2d 780 (1968). There was competent evidence to support the findings of fact by the

court that the defendant maliciously turned the plaintiff out of doors and that the plaintiff was entitled to alimony *pendente lite* and counsel fees, although there was some evidence that the plaintiff may have substantially contributed to the marital difficulties between the parties.

[5] In defendant's assignments of error eight and eleven, it is contended that the amount of alimony *pendente lite* ordered paid to the plaintiff is excessive. The amount of alimony *pendente lite* is to be determined in the discretion of the trial judge in the same manner as the amount of alimony is determined. G.S. 50-16.3(b). It is provided in G.S. 50-16.5(a) that:

> "(a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."

[6] When the estates, earning capacity, accustomed standard of living of the parties, and the other facts of this case are considered, no abuse of discretion is shown in the amount awarded to plaintiff as alimony *pendente lite* and in requiring defendant to pay the motel bill incurred by plaintiff and the children of the parties from 4 June 1970 to 1 July 1970.

[7] Defendant's assignment of error nine challenges the amount of counsel fees awarded. The provision for the payment of counsel fees *pendente lite* is contained in G.S. 50-16.4. This statute requires that the amount of the fees shall be reasonable. The reasonable amount is to be determined by the trial judge in the exercise of discretion. When the circumstances of this case are all taken into consideration, there was no abuse of discretion in the award of $2,500 counsel fees to plaintiff's counsel. The facts in the case of *Schloss v. Schloss* 273 N.C. 266, 160 S.E. 2d 5 (1968), cited by defendant in support of his contention, are distinguishable from the facts in the instant case. See *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221 (1967) and *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443 (1960).

[8] Defendant's tenth assignment of error, which was to the award of the primary custody of the five younger children to plaintiff, is not brought forward and discussed in his brief and is therefore deemed abandoned. Rule 28 of the Rules of Practice in the Court of Appeals.

Defendant's assignment of error twelve challenges the amount of support for the children that defendant was ordered

to pay pending the trial of this cause. The court ordered the defendant to pay to plaintiff $150 per month for the support of each of the following children: John Robert Little, Zeb Vance Little, and Linda Little; and the sum of $100 per month for the support of each of the following children: Alma Jean Little and Velma June Little. There is a provision included in the order that when Alma Jean Little and Velma June Little enter a "full-time" boarding school, the payments for their benefit shall be reduced to $20 per month each. There is a further provision relating to the elimination of support payments.

[9, 10] It was permissible under G.S. 50-13.5(b)(3) for the plaintiff to join this action for custody and support of the minor children of the parties in her action for alimony without divorce. Under G.S. 50-13.4(b), "the father, the mother, or any person, agency, organization or institution standing in *loco parentis* shall be liable, in that order, for the support of a minor child." The judge, under this statute, in proper instances, may enter an order requiring support for a minor child. The amount shall be in the discretion of the court and sufficient to meet the reasonable needs of the child for health, education, and maintenance, with due regard being given to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the case. G.S. 50-13.4(c). When all of these factors are taken into consideration in this case, there was competent evidence to support an award to the plaintiff from the defendant for the support and maintenance of the children of the parties, and no abuse of discretion has been made to appear in the amount thereof.

Defendant's assignments of error are overruled. Based upon material findings of fact, which are supported by competent evidence, Judge Seay properly entered judgment awarding alimony *pendente lite,* counsel fees, custody and support of the children, pending the determination of this cause on its merits.

The judgment is affirmed.

Affirmed.

PARKER and HEDRICK, JJ., concur.

IN THE MATTER OF CALLIE HOOPER KING, ADMINISTRATRIX OF THE ESTATE OF ALBERT KING, DECEASED; AND ROBERT I. KING AND WIFE, CALLIE HOOPER KING, PETITIONERS v. MARY ALICE KING LEE AND HUSBAND, CHARLIE LEE; IRENE KING BROADNAX AND HUSBAND, ROBERT BROADNAX; WILLIE ALBERT KING AND WIFE, DOROTHY LAWSON KING; DAVID KING, SINGLE; FRANCES KING GALLOWAY AND HUSBAND, JOHN GALLOWAY; BESSIE KING GALLOWAY AND HUSBAND, FRANK GALLOWAY; JESSIE KING LAWSON AND HUSBAND, LINDSEY LAWSON; PRICIE KING HARRIS, WIDOW; DAISY KING TOTTEN AND HUSBAND, JAMES TOTTEN; GEORGE KING AND WIFE, FRANCES G. KING; JIMMIE A. KING AND WIFE, JUANITA SELLERS KING; AND HENRY KING, WIDOWER, DEFENDANTS

No. 7017SC410

(Filed 16 September 1970)

1. **Partition § 4; Ejectment § 6— conversion of partition proceeding into action to try title**

Partition proceeding was converted into a civil action to try title where defendants denied that petitioners owned any interest in the land described in the complaint.

2. **Ejectment § 7— burden of proof upon plaintiff**

In ejectment, plaintiff must prevail, if at all, upon the strength of his own title and not because of the weakness or lack of title in defendant, plaintiff having the burden to show title good against the world or good against defendant by estoppel.

3. **Ejectment § 10— sufficiency of plaintiffs' evidence — failure to show possession**

In this action in ejectment, plaintiffs failed to make a *prima facie* showing of good title in them and defendants' motion for a directed verdict should have been allowed, where plaintiffs introduced a deed conveying the property in question to their intestate but the only evidence of possession was that the land had been listed for taxes by the intestate prior to his death and by his estate after his death, and plaintiffs failed to offer proof of title by estoppel or by superior deed from a common source.

4. **Ejectment § 10— proof of possession — listing and payment of taxes**

Evidence of listing and payment of taxes is no evidence of actual possession and will not support an action in ejectment.

APPEAL by defendants Willie Albert King and Dorothy Lawson King, from *McConnell, J.*, 9 March 1970 Civil Session of the Superior Court of ROCKINGHAM County.

This special proceeding was instituted by petitioners for the sale for partition of three tracts of land which, they alleged, were owned by Albert King, intestate, at the time of his death.

Petitioner Callie Hooper King is the duly appointed, qualified, and acting administratrix of the estate of Albert King. Petitioner Robert I. King is a son of Albert King. All of the other children of Albert King are respondents.

Appellants Willie Albert King and his wife, Dorothy Lawson King, filed answer to the petition denying that the intestate, Albert King, owned tract No. 3 described in the petition at the time of his death and averring sole seizure and possession in them. No other respondent filed answer, nor did any petitioner reply to the averments in the answer filed by appellants.

The proceeding was transferred to the civil issue docket of the Superior Court. At the close of petitioners' evidence, respondents Willie Albert King and his wife, Dorothy Lawson King, moved for a directed verdict. The motion was denied. Appellants offered no evidence but rested and renewed their motion which was again denied. Both motions were reduced to writing and the grounds therefor stated with particularity. Petitioners moved for directed verdict. The motion was allowed and judgment entered declaring the 13 children of Albert King owners as tenants in common of the land in controversy. Respondents Willie Albert King and Dorothy Lawson King appealed.

Gwyn, Gwyn and Morgan, by Julius J. Gwyn, for respondents Willie Albert King and Dorothy Lawson King appellants.

Bethea, Robinson and Moore, by Norwood Robinson, for petitioner appellees.

MORRIS, J.

[1] Appellants' denial that petitioners owned any interest in the land described in the complaint as tract No. 3 converted the action into a civil action to try title, and it became, in effect, an action in ejectment. *Skipper v. Yow,* 249 N.C. 49, 105 S.E. 2d 205 (1958); 6 Strong, N.C. Index 2d, Partition, § 4, p. 199; *Coltrane v. Laughlin,* 157 N.C. 282, 72 S.E. 961 (1911).

[2] In ejectment, plaintiff must prevail, if at all, upon the strength of his own title and not because of the weakness or lack of title in defendant. *Murphy v. Smith,* 235 N.C. 455, 70 S.E. 2d 697 (1952); *Cothran v. Motor Lines,* 257 N.C. 782, 127 S.E. 2d 578 (1962). To recover, "plaintiff must show title good against the world, or good against the defendant by estoppel. It makes no difference whether the defendant has title or not,

the only inquiry being whether the plaintiff has it." *Davis v. Land Bank,* 219 N.C. 248, 249, 13 S.E. 2d 417 (1941).

Petitioners' proof of title consisted of the following: A deed (plaintiffs' exhibit #2) dated 11 September 1946, from B. M. Johnston and wife, Mattie I. Johnston, to Albert King and wife, Lula King, recorded in Book 373, at page 593, Rockingham County Registry, conveying the following described property:

> "A certain tract or parcel of land in Rockingham County, State of North Carolina, and adjoining the lands of B. M. Johnston, Lester Harrelson, J. L. Butler and others, and bounded as follows: It being a tract or parcel of land situated in Rockingham County near the Caswell County and Rockingham County lines, described and bounded as follows: Bounded on the North by the Watlington Estate; on the East by the lands of Lester Harrelson; on the South by Paw Paw Branch and the R. H. Johnston Homeplace; on the West by Hogan's Creek and the lands of J. L. Butler, containing 100 acres, more or less, and being a part of the Billie Garrett Tract, later owned by George Johnston, Paw Paw Branch is the South boundary of the land herein conveyed; Hogan's Creek and the land of J. L. Butler are the Western boundary thereof and the Watlington line is the Northern boundary. The Northeastern boundary is a small branch running from Lester Harrelson's land Southeasterly to Paw Paw Branch."

The Tax Director of Rockingham County testified that tract No. 3 in the petition was described exactly as was the tract conveyed to the intestate by the deed referred to as plaintiffs' exhibit No. 2. He testified that his records disclosed that the land in controversy had been listed for taxes by the intestate prior to his death and by his estate after his death. On cross-examination, he testified that the land listed for taxes by the intestate and by his estate was on the west side of Hogan's Creek (the deed introduced by petitioners having shown that Hogan's Creek was the western boundary of the land). He further testified on cross-examination that he had been a registered surveyor since 1954, that he had read the description of the land as contained in plaintiffs' exhibit No. 2 but he could not tell where the land was situated.

Petitioners then offered the Register of Deeds who testified from the records of her office that Lula King, wife of Albert King, died on 5 June 1947.

In *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142 (1889), Avery, J., set out clearly and precisely the various ways by which a party may prove title. They are:

"1. He may offer a connected chain of title or a grant direct from the State to himself.

2. Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought. (Citations omitted.)

3. He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. (Citations omitted.)

4. He may show, as against the State, possession under known and visible boundaries for thirty years, or as against individuals for twenty years before the action was brought. Secs. 139 and 144, Code.

5. He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. Code, sec. 147; (citations omitted).

6. He may connect the defendant with a common source of title and show in himself a better title from that source. (Citations omitted.)"

In *Cothran v. Motor Lines, supra,* Rodman, J., noted that what was said by Avery, J., in 1889 accurately summarizes the law today with the exception that G.S. 1-36 makes it unnecessary to prove the sovereign has parted with its title when not a party to the action.

In *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627 (1920), plaintiff alleged ownership of a tract of land and alleged defendant was in wrongful possession of a portion thereof. Defendant by

answer averred that he owned and was in possession at 22.6 acres which he described. At trial, plaintiffs introduced a connected line of deeds, the first dated in 1895, for 185 acres of land which was described by metes and bounds, and the last dated in 1918 conveying the land to plaintiffs. Plaintiffs' evidence further tended to show defendant in possession of 22.6 acres of land, with definite boundaries as claimed by defendant in his answer, lying and being within the larger boundaries set forth in plaintiffs' deeds. Defendant's motion for nonsuit was granted, and the court entered judgment adjudging defendant to be the owner of the 22.6 acres and entitled to retain possession. On appeal the Court affirmed the nonsuit but held that there was error in adjudging title in defendant because that could only be done on affirmative findings. In affirming the nonsuit, the Court reiterated the rule that in an action in ejectment plaintiff must recover on the strength of his own title. After setting out, in seriatim, the six methods of meeting that requirement, the Court said:

> "From a perusal of this statement it will appear, as held in *Graybeal v. Davis,* 95 N.C., 508, that, in order for plaintiff to establish his title, he must show:
>
> 1. A grant from the State directly to himself or connect himself with one by proper deeds or he must show possession in the assertion of ownership, with or without color, for the requisite period, or that defendant is estopped to deny his title.
>
> Recurring to the testimony, the plaintiff has failed to show title in any of the ways indicated in these decisions. He has not shown any grant from the State. Nor has he offered any evidence of possession in himself or those under whom he claims. Nor presented any facts creating an estoppel in his favor. He has shown merely a line of deeds, beginning in 1895, covering a tract of land of 185 acres, and that defendant is in present possession of a portion of said land asserting ownership, and, on authority, this will not suffice."

In *Cothran v. Motor Lines, supra,* plaintiff alleged that he owned a certain tract of land, specifically described; that defendant had wrongfully cut a ditch on the land in which it had laid a four-inch iron pipe for the transmission of sewage into Paw Creek, a stream crossing plaintiff's land. He sought a mandatory injunction. Defendant denied plaintiff owned the

land described in the complaint. At trial in 1962, plaintiff introduced a deed to himself dated in May 1951. The description in the deed was identical to the description in the complaint. The plaintiff testified and referred to the land as "my land," and also testified that part of the land was vacant, that there were two buildings and a deep well on a part, that he intended to build a house on the vacant part, that he hadn't been out there much since the sewer line was put in, that sometimes he got out and walked on the property. There was no evidence that any buildings were or had been occupied nor what he did when visiting the property before the sewer line was put in nor how often he went there. The trial court sustained defendant's motion for nonsuit. On appeal, the opinion of the unanimous court was written by Rodman, J. He referred to the various ways a party may prove title and said:

> "Plaintiff made no effort to show title by estoppel or that he and defendant claimed from a common source. He introduced a deed to himself dated in May 1951. The description in that deed is identical with the description in the complaint. It begins in the center of the Thrift Belt Road and proceeds by specific course and distance to embrace the area described in the complaint.
>
> The deed is color of title; but color of title is not sufficient to make a *prima facie* case of title. The color must be strengthened by possession, which must be open, notorious, and adverse for a period of seven years. G.S. 1-38."

The Court held that plaintiff's evidence was not sufficient to show possession and affirmed the nonsuit.

In *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593 (1955), plaintiffs sought to recover damages for trespass in cutting and removing timber from certain lands in Halifax County, specifically described in the complaint, alleging ownership. Defendant answered denying the allegations of the complaint and by further answer set out a timber deed under which he claimed the right to cut the timber. At trial plaintiffs introduced a connected chain of deeds from 1905 to 1940 and also introduced oral testimony with respect to the line and boundaries of the land involved. When plaintiffs rested, defendant's motion for judgment as of nonsuit was granted. On appeal the judgment was affirmed. The Court said that plaintiff must rely on the strength of his own title, referred to the various methods of proving title set out in *Mobley v. Griffin, supra,* and noted

that in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action. The Court held that plaintiffs' evidence was not sufficient to bring their case within any of the six rules. If they intended to invoke the sixth rule, that is, to show a common source of title, the evidence was insufficient because it failed to connect defendant with any source of title common to both plaintiffs and defendant. If they relied on adverse possession under known and visible boundaries or under color of title, the evidence was too vague and insufficient to support either.

[3, 4] Testing petitioners' evidence by these rules, we must conclude that petitioners have failed to show *prima facie* their good title. There has been no proof of title by estoppel nor was there evidence of a common source of title with the evidence showing better title in petitioners from that source. The only evidence of possession is that the intestate, and after his death his estate, listed property in Ruffin Township known as the "Ben Johnston" tract for taxes. There is no evidence that the taxes were paid nor is the evidence clear with respect to whether the land described in the complaint was the same land listed for taxes. Evidence of listing and payment of taxes is no evidence of actual possession and does not suffice to support an action in ejectment. *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726 (1961). Nor was plaintiffs' evidence sufficient to identify and locate the land they claim.

Having concluded, as we do, that petitioners have failed to prove title to tract No. 3, it follows that the court was in error in entering the judgment in the record. The motion of Willie Albert King and Dorothy Lawson King for directed verdict should have been granted and judgment entered denying petitioners' request for sale of tract No. 3 and remanding the cause to the Clerk of the Superior Court to the end that tracts Nos. 1 and 2 as described in paragraph 5 of the petition could be sold for partition.

Error and remanded.

BROCK and GRAHAM, JJ., concur.

ROY H. RABON, JR. v. PHYLLIS L. RABON LEDBETTER

No. 7019SC485

(Filed 16 September 1970)

1. **Divorce and Alimony § 23; Husband and Wife § 11— provision in separation agreement for child support — presumption of reasonableness — change in amount of support — change of conditions**

While provisions in a valid separation agreement for the maintenance and support of the minor children of the marriage cannot deprive the courts of their inherent authority to protect the interests and provide for the welfare of infants, there is a presumption, in the absence of evidence to the contrary, that such provisions mutually agreed upon are just and reasonable, and the court is not warranted in ordering a change in the absence of any evidence of a change in conditions.

2. **Divorce and Alimony § 22— modification of child custody order**

While orders in custody proceedings are never final, since the needs of the children and the ability of the parents to supply those needs may change, a court is not warranted in modifying or changing a prior valid order absent a showing of change in conditions. G.S. 50-13.7(a).

3. **Divorce and Alimony § 23— modification of child support order — relieving father from payment of support while children visit him — failure of court to find change of circumstances**

Where a separation agreement incorporated into the original order providing for custody and support of the children required the father to pay $300 per month for support of the children and contemplated summer visits of the children with their father, but there was no provision relieving the father of any portion of the $300 monthly payments during such visits, the trial court erred in modifying the original order by relieving the father of the obligation to make the $300 monthly support payments while the children visited with him, in the absence of evidence and finding of any change in circumstances to justify such modification.

4. **Divorce and Alimony § 22— motion by husband to modify child support order — denial of wife's motion for travel expenses, attorney's fees, and bond to assure compliance with visitation order**

The trial court did not abuse its discretion in the denial of the wife's motion that the husband be required to pay her travel expenses from another state and her attorney's fees in defending against the husband's motion for modification of a child custody and support order, and that the husband be required to post bond of $1000 to assure his compliance with any visitation order that might be entered.

APPEAL by defendant from *Kivett, J.*, April 1970 Civil Session of RANDOLPH Superior Court.

This is an appeal by the mother of two minor children from an order modifying certain provisions of a prior order relating to custody and support of the children. The facts giving rise to this appeal are as follows:

The marriage of the parties was dissolved by absolute divorce decree entered 21 October 1968 in the plaintiff husband's action brought on the ground of one year's separation. The parties had signed a separation agreement, and defendant did not contest the divorce, or request alimony, but did move for custody of the two minor children. When the divorce decree was signed, Judge Exum, the Judge presiding at the session of superior court in which the cause was pending, also signed an order which awarded custody of the children to defendant, permitted her to have them with her outside of North Carolina (she having moved to Arkansas), and directed the plaintiff father to provide for the support of the children by paying into court $300.00 per month to be transmitted by the clerk to the defendant for use by her in providing for the maintenance of the two children. In addition, Judge Exum's order directed plaintiff to continue to carry hospital insurance for the children and to pay for their medical, dental, surgical and hospital treatment, not covered by such insurance, in excess of the amount normal for growing children. Judge Exum's order also contained the following:

> "The plaintiff, Roy H. Rabon, Jr., shall have the right to visit with said children at any reasonable time; and provided that he shall have suitable and reasonable facilities and proper persons to care for said children, he shall have the right to have the said children visit with him at reasonable times and under reasonable circumstances including the right to have said children visit him during a part of the summer months. The parties hereto shall attempt to agree upon a suitable visitation plan which will provide full and free opportunities of visitation and will yet be in the best interest of said children, and any plan devised between them may be embodied in an order and submitted to the Court out of term and out of the district for approval; and in the event that such visitation plan cannot be agreed upon, either of the parties hereto may move the Court for an order providing for such visitation privileges by the plaintiff, which said order may likewise be signed out of term and out of the district.

"IT IS FURTHER ORDERED that this matter is retained for further orders, upon proper motion by either of the parties, relative to the care, custody, maintenance and matters affecting the welfare of said two minor children until such time as they reach their majority or are emancipated according to law."

On 4 March 1970 plaintiff filed a motion in the cause, seeking a review of Judge Exum's order and alleging that since the date of that order both plaintiff and defendant had remarried and "there has been a change of circumstances insofar as the parties and the two minor children born of the marriage are concerned." Plaintiff alleged he had attempted, but had been unable, to reach agreement with defendant covering visitation of the children, and that he wished to be relieved of paying the $300.00 per month while the children visited with him. In his written motion plaintiff also asked the court to inquire into the reasonableness of the $300.00 monthly payment "in view of the fact that both the plaintiff and the defendant have remarried," but at commencement of the hearing plaintiff withdrew this request.

Defendant, answering plaintiff's motion, admitted remarriage of the parties but asserted this had nothing to do with plaintiff's obligation to support his children, and alleged $3,600.00 per year was not adequate in view of an increase in plaintiff's salary and the inflation which had occurred since the date of Judge Exum's order. Defendant moved for an order requiring plaintiff to pay her travel expenses and attorney's fees in defending against plaintiff's motion, and requested that plaintiff be required to post bond in the amount of $1,000.00 to assure compliance with any visitation order which might be entered.

After hearing, Judge Kivett signed an order directing that plaintiff should have the children visit him in North Carolina from 1 July to 15 August of each year and that during this period he was to be relieved of paying the $300.00 for the month of July and was to be relieved of paying $100.00 of the $300.00 for the month of August of each year. The order denied defendant reimbursement of travel expenses and attorney's fees and refused her request to have plaintiff post bond.

From so much of the order as relieved plaintiff of making support payments while the children were visiting him and as

denied reimbursement to defendant for travel expenses and attorney's fees and declined to require plaintiff to post bond, defendant appealed.

Walker, Bell & Ogburn by John N. Ogburn, Jr., for plaintiff appellee.

Ottway Burton for defendant appellant.

PARKER, J.

Appellant's first assignment of error is directed to that portion of the order appealed from which relieved plaintiff of the obligation to make full support payments for the children while they were visiting with him in the summertime. At the hearing defendant introduced in evidence the written separation agreement which had been signed by the parties prior to their divorce. In this agreement the plaintiff had agreed to pay $300.00 per month for support of the children, based upon his then current earnings. The agreement also contemplated summer visits of the children with their father, and there was no provision for relieving him of any portion of the $300.00 monthly payments during the time of these visits.

[1] While the provisions of a valid separation agreement relating to marital and property rights of the parties cannot be ignored or set aside by the court without the consent of the parties, such agreements "are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children." *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73; *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235. No agreement between husband and wife will serve to deprive the courts of their inherent authority to protect the interests and provide for the welfare of infants. Husband and wife "may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court." *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487. Nevertheless, where parties to a separation agreement agree concerning the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the provisions mutually agreed upon are just and reasonable, and the court is not warranted in ordering a change in the absence of any evidence of a change in conditions. *Fuchs v. Fuchs, supra.*

[2] In this case the order entered by Judge Exum at the time of the divorce of the parents relating to the custody and support of the children, in effect incorporated the provisions of the separation agreement. It is, therefore, apparent that Judge Exum considered these provisions reasonable in the light of the conditions existing at the time he entered the order. No appeal was taken from that order. While orders in custody proceedings are never final, since with the passage of time both the needs of the children and the ability of the parents to supply those needs may change, a court is not warranted in modifying or changing a prior valid order absent a showing of change in conditions. *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332. This requirement is further pointed out in the language of G.S. 50-13.7(a): "An order of a court of this State for custody or support, or both, 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." (Emphasis added.)

[3] The order appealed from in the case now before us contains no finding as to any change in circumstances. The only allegation made by plaintiff when he moved for modification of the prior order as to any change in circumstances, was that both parents had remarried. However, there was no allegation as to how this fact related in any way to the custody and support of the children. There was no evidence of any change in the needs of the children, and the only evidence of any change in the ability of the father to make the support payments as directed in the original order was that offered by the defendant, which indicated that the plaintiff father's earnings had increased. In the absence of evidence and finding of any change in circumstances, there was error in the order appealed from insofar as it modified the plaintiff's obligation to continue to make the full $300.00 monthly payments for the support of the children, without reduction during the time of their summer visits to him.

There is no merit in plaintiff's contention that, since he would necessarily be supporting his children while they visited with him, the order appealed from did not really modify the original order. The original order contemplated exactly such visits, yet made no provision for any reduction on the monthly payments. By omitting any such provision, it is possible that the court in making the original order took into account that

certain expenses of the children continued at their mother's home even during their absence while visiting their father. However that may be, provision for any reduction in the payments was omitted from the original order, and that order could not thereafter be modified by inserting such provision without a showing and finding of change in circumstances.

[4] There is no merit in appellant's remaining assignments of error which related to the denial of her motion to require plaintiff to reimburse her for travel expenses and attorney's fees and to post bond. These were all matters within the sound discretion of the trial judge and no abuse of discretion has been shown.

The order appealed from insofar as it directs any change in the plaintiff's obligation to continue to make the full $300.00 monthly support payments for the children is reversed; in other respects it is affirmed.

Affirmed in part,

Reversed in part.

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

A. LYLE DAVIS AND RAY JAY WEISNER, RESIDENTS AND TAXPAYERS OF IREDELL COUNTY, NORTH CAROLINA, IN THEIR OWN INTEREST AND IN THE INTEREST OF ALL OTHER RESIDENTS AND TAXPAYERS OF IREDELL COUNTY WHO MAY MAKE THEMSELVES PARTIES TO THIS ACTION v. IREDELL COUNTY, NORTH CAROLINA, a BODY POLITIC AND CORPORATE, DULY CREATED BY THE STATE OF NORTH CAROLINA

No. 7022SC488

(Filed 16 September 1970)

1. **Counties § 6— taxpayers' action — proposed county courthouse — alleged irregularities in procedure**

In taxpayers' action alleging certain irregularities by the county in the purchase of land on which to locate a proposed government center consisting of a courthouse and jail, the evidence presented by the county was sufficient to establish that the county commissioners were following correct statutory procedures relating to notice to the public of the proposed center. G.S. 153-9(9).

2. **Counties § 6; Taxation § 6— taxpayers' action — proposed county courthouse — necessary expense — necessity for vote**

In taxpayers' action alleging certain irregularities by the county in the purchase of land on which to locate a proposed government

center consisting of a courthouse and jail, there was no merit to the taxpayers' contention that the purchase of the land was not a necessary expense under the Constitution and that the county commissioners exceeded their authority when they purchased these tracts without first having the purchase approved by the voters, since the tracts in question were purchased from funds already on hand in the form of surpluses in the capital improvement fund and there was consequently no need for approval by the voters. N. C. Constitution, Art. VII, § 6.

3. Counties § 6— taxpayers' action — proposed county courthouse — capital reserve fund

In taxpayers' action alleging certain irregularities by the county in the purchase of land on which to locate a proposed government center consisting of a courthouse and jail, the question whether the county commissioners failed to follow statutory requirements for the accumulation of a capital reserve fund to be used for the development of the government center *held* not presented by the record of the case, since there was no showing that a capital reserve fund was ever established by the county. G.S. 153-142.1 *et seq.*, G.S. 153-114.

APPEAL by plaintiffs from *Bowman, S.J.*, 16 March 1970 Session of IREDELL Superior Court.

Plaintiffs brought this action as residents and taxpayers of Iredell County in their own behalf and in behalf of other residents and taxpayers alleging irregularities in the purchase of land on which to locate a proposed government center in that a unanimous vote had not then been taken to relocate the county courthouse and jail, that appraisals of the land were not made, that the county accumulated monies in a capital reserve fund out of which to pay for the center without first adopting a resolution as required by G.S. 153-142.3, that defendant has expended these capital reserve funds without first adopting a resolution approving the expenditure of these funds as required by G.S. 153-142.8, and that defendant failed to make any findings that the proposed land purchase is needed for governmental purposes. Plaintiffs requested that the purchases be declared null and void, and that the defendant be enjoined from continuing under the plan or the resolution of 5 January 1970 that authorized action under the plan. Plaintiffs also sought a preliminary injunction.

Defendant moved under Rule 12 to dismiss the complaint for failure to state a claim upon which relief can be granted. A hearing was held on plaintiffs' motion for a preliminary in-

junction and on defendant's motion for dismissal for failure to state a claim upon which relief can be granted.

At this hearing, the plaintiffs' evidence tended to show that there had been no resolutions by the Board of County Commissioners concerning the establishment or the use of a capital reserve fund, nor had such a fund been established. A capital improvement fund did exist and consisted of surpluses from the general fund and a specific capital improvement levy of two cents per one hundred dollar valuation in the fiscal year 1969-70. A resolution was passed by the Board of County Commissioners on 5 January 1970 that the County begin purchase of properties in the two-block area contemplated for the government center with the first phase of the plan being the relocation of the courthouse and jail. The resolution authorized the purchase of land for the courthouse and jail as well as other land for the proposed center as it became available or might be needed. The resolution provided that the funds for these purchases were to come from the capital improvement fund and that the project would be financed on a pay-as-you-go basis. Provision was also made in the resolution for the appraisal of the properties before they were bought. Three tracts of land were purchased in the month of January 1970 pursuant to the resolution for a sum of $25,500.00. In addition, $50,000 was placed in escrow for the purchase of another tract of property. Notice of the proposal to relocate the courthouse and jail and to hold a final vote on 4 May 1970 was published 4 February 1970, 4 March 1970, and was scheduled to be published 4 April 1970.

Defendant's evidence presented the same basic facts with the following additions. The selection of the site for the new government center was the culmination of years of planning by the Board and the conclusion that the existing buildings could not be properly renovated. The cost estimate for the new courthouse was $725,000 and for the jail $350,000. Provision was made in the plans so that if funds ran low, the new jail would not be equipped until the funds did become available. Currently there is $650,000 in the budget under a capital improvement fund, and it is anticipated that $411,000 will be available from discoveries, penalties, and other unforeseen sources, with the development planned on a pay-as-you-go basis. Neither the courthouse nor the jail are to be located on any of the land already purchased. The Board contemplates the same method of funding the courthouse and jail as was used in 1965-66 to build the

present courthouse annex—that is—by accumulation of surpluses for capital improvements.

The trial judge, after making certain findings of fact, made conclusions of law to the effect that the erection of the courthouse and jail were necessary county expenses under Article VII, sec. 6, of the Constitution of North Carolina; that the Board had the authority to purchase property necessary for any county building; that the present site cannot be changed except by unanimous vote of the Board; that the Board has the authority under G.S. 153-9(8a) to levy a special tax for constructing and equipping courthouses and jails as well as for acquiring land for the sites; that the defendants are performing their duties under G.S. 153-9(8), (8a), and (9); that the provisions of the General Statutes with respect to the establishment of capital reserve funds are not controlling here; and the complaint was dismissed on the grounds that it failed to state a claim upon which relief can be granted under Rule 12.

From these findings plaintiffs appeal to this Court.

Raymer, Lewis & Eisele by Douglas G. Eisele for plaintiff appellant.

Chamblee, Nash and Frank by Jay F. Frank for defendant appellee.

CAMPBELL, J.

[1] Plaintiffs assign as error the dismissal of the action by the trial judge under Rule 12 of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. They allege that the defendant did not follow the proper statutory procedures in purchasing land and entering contracts in furtherance of a plan to move the Iredell County Courthouse, jail and other public buildings to a new site.

Plaintiff first argues that the defendant began the purchase of land in January 1970 in connection with the development of a new government center without first complying with G.S. 153-9(9), which reads as follows:

> "(9) To Designate Site for County Buildings.—To remove or designate a new site for any county building; but the site of any county building already located shall not be changed, unless by a unanimous vote of all the members of the board at any regular monthly meeting, and unless

upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, once in each of three calendar months, and posted in one or more public places in every township in the county for three months, next immediately preceding the monthly meeting at which the final vote on the proposed change is to be taken. Provided that where the notice is published in a newspaper printed in the county it shall not be necessary to post the notices in the townships. Such new site for the county courthouse shall not be more than one mile distant from the old, except upon the special approval of the General Assembly."

However, the evidence presented at the hearing does not bear this contention out. In a resolution of 5 January 1970, the Board of County Commissioners contemplated the move of the courthouse and jail to the site of a proposed new government center. Following this resolution the machinery to provide notice and a final vote pursuant to the above statute was set in motion. At the time of the hearing two of the required monthly notices had been published. During the month of January 1970 three tracts of land were also purchased for the new government center under the authority of the 5 January 1970 resolution. However, neither the courthouse nor the jail nor any existing county building to which the statute applies, were planned for any of these three tracts, as it was shown at the hearing. Indeed, the evidence indicated that the County had entered into no binding contracts regarding the purchase of land for the erection of the courthouse or the jail, only non-obligatory options had been acquired. All of the evidence shows that the Board of County Commissioners is following the correct statutory procedure regarding the relocation of the courthouse and jail. They have set the proper statutory procedure in motion and have entered no obligations regarding the proposed move.

[2] Plaintiffs next contend that the purchase of the three tracts of land for the proposed new government center is not a necessary expense under the Constitution of North Carolina and that the Board exceeded its authority when it purchased these tracts without first having it approved by a majority in an election. The relevant constitutional language is found in Article VII, sec. 6 of the North Carolina Constitution and provides as follows:

". . . No county, city, town, or other municipal corporation

> shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose."

A close reading of this provision indicates that it contemplates a contracting of an obligation to be paid at some future time. Here the land in question was purchased from funds already on hand in the form of surpluses in the capital improvement fund. This falls clearly within the rule laid down in *Adams v. Durham,* 189 N.C. 232, 126 S.E. 611, where the city wanted to build an auditorium with funds received from the sale of a lot and city building. The court found that this was not a necessary public purpose but was a public purpose. Referring to the constitutional provision, the court stated: ". . . But this provision, in our opinion, has no application to the facts of this record, where, as stated, the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. . . ." See also *Goswick v. Durham,* 211 N.C. 687, 191 S.E. 728, where the Court said: ". . . The acquisition of the land [for an airport] from surplus funds was not beyond the power of the city and it in no way offended the provisions of Article VII, sec. 7, [now sec. 6] of the Constitution. . . ." Under these principles, there is no merit in this contention of the plaintiffs.

[3] Plaintiffs' final contention is that the defendant failed to follow the statutory requirements for the accumulation of a capital reserve fund which is to be used for the development of the new government center. But on close examination of the record, there is no showing that a capital reserve fund was ever established. Without the establishment of a capital reserve fund, the requirements of G.S. 153-142.1 *et seq.* regarding the establishment and use of capital reserve funds never come into play.

The evidence shows that the defendant did not attempt to establish "capital reserve funds" pursuant to G.S. 153-142.1. Instead the Board of County Commissioners in the instant case proceeded under the general authority of G.S. 153-114 wherein it is provided "[e]ach county shall maintain the following funds and *such other funds* as the board of county commissioners may require. . . ." (Emphasis added.) Pursuant to this authoriza-

tion, the Board of County Commissioners did "set up and appropriate a fund for capital improvements for Iredell County." "The budget resolution did not, itself, set forth the particulars of any capital reserve program. It set forth only the amount of the appropriation and the source of the funds." On this evidence Judge Bowman found as a fact, "[t]hat present and past Boards of Iredell County Commissioners, in anticipation of the need for new county facilities, have, for at least seven years, allocated funds for capital improvements, to be used for providing new county facilities by budgeting for capital improvements, spending only those funds which were absolutely necessary, and accumulating the surplus, and budgeting the same from year to year." There is no allegation that the Board of County Commissioners acted improperly under these statutory provisions. The interesting question as to whether this method of accumulating a capital improvement fund is valid is not presented under this record, and we have not passed on it.

The evidence supports the findings of fact, and the findings of fact support the conclusions of law.

We find

No Error.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. OLIVER HILTON DICKERSON

No. 7018SC548

(Filed 16 September 1970)

1. **Criminal Law § 91; Constitutional Law § 30— removal of case from calendar until defendant expressed satisfaction with counsel and agreed to cooperate in defense**

The trial court was without authority to order that defendant's case not be returned to the calendar until defendant furnished to the court a written statement that he was satisfied with his court-appointed attorney and that he would cooperate with him in the preparation and trial of the case.

2. **Criminal Law 91; Constitutional Law § 32— appointment of counsel unsatisfactory to defendant**

While the court may not delay a trial indefinitely, over defendant's objection, pending his expression of satisfaction with counsel,

neither may a defendant insist that only counsel satisfactory to him be appointed to represent him, but defendant must accept counsel appointed by the court unless he desires to present his own defense.

3. **Contempt of Court § 2; Criminal Law § 98— disruptive conduct by defendant — inherent power of court — necessity for findings of fact**

If defendant's failure to cooperate with his attorney manifests itself in contemptous or disruptive conduct, the court has the inherent authority to deal with it, but it is essential in such instances, as in instances of an adjudication of direct contempt, that the particulars of the offense be specified on the record.

4. **Criminal Law § 98; Contempt of Court § 2— courtroom decorum — powers of court**

Trial judges have broad power to take whatever legitimate steps are necessary to maintain proper decorum and appropriate atmosphere in the courtroom during a trial, including the power to deal appropriately with an unruly defendant.

CERTIORARI to review order of *Collier, J.*, 2 March 1970 Session of GUILFORD County Superior Court.

Defendant was tried and convicted of felonious breaking and entering and felonious larceny at the 31 March 1969 Session of Guilford Superior Court. A new trial was granted upon appeal. *State v. Dickerson,* 6 N.C. App. 131, 169 S.E. 2d 510. Upon the call of the case for retrial defendant's court appointed counsel stated to the court that defendant desired that he be removed as counsel. Defendant confirmed this, stating:

> "Your Honor, I would like to state, we discussed the capability of him representing me, and we did come to the conclusion he would discontinue his services and I would request defense counsel to represent me. . . . I can't understand why, he can't explain to me why I am being tried without—under the same circumstances I was tried in the previous case. I was tried twelve months ago. . . . I feel like it is double jeopardy to be tried twice."

The court explained to the defendant that the Court of Appeals had awarded a new trial because of error in the previous trial, and denied his request that new counsel be appointed to represent him.

After various other motions were made by defendant through his counsel, and denied by the court, the selection of the jury was begun. While the solicitor was questioning the prospective jurors, defendant rose to his feet without instruc-

tions from the court or counsel and the record indicates that the following then transpired:

"THE COURT: Have a seat.
(The Defendant continued to stand.)

THE COURT: Have a seat.
(The Defendant continued to stand.)

THE COURT: HAVE A SEAT.
(The Defendant sat down.)

THE COURT: Members of the Jury, don't discuss the case during the recess. We will take about five minutes."

During recess, the court entered the following order:

"This case, having come on for hearing at the March 2, 1970, Criminal Session of the Superior Court of Guilford County, before the undersigned Judge Presiding, and the defendant having entered a plea of not guilty to the charge of storebreaking, larceny or receiving, through his Court-appointed attorney, Forrest Campbell, Esq., and prior to the completion of the selection of a Jury to hear said case,

THE COURT FINDS AS A FACT that the defendant in this case, by his words and conduct, refuses to cooperate with his Court-appointed attorney, Forrest Campbell, Esq., in the preparation and trial of his case, and the Court therefore DISMISSES the Court-appointed attorney, Forrest Campbell, Esq., and appoints the Public Defender to represent the defendant.

THE COURT DIRECTS that the case be continued for the Term, the case not to be returned to the calendar unless and until the defendant has furnished to the Court a written statement, signed by him, to the effect that the person who is appointed to represent him is satisfactory and that he will cooperate with said attorney appointed by the Court in the preparation for trial and in the trial of his case, and that he will abide by the rules and regulations of the Court and conduct himself in a proper manner before and during the trial of his case in Court; that until said statement is furnished to this Court the defendant shall be retained in the custody of the Department of Correction under bond of Ten Thousand ($10,000.00) Dollars, until he does furnish said statement to this Court, and his case is tried."

Certiorari was allowed upon petition of the defendant to review the order.

Robert Morgan, Attorney General, by Mrs. Christine Y. Denson, Staff Attorney, for the State.

Wallace C. Harrelson, Public Defender Eighteenth Judicial District, for defendant appellant.

GRAHAM, J.

[1] Defendant challenges the order on various grounds. We discuss only two. First, he contends that the court was without authority to require that he agree, as a prerequisite to receiving a trial, that he is satisfied with his court appointed attorney and will cooperate with him. We agree. It is impossible to force happiness or satisfaction on anyone. Under the terms of the order in question, if the defendant is not satisfied with his counsel, he must nevertheless represent to the contrary or forfeit his constitutional right to a speedy trial. Even though defendant's dissatisfaction may be ill-founded; if, in order to receive a trial, it is required that he deny that it exists, when in fact it does, the effect has been to require that he dishonestly represent his true feelings. His right to be tried may not be conditioned upon such a requirement.

[2] While the court may not delay a trial indefinitely, over a defendant's objection, pending his expression of satisfaction with counsel, neither may a defendant insist that only counsel satisfactory to him be appointed to represent him. An indigent defendant must accept counsel appointed by the court unless he desires to present his own defense. *State v. Alston,* 272 N.C. 278, 158 S.E. 2d 52; *State v. Morgan,* 272 N.C. 97, 157 S.E. 2d 606; *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330; *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667; *State v. Moore,* 6 N.C. App. 596, 170 S.E. 2d 568; *Campbell v. State of Maryland,* 231 Md. 21, 188 A. 2d 282; *Brown v. United States,* 105 U.S. App. D.C. 77, 264 F. 2d 363. " '[T]he authorities seem united in the view that if there is fair representation by competent assigned counsel, proceeding according to his best judgment and the usually accepted cannons of criminal trial practice, no right of the defendant is violated by refusal to accede to his personal desire in the matter.' " *State v. McNeil, supra.*

[3] Defendant's next contention is that there is no showing in the record as to what specific acts and conduct were relied

upon by the court as the basis for the action taken. This contention also has merit. The record shows that defendant voluntarily stood until instructed three times by the trial judge to sit down. However, whether he stood and continued standing for the purpose of disrupting the trial or otherwise demonstrating a contempt for the court does not affirmatively appear from the record or from any determination made and set forth in the record by the court. The basis of the order appears to be the court's finding: "[T]hat the defendant in this case, by his words and conduct, refuses to cooperate with his court-appointed attorney. . . ." Whether the "words and conduct" refer solely to defendant's act of voluntarily standing, other acts or statements not reflected by the record, or a combination of circumstances is not made to appear. If defendant's failure to cooperate with his attorney manifested itself in contemptuous or disruptive conduct, the court clearly had the inherent authority to deal with it. However, we think it essential in such instances, as in instances of an adjudication of direct contempt, that "the particulars of the offense be specified on the record." G.S. 5-5; *In re Palmer,* 265 N.C. 485, 144 S.E. 2d 413; *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581.

[4] Although we find erroneous the court's requirement that defendant furnish a written statement as specified in the order, we nevertheless point out that trial judges have broad power to take whatever legitimate steps are necessary to maintain proper decorum and appropriate atmosphere in the courtroom during a trial. This includes the power to deal appropriately with an unruly defendant. In the case of *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, the defendant continued to make abusive, threatening and disruptive remarks to the court, after having been warned that he would be removed from the courtroom if his disruptive behavior continued. At one point he tore the file which his attorney had and threw the papers on the floor. The court ordered the defendant removed from the courtroom, and the trial proceeded in his absence. The Supreme Court of the United States held that the action of the trial judge did not violate the defendant's constitutional right to be confronted with witnesses against him. Mr. Justice Black, in expressing the view of seven members of the Court, stated:

> "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disre-

gard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."

The order of the trial court is modified by striking therefrom the portion directing that the case not be returned to the calendar unless and until the defendant has furnished to the court a written statement. The portions of the order relating to continuing the case for the term, setting bond pending trial, and appointing the Public Defender to represent the defendant were within the discretion of the trial court and will not be disturbed.

Modified and affirmed.

BROCK and MORRIS, JJ., concur.

JAMES THOMAS DIXON v. JOHN A. SHELTON

No. 7021SC483

(Filed 16 September 1970)

1. **Animals § 2— injury inflicted by horse — evidence of injury**

In a veterinarian's action to recover damages for injuries received when he was kicked by defendant's horse during a pregnancy examination of the horse, the trial court properly excluded plaintiff's testimony relating to his facial scars resulting from the kick, where there had been no previous testimony that the plaintiff had been kicked by the horse.

2. **Animals § 2— injury inflicted by horse — testimony by plaintiff's physician**

In a veterinarian's action to recover damages for injuries received when he was kicked by defendant's horse during a pregnancy examination of the horse, the trial court properly excluded testimony by plain-

tiff's physician that the plaintiff had been kicked by a horse, where the testimony was not within the personal knowledge of the physician.

3. **Animals § 2— injury inflicted by horse — injury to veterinarian — competency of evidence**

In a veterinarian's action to recover damages for injuries received when he was kicked by defendant's horse during a pregnancy examination of the horse, plaintiff was not prejudiced by his witness' testimony on cross-examination that plaintiff had taken no other precautions on walking behind the horse than "just being slow and easy," where (1) the witness had previously testified to everything that had been done by plainitff in preparing for the examination, including the fact that plaintiff had not used a twitch or hobbles but had instructed the witness to hold up one of the horse's forefeet, and (2) a subsequent expert witness testifying for plaintiff stated that the method used by plaintiff was the one commonly used in the county.

4. **Animals § 2— injury inflicted by horse — testimony of seller — non-expert testimony of observations**

In a veterinarian's action to recover damages for injuries received when he was kicked by defendant's horse during his pregnancy examination of the horse, the trial court correctly allowed the seller of the horse to testify as to what she had observed from years of experience "as to technique or approach to the horse" during a pregnancy examination, the seller not being asked to give an opinion as an expert.

5. **Rules of Civil Procedure § 50— motion to set aside verdict**

A motion to set aside the verdict as being against the greater weight of the evidence is directed to the sound discretion of the presiding judge, whose ruling is not reviewable on appeal in the absence of abuse of discretion.

6. **Animals § 2— injury inflicted by horse — evidence of vicious propensities**

In a veterinarian's action to recover damages for injuries received when he was kicked by defendant's horse during a pregnancy examination of the horse, the trial court properly overruled plaintiff's motion to set aside the verdict for defendant as being against the greater weight of the evidence, where the only evidence relating to the vicious propensity of the horse was testimony that defendant's younger daughter fell from the horse some four years prior to plaintiff's accident.

APPEAL by plaintiff from *Johnston, J.*, 26 January 1970 Session of FORSYTH Superior Court.

Plaintiff seeks to recover damages for injuries received when he was kicked by defendant's horse. When the injuries were inflicted, the plaintiff, a veterinarian, was performing a pregnancy test by rectal examination of the mare. He alleges that the "riding horse was possessed of dangerous, vicious, mis-

chievous and ferocious habits, being an animal which, on occasions, displayed excitable and unmanageable habits which were known to the defendants to be dangerous to mankind." Defendant's motions for directed verdict were overruled. The jury, in answer to issues to which there were no objections, found that defendant was the owner and keeper of the horse but that it was not one "possessing a vicious propensity." Plaintiff appeals.

White, Crumpler and Pfefferkorn, by Joe P. McCollum, Jr., for plaintiff appellant.

Hudson, Petree, Stockton, Stockton and Robinson, by John M. Harrington, for defendant appellee.

MORRIS, J.

[1, 2] Plaintiff's first four assignments of error are to the admission or exclusion of evidence. He first contends that the court committed prejudicial error in striking, on motion of defendant, the following testimony:

> "Q. Now, do you have any other scars on your face left from this thing?
>
> A. The one the horse did. The one that comes down this way and goes across the eyebrow to right here (indicating)."

At that point, there had been no evidence introduced from any witness that plaintiff had been kicked by a horse. Indeed, the plaintiff had testified "I do not remember seeing the horse till this day." He remembered nothing of what occurred except that he went to defendant's house to inquire where the horse was. He further testified that he did not regain consciousness for some nine to twelve days. This evidence was properly stricken. Similarly, he contends that testimony of the doctor who treated him should not have been stricken. Dr. de la Torre was asked to refer to his notes and "tell us when you first saw him and what you found at that time." The physician answered: "On July 6, '66, he was admitted to Forsyth Memorial Hospital by Doctor Starling, a general surgeon, who called me about him, and I saw him that day. He had been kicked by a horse, on that day." On motion of defendant, the last statement was stricken and the jury instructed not to consider it. Plaintiff contends the physician should be allowed to testify "upon his personal knowledge based on an examination of the injured party . . . as

to the nature and extent of the injuries, or disfigurement; . . . [and] the cause of the suffering allegedly endured by plaintiff." 3 Strong, N.C. Index 2d, Medical Testimony, § 50, pp. 683 and 684. While we do not disagree with plaintiff as to the principle of law upon which he relies, we do not think it applicable. Obviously, from plaintiff's own evidence, the physician could not have obtained from plaintiff any history of how the injuries were received nor was that information within his personal knowledge. This evidence was also properly stricken.

[3] The young man who assisted the plaintiff by holding the "lead shank" and the mare's left forefoot, at the direction of plaintiff, testified in detail with respect to the procedure used by plaintiff and what occurred from the time they went to the defendant's pasture until the plaintiff was injured. He testified that he followed the plaintiff's instructions; that he was holding the lead shank in one hand, and the mare's foot in the other; that he was holding the horse's foot approximately three feet off the ground; that as plaintiff began his examination, the horse seemed slightly nervous, so he stopped for a few minutes and rubbed the horse's hind quarters, and the witness put the horse's foot down; that when he was ready they went through the same process, the witness getting down and holding the horse's foot and the lead shank; that he held the leg up as best he could; that plaintiff had entered the mare with his arm when she lunged forward, forcing the witness back, and he could see her kicking the plaintiff in the head; that she had made no movement at all before she made the sudden lunge forward. The witness further testified that he did not recall a twitch in the trunk of plaintiff's car; that he had used a twitch before in holding a horse and knew how, but that plaintiff did not tell him to use a twitch; that he did not use any hobbles; that plaintiff did not tell him to use hobbles. The witness was then asked, "Were there any precautions taken when Doctor Dixon walked around behind this horse?" Over plaintiff's objection witness was allowed to answer the question, his answer being "None other, Sir, than just being slow and easy." Plaintiff contends that the question called for a conclusion from a non-expert. We fail to see prejudice to plaintiff. The witness had testified to everything that was done and had then testified that neither hobbles nor twitch was used. Subsequent expert witness testifying for plaintiff testified that the method used was the one commonly used in Forsyth County and provided as much restraint as other methods, that a horse could not kick with both

feet at the same time with one front leg up, that holding one leg up is an accepted method of restraint when a rectal palpation pregnancy test is being performed. The allowance of the question did not constitute prejudicial error.

[4] Mrs. Sara Morgan testified that she had been training horses and teaching horseback riding for some 18 years and owned her business known as "Cedar Hollow Farm." She had sold the mare to defendant for his young daughter. She testified that during her years of experience she had quite often observed a horse being tested to determine whether it was in foal. Over plaintiff's objection she was allowed to testify with respect to what she had observed "as to technique or approach to the horse." Plaintiff's objection seems to be based on his contention that the witness was not possessed of expert qualifications on this subject. However, the witness was not asked to give an opinion as an expert. She was merely asked to testify as to what she had observed. This she was competent to do, and the court's ruling was correct.

Plaintiff's first four assignments of error are overruled. The record is replete with evidence as to the nature and extent of plaintiff's injuries which were severe, how they were received, the normal procedure for performing the test which was being performed, the usual and acceptable procedures of restraint used, and the methods used on this occasion. The evidentiary rulings of the court did not result in prejudice to plaintiff.

Plaintiff's next six assignments of error are directed to the charge of the court to the jury. We do not deem it necessary to set out the alleged errors in seriatim. Suffice it to say that we have carefully examined the charge, and when considered as a whole, we find it free from prejudicial error.

[5, 6] Plaintiff further contends that the trial court erred in overruling his motion to set aside the verdict as being against the greater weight of the evidence. Plaintiff concedes that this motion is directed to the sound discretion of the presiding judge whose ruling is not reviewable on appeal in the absence of abuse of discretion. *Frye and Sons, Inc. v. Francis,* 242 N.C. 107, 86 S.E. 2d 790 (1955). We find no abuse of discretion. On the contrary, the evidence is clear that the only incident known to defendant resulting in injury to anyone was an occasion on which his younger daughter fell from the horse some four years prior to this accident and an occasion when defendant himself fell from

the horse. Defendant argues that no prejudice could have resulted to plaintiff even if errors were committed during the course of the trial for that there was no sufficient evidence upon which to submit to the jury the issues of vicious propensity or knowledge thereof. We, of course, do not discuss the merits of this contention, because it is not before us. We do note, however, that the record is silent as to the ground or grounds for the motions for directed verdict made by defendant. G.S. 1A-1, Rule 50, is explicit in its requirement that "A motion for a directed verdict shall state the specific grounds therefor." See *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970). The defendant's failure to state the grounds for his motions was sufficient basis for the court's overruling them.

In the trial of this matter, we find

No error.

BROCK and GRAHAM, JJ., concur.

IRA ANDERSON v. MICHAEL BRUCE MANN AND CHRISTINE BARNWELL MANN

No. 7019SC422

(Filed 16 September 1970)

1. Rules of Civil Procedure § 50— motion for directed verdict — sufficiency of evidence

On appeal from the granting of a motion for a directed verdict, the Court of Appeals must determine the sufficiency of plaintiff's evidence guided by the same principles applicable in determining the sufficiency of evidence to withstand the former motion for nonsuit under G.S. 1-183.

2. Rules of Civil Procedure § 50— motion for directed verdict — consideration of evidence

Upon motion for a directed verdict, all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies therein being resolved in plaintiff's favor.

3. Rules of Civil Procedure § 50— directed verdict for contributory negligence

Defendant is entitled to a directed verdict if plaintiff's evidence, considered in the light most favorable to plaintiff, so clearly establishes

his own negligence as one of the proximate causes of his injury that no other reasonable inference can be drawn therefrom.

4. **Automobiles § 83— contributory negligence of pedestrian — failure to yield right-of-way to vehicle**

Plaintiff's evidence disclosed that he was contributorily negligent as a matter of law in failing to yield the right-of-way to a vehicle upon the roadway while crossing the roadway at a point other than within a marked crosswalk or an unmarked crosswalk at an intersection in violation of G.S. 20-174(a), where it tended to show that plaintiff's car stalled in the right-hand traffic lane, that plaintiff turned from his car and started across the road toward a store, that when he had taken three or four steps he was struck by defendant's car which approached from behind plaintiff's car, and that plaintiff's vision in the direction from which defendant approached was unobstructed for a distance of one-half mile.

5. **Automobiles § 46— opinion testimony as to speed — contradiction by physical facts**

Where plaintiff's own evidence showed that defendant's car left skid marks of only 27 feet, opinion testimony by plaintiff's witness that defendant was traveling 60 miles per hour is contrary to human experience.

APPEAL by plaintiff from *Copeland, S.J.*, 2 March 1970 Session of RANDOLPH Superior Court.

Plaintiff seeks to recover for personal injuries allegedly sustained when he was hit by a car owned by defendant Christine Barnwell Mann and then being driven by defendant Michael Bruce Mann. Plaintiff alleges that the accident occurred at approximately 2:30 p.m. on 18 January 1965; that plaintiff's car had stalled "on the right hand traffic lane being unable to move it from the hard surface portion of the highway and raised the hood on said motor vehicle and attempted for several minutes to get it started"; that he failed in this attempt and started across the highway to a store; that "as he was almost across the highway" he was struck by defendant Mann. He alleged defendants were negligent in that defendant Mann, the driver, negligently failed to maintain a proper lookout, negligently failed to keep control of the car, operated the car carelessly and recklessly and in willful and wanton disregard of the rights and safety of others, drove at a speed greatly in excess of a reasonable and prudent speed, drove on the left side of the highway, attempted to pass plaintiff's stalled vehicle without 500 feet unobstructed vision, attempted to pass plaintiff's vehicle

"against the no passing yellow lines on said highway," and failed to sound his horn.

The complaint alleged and the answer of defendants admitted that vision in the direction in which defendant Mann was approaching was unobstructed for 1500 feet.

Each defendant filed separate answer. Each denied the allegations of negligence, averred that the accident was solely caused by plaintiff's negligence and pleaded plaintiff's contributory negligence as a bar to any recovery.

At the end of plaintiff's evidence, defendants' motion for directed verdict was allowed. Plaintiff appeals.

Ottway Burton for plaintiff appellant.

Perry C. Henson and Thomas C. Duncan for defendant appellees.

MORRIS, J.

The record does not reveal any motion made at the close of plaintiff's evidence. However, at oral argument counsel entered into a written stipulation, filed as a part of the record, that this Court consider the motion made as a motion for directed verdict. The grounds therefor are set out in the judgment, to wit, "that the plaintiff offered no evidence of negligence on the part of the defendant and, even if there were such evidence, the plaintiff's evidence disclosed contributory negligence on the part of the plaintiff."

[1] On appeal from the granting of a motion for directed verdict, we must determine the sufficiency of plaintiff's evidence guided by the same principles applicable in determining the sufficiency of evidence to withstand the former motion for nonsuit under G.S. 1-183. *Musgrave v. Savings & Loan Assn.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970).

[2] Under the established rules all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies therein being resolved in plaintiff's favor. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969).

[3] If plaintiff's evidence, considered in the light most favor-

able to him, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference can be drawn therefrom, then defendant is entitled to a directed verdict. *Bowen v. Gardner, supra.*

[4] Plaintiff's evidence tended to show that on the day of the accident the sun was shining, the road was clear but there was snow on the shoulder of the road "where the highway people had pushed it off" "half knee deep." As plaintiff was proceeding down the highway driving his 1952 Buick, the car cut off and "came to a halt" right in front of Stradler's store. It was "over on the right hand side over as far as, next to the snow as you could get" still on the hard surface. The width of the hard surfaced portion at that point was approximately 24 feet. Looking back in the direction from which plaintiff had come, the road was level and one could see about half a mile. At that time at that point on the road there was a double yellow line surrounding a white broken line and the posted speed limit was 45 miles per hour. Plaintiff got out, raised the hood on his left side of the car, and put his hand over the carburetor to try to get the car started. His son, seated in the car, was to mash the starter. This did not work and plaintiff testified: "I said I will walk over to the store and get a bottle of gas and we will pour some gas in the carburetor to see if it will crank. As to whether I started walking across to the store, I turned around and when I turned around that is all I ever remember. When I turned around, I turned around in the direction of the store, faced the store."

On cross-examination plaintiff testified "I never saw the car that hit me. As to you understanding that I said I turned around from the side of the car to walk across the road to get gas, I told my oldest boy, I said, 'I will go over there and get a bottle of gas and pour it in the carburetor.' I never did get started to get the gas. I turned around to speak to him and that was the last thing I remember."

Plaintiff's son testified that he was a passenger in his father's car in the front seat. There was no other passenger. When the car stalled, his father got out and raised the hood on the left side and tried to start it. He told his son that he was going to Stradler's store and get a bottle of gas. "He started over. He got far enough for the fenders of the car if you are out in the street that the defendant's car on the left side picked him up." "It picked him up and he slid his wheels 27 feet before

he ever got stopped." The witness first saw the defendant's car when it was about 300 feet behind them. He watched it through the rear view mirror until the driver pulled over in the left hand side of the road. "I did not see him when he came back into view there on the left hand side until after he had done hit my father because we didn't have no side mirror on the car." In the opinion of the witness defendant was operating his automobile at a speed of 60 miles per hour.

On cross-examination, he testified that he stepped off the skid marks and they were 27 feet in length and angled a little bit over toward the driveway to the store on the left hand side of the road. Plaintiff had taken three or four steps. "I didn't see the car hit my father. I saw the car after it had hit my father." Plaintiff was knocked forward some distance and came to rest in "that left hand lane over there with his head toward the edge of the road and his feet toward back to the center of the road, more or less straight across the road." The defendant told the witness that he didn't see the plaintiff.

> "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." G.S. 20-174(a).

The uncontradicted evidence is that the plaintiff's vision in the direction from which defendant was approaching was unobstructed for a distance of one-half mile. Plaintiff's son testified that he watched defendant's car approaching from a distance of 300 feet. Plaintiff himself testified that he turned from the car and faced the direction of the store. From his own evidence he had every opportunity to see the approaching vehicle and yield the right-of-way as it was his duty to do.

[4, 5] We do not concede that the uncontradicted evidence tends to show that defendant was traveling 60 miles per hour in a 45 mile-per-hour zone. On the contrary, we are of the opinion that in the light of plaintiff's own evidence that defendant's car left 27 feet of skid marks, the suggestion that he was traveling at a speed of 60 miles per hour is contrary to human experience. See *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246 (1945), and *Burgess v. Mattox,* 260 N.C. 305, 132 S.E. 2d 577 (1963). However, even should we concede that defendant was exceeding the speed limit and should have seen the plaintiff, a reading of plaintiff's evidence leads to the conclusion, as

a matter of law, that his own negligent conduct contributed to his injury.

The judgment of the trial tribunal is

Affirmed.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. FRANK K. GRIGGS

No. 7018SC549

(Filed 16 September 1970)

Criminal Law § 76— inculpatory in-custody statements — admission in evidence without voir dire hearing

In this prosecution for felonious assault and attempted armed robbery, the trial court erred in the admission, over defendant's objection, of evidence of in-custody statements made by defendant which placed him near the crime scene and at the place where the victim first encountered his assailant and showed that defendant was using an alias name on the night in question because he was being sought for another crime, where the court conducted no *voir dire* examination to determine the voluntariness of defendant's statements, since the statements, although not a confession, tended to be inculpatory.

On *certiorari* to review judgment of *Gywn, J.*, 11 August 1969 Session, GUILFORD Superior Court.

Because of the delay of the court reporter in furnishing to counsel a transcript of the trial proceedings, and counsel's consequent inability to timely docket the record in this Court, we allowed *certiorari* to perfect a late appeal.

Defendant was charged in two bills of indictment with felonious assault and attempted armed robbery. Defendant entered pleas of not guilty to each charge. From a verdict of guilty of felonious assault and attempted armed robbery, defendant appeals.

The State's evidence tended to show that, on the night of 11 February 1969, the prosecuting witness, Mr. William R. Gunz, entered the Rathskeller Restaurant in the City of Greensboro, sat at a table and talked with the defendant, who was theretofore a stranger to him, for about two hours, and left. As he was starting his automobile, the defendant entered the front

seat, pointed a pistol at Mr. Gunz, announced that "This is a stick-up," and shot Mr. Gunz in the face. The State's evidence further tended to show that, shortly after the alleged shooting, the defendant was accosted by Officer W. J. Kisby of the Greensboro Police Department. The defendant took the officer's service revolver at gunpoint, but was shortly thereafter captured by Officer Kisby. The customer register of the Rathskeller, for the night in question, included the name of Jerry Lee Shaw.

Attorney General Morgan, by Staff Attorney Walker, for the State.

Alston, Pell, Pell & Weston, by E. L. Alston, Jr., for defendant appellant.

BROCK, J.

At the close of the State's evidence, the defendant moved for judgment of nonsuit, which motion was denied. The State was then permitted to re-open its case, and Officer H. D. Blue of the Greensboro Police Department testified as to conversation between himself and the defendant, while the defendant was in custody, quoted as follows:

"I did not know this defendant prior to seeing him in connection with this case. The name Jerry Lee Shaw is the name he gave us when he was arrested by the officer on the 12th. He did not tell me that was his name. That just came to me through some of the other police officers.

Q. All right, sir. Sometime later did you receive a phone call from the defendant?

A. Yes, sir.

Q. When and under what circumstances was that?

A. That was after he had been arrested in the Gunz case. One evening I went home after work and I received a call from the defendant, he was still in the County jail. He told me that his real name was Frank Griggs. MOTION TO STRIKE. MOTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 3.

WITNESS CONTINUES:

That he had seen his brother's name in the cell where he was locked up written on the wall. He got to thinking

about it and wanted to tell me his real name. He also wanted to tell me that he was wanted here in Greensboro under the name of Frank Griggs. MOTION TO STRIKE. MOTION DENIED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 4.

When he called me he identified himself to me. I had had conversations with him before, and recognized his voice. I talked to him again the next morning, but this was all the conversation was about that night on the telephone.

CROSS EXAMINATION (By Mr. Alston)

The defendant told me that he did not shoot anybody or attempt to rob anybody in the early morning hours of February 12, 1969. He did not tell me that he didn't remember leaving the Rathskeller. He did not tell me that he had a bus ticket back to Winston-Salem and was trying to get to the bus station from the Rathskeller.

REDIRECT EXAMINATION (By Mr. Clark)

I first talked with the defendant around 11:00 a.m. on the 12th of February. Before talking to him I advised him of his constitutional rights. I advised him he did not have to make any statement to me, that anything he said could be used in court against him, that before answering any questions, that if he could not afford an attorney one would be appointed for him and he could wait until his appointed attorney was present before answering questions. I asked him if he understood these rights and he said he did. He said he would make a statement to me.

Q. And, do you recall what he said at that time? OBJECTION. OBJECTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 5.

He stated that he came to Greensboro on the 11th from Winston-Salem by way of bus, and after arriving he went to the Greensboro Coffee Shop and had a couple of beers. The Greensboro Coffee Shop is at the intersection of Washington and Greene Streets. After leaving there he stopped at one other place and had one other beer. After leaving the second place he was walking around waiting on a bus to go back to Winston-Salem. He said he worked for Thomasville Furniture Company.

Q. What did he say about taking Mr. Kisby's gun? OBJECTION. OBJECTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 6.

A. What I asked him about this charge he told me that he didn't do anything like that, that the police officer was crazy.

On this particular date he denied being at the Rathskeller. On the 17th I confronted him with a register we had from the Rathskeller. OBJECTION. OBJECTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 7.

He stated: 'Well, I could have been down there.' MOTION TO STRIKE. MOTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 8.

Q. On the 12th when he disrobed, what statement did he make about the abrasions and scratches on his body? OBJECTION. OBJECTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 9.

A. He told me that a board fell on him at work. He did not state how long ago that had been or make any other statements about it at all.

Q. When you talked to him about his name being Griggs, did you ask him why he was using the name 'Shaw?' OBJECTION. OBJECTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 10.

A. He told me he was wanted here in Greensboro on a felonious larceny charge and that's the reason he was using another name. MOTION TO STRIKE. MOTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 11.

Q. What, if anything, did he later say to you about being at the Rathskeller? OBJECTION. OBJECTION OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 12.

A. I don't recall him making any statement other than the fact he could have been down on that night. I went over State's Exhibit 1 with him, the register book, and showed him where his name was written in the log book on page 3 circled in red.

Q. And in response to that he said he may have been at the Rathskeller? OBJECTION.

COURT: That's leading but the Court allows the leading character in the Court's discretion.

A. Yes. EXCEPTION. DEFENDANT'S EXCEPTION NO. 13."

Timely objections and exceptions to this testimony were made by counsel. The record discloses that this testimony was admitted without a *voir dire* examination to determine the voluntariness of the statements of the defendant.

The statements placed defendant, on the night in question, in Greensboro, near the scene of the alleged crime, and at the very place where Mr. Gunz first encountered his assailant. They further showed that his reason for using the alias of Shaw was that he was being sought in Greensboro for another crime.

The statements, while not technically a "confession," inasmuch as defendant did not admit guilt, nevertheless tended to be inculpatory. Defendant contends, and we agree, that their admission without a determination that they were voluntarily given constituted prejudicial error.

New Trial.

MORRIS and GRAHAM, JJ., concur.

PEGGY L. REDDING v. F. W. WOOLWORTH COMPANY

No. 7021SC398

(Filed 16 September 1970)

1. **Negligence §§ 5.1, 57— injury to invitee — liability of proprietor — sufficiency of evidence of negligence**

Plaintiff invitee who was injured in defendant's store when she was forced to jerk her head violently to one side in order to escape an object that flew past her ear, *is held* to have made out a *prima facie* case of defendant's actionable negligence, where plaintiff's evidence was to the effect that (1) she entered the store with her child in order to buy a toy, (2) she was struck on the neck by a wooden object that resembled a part of a planter being assembled nearby by one of the defendant's employees, (3) someone, possibly the employee, retrieved the object and returned it to the place of assembly, and (4) the same or a similar object with an extended screw or nail flew past the plaintiff's ear, causing her to move her head violently.

2. **Negligence §§ 5.1, 53— liability of store proprietor to invitee — standard of care**

A store proprietor owes to his business invitees the duty to keep in reasonably safe condition the areas of the store where customers are expected to go so as not unnecessarily to expose customers to

danger, and to warn of unsafe conditions of which the proprietor was charged with knowledge.

3. **Negligence § 5.1— duty and standard of care of store proprietor — questions of law**

The duty and standard of care of a store proprietor are matters of law to be explained by the court to the jury; they are not matters which plaintiff is required to prove.

4. **Negligence § 20— negligence as legal result of certain facts**

Negligence is not a fact in itself, but rather it is the legal result of certain facts.

5. **Negligence § 29— proof of negligence**

Negligence is a conclusion of law; plaintiff need not directly prove negligence, but must prove facts from which the jury would be warranted in inferring it.

6. **Negligence § 29— proof of negligence**

Facts which are relied upon to raise an inference of negligence must establish the probability thereof and not a mere conjecture or surmise.

APPEAL by plaintiff from *Exum, J.*, 9 March 1970 Session, FORSYTH Superior Court.

Plaintiff seeks to recover damages for injuries allegedly inflicted by negligence of defendant's employee. Plaintiff's evidence taken in the light most favorable to her tended to show the following: On 4 November 1966, plaintiff entered defendant's store with her small child to buy him a toy. She had placed the child aboard a hobby horse ride at the front of the store and was waiting for him when she was struck on the neck by a wooden object. She stated that it resembled a part of a planter which was being assembled at a nearby checkout counter by defendant's employee, Arnold. A man, possibly Arnold, retrieved the object and returned it to the assembly point; whereupon it or another similar object with a nail or screw extending from it flew past plaintiff's ear, causing her to jerk her head violently to one side.

Plaintiff's evidence further tended to show the following: The violent jerking of her head caused a cervical sprain, aggravating a pre-existing degenerative disc disease and degenerative osteo-arthritis. Since that time she has experienced pain, numbness, headaches, nausea, muscular weakness, and a partial loss in range of motion of her head and neck. She has incurred

considerable medical expenses and has suffered a loss of earning capacity.

At the close of plaintiff's evidence, the trial court granted defendant's motion for a directed verdict. Plaintiff appealed to this Court.

Wilson, Morrow & Boyles, by John F. Morrow for plaintiff.

Deal, Hutchins & Minor by Fred S. Hutchins, Jr., for defendant.

BROCK, J.

[1] The sole question presented is whether plaintiff's evidence was sufficient to require submission of the case to the jury. Defendant appellee contends that plaintiff failed to make out a *prima facie* case of actionable negligence in that she failed to show (1) any duty or standard of care or any specific acts upon which the jury could predicate a finding of negligence, or plaintiff's status in relation to the store; (2) failed to show that any action of Mr. Arnold was the cause of her injury, and (3) assuming Mr. Arnold's conduct to have caused her injury, failed to show that it was reasonably foreseeable, i.e., that his conduct proximately caused her injuries.

[2, 3] The plaintiff's status in relation to the store was shown. She was a business invitee. The duty owed her by defendant was to keep in reasonably safe condition the areas of the store where customers are expected to go so as not unnecessarily to expose customers to danger, and to warn of unsafe conditions of which the defendant was charged with knowledge. *Gaskill v. A. and P. Tea Co.*, 6 N.C. App. 690, 171 S.E. 2d 95. Duty and standard of care are matters of law to be explained by the Court to the jury; they are not matters which plaintiff is required to prove. Given the relationship between the parties, the duty and the standard of care are implied by law.

[4, 5] Our Supreme Court has said that negligence is not a fact in itself, but rather, is the legal result of certain facts. *Skipper v. Cheatham*, 249 N.C. 706, 107 S.E. 2d 625 (1959). Negligence is a conclusion of law; plaintiff need not directly prove negligence, but must prove facts from which the jury would be warranted in inferring it.

It is neither alleged nor proved that Arnold's actual manner of assembling the planter was negligent. Nor does the evidence

disclose the size of the planter, the complexity of its construction, the tension to which its part were subject during assembly, whether it was customary to assemble merchandise in the public part of the store, or any other circumstances indicating that it was negligent to assemble this particular planter at the particular time and place in question. Thus, the question reduces itself to whether the jury could properly infer negligence from the bare fact that Arnold assembled a planter in an area of the store frequented by customers.

[6] This aspect of the case is within the rule that facts which are relied upon to raise an inference of negligence must establish the probability thereof, and not a mere conjecture or surmise. *Ashe v. Acme Builders, Inc.*, 267 N.C. 384, 148 S.E. 2d 244 (1966). However, the jury would be justified in inferring negligence if it found that Arnold continued to assemble the planter with knowledge that the part had once flown off and struck the plaintiff.

Defendant also contends that the evidence fails to connect the object which struck plaintiff with Mr. Arnold. However, plaintiff testified that the object appeared to be a part of the planter. From this the jury could infer that a part flew loose a second time from the planter which Arnold was assembling, without plaintiff or anyone else having observed its actual flight.

Defendant further contends that the injuries suffered by Mrs. Redding were not foreseeable.

> "Foreseeability is an essential element of proximate cause. 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." *Williams v. Boulerice*, 268 N.C. 62, 68, 149 S.E. 2d 590, 594 (1966).

> "The general rule is that if the defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility, except insofar as he was on notice of the existence of such susceptibility, but if his misconduct amounted to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by plain-

tiff notwithstanding the fact that these damages were unusually extensive because of peculiar susceptibility." *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964).

"A tort-feasor is liable to the injured party for all of the consequences which are the natural and direct result of his conduct although he was not able to have anticipated the peculiar consequences that did ensue." *Lockwood v. McCaskill, supra.*

The part, or a part, having once flown loose from the planter, it was clearly foreseeable by defendant that it might do so again; and clearly it was foreseeable by defendant that some injury to an ordinary person was probable from a flying object, and particularly one which had a nail or a screw extending from it.

Reversed.

MORRIS and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. LARRY HILL, ALIAS LAWRENCE STEPHEN HILL

No. 7018SC461

(Filed 16 September 1970)

1. **Robbery § 4— armed robbery — sufficiency of evidence**

There was ample evidence to require submission of the case to the jury in this armed robbery prosecution where the State's witness positively identified defendant as one of the persons who robbed him.

2. **Robbery § 5— instructions — informing jury that armed robbery carries greater punishment than common law robbery**

In this armed robbery prosecution, it was not prejudicial error for the judge to inform the jury that armed robbery carries a greater punishment than common law robbery.

3. **Robbery § 5— common law robbery — instructions**

The trial court's instructions on common law robbery were adequate when the charge is viewed as a whole.

APPEAL by defendant from *Gambill, J.,* 30 March 1970 Criminal Session of Superior Court held in GUILFORD County.

Defendant was tried upon a bill of indictment charging him with armed robbery of Eddie Walker, Jr. (Walker), who at that time was the manager and in charge of the service station operated as Kayo Oil Company. Upon the call of the case for trial, the defendant pleaded not guilty and trial was by jury.

The evidence for the State tended to show that the defendant had been employed by Walker to work at the Kayo Oil Company, a filling station business in Greensboro. The defendant had worked there and was robbed the first night he worked. After that the defendant did not return to work. Walker testified that about 4:30 a.m. on 15 February 1970, business was slack and he, Walker, who was on duty, was in his car doing something to his stereo. At that time an unidentified man approached and asked for a gas can. Walker directed him to another service station and about thirty minutes later, he reappeared. About this time the defendant, with a mask across his mouth and a pistol in his hand, approached and directed Walker to go into the service station. The pistol was a .32 or .38 revolver. Walker recognized the defendant by seeing part of his features, as well as by his voice. The defendant went to the side of the desk in the service station where the key to the money drawer was kept, got the key, and gave it to Walker. As directed by the defendant, Walker used the key and opened the drawer. The unidentified man then proceeded to get the money out of the drawer. Defendant then told Walker to take the money out of his pockets, which he did. Defendant next directed Walker's attention to a safe in the floor which was concealed as a drain and asked him what that was. When Walker told him he did not know, the defendant informed him that he was the manager and that he did know that it was a safe. Defendant then cocked the gun and informed Walker that if he did not open the safe, he was going to "mess him up." Walker told defendant that the combination to the safe was in the wallet they had taken from him. After getting the combination, Walker opened the safe, threw the money out, and the unidentified man picked it up. Then the defendant kicked Walker in the back and said to the unidentified man, "Let's mess him up." The unidentified man said, "No, we'll get in trouble." The defendant told Walker to get in his (Walker's) car; the unidentified man got in front with Walker, and defendant got in the rear. They directed him to drive some distance in town before telling him to stop near Bell's Florist on Market Street where they got out and left. They took $370

of the money belonging to the business and $20 belonging to Walker.

The defendant offered no evidence. The jury returned a verdict finding the defendant guilty of armed robbery. From a judgment of imprisonment for not less than ten nor more than fifteen years, the defendant appealed to the Court of Appeals.

Attorney General Morgan, Staff Attorney League, and William Lewis Sauls for the State.

Assistant Public Defender of the Eighteenth Judicial District Robert D. Douglas III, for defendant appellant.

MALLARD, C.J.

[1] Defendant assigns as error the overruling of his motion for judgment of nonsuit. The witness for the State positively identified the defendant as one of the two persons who robbed him with a .32 or .38 pistol. There was ample evidence to require submission of the case to the jury.

[2] Defendant assigns as error two statements made by the trial judge in the charge to the jury that armed robbery carries with it greater punishment than common law robbery. In doing so, the judge was attempting to distinguish the differences between armed robbery and common law robbery. These statements by the judge did not point out the exact amount of punishment for either offense. While it is ordinarily error in noncapital cases for the trial judge to inform the jury as to punishment, such information by the judge does not always constitute prejudicial error.

In the case of *State v. Rhodes*, 275 N.C. 584, 169 S.E. 2d 846 (1969), it is said:

> "It does not follow, however, that instructions disclosing the punishment authorized by statute will always constitute prejudicial error. The propriety and effect of such an instruction must be considered 'in the light of the circumstances of the trial, as, for example, where it is made in response to remarks of counsel on the subject made in the presence of the jury.' * * *"

In the case of *State v. Howard*, 222 N.C. 291, 22 S.E. 2d 917 (1942), the Court held:

"The rule prevails that in order to overthrow the verdict and judgment it must be made to appear not only that the action of the trial judge complained of was erroneous, but that it was 'material and prejudicial, amounting to a denial of some substantial right.' * * *"

We hold that in this case it was not prejudicial error for the judge to inform the jury that armed robbery carries a greater punishment than common law robbery.

[3] Defendant contends that the trial judge did not adequately define common law robbery. When the charge is viewed as a whole, we are of the opinion and so hold that the charge as to common law robbery was adequate.

We have carefully examined all of the defendant's assignments of error, and no prejudicial error is made to appear.

In the trial we find no error.

No Error.

PARKER and HEDRICK, JJ., concur.

IN THE MATTER OF: THE CUSTODY OF ROBERT REGINALD ROSE, ELVIN HENRY ROSE AND ALEXANDER ROSE

No. 7019SC417

(Filed 16 September 1970)

1. Habeas Corpus § 3— order awarding custody of children — sufficiency of evidence

In a *habeas corpus* proceeding instituted by the mother to determine the custody of the children, there was plenary evidence to support the court's findings and conclusion that the mother was a fit and proper person to have custody of the children and that it would be in their best interest to have custody vested in her.

2. Habeas Corpus § 3— order awarding "permanent" custody of children

A father could not complain of an order which awarded "permanent" custody of the children to the mother, since court decrees in child custody and support matters are not permanent in character but may be modified by the court in the future if subsequent events and the welfare of the children so require. G.S. 50-13.7(a).

3. Appeal and Error § 45— the brief — abandonment of exceptions

Exceptions and assignments of error not brought forward and argued in appellant's brief are deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

APPEAL by Alfred Reginald Rose from *Kivett, J.*, 10 April 1970 Session of RANDOLPH County Superior Court.

This appeal is from an order awarding custody of three infant children to their mother, Olivia Ulloa Rose. The children are: Robert Reginald Rose, born 29 June 1964; Elvin Henry Rose, born 23 November 1966; and Alexander Rose, born 2 January 1968. The order was entered after a lengthy hearing on consolidated applications for writs of *habeas corpus*, one filed by the mother on 18 June 1969, and the other filed on 21 November 1969 by the children's father, Alfred Reginald Rose.

The court's order, entered 10 April 1970, makes extensive findings of fact and orders that Olivia Ulloa Rose be awarded the "permanent care, custody and tuition" of the children, subject to certain recited restrictions and conditions. It further orders that the father shall have the right to have the children visit with him from 10 July to 22 August each summer and every other weekend from Friday at 7:00 p.m. until Sunday a.m. The father appealed.

Walker, Bell & Ogburn by John N. Ogburn, Jr., for appellant.

Hugh R. Anderson and William W. Ivey, for defendant appellee.

GRAHAM, J.

[1] Through his first assignment of error appellant contends that the court abused its discretion in granting custody of the children to the mother. This assignment of error is overruled. There is plenary evidence to support the court's findings which support its conclusion that the mother is a fit and proper person to have custody of the children and that it would in their best interest that custody be vested in her.

Much of the evidence presented at the hearing indicates that the father's conduct with respect to the children was anything but exemplary. On 3 April 1969 the father and a cousin, a professional bail bondsman from Asheboro, took the children from their home in California and brought them to North Caro-

lina without the mother's knowledge and consent. At that time the mother and father were living together and the mother was supporting the children and partially supporting the father who was recovering from a back operation. At no time was the mother notified of the whereabouts of the children or of their health and well-being. When she came to Asheboro in June of 1969 in search of the children, the same cousin who assisted in bringing the children to North Carolina had her arrested for trespassing. The record does not show that she was prosecuted. The mother was frustrated in her attempt to have her application for *habeas corpus* served, although the father was living and working in Randolph County. An inference arises from the evidence that the father and his bondsman cousin knew that the sheriff had papers which he was attempting to serve on the father. Despite her exhaustive efforts, the mother was unable to see her children from 3 April 1969 until the matter came on for hearing over a year later—and then only for a short period in the office of the father's attorney, with the father, the bondsman cousin, and another cousin of the father standing just outside the door. The children, who had been devoted to their mother before they were taken from her custody, kicked her when they saw her for the first time in over a year and told her to "[g]et out of here. We don't want you." This was in the presence of the father who stood idly by and did not remonstrate with the children concerning their conduct toward the mother. The father denied that he had done anything to alienate the children toward their mother during the year they had been under his exclusive care. The record strongly suggests the contrary. Fortunately, after only a few brief moments with their mother, the hostility of the children toward her disappeared. The evidence would have supported a finding that the father violated a California court order in removing the children from that State.

[2] Appellant's second assignment of error is based on an exception to the language of the order which provides that the mother shall have the "permanent" care, custody and tuition of the children. His argument is that the court exceeded its jurisdiction by awarding "permanent" custody. It is elementary that court decrees in child custody and support matters are not permanent in character and may be modified by the court in the future if subsequent events and the welfare of the child require. G.S. 50-13.7(a); *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357; *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884; *In re Bowen,* 7 N.C. App. 236, 172 S.E. 2d 62. The appellee concedes

the rule. The order itself does not contemplate that the question of custody is being irrevocably determined. The fact that the word "permanent" is used in the order in no way changes its legal effect. This assignment of error is also overruled.

[3] Other exceptions and assignments of error appear in the record. However, they are not brought forward and argued in appellant's brief and are therefore deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

Affirmed.

BROCK and MORRIS, JJ., concur.

CARL ROBBINS v. EWELL DAVID BOWMAN

No. 7019SC444

(Filed 16 September 1970)

1. **Pleadings § 1; Sundays and Holidays— filing of complaint — extension of time — Labor Day**

   Clerk of court properly extended time to file complaint to 2 September 1969 where the statutory 20-day limitation for extension of time would have fallen on Labor Day, 1 September 1969. G.S. 1-121, G.S. 1-593, G.S. 103-4.

2. **Evidence § 3— judicial notice — dates**

   The Court of Appeals takes judicial notice that 1 September 1969 was the first Monday in September.

3. **Pleadings § 1— filing of complaint — extension of time — statement of purpose of action**

   Application for extension of time to file complaint must clearly state the purpose of the action as well as its nature. G.S. 1-121.

4. **Process § 7— service on resident defendants who are outside the State — allegations of fraud**

   Purported service of process on North Carolina resident defendant who was outside the State was void where neither the affidavit nor the complaint contained allegations that the defendant departed from the State with intent to defraud his creditors or to avoid the service of summons. G.S. 1-98.2, G.S. 1-98.4.

APPEAL by plaintiff from *Copeland, S.J.*, 2 March 1970 Civil Session of Superior Court held in RANDOLPH County.

Defendant moved to dismiss and for summary judgment pursuant to Rule 12 and Rule 56 of the Rules of Civil Procedure. The trial court allowed the motion, and plaintiff excepted and appealed to the Court of Appeals.

Clarence C. Boyan for plaintiff appellant.

Smith & Casper by Charlie B. Casper for defendant appellee.

MALLARD, C.J.

[1] Summons in this case was issued on 12 August 1969. On the same date the Clerk of Superior Court of Randolph County, pursuant to G.S. 1-121 (which was applicable at that time but was repealed effective 1 January 1970), issued an order extending the time for filing complaint to the 2nd day of September 1969. Plaintiff contends that the trial court committed error in holding that the order purporting to extend the time for filing complaint to 2 September 1969 was contrary to the provisions of G.S. 1-121. The pertinent part of the statute reads:

> "(P)rovided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint: Provided further, said application and order shall state the nature and purpose of the suit."

[2] We take judicial notice that 1 September 1969 was the first Monday in September. The statute, G.S. 103-4, declares that the first Monday in September is Labor Day and that it is a public holiday. When the extension order was signed, the statute, G.S. 1-593, read as follows:

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

Nothing else appearing, it was not improper for the clerk to extend the time for filing the complaint under these circumstances to 2 September 1969.

[3] The above-quoted portion of the statute, G.S. 1-121, required that the application for the extension order and the order

"shall state the nature and purpose of the suit." The order of extension is defective and insufficient in that it neither states the *nature* nor the *purpose* of the action as required by the statute. The application for the order recites that "the nature and purpose of this action are as follows: For the property damage of Carl Robbins due to the negligence of Ewell David Bowman as a result of an automobile collision on State Road #1919 in Randolph County, North Carolina, on August 13, 1966." The *nature* of the action is stated in this application, but the purpose is not *clearly stated.* There is no doubt but that the purpose of the action was for the *recovery of damages,* but the application does not state that it is for the recovery of damages, and the statute specifically required that the *purpose* be stated in the application.

[4] Plaintiff also contends that the trial judge committed error in finding and concluding as a matter of law:

> "(T)hat the affidavit of the plaintiff dated November 7, 1969, and filed December 9, 1969, does not comply with the provisions of Sections 1-98.2 and 1-98.4 of the General Statutes of North Carolina and that the order of the Clerk of the Superior Court of Randolph County dated the 9th day of December, 1969, and the purported Alias and Pluries Summons for Relief directed to the Sheriff of Patrick County, Virginia, for service upon the defendant was contrary to the provisions of law and of no effect; * * * that there is no genuine issue as to any material fact and that the motion of the defendant to dismiss and for summary judgment should be granted on the ground that the plaintiff's claim is barred as a matter of law by the three-year statute of limitations and that there has been no valid service of process upon the defendant * * *."

G.S. 1-98.2(6) reads:

> "Service of process by publication or service of process outside the State may be had in the following kinds of actions and special proceedings:
>
> * * *
>
> (6) Where the defendant, a resident of this State, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons."

This statute means that service of process personally on a defendant outside the State may be had in any case where the defendant, *a resident of this State,* has departed therefrom *with intent to defraud his creditors or to avoid the service of summons.*

G.S. 1-98.4 requires, among other things, that to secure an order for service of process outside the State, the verified pleadings or affidavit must state the action is one of those specified in G.S. 1-98.2.

In the complaint in this case it is alleged that the defendant is a resident of Randolph County. The affidavit upon which the order to obtain personal service outside the State is based is to the effect that summons has been returned by the Sheriffs of Randolph and Rockingham Counties, that the defendant was "not found"; that after diligent search and inquiry, the defendant cannot be found within the State; that defendant is a necessary party to this action of the plaintiff for damages to plaintiff's automobile as a result of an automobile collision on 13 August 1966 caused by defendant's negligence; that plaintiff is entitled to an order for service of process outside the State under the provisions of G.S. 1-98.2; and that the defendant is a *resident of this State* and has departed therefrom. In neither the affidavit nor the complaint is it alleged that the defendant has departed from the State with intent to defraud his creditors or to avoid the service of summons. Therefore, the statutes permitting service of process outside the State have not been complied with. Absent such compliance, the purported service of process outside the State is void. *Harrison v. Hanvey,* 265 N.C. 243, 143 S.E. 2d 593 (1965); *Church v. Miller,* 260 N.C. 331, 132 S.E. 2d 688 (1963). The cases cited by plaintiff are distinguishable.

Plaintiff moved the trial judge for an extension of time in which to file his complaint. The denial of this motion was not error.

We hold that pursuant to Rule 12 and Rule 56 of the Rules of Civil Procedure, the trial court correctly allowed defendant's motion to dismiss and for summary judgment.

Affirmed.

PARKER and HEDRICK, JJ., concur.

MARGARET ROBBINS v. EWELL DAVID BOWMAN

No. 7019SC445

(Filed 16 September 1970)

APPEAL by plaintiff from *Copeland, S.J.*, 2 March 1970 Civil Session of Superior Court held in RANDOLPH County.

Clarence C. Boyan for plaintiff appellant.

Smith & Casper by Charlie B. Casper for defendant appellee.

MALLARD, C.J.

This is a civil action seeking to recover damages for personal injuries. The questions involved in this appeal are identical with those in the case of *Carl Robbins v. Ewell David Bowman, ante,* 416, and the action of the trial judge in allowing defendant's motion to dismiss and for summary judgment is affirmed for the reasons stated therein.

Affirmed.

PARKER and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES HUBERT WYATT AND DOUGLAS ANDERSON

No. 7023SC493

(Filed 16 September 1970)

1. Forgery § 2— consolidation of prosecutions

Trial judge properly acted within his discretion when he consolidated for trial two indictments charging one defendant with the forgery of checks and with the uttering of the same forged checks, and two indictments jointly charging defendant and a co-defendant with forgery and with uttering forged checks.

2. Forgery § 2— prosecution — sufficiency of evidence

In a prosecution charging defendant with forgery and with uttering forged checks, the issue of defendant's guilt was properly submitted to the jury, where the State's evidence would permit a jury to find (1) a false writing of each of the four checks described in the indictments; (2) an intent to defraud on the part of defendant, who

falsely made each of the checks; and (3) each check as made was apparently capable of defrauding.

3. Forgery § 1— uttering forged instrument — definition

Uttering a forged instrument consists in offering to another the forged instrument with knowledge of the falsity of the writing and with intent to defraud.

4. Forgery § 2— uttering forged check — sufficiency of evidence

Evidence in this case *held* insufficient to sustain a conviction of uttering forged check.

APPEAL by defendants from *Beal, J.*, April 1970 Session of WILKES Superior Court.

Defendant James Hubert Wyatt (Wyatt) was charged in four bills of indictment, each containing two counts: first, charging that he forged a particularly described check, and second charging that he uttered the same forged check knowing it to have been forged. In two of the bills defendant Douglas Anderson (Anderson) was jointly charged with Wyatt on both counts. (Other persons were jointly charged with Wyatt on both counts in the other two bills, but the charges against such other persons are not involved on this appeal.) Each of the four checks which were separately described in the four bills of indictment was purportedly drawn on the account of City Body Shop in the Northwestern Bank, North Wilkesboro, N. C., and each purported to bear the signature of Foy Raymer.

On motion of the solicitor and over objection of defendants all charges were consolidated for trial. Both defendants pleaded not guilty. The State offered evidence tending to show: Foy Raymer runs the City Body Shop in North Wilkesboro. On or just prior to 17 October 1969 his place of business was broken into and 14 checks, including the four checks described in the four bills of indictment, were taken from his checkbook. Mr. Raymer did not sign any of the four checks and did not authorize anyone else to sign his name thereon, and the name signed on each check is not his signature. Two of the checks were dated 16 October 1969 and two were dated 17 October 1969. Two of the checks were cashed at the Eagle Store in North Wilkesboro and one at Smithey's Supermarket. A handwriting expert testified that in his opinion Wyatt made all of the writing on the face of all four checks and Anderson made the endorsement appearing on the back of one of the checks.

At the conclusion of the State's evidence, the court dismissed as to Wyatt the second count, which charged the offense of uttering a forged instrument, in each of the four bills of indictment, and dismissed as to Anderson the first count, which charged the offense of forgery, in each of the two bills in which he was named. The case was submitted to the jury on the issues of Wyatt's guilt or innocence of four charges of forgery and of Anderson's guilt or innocence of two charges of uttering a forged instrument. The jury found Wyatt guilty on the charges of forgery as contained in all four bills of indictment and found Anderson not guilty on the charge of uttering a forged instrument as contained in one of the bills of indictment in which he was named and found him guilty of uttering a forged instrument as contained in the remaining bill of indictment in which he was named. From judgment on the verdict imposing prison sentences, both defendants appealed.

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

Jerry D. Moore for defendant appellant James Hubert Wyatt.

Julius A. Rousseau, Jr., for defendant appellant Douglas Anderson.

PARKER, J.

WYATT'S APPEAL

[1] Appellant Wyatt first assigns as error the trial court's consolidation of the cases for purposes of trial. Under the circumstances disclosed by the record before us consolidation was a matter for the sound discretion of the trial court. There is no showing that the joint trial has deprived appellant in any way of a fair trial, and the exercise of the court's discretion will not be disturbed upon this appeal. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492.

[2] The only remaining assignment of error brought forward in the brief of appellant Wyatt is that the court erred in overruling his motion for nonsuit. There is no merit in this assignment of error. Considering the State's evidence in the light most favorable to it and giving to the State the benefit of every reasonable inference to be drawn therefrom, the State's evidence was amply sufficient to permit a jury to find (1) a false writing of each of the four checks described in the first count of each of

the four bills of indictment; (2) an intent to defraud on the part of defendant Wyatt who falsely made each of said checks; and (3) each check as made was apparently capable of defrauding. These are the three essential elements necessary to constitute the crime of forgery. *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22. On Wyatt's appeal we find no error.

ANDERSON'S APPEAL

[3] Appellant Anderson assigns as error the overruling of his motion for nonsuit. This assignment of error must be sustained. The charges of forgery against Anderson were dismissed by the court and the State's case against him was submitted to the jury on two counts, each of which charged that he committed the offense of uttering a forged check knowing it to have been forged. As to one of these the jury found him not guilty, and on this appeal we are concerned only with the remaining charge of uttering on which he was found guilty and on which sentence was imposed.

[4] Uttering a forged instrument consists in offering to another the forged instrument with knowledge of the falsity of the writing and with intent to defraud. *State v. Greenlee, supra.* With reference to the particular check which the jury found Anderson guilty of uttering, the only evidence offered by the State to indicate what had occurred was the testimony of the Police Chief of North Wilkesboro that he had first seen the check in the week of 20 October "(u)p at the Discount House on 421." There was no evidence to indicate how the check reached the Discount House. There was no evidence from which the jury could find that Anderson had ever offered the check to anyone. His motion for nonsuit as to the charge of uttering this check should have been sustained.

The result is:

As to defendant Wyatt, we find no error.

As to defendant Anderson, the judgment is reversed.

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

WOODROW W. JULIAN, EMPLOYEE v. HUGHEY TILE COMPANY, EMPLOYER, THE HOME INDEMNITY COMPANY, CARRIER

No. 7019IC386

(Filed 16 September 1970)

Master and Servant § 96— review of compensation proceeding — remand for findings of fact

The Court of Appeals remands a workmen's compensation case to the Industrial Commission for findings of fact on the appellant's contention that the Compromise Settlement Agreement did not coincide with his understanding with respect to reimbursements for certain medical expenses.

APPEAL by plaintiff from the *North Carolina Industrial Commission* opinion and award of 19 February 1970.

On 6 October 1969, Commissioner Marshall entered an "Order Approving Compromise Settlement Agreement." The order approved and allowed a fee of $1000 for plaintiff's counsel. Immediately following the order, the record on appeal contains an affidavit of plaintiff as follows: "That the attached agreement is the only agreement I have signed and consented to in this case and I have not authorized any person to consent to any other agreement for me." The record indicates that the "affidavit" was "sworn to on October 28, 1969," although the acknowledgment of the officer does not appear. The record next contains a copy of an "Agreement for Final Compromise Settlement and Release." This agreement does not contain the same amount of settlement as is shown in the commissioner's order. The record indicates this agreement was signed only by the plaintiff whose signature was acknowledged before a notary public whose name and expiration of commission are reproduced as a part of the record. The next document appearing in the record is "Application for Review" as follows:

> "THE UNDERSIGNED HEREBY GIVES NOTICE OF APPEAL AND APPLICATION FOR REVIEW in the above case to the North Carolina Industrial Commission, sitting as the Full Commission. Error on the part of the Hearing Commission is alleged for that:
>
> 1. Agreement apparently not what Woodrow W. Julian agreed to. Need copy of transcript and agreement as filed.

All grounds for appeal not specifically set forth herein are hereby specifically waived and abandoned except as otherwise provided by law and the rules of the Industrial Commission.

W. W. Julian

By: John Randolph Ingram

Date of this Application:

October 17, 1969."

Immediately following this is the order of the Full Commission filed 19 February 1970. The order states that counsel for the parties appeared and ably presented their contentions, counsel for plaintiff contending that the agreement as approved did not coincide with plaintiff's understanding with respect to his receiving reimbursement for certain medical expenses allegedly paid by him. The Commission found no facts but stated: "The Full Commission has considered the contentions of the parties and has reviewed the record in the case, and is of the opinion that no real controversy exists and that any medical expenses actually paid by the plaintiff can be determined in an administrative manner upon plaintiff's production of proper receipts covering medical expenses he paid." The Full Commission therefore approved the commissioner's order except for attorney's fees which was increased to $1500.

John Randolph Ingram for plaintiff appellant.

Hedrick, McKnight, Parham, Helms and Warley, by Philip R. Hedrick, for defendant appellee.

MORRIS, J.

We are not able to make any determination of this appeal from the record now before us. The record contains an award based on a compromise agreement for the payment of $6750 in addition to counsel fees and medical expense up to the date of the agreement. It also contains an agreement executed only by plaintiff calling for the payment of $8072.10 "plus the medical bills attached hereto." Appellant's assignments of error are as follows:

1. "The appellant assigns as error the failure of the Full Commission and Hearing Commissioner to find plaintiff did not sign and execute the settlement agreement filed by

Commissioner Marshall on October 6, 1969. EXCEPTION No. 1"

Exception No. 1 is to the order of the Hearing Commissioner.

2. "The appellant assigns as error that the Full Commission erred in the finding no real controversy exists. EXCEPTION No. 2"

Exception No. 2 is also to the order of the Hearing Commissioner entered 3 October 1969.

3. "The appellant assigns as error that the Hearing Commissioner erred in the entry of the Opinion and Award filed October 6, 1969. EXCEPTION No. 3"

Exception No. 3 is to the order of the Full Commission filed 19 February 1970.

Exception No. 5 is to the portion of the Full Commission's order quoted above, but this exception does not appear in the grouping of exceptions and assignments of error.

In his brief appellant argues that since plaintiff did not sign the agreement upon which the award was based, the entry of the award by the commissioner on 6 October 1969 and the entry of the order approving it by the Full Commission on 19 February 1970, constituted error. He also argues in his brief that upon the evidence plaintiff is entitled as a matter of law to 400 weeks' compensation.

Defendant attached to its brief as an appendix a copy of an agreement which it contends is the one upon which the award was based.

In an effort to arrive at some understanding of the case, this Court ordered the Industrial Commission to certify to the Court as an addendum to the record "the order of the Industrial Commission filed 6 October 1969 approving the compromise settlement agreement, and a certified copy of the compromise settlement agreement which was so approved." In response thereto, the Industrial Commission certified to the Court a copy of the agreement upon which the award was based calling for the payment of $6750 "in one lump sum without commutation, plus the medical bills attached hereto." This agreement is signed by all parties and the plaintiff's signature acknowledged before a notary public whose certificate appears thereon.

We have before us no facts. Counsel for plaintiff stated in oral argument that a page providing for lesser payment was inserted in the agreement in lieu of the page providing for the larger amount. This may have caused the problem, but we are left to speculate on the answers to several questions. If a page was inserted, was it done by agreement of counsel? Who presented the agreement to the Hearing Commissioner? Does the record before the Industrial Commission contain two executed agreements or only one? If only one, which one?

While appellant's assignments of error are not properly before us, we are of the opinion that the irregularities charged on this appeal are of such nature that a determination should be made. We do not perceive that this can be done without findings of fact by the Industrial Commission. The application for review by the Full Commission was based upon the ground that the "agreement apparently not what Woodrow W. Julian agreed to." The matter must be remanded to the Industrial Commission for findings of fact.

Remanded.

BROCK and GRAHAM, JJ., concur.

BRYTE ELAM LANE AND HUSBAND, GUY F. LANE v. HELEN BENNETT FAUST, WIDOW, HELEN FAUST LLEWELLYN, WIDOW, JACK MARTINDALE FAUST, AND ISAAC HENRY FAUST

No. 7019SC524

(Filed 16 September 1970)

1. Quieting Title § 2— burden of proof

In an action to remove cloud from title to real property, the burden is on plaintiff to prove good title either against the whole world or against the defendant by estoppel.

2. Quieting Title § 2— actions

In an action to remove cloud from title to real property, the trial judge erred when, upon consideration of plaintiffs' evidence alone and without permitting the defendants to introduce any evidence, he took the case from the jury and rendered judgment for the plaintiffs, who bore the burden of proof.

APPEAL by defendants from *Long, J.*, 4 May 1970 Civil Session of RANDOLPH Superior Court.

This is a civil action to remove cloud from title to real property. Plaintiffs filed complaint 25 February 1969 alleging that the *feme* plaintiff is the owner of a described tract of land in which defendants assert some interest. Plaintiffs asked that defendants' claims be adjudged invalid and that *feme* plaintiff be adjudged the fee simple owner. Defendants answered, denying *feme* plaintiff's ownership and in a counterclaim alleging they were fee simple owners and asking that they be so adjudged. Plaintiffs replied and denied the allegations as to ownership in the counterclaim.

The case came to trial before judge and jury at the 4 May 1970 session of the Superior Court held in Randolph County. Plaintiffs introduced in evidence a stipulation of the parties that the property in question was owned in fee simple by Isaac H. Faust upon his death on 22 November 1938. Plaintiffs also introduced in evidence the will of Isaac H. Faust, the probate proceedings relating thereto, and recorded deeds which would vest in the *feme* plaintiff such title as the widow of Isaac H. Faust received and could convey under the terms of his will. The court then granted plaintiffs' motion for judgment against the defendants "without the intervention of a jury" and signed judgment adjuding defendants' claims in the lands to be invalid and adjudging *feme* plaintiff to be the fee simple owner.

Defendants excepted to this judgment and appealed.

Adam W. Beck for plaintiff appellees.

John Randolph Ingram for defendant appellants.

PARKER, J.

[1, 2] In an action to remove cloud from title to real property the burden is on plaintiff to prove good title either against the whole world or against the defendant by estoppel. *Walker v. Story*, 253 N.C. 59, 116 S.E. 2d 147. In the case before us the trial judge, upon consideration of plaintiffs' evidence alone and without permitting the defendants to introduce any evidence, took the case from the jury and rendered judgment for the plaintiffs, who bore the burden of proof. In this there was error.

From the record it appears that both parties claim to derive title through provisions of the will of Isaac H. Faust, deceased. (Plaintiffs, in addition, assert title by adverse possession, but

no question relative to this claim is presented on this appeal.) The trial court, considering plaintiffs' evidence alone and without giving defendants any opportunity to present evidence, concluded as a matter of law that the will of Isaac H. Faust conferred upon his widow the right to sell the subject property, that by her conveyance she had vested fee simple title in her grantees, and that they in turn had subsequently conveyed to the *feme* plaintiff. On these conclusions of law, the court granted plaintiffs' motion for "judgment without the intervention of the jury," and adjudged title in the *feme* plaintiff.

It may well be, as appellees now contend, that this case could have been disposed of by summary judgment under Rule 56 of the Rules of Civil Procedure, G.S. 1A-1, and that the same result would have been reached. However, no motion for summary judgment was made and the trial court did not arrive at its judgment by that route. Had such a motion been made in apt time prior to trial and defendants been given notice thereof as required by Rule 56, defendants would have been afforded the opporunity to present in affidavit form such evidence as they could muster to support their claims. If, when so presented, their evidence should prove to be incompetent or otherwise insufficient and the pleadings and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that plaintiffs are entitled to a judgment as a matter of law, summary judgment for plaintiffs would be appropriate. But this did not occur in the present case and defendants have been denied all opportunity even to present their evidence.

Had it been proper for the trial court to consider plaintiffs' evidence alone, its conclusions and judgment may have been correct. The error lay in denying defendants any opportunity to present their evidence, either for consideration by the court upon a motion for summary judgment prior to trial or for consideration by the jury upon the trial. Whether defendants will be able to present any competent evidence in support of their position can only be determined when they have been afforded an opportunity to do so. By denying them that opportunity, the trial court simply moved too fast too soon and thereby committed error.

The judgment appealed from is reversed and the case is remanded for a

New trial.

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

STATE OF NORTH CAROLINA v. ROBERT LEE CHAVIS

No. 7018SC460

(Filed 16 September 1970)

1. **Automobiles § 131— failure to assist person injured in accident — sufficiency of evidence of personal injury**

In this prosecution under G.S. 20-166(c) for failure of the operator of an automobile involved in an accident to render assistance to a person injured in the accident and to give his name, address, driver's license number and the registration number of his vehicle, there was sufficient evidence that a person received personal injuries in the accident for submission of the case to the jury, where a passenger in one of the automobiles involved in the accident testified that her head struck the windshield, that she went to the hospital for an examination but received no treatment, and that her head hurt for about a week after the accident.

2. **Automobiles § 131— failure to assist person injured in accident — instructions**

In this prosecution for a violation of G.S. 20-166(c), the trial court did not fail to instruct the jury that the burden was on the State to satisfy the jury beyond a reasonable doubt that defendant knowingly and intentionally failed to render aid to the party injured in the accident.

3. **Automobiles § 131— failure to stop after accident — prosecution under G.S. 20-166(c) — necessity for instructing on misdemeanor defined in G.S. 20-166(b)**

The misdemeanor described in G.S. 20-166(b) is not a lesser included offense of the crime described in G.S. 20-166(c); therefore, in a prosecution for a violation of G.S. 20-166(c), the trial court did not err in failing to instruct the jury on the offense defined in G.S. 20-166(b).

APPEAL from *Collier, J.*, 23 March 1970 Criminal Session, GUILFORD Superior Court.

The defendant Robert Lee Chavis was tried on a two-count bill of indictment, proper in form, charging him in the first count with a violation of G.S. 20-166(a) by failing to stop the automobile of which he was driver after it was involved in an accident involving personal injury, and in a second count with a

violation of G.S. 20-166(c) by failing to render assistance to the injured party, identify himself, give his driver's license number and registration number of the automobile.

The defendant pleaded not guilty. At the conclusion of the State's evidence the defendant's motion for a judgment as of nonsuit was allowed as to the first count in the bill of indictment. The defendant testified in his own behalf. His motion for a judgment as of nonsuit, made at the conclusion of all the evidence, was denied. The jury found the defendant guilty as charged in the second count of the bill of indictment. From a judgment entered on the verdict, the defendant appealed to the North Carolina Court of Appeals.

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

Robert D. Douglas III, Assistant Public Defender for the Eighteenth Judicial District, for the defendant appellant.

HEDRICK, J.

The defendant first assigns as error the court's denial of his motion for judgment as of nonsuit made at the conclusion of the State's evidence and renewed at the close of all the evidence. The evidence, when considered in its light most favorable to the State, tended to show that on 4 October 1969, at about nine or ten o'clock p.m., an automobile operated by Glenn Henry Lakins on Lee Street in the City of Greensboro, North Carolina, was in collision with a 1959 Cadillac automobile operated by the defendant Robert Lee Chavis, and that after the accident the defendant immediately ran from the scene without identifying himself or rendering any assistance to any person injured in the collision.

Glenn Henry Lakins testified that his wife, Judy Lakins, and Dannie Kendrick were passengers in the automobile he was operating at the time of the collision with the automobile operated by the defendant.

Judy Lakins, a passenger in the automobile driven by her husband, testified: "Yes, I was injured. My head hit the windshield. I later went to the hospital. My head bothered me for about a week after that. . . . My head hurt for about a week. That hurt pretty bad. I was concerned about what happened

to mother's car and my head. I did not get any treatment at the hospital."

[1] The defendant contends that the evidence was not sufficient to show that anyone received personal injuries as a result of the accident. In the instant case the burden was on the State to offer evidence that the defendant was guilty of every element of the offense charged in the second count of the bill of indictment. *State v. Overman,* 257 N.C. 464, 125 S.E. 2d 920 (1962). The bill of indictment charged that Judy Lakins, and others, suffered personal injuries as a result of the accident. The evidence tended to show that Judy Lakins, a passenger in one of the automobiles involved in the collision, was injured and was taken to the hospital for examination. Whether Judy Lakins received personal injuries in the accident within the meaning of the statute was a matter for determination by the jury. *State v. Overman, supra.* There was ample evidence that the defendant had violated every element of the offense charged in the second count of the bill of indictment. This assignment of error is overruled.

[2] The defendant next contends that the court failed to instruct the jury that the burden was on the State to satisfy the jury beyond a reasonable doubt that the defendant knowingly and intentionally failed to render aid and assistance to the party injured in the accident. At the beginning of his charge, the judge read the bill of indictment and the statute to the jury. The judge then proceeded to describe the various elements embraced in the offense charged in the bill of indictment. The judge then instructed the jury that the burden was on the State to satisfy it beyond a reasonable doubt that the defendant had violated every element of the crime charged in the bill of indictment. This assignment of error is without merit.

[3] The defendant's third assignment of error is that the trial judge erred in failing to instruct the jury as to other possible lesser included offenses, specifically G.S. 20-166(b), a misdemeanor, which, in pertinent part, provides: "The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle. . . ." The defendant's contention is meritorious if the violation described in G.S. 20-166(b) is a lesser included offense of that charged in the bill of indictment, G.S. 20-166(c), and if there is evidence of such lesser included offense. G.S. 15-170 provides that a de-

fendant may be convicted of the crime charged in the indictment or a lesser degree of the same crime.

In *State v. Rorie,* 252 N.C. 579, at 581, 114 S.E. 2d 233 (1960), Denny, J., later C.J., stated, ". . . that an indictment or information is insufficient to charge the accused with the commission of a minor offense, or one of less degree, unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense. . . ." G.S. 20-166(b) has as one of its essential elements "damage to property and in which there is not involved injury or death"; whereas, G.S. 20-166(c) has as one of its essential elements "injury or death to any person." Therefore, G.S. 20-166(b) is not a lesser included offense of the crime charged in the indictment. This assignment of error is overruled.

We have carefully considered all of the defendant's assignments of error and conclude that the defendant had a fair trial free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. BILLY LEWIS ROBINSON AND MARY LOU BROOKS

No. 7021SC487

(Filed 16 September 1970)

Fornication and Adultery § 4— sufficiency of evidence

In a prosecution charging defendants with fornication and adultery in violation of G.S. 14-184, the State's evidence was sufficient to carry issue of defendants' guilt to the jury.

APPEAL by defendants from *Armstrong, J.,* 20 April 1970 Session, FORSYTH Superior Court.

The defendants, Billy Lewis Robinson (Robinson), and Mary Lou Brooks (Brooks), were charged in warrants, proper in form, with fornication and adultery in violation of G.S. 14-184. The cases were consolidated for trial and the defendants pleaded not guilty. The jury found each defendant guilty as charged.

From judgments entered on the verdicts, the defendants appealed to this Court.

Robert Morgan, Attorney General, by James L. Blackburn, for the State.

Morgan, Byerly, Post and Keziah, by W. B. Byerly, Jr., for the defendant.

HEDRICK, J.

The defendants assign as error the court's refusal to allow their motions for judgments as of nonsuit.

The only evidence before the court and jury was that offered by the State which tended to establish the following facts: The defendant Robinson separated himself from his wife in December 1969, and during the month of January 1970 he was residing in a trailer at Kanoy Trailer Park, Kernersville, Forsyth County, North Carolina. Three witnesses for the State testified that on 27 January 1970 they went to the defendant Robinson's trailer between the hours of 9:00 and 10:00 p.m. where they saw the defendants Robinson and Brooks in bed together. These witnesses testified that they saw a lady's robe thrown across a chair in the living room, and that food was cooking on the stove, and the dining table had been set for two people.

Emily Carol Robinson testified that she saw the defendant Brooks getting into Robinson's blue Corvair at Triad Manufacturing Company, where the defendants worked, three or four weeks prior to the date she saw them in bed together in the trailer and, also, on 27 January 1970 she saw a prescription bottle in the trailer bearing the name of Mary Lou Brooks, and on the same occasion she saw a pair of women's boots in the defendant Robinson's blue Corvair.

Mrs. Charles Bryant, who resided in the Kanoy Trailer Park, testified that she saw the defendant Brooks go to Robinson's trailer on three separate occasions, in the nighttime, in the month of January 1970 and remain inside the defendant Robinson's trailer for approximately three hours on each occasion.

The defendants contend that the evidence tends to show only a single act of illicit sexual intercourse, and that such is not a violation of G.S. 14-184.

In *State v. Kleiman,* 241 N.C. 277, 85 S.E. 2d 148 (1954), Bobbitt, J., now C.J., summarized the North Carolina law with respect to this statute as follows:

> "A single act of illicit sexual intercourse is not fornication and adultery as defined by G.S. 14-184, *S. v. Ivey,* 230 N.C. 172, 52 S.E. 2d 346; for, as stated in *S. v. Davenport,* 225 N.C. 13, 33 S.E. 2d 136, ' "Lewdly and lasciviously cohabit" plainly implies habitual intercourse, in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or non-habitual intercourse and the offense the statute means to denounce.'
>
> "But, as stated further by *Seawell, J.,* in the opinion in the *Davenport* case: 'It is never essential to conviction that even a single act of illicit sexual intercourse be proven by direct testimony. While necessary to a conviction that such acts must have occurred, it is, nevertheless, competent to infer them from the circumstances presented in the evidence. . . .'"

In the instant case the evidence tended to show some association between the defendants for a period of three or four weeks. Evidence that the *feme* defendant was seen to enter and remain in the male defendant's living quarters for approximately three hours in the nighttime on three separate occasions in the month of January 1970 must be considered in connection with the evidence of what occurred in the male defendant's trailer on the night of 27 January 1970 and, when so considered, we hold the evidence sufficient to carry the case to the jury. *State v. Kleiman, supra.*

The judgments are affirmed.

Affirmed.

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

GILBERT HUGH MOORE, SR. v. ASSOCIATED BROKERS, INC.

No. 7018DC462

(Filed 16 September 1970)

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

An exception to the entry and signing of the judgment presents only the question whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form.

2. **Master and Servant § 9— employment contract — dispute over provisions for bonus or incentive pay — findings of fact**

In an action arising out of a dispute over the terms of an employment contract, the plaintiff contending that he was to be paid a bonus or incentive pay equal to 15% of his annual salary and the defendant contending that the contract made no provision for bonus or incentive pay, the trial court's findings of fact *are held* sufficient to support its conclusion of law that the plaintiff was not entitled to any bonus or incentive pay.

APPEAL by plaintiff from *Kuykendall, District Judge,* 6 April 1970 Civil Session, GUILFORD District Court.

This was a civil action to recover $750 on a contract of employment. The plaintiff claimed incentive pay allegedly due him for the period from 1 October 1968 through 31 January 1969. The defendant filed answer denying that he was indebted to the plaintiff under the terms of the contract. The case was tried without a jury, and after making findings of fact, the court entered judgment in favor of the defendant. To the entry and signing of the judgment, the plaintiff excepted and appealed to this Court.

Parker and Mazzoli, by Gerald C. Parker, for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and Richard W. Ellis, for the defendant appellee.

HEDRICK, J.

[1] The only exception in the record was to the entry and signing of the judgment. Therefore, our inquiry is limited to ". . . the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is reg-

ular in form." *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968).

The court made the following findings of fact:

"(1) The plaintiff was employed by the defendant as its Retail Sales Manager for North Carolina from May 1, 1967 until January 31, 1969.

"(2) Prior to the time of plaintiff's employment by defendant, he conferred in person with officers and directors of the defendant, at which time various aspects of his employment and benefits were discussed. Among other things, it was specifically explained to the plaintiff that he would not become eligible to participate in the Profit Sharing Plan of the defendant until plaintiff had been employed by the defendant for a period of three years. It was further explained to the plaintiff that he might be paid a bonus, in addition to his regular salary, such bonus to be paid on the basis of merit and in the sole discretion of the Board of Directors of the defendant.

"(3) Subsequent to the conference referred to above, the defendant, by letter dated April 10, 1967, offered plaintiff employment, the terms of which employment included in pertinent part:

"'1. Salary: $15,000 per year

"'2. Profit Sharing Plan: 15% of annual salary (Based on availability of profits).'

"The offer of employment made no mention of any bonus payment.

"(4) By letter dated April 19, 1967, the plaintiff accepted the offer of employment.

"(5) At the time plaintiff received defendant's offer of employment and accepted same, plaintiff knew that he was not eligible to participate in defendant's Profit Sharing Plan until he had been employed for three years by the defendant.

"(6) The plaintiff knew the difference between a Profit Sharing Plan and a bonus.

"(7) The plaintiff was paid a bonus, which bonus was

awarded in the discretion of the Directors of the defendant, of 15% of salary for the period May 1, 1967 through September 30, 1968. Thereafter, no bonus was paid to plaintiff for the period October 1, 1968 through January 31, 1969, the date on which plaintiff's employment with defendant terminated."

[2] The existence of an employment contract between the parties was admitted. The controversy between the parties was as to the terms of the said contract. The plaintiff contends that the contract provided that he would be paid a bonus or incentive pay equal to 15% of his annual salary. The defendant contends that the contract made no provision for the payment of a bonus or incentive pay. This controversy and the terms of the contract were resolved by the court in its findings of fact in favor of the defendant. The findings of fact support the conclusion of law that the plaintiff is not entitled to any bonus or incentive pay under the terms of the employment contract.

The judgment appealed from is affirmed.

Affirmed.

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

NOAH DANIEL PHILLIPS v. ANNIE BRANSON PHILLIPS

No. 7019SC436

(Filed 16 September 1970)

Divorce and Alimony § 13; Evidence § 12— absolute divorce — testimony of adultery by spouse

In the husband's action for absolute divorce on the ground of one year's separation, the trial court committed prejudicial error in allowing the husband to testify on cross-examination as to the adulterous conduct of his wife. G.S. 50-10.

APPEAL by defendant from *Gambill, J.*, 2 March 1970 Session of RANDOLPH Superior Court.

This was a civil action brought by plaintiff-husband, Noah Daniel Phillips, against the defendant-wife, Annie Branson Phillips, on 17 December 1968 in the Randolph County Superior Court for absolute divorce on the grounds of one year separation.

The defendant-wife filed answer denying separation and alleging abandonment as a further defense, praying that the plaintiff-husband be denied a divorce and praying for counsel fees. Both parties offered evidence in support of their allegations. Issues were submitted to and answered by the jury in favor of the plaintiff-husband, and the court entered judgment on the verdict awarding the plaintiff an absolute divorce from the defendant.

The defendant appealed to the North Carolina Court of Appeals assigning error.

Coltrane and Gavin, by T. Worth Coltrane, for plaintiff appellee.

Ottway Burton for defendant appellant.

HEDRICK, J.

Of the numerous assignments of error brought forward and argued on this appeal, we deem it necessary to discuss only that one relating to the court's allowing the plaintiff-husband to testify as to matters tending to show that the defendant-wife had committed adultery.

During the trial of this cause, while the plaintiff-husband was being cross-examined by the defendant-wife's counsel, Mr. Burton, the record discloses that the following occurred:

"Q. When did she leave, if you know?

"A. I believe it was October.

"Q. October what?

"A. I don't remember but it was October, I am quite sure. I caught her with this man here and the baby one night and I took it to Court.

"MR. BURTON: I didn't ask him that.

"THE COURT: He can explain. Go ahead.

"MR. BURTON: OBJECTION-OVERRULED

"A. I caught her this night out at this colored church out in the woods one Sunday night with the baby, about 9 o'clock and I took the car and then I took her back to her mother's and she got her brother to take her up at the

farm and stayed about two days and then she went back home and that was in October, best I recall."

The appellant contends that the court committed prejudicial error in allowing the husband to testify over the defendant's objection as to the adulterous conduct of his wife. G.S. 50-10, in pertinent part, provides:

"The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact."

In *Hicks v. Hicks,* 275 N.C. 370, 167 S.E. 2d 761 (1969), Branch, J., said, "The provisions of N.C. Gen. Stat. § 50-10 are not limited to 'any action or proceeding for divorce on account of adultery' or 'actions or proceedings in consequence of adultery,' but includes 'every complaint asking for a divorce.' Thus, its declaration that the husband and wife are incompetent witnesses to prove the adultery of the other refers to *all* divorce actions, including actions for alimony without divorce." Therefore, in the instant case it was prejudicial error for the court to allow the husband to testify to such facts as tended to show that the wife had committed adultery.

For the reasons stated the defendant is entitled to a new trial.

New trial.

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

JUDSON DUNBAR IVES, BY HIS NEXT FRIEND, DWIGHT H. IVES v. VIRGINIA IVES HOUSE AND RONALD RAYMOND HOUSE

No. 7020SC438

(Filed 16 September 1970)

Insane Persons § 2— appointment of next friend — necessity for notice to plaintiff and hearing on competency

The trial court properly revoked an order by the clerk of court appointing a next friend to bring an action on behalf of an alleged mental incompetent, and properly dismissed the action filed by the next friend on plaintiff's behalf, where plaintiff had not previously been adjudicated incompetent to manage his affairs, plaintiff was given no notice of the petition for appointment of a next friend, no hearing was held to determine plaintiff's competency, and no emergency was shown to exist.

APPEAL from *Ragsdale, S.J.*, 9 March 1970, Civil (A) Session of MOORE Superior Court.

Dwight H. Ives (Dwight) filed a petition on 14 August 1969 with the Clerk of Superior Court alleging that Judson Dunbar Ives was mentally incompetent due to want of understanding because of old age and disease; that defendants have exerted undue influence over him in that they have coerced him to deed two parcels of land to them and to turn certain stock over to them when he did not have the mental capacity to do so. Dwight asked that he be appointed a next friend for Judson Dunbar Ives to bring an action on his behalf to recover the property. On that same date the Clerk of Superior Court issued an order appointing Dwight as next friend, and he filed a complaint against the defendants to recover the property and to appoint a trustee for Judson Dunbar Ives. No notice was given Judson Dunbar Ives regarding the petition for the appointment of a next friend nor was a hearing ever held regarding the incompetency of Judson Dunbar Ives. A Notice of *Lis Pendens* was also filed against the land in question on 14 August 1969.

On 2 October 1969 Judson Dunbar Ives filed a motion, verified by him on 25 September 1969, to revoke the appointment of the next friend alleging that he was not incompetent and that the petition for appointment was filed without his consent or knowledge. On 6 October 1969 defendants filed a demurrer to the complaint.

On 17 March 1970, the trial judge entered a judgment quashing the order appointing Dwight as next friend and dismissing the action. The judgment recited that the matter was heard in open court and after a full hearing the court found that no notice was ever given Judson Dunbar Ives and that no hearing was ever held regarding the appointment of plaintiff, and that no evidence was ever presented before him indicating that Judson Dunbar Ives is incompetent.

Plaintiff excepted to the signing and entry of the judgment and appeals to this Court.

Boyette and Boyette by Mosley G. Boyette, Jr., for plaintiff appellant.

Page, Neville and Monroe by Robert N. Page III for defendants appellees.

CAMPBELL, J.

The proceedings in this case began before the New Rules of Civil Procedure became effective; therefore it must be decided under the old statutes. Old G.S. 1-64 provided only that incompetents must be represented by a guardian or next friend, but made no mention of the procedure to be followed in appointing one. Old G.S. 1-65 spoke only of guardians *ad litem* and authorized the appointment of one for infants, idiots, incompetents, etc. but it also made no mention of procedure to be followed. The only stated procedure for the appointment of a next friend appeared in Superior Court Rule 16 and simply said that where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend upon the written application of a reputable, disinterested person closely connected with such infant. No procedure was ever incorporated into the statutes regarding notice of a hearing. But the Supreme Court of North Carolina, in a similar case, has adopted a requirement of notice and a hearing. In *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490, the Court said: ". . . It is clear, therefore, that when a party's lack of mental capacity is asserted and denied—and he has not previously been adjudicated incompetent to manage his affairs—he is entitled to notice and an opportunity to be heard before the judge can appoint either a next friend or a guardian *ad litem* for him. . . ." Here, no notice was ever given, nor was there a hearing to determine whether Judson Dunbar Ives was in fact incompetent. No emergency was shown to exist

and, even though opportunity was presented, no evidence was offered at the hearing before the judge to show that he was in fact incompetent.

The trial judge was correct in revoking the order appointing plaintiff as next friend and entering judgment for the defendants.

For the reasons stated, in the trial below there was

No Error.

BRITT and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. DAVID TRIPLETT

No. 7023SC454

(Filed 16 September 1970)

Criminal Law § 145.1— violation of probation — transfer to county of original sentencing

Where a defendant charged with a violation of probation made a motion to be returned to the county in which he was originally placed on probation, the superior court judge was required by statute to grant the motion; and it was error for the judge himself to conduct a hearing on the violation and to extend the period of probation. G.S. 15-200.

APPEAL by defendant from *Gambill, J.*, in chambers, 17 April 1970, WILKES Superior Court.

This was a criminal action heard on the report of the North Carolina Probation Officer as to the defendant's having violated the terms and conditions of probation.

The record on appeal reveals that the defendant was convicted of breaking, entering and larceny at the May 1967 Term of the Superior Court of Surry County, and that he received a sentence of imprisonment of not less than three nor more than five years and that said prison sentence was suspended and the defendant was placed on probation for a period of three years upon the usual conditions of probation plus the special condition that the defendant pay a fine of $200.00 and the costs and restitution to Howard Hinson in the amount of $150.00, all to be paid at the rate of $20.00 each month. Thereafter, the proba-

tioner, a resident of Wilkes County, was transferred to the supervision of E. J. Durham, Probation Officer assigned in Wilkes County.

On 16 April 1970, Probation Officer Durham served upon the defendant a notice requiring the defendant to post bond in the amount of $500.00 for the defendant's appearance before the Resident Judge of the Twenty-third Judicial District at his office in North Wilkesboro, North Carolina, at 2:00 p.m. on 17 April 1970 for a hearing for the violation of the defendant's probation for failure to comply with the judgment in Surry County.

On 17 April 1970, the defendant filed with the said E. J. Durham a request to be returned to Surry County, and said request was presented to the Honorable Robert M. Gambill by the said E. J. Durham prior to 2:00 p.m. on 17 April 1970. On 17 April 1970, Judge Gambill heard the report of the probation officer as to the defendant's having violated the terms and conditions of probation, and after finding as a fact that the defendant had violated the special condition of probation by failing to pay court costs, fine and restitution at the rate of $20.00 each month, and that as of 10 April 1970 there was an outstanding balance in the amount of $223.90, and that no payment had been made since 15 March 1968, the court entered an order extending probation from 10 May 1970 until 9 May 1971, and issued a "Probation Violation Warrant and Order for a Capias" which, in pertinent part, provided:

> "IT IS NOW, THEREFORE, ORDERED that a *Capias Instanta* be issued by the Clerk of this court with his seal imprinted thereon for the above named defendant, that he may be taken and returned to the Court for a further hearing as to whether or not he has violated the terms and conditions of the Probation judgment.
>
> "IT IS FURTHER ORDERED, that, when the defendant be found, the Probation Officer or any duly authorized law enforcement officer of this County go for and return the said defendant to Surry County and shall produce him in Court for the further hearing above mentioned.
>
> "$500.00 Bond continued to May 4, 1970 Term of Surry Superior Court."

To the entry of the "Order Extending Probation" and the entry of the "Probation Violation Warrant and Order for a

Capias," the defendant excepted and appealed to the North Carolina Court of Appeals.

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

Franklin Smith for defendant appellant.

HEDRICK, J.

G.S. 15-200, in pertinent part, provides that where a probationer resides in a county or judicial district other than that in which he was placed on probation, the resident judge of the superior court of the district where the said probationer resides ". . . shall on request of the probationer, return such probationer for hearing and disposition to the county or judicial district in which such probationer was originally placed on probation; . . . ."

The record discloses that the defendant's request to be returned to Surry County had been filed with the probation officer at 10:00 a.m. 17 April 1970, and that the same had been delivered to the Resident Judge before 2:00 p.m. 17 April 1970. The applicable portions of the statute are mandatory, and in the instant case required the court to return the probationer to Surry County for a hearing and disposition as to the violation of the conditions of probation. Instead, Judge Gambill heard the report of the probation officer, made findings of fact, and entered an order extending probation. He also issued a "Probation Violation Warrant and Order for a Capias" to have the defendant returned to Surry County for a further hearing as to "whether or not he has violated the terms and conditions of the Probation judgment." The two orders appear to be contradictory.

When the motion was made by the defendant to be returned to Surry County the statute required that he be returned. It was error for Judge Gambill to conduct a hearing and extend the period of probation and the order purporting to do so is hereby vacated.

The order of Judge Gambill transferring the case to Surry County was proper.

The case is returned to Wilkes County for further proceedings consistent with this opinion.

Error and remanded.

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

KELLY A. CHADWICK, T/A CHADWICK THRUWAY JEWELERS v. AETNA INSURANCE COMPANY

No. 7021DC481

(Filed 16 September 1970)

1. **Insurance § 141— loss of jewelry from store — construction of exclusion of coverage for unexplained loss or mysterious disappearance**

In this action to recover upon an insurance policy for the loss of a quantity of jewelry from plaintiff's store, the trial court erred in instructing the jury that a provision of the policy excluding coverage for "unexplained loss, mysterious disappearance or shortage disclosed on taking inventory" in effect contained only one exclusion for "loss or shortage disclosed on taking inventory" and that it should not be concerned with whether the loss was an "unexplained loss" or a "mysterious disappearance" unless it was disclosed on taking inventory, since the policy provision clearly contemplated that liability would be precluded in case of (1) unexplained loss or (2) mysterious disappearance or (3) loss or shortage disclosed on taking inventory.

2. **Insurance § 6— construction of policy — ambiguity**

The rules that a policy of insurance is to be construed strictly against the insurer and liberally in favor of the insured and that an exception from liability is not favored apply only where the language of the policy is ambiguous and reasonably susceptible of two or more interpretations.

APPEAL by defendant from *Henderson, J.*, 2 March 1970 Session of FORSYTH District Court.

This was a civil action brought by plaintiff to recover upon an insurance policy issued by defendant. It was alleged that while the policy was in force a quantity of jewelry was removed from plaintiff's premises by persons unknown. Defendant contended that the alleged loss came within a policy exclusion, to wit:

> "5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except: . . . (M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory."

Plaintiff's evidence tended to show that the loss was discovered on 24 February 1967, and that the jewelry was taken by an unidentified man and woman who pretended to be customers, and to whom plaintiff had shown the jewelry on 13 February. Plaintiff's evidence further tended to show that the loss was dis-

covered during a "spot check." Defendant's evidence tended to show that the loss was unexplained and in fact could have occurred at anytime between 4 February and 24 February 1967.

From a jury verdict for plaintiff in the amount of $1,517.30, defendant appealed to this Court.

Powell & Powell, by Harrell Powell, Jr., for plaintiff.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for defendant.

BROCK, J.

[1] The crux of defendant's appeal lies in its eighth assignment of error which asserts error in the trial court's construction of the exclusionary provision of the policy quoted above. The trial judge instructed the jury, in effect, that it was not to be concerned whether the loss was an "unexplained loss" or a "mysterious disappearance" unless it was disclosed on taking inventory. He clearly instructed the jury that the provision of the policy quoted above contained only one exclusion, i.e., "loss or shortage disclosed on taking inventory." We disagree with this interpretation.

[2] It is well settled that policies of insurance, having been prepared by the insurer, are to be liberally construed in favor of the insured, and strictly against the insurer. An exception from liability is not favored. *Henderson v. Hartford Accident & Indemnity Co.*, 268 N.C. 129, 150 S.E. 2d 17 (1966). However, these rules come into play only where the language is ambiguous and reasonably susceptible of two or more interpretations. *Walsh v. United Insurance Co. of America*, 265 N.C. 634, 144 S.E. 2d 817 (1965).

[1] The parties cite no case, and none is found, in which policy language similar to that here involved was construed. However, we think that the provision in question is sufficiently definite to be construed according to its terms, without resort to the rule of liberality in favor of the insured. The provision clearly contemplated that liability would be precluded in any one of three events, to wit:

1. Unexplained loss, or
2. Mysterious disappearance or
3. Loss or shortage disclosed on taking inventory.

It appears plainly that the import of the provision is to bar recovery for unexplained losses or for mysterious disappearances, however they come to light, and for loss or shortage disclosed on taking inventory.

It is not deemed necessary to discuss appellant's remaining assignments of error.

New Trial.

MORRIS and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN DAVID LYLES

No. 7018SC490

(Filed 16 September 1970)

1. **Criminal Law § 166— abandonment of assignments of error**
   Assignments of error not set out in the brief are deemed abandoned.

2. **Robbery § 5— instructions — elements of armed robbery and common law robbery**
   In this armed robbery prosecution wherein the lesser offense of common law robbery was also submitted to the jury, the trial court adequately distinquished the two offenses and charged the jury as to the elements necessary for conviction on either of the two charges.

3. **Robbery § 5— instructions — armed robbery — amount of force — firearm or other dangerous weapon**
   In this armed robbery prosecution, the trial court did not lead the jury to believe that it could return a verdict of guilty of armed robbery upon a finding that the force used was sufficient to create an apprehension of danger or to induce the victim to surrender his property, where the court listed the elements of common law robbery and armed robbery, and then stated that, in addition, for conviction of armed robbery, the life of the victim must be endangered or threatened with the use or threatened use of a firearm or other dangerous weapon.

APPEAL by defendant from *Collier, J.*, 20 March 1970 Session, GUILFORD Superior Court.

The defendant was charged in a warrant with armed robbery. The State's evidence tended to show that on 17 December 1969 the defendant approached Mr. James F. Jones, the store

manager, exhibited what appeared to be the barrel of a small-caliber pistol, and demanded the contents of the cash register. The State's evidence further tended to show that the defendant thereby obtained approximately $111.00 and departed.

The defendant presented no evidence. The court charged the jury with regard to armed robbery and the lesser included offense of common law robbery. From a verdict of guilty of armed robbery and a judgment of imprisonment entered thereupon, the defendant appealed to this Court.

Attorney General Morgan, by Staff Attorney Blackburn, for the State.

D. Lamar Dowda, Assistant Public Defender, Eighteenth Judicial District, for defendant.

BROCK, J.

[1] Appellant's exceptions grouped under assignments of error Nos. 2 and 5 are not set out in his brief; therefore, they are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[2] Appellant assigns as error that the court erred in its charge to the jury by failing adequately to distinguish armed robbery from common law robbery and to charge the jury as to the elements necessary for conviction on either of the two charges.

The trial judge listed the elements of common law robbery as being applicable to both armed robbery and common law robbery. He then stated the additional element required for conviction of armed robbery, to wit, that the life of the person from whom the property is taken is endangered or threatened with the use or threatened use of any firearm or other dangerous weapon. These instructions clearly distinguish the two charges.

[3] Appellant further assigns as error that the court, in charging as to the force or threatened force necessary to constitute robbery, led the jury to believe that it could return a verdict of guilty of armed robbery upon a finding that the force used was sufficient to create an apprehension of danger or to induce the victim to surrender his property to avoid apprehended injury. However close reading of the trial court's charge demonstrates that the jury was instructed, in substance, that at least such force or threatened force must be found as would reason-

ably subject the victim to an apprehension of danger, in order to support a conviction of either common law robbery or armed robbery, and that, *in addition,* for conviction of armed robbery, the life of the victim must be endangered or threatened with the use or threatened use of a firearm or other dangerous weapon. The cases cited by appellant dealing with "conflicting instructions" are not in point.

No Error.

MORRIS and GRAHAM, JJ., concur.

JAMES A. ROBERSON v. CITY COACH LINES

No. 7021SC364

(Filed 16 September 1970)

Automobiles § 76— contributory negligence — following too closely — proper lookout

In a personal injury action arising out of a collision between plaintiff's automobile and defendant's bus, plaintiff's evidence discloses his contributory negligence as a matter of law in following the bus too closely and in failing to keep a proper lookout.

APPEAL by plaintiff from *Johnston, J.,* 26 January 1970 Session, FORSYTH Superior Court.

This is a civil action to recover compensation for damages to an automobile and personal injuries allegedly sustained as a result of a collision between an automobile owned and operated by the plaintiff James A. Roberson and a bus belonging to the defendant City Coach Lines. At the conclusion of the plaintiff's evidence, the defendant's motion for a directed verdict was allowed. From the judgment dismissing plaintiff's action, the plaintiff appealed to the North Carolina Court of Appeals.

White, Cross and Pfefferkorn, by William G. Pfefferkorn, Joe P. McCollum, Jr., and Carl D. Downing, for the plaintiff appellant.

Hatfield, Allman and Hall, by Roy G. Hall, Jr., for the defendant appellee.

HEDRICK, J.

The determinative question presented on this appeal is whether the evidence discloses as a matter of law that the plaintiff's own negligence was one of the proximate causes of the collision between the automobile owned and operated by the plaintiff Roberson and the defendant's bus. When the evidence is reviewed and considered in its light most favorable to the plaintiff, it tends to establish the following facts: On 11 December 1967 at about 12:20 p.m. the plaintiff's automobile and the defendant's bus were being operated in an easterly direction in the same lane on Interstate Highway 40 within the City of Winston-Salem, North Carolina. The defendant's bus suddenly and without warning stopped and the plaintiff's automobile collided with the rear of the bus causing the damage and injuries complained of. Immediately before and at the time of the collision it was raining and the surface of the highway was wet and slippery. Plaintiff testified that the visibility was one-quarter to one-half mile and that he first saw the bus when it was a block or a block and a half in front of him, and that he first realized that it was stopping or stopped in his lane of travel when he was five or six car lengths behind the bus, and that he was unable to stop his automobile before colliding with the rear of the defendant's bus. A motorist is charged with the duty of keeping an outlook in the direction of travel and he is held to the duty of seeing what he ought to have seen. *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804 (1960). "[O]rdinarily the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist to the rear was not keeping a proper lookout or that he was following too closely." *Burnett v. Corbett,* 264 N.C. 341, 141 S.E. 2d 468 (1965).

From the evidence in the instant case the conclusion is inescapable that the plaintiff was following the defendant's bus too closely, that he was not keeping a proper lookout, and that these breaches were at least a proximate cause of the collision and the injuries and damage suffered by the plaintiff. *Burnett v. Corbett, supra; Crotts v. Transportation Co.,* 246 N.C. 420, 98 S.E. 2d 502 (1957); *Black v. Milling Co.,* 257 N.C. 730, 127 S.E. 2d 515 (1962); *Fawley v. Bobo,* 231 N.C. 203, 56 S.E. 2d 419 (1949); *Clontz v. Krimminger, supra.*

The judgment appealed from is

Affirmed.

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

STATE OF NORTH CAROLINA v. PRESTON EUGENE DOBBINS

No. 7028SC411

(Filed 16 September 1970)

Municipal Corporations § 29; Riots and Inciting to Riot § 1; Weapons and Firearms — unlawful possession of dangerous weapon in curfew area — curfew violation — validity of statutes and ordinance

In this appeal from convictions of defendant for unlawful possession of a dangerous weapon in an area in which a declared state of emergency exists in violation of G.S. 14-288.7 and for violation of a municipal emergency curfew ordinance, *held,* (1) the declaration of a state of emergency and imposition of a curfew by the mayor of the municipality did not violate defendant's First Amendment rights, (2) G.S. Ch. 14, Art. 36A is constitutional, and (3) defendant's constitutional rights were not violated at the time of his arrest and during his trial in superior court.

APPEAL by defendant from *Grist, J.,* 19 January 1970 Session, BUNCOMBE Superior Court.

A warrant issued from the Police Court of the City of Asheville charged that on or about 30 September 1969 defendant did unlawfully and wilfully "possess off his own premises a dangerous weapon, to-wit: a 12 gauge shotgun and shells in an area in which a declared state of emergency exists, in violation of (G.S.) 14-288.7, . . ." A second warrant from said Court charged that on said date defendant "did unlawfully and wilfully violate emergency curfew ordinance of the City of Asheville (number 613), and proclamation imposed by Mayor Wayne S. Montgomery on September 29, 1969, by being on a public street, alley, roadway or public property within the City Limits of Asheville between the hours of 9:00 p.m. and 6:00 a.m., contrary to the form and *(sic)* the statute in such cases made and provided and against the peace and dignity of the State."

Defendant was convicted of the charges in the Police Court and appealed to Superior Court. Before pleading to the charges in Superior Court defendant moved to quash the warrants, contending, among other things, that the statute, ordinance, and proclamation referred to in the warrants are unconstitutional. The motions to quash were overruled, defendant pleaded not guilty, a jury found him guilty as charged, and from judgment predicated on the verdict, defendant appealed to the Court of Appeals.

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

Chambers, Stein, Ferguson & Lanning, by James E. Ferguson II, and Robert Harrell, for defendant appellant.

BRITT, J.

By his assignments of error defendant contends, *inter alia:* (1) The action of the Mayor of the City of Asheville in declaring a state of emergency and imposing a city-wide curfew for the night of 30 September 1969 violated defendant's rights guaranteed by the First Amendment to the U. S. Constitution. (2) The statutory scheme of Chapter 14, Art. 36A, of the General Statutes of North Carolina is unconstitutional in contravention of the First, Fourth, Ninth and Fourteenth Amendments to the U. S. Constitution and Art. I, Sec. 17 of the North Carolina Constitution. (3) Rights guaranteed to defendant under the Federal and State Constitutions were violated at the time of his arrest and during the course of his trial in Superior Court.

Suffice to say we have carefully considered all of defendant's contentions but find them without merit. We hold that the challenged statutes, ordinance, and proclamation are constitutional and that defendant received a fair trial free from prejudicial error.

No error.

CAMPBELL and VAUGHN, JJ., concur.

LOUVELIA FERGUSON v. LACY FERGUSON, JR.

No. 7019SC435

(Filed 16 September 1970)

Divorce and Alimony § 2; Jury § 1— right to jury trial — wife's abandonment of alimony claim

In the wife's action for alimony without divorce and for custody and support of the children, the trial court properly removed the case from the trial docket when the wife abandoned her claim to alimony, and the defendant was not entitled to a jury trial on the issue of

abandonment of his children. G.S. 50-13.5(g), G.S. 50-13.5(h), G.S. 50-13.7.

APPEAL by defendant from *Gambill, J.*, 2 March 1970 Session of RANDOLPH County Superior Court.

This action for alimony without divorce and custody and support for minor children was filed by plaintiff on 2 May 1969. When the matter came on for a *pendente lite* hearing on 16 May 1969, plaintiff stated in open court that she was not seeking support for herself but only for the children. The court thereupon awarded custody of the children to plaintiff, ordered defendant to provide for their support, and retained the cause pending further orders.

The cause was thereafter calendared for trial at the 2 March 1970 Session of Superior Court. Judge Gambill made findings, based upon the record and recited stipulations, that the parties were divorced subsequent to the institution of the action, that plaintiff's claim for support for herself had been withdrawn, and that no issue remained to be passed upon by a jury. Based upon these findings, Judge Gambill ordered the case stricken from the trial docket and placed on the inactive docket to be subject to future orders "on the question of custody and support of the minor children as facts and circumstances justify." Defendant appealed.

No appearance of counsel for plaintiff.

Ottway Burton for defendant appellant.

GRAHAM, J.

Defendant's principal contention is that he is entitled to a jury trial on the issue of abandonment of his children, since the complaint alleged and the answer denied that defendant had wilfully abandoned and refused to support the plaintiff *and the minor children*. His contention has no merit. "Orders for custody and support of minor children may be entered when the matter is before the court . . . irrespective of the rights of the wife and the husband as between themselves in an action . . . for alimony without divorce." G.S. 50-13.5(g). Proceedings for custody and support of minor children are to be heard by the court without a jury. G.S. 50-13.5(h). When the plaintiff abandoned her claim for alimony, nothing remained for a jury to hear and the court properly removed the case from the trial docket. The

previous order for custody and support of the minor children remains subject to change or modification upon motion in the cause and a showing of changed circumstances by either party or anyone interested. G.S. 50-13.7.

Defendant's other exceptions and assignments of error have been carefully examined. No prejudicial error has been made to appear.

Affirmed.

BROCK and MORRIS, JJ., concur.

VIRGINIA SUE HOLLINGSWORTH v. JOSEPH E. HYATT AND WIFE, HELEN R. HYATT

No. 7022SC376

(Filed 16 September 1970)

Landlord and Tenant § 6— action for breach of contract to furnish water

In a tenant's action alleging the landlord's breach of contract to furnish water to the demised premises, neither the admissions in the pleadings nor the evidence was sufficient to show a legal obligation by the landlord to furnish plaintiff with water.

APPEAL by plaintiff from *Seay, J.*, February 1970 Civil Session, DAVIDSON Superior Court.

This is an action for breach of contract in which plaintiff alleges that defendants failed to furnish water to a house owned by defendants and orally leased by them to plaintiff. In their answer defendants admitted allegations of the complaint that they owned the subject property and that they rented it to plaintiff "for a charge of $30 a month"; however, defendants denied that they agreed to supply the premises with water.

At the conclusion of plaintiff's evidence, defendants moved for a directed verdict in their favor. From judgment allowing the motion and dismissing the action, plaintiff appealed.

Charles F. Lambeth, Jr., for plaintiff appellant.

J. Lee Wilson and Ned A. Beeker for defendant appellees.

BRITT, J.

We do not think the admissions in the pleadings and the evidence introduced at trial were sufficient to show a legal obligation on the part of defendants, or either of them, to provide plaintiff with water; therefore, the judgment granting defendants' motion for a directed verdict is

Affirmed.

CAMPBELL and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. ROGER DALE LAND

No. 7022SC480

(Filed 16 September 1970)

APPEAL by defendant from *Seay, J.*, 26 January 1970 Criminal Session of Superior Court held in DAVIDSON County.

The defendant was tried upon a bill of indictment charging him with first-degree burglary. Upon the call of the case for trial, he pleaded not guilty and trial was by jury.

The evidence for the State in part tended to show that the prosecuting witness, Mrs. Bobby Dockery, alone in her house, was awakened during the night of 24 August 1969 by a noise. She went to the den to get a gun where she was grabbed by the defendant who threatened her with a knife or a straight razor. She asked what he wanted, and he replied, "I'm just going to show you a good time." The defendant proceeded to make sexual advances and kissed Mrs. Dockery several times while she protested. There was a knock at the front door followed by a knock at the back door. Mrs. Dockery went to the back door and found some police officers there. The officers discovered the defendant in a bedroom hiding under the bed. There was also evidence that a screen had been cut and entry made into the house through a window. A neighbor across the street had seen a man enter through the window, had heard Mrs. Dockery cry out in alarm, and had called the police.

The defendant offered no evidence and at the close of the evidence for the State moved for judgment as of nonsuit, which was overruled.

The jury returned a verdict of guilty of breaking or entering with intent to commit the felony of rape, and from judgment imposing sentence, the defendant appealed.

Attorney General Morgan and Staff Attorney Sauls for the State.

Clarence C. Boyan for defendant appellant.

MALLARD, C.J.

The defendant noted over fifty exceptions to the ruling of the trial judge and to portions of the charge to the jury, but on examination we find none of them of substantial merit.

The evidence was sufficient to support the verdict, and in the trial we find no prejudicial error.

No Error.

PARKER and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. LESTER SUMMERLIN

No. 7018SC468

(Filed 16 September 1970)

APPEAL by defendant from *Collier, J.*, 13 April 1970 Criminal Session of GUILFORD Superior Court.

In these criminal cases the defendant, represented by counsel, waived bills of indictment and pleaded guilty to three charges of armed robbery set forth in informations signed by the solicitor. From judgments imposing prison sentences in the three cases, defendant appealed to the Court of Appeals.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

Assistant Public Defender Robert D. Douglas III, for defendant appellant.

PARKER, J.

With admirable candor, appellant's counsel states that he has searched the record and all proceedings involved in this appeal and is unable to find prejudicial error. We agree.

Each information on which defendant was brought to trial was proper in form to charge the offense of robbery with the use or theatened use of firearms as described in G.S. 14-87. Each information contained "as full and complete a statement of the accusation as would be required in an indictment," as required by G.S. 15-140.1, and pursuant to that statute the defendant and his counsel each signed written waivers of indictment which appeared on the face of each information. Before accepting defendant's tendered guilty pleas, the trial judge carefully examined the defendant as to his understanding of the nature of the charges against him, of his right to plead not guilty and to be tried by a jury, of the maximum punishment which might be imposed upon his tendered guilty pleas, and concerning the voluntariness of his pleas. The court also questioned defendant concerning his readiness for trial and as to whether he was satisfied with the services of his counsel. After this examination the court entered an order, which is made a part of the record, making findings of fact and adjudging that the pleas of guilty tendered by defendant were freely, understandingly and voluntarily made. On these findings and adjudication the court ordered the pleas of guilty to be entered in the record. The sentences imposed were within statutory limits provided in G.S. 14-87. In the entire proceedings and the judgments appealed from we find

No error.

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

STATE OF NORTH CAROLINA v. CONNIE ABNER SPEARS

No. 7023SC506

(Filed 16 September 1970)

APPEAL by defendant from *Beal, S.J.*, Regular April 1970 Criminal Session, WILKES Superior Court.

Defendant pleaded guilty to the crime of robbery and judgment imposing an active prison sentence was entered. An order

was also entered revoking defendant's probation and placing a suspended sentence into effect. Defendant appealed.

Attorney General Robert Morgan by Staff Attorney Ernest L. Evans, for the State.

McElwee, Hall and Herring by Jerone C. Herring for defendant appellant.

VAUGHN, J.

With commendable frankness counsel for defendant states that he is unable to find prejudicial error in this case. After a careful examination of the face of the record, we are satisfied that no prejudicial error appears thereon.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

WACHOVIA BANK AND TRUST COMPANY, N. A., JOHN C. WHITAKER AND L. D. LONG, TRUSTEES UNDER THE WILL OF MRS. KATE G. BITTING REYNOLDS, DECEASED, PETITIONERS, v. ROBERT MORGAN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; ST. JOSEPH'S HOSPITAL, INC.; CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY (FORMERLY CHARLOTTE MEMORIAL HOSPITAL); CITY OF WINSTON-SALEM; NORTH CAROLINA BAPTIST HOSPITALS, INC.; REX HOSPITAL; DUKE UNIVERSITY; WESLEY LONG HOSPITAL, INC.; HICKORY MEMORIAL HOSPITAL, INC.; HUGH CHATHAM MEMORIAL HOSPITAL, INC.; PASQUOTANK COUNTY; GOOD SAMARITAN HOSPITAL, INC.; SOUTHEASTERN GENERAL HOSPITAL (FORMERLY BAKER-THOMPSON MEMORIAL HOSPITAL, INC.); TRUSTEES OF LINCOLN HOSPITAL; ROCKY MOUNT SANITARIUM, INC.; S. D. MCPHERSON, TRADING AS MCPHERSON HOSPITAL; LEXINGTON MEMORIAL HOSPITAL, INC.; J. C. CASSTEVENS, TRADING AS CASSTEVENS CLINIC; THE ASHEVILLE ORTHOPEDIC HOME, INC.; PROVIDENCE HOSPITAL (FORMERLY PETRIE HOSPITAL, INC.); ANSON COUNTY HOSPITAL (FORMERLY THE ANSON SANATORIUM); FORSYTH COUNTY; CITY OF RALEIGH; WAKE COUNTY; CUMBERLAND COUNTY; PRESBYTERIAN HOSPITAL, INC.; WATTS HOSPITAL; SAMPSON COUNTY MEMORIAL HOSPITAL, INCORPORATED; ONSLOW MEMORIAL HOSPITAL, INCORPORATED; NEW HANOVER MEMORIAL HOSPITAL, INC.; HENDERSON COUNTY (OPERATOR OF MARGARET R. PARDEE MEMORIAL HOSPITAL); WILSON MEMORIAL HOSPITAL, INC.; MEMORIAL MISSION HOSPITAL OF WESTERN NORTH CAROLINA, INCORPORATED; C. J. HARRIS COMMUNITY HOSPITAL, INCORPORATED OF SYLVA, NORTH CAROLINA; MOREHEAD MEMORIAL HOSPITAL; NORTH CAROLINA HOSPITAL ASSOCIATION; RESPONDENTS

No. 7021SC518

(Filed 21 October 1970)

1. Appeal and Error §§ 1, 7; Trusts § 4— appeal by trustees of charitable trust — parties aggrieved — consideration of appeal

Although an appeal by the trustees of a charitable trust was subject to dismissal on the ground that there were no parties aggrieved by the order of the superior court modifying the trust, the Court of Appeals nonetheless considers the appeal in the exercise of its supervisory power, where the order affected the interests of a substantial number of public and private hospitals in the State, as well as thousands of persons who will be hospitalized as charity patients. G.S. 1-271, G.S. 7A-32(c).

2. Appeal and Error § 7— right of appeal — judgment entered on party's own motion

A party has no right to appeal from a judgment entered on his own motion.

3. Trusts § 4— petition to modify charitable trust — jurisdiction of superior court

Superior court properly had jurisdiction over the parties and subject matter in a hearing on a trustees' petition to modify a charitable trust that was subject to a 1948 judgment setting forth the rights and duties of the trustees, where (1) the 1948 judgment specifically provided for the retention of the case on the inactive docket for reactivation upon proper notice and (2) the trustees' petition and proper notice were served on all parties.

4. Trusts § 4— charitable trust — trial court's authority to modify trust terms

Where a trial court correctly finds that it is now impossible or impracticable to administer a charitable trust in the manner directed by the settlor's will, the trial court has plenary authority, both inherent and statutory, to order that the trust be administered as nearly as possible thereto so as to fulfill the general charitable intention of the settlor. G.S. 36-23.2.

5. Trusts § 4— petition to modify charitable trust — sufficiency of findings of fact

In a trustee's action to modify a charitable trust instrument which provided for the direct payment of trust income to the hospitals of the State for the benefit of charity patients, the trustees contending that the innovations of governmental and social programs have made it impossible or impracticable to accomplish the purpose of the trust, there was insufficient evidence to support the trial court's findings of fact that needy patients are being so adequately cared for by governmental and social programs that direct payment by the trust toward the care of the patients is impossible or impracticable; consequently, the judgment of the trial court granting relief to the trustees is reversed without prejudice to the trustees to reapply for relief on a theory more consistent with the facts shown by the evidence.

Judge MORRIS concurring.

Judge BROCK dissenting.

APPEAL by petitioners from *Lupton, J.*, 27 April 1970 Session of FORSYTH County Superior Court.

Action was initiated in November 1947 by trustees named under the will of Mrs. Kate G. Bitting Reynolds, deceased, for instructions and advice concerning their rights and duties under Section Five of the will. Judgment was entered 24 May 1948 granting the instructions and advice sought and ordering that the case be retained on the inactive docket of the court for further orders, with leave granted to the trustees and other interested parties to reactivate the case upon notice to proper parties. The judgment was reviewed and affirmed by the Supreme Court. *Trust Co. v. McMullan, Attorney General,* 229 N.C. 746, 51 S.E. 2d 473.

On 18 August 1969, the present trustees under Mrs. Reynolds' will filed a petition in the original action requesting broader discretionary powers in administering the trust. In the petition the trustees alleged that because of the innovations of governmental and social programs it has become impossible or impracticable to accomplish the testatrix's purpose of providing medical care to charity hospital patients in North Carolina by paying the income of the trust in the manner set forth in Section Five of the will. The pertinent provisions of Section Five are as follows:

> "All the Rest, Residue and Remainder of my estate . . . I give, devise and bequeath:
>
> To my trustees hereinafter named, in trust, . . . to pay three-fourths of the net income therefrom to the Hospitals located in the State of North Carolina, for the benefit of Charity patients, and said trustees shall pay such income quarterly to said hospitals upon the basis of the average number of charity patients cared for therein during each day of the immediately preceding period of three months. Any hospital participating under the provisions of this Will except those benefiting from specific bequests shall make a monthly report to my trustees showing the number of charity patients cared for during each day of the month, and my trustees shall be the sole judge as to the eligibility to receive benefits hereunder of any and all hospitals, and the decision of my trustees in respect thereto shall be final."

After a hearing on the petition the presiding judge signed the judgment tendered by the trustees, wherein findings of fact are set forth including the following:

> "The Testatrix, by SECTION FIVE of her Will, manifested a general intention to devote her property, the residual portion of her estate, to charity.
>
> (11) It was the manifested general intention of Mrs. Kate G. Bitting Reynolds, Deceased, the settlor or testatrix, to devote a three-fourths portion of her residuary estate toward the promotion of health and medical care for the people of North Carolina in need of medical care and assistance.
>
> (12) Mrs. Kate G. Bitting Reynolds executed her Will on or about July 26, 1934, and died a resident of Forsyth County on September 23, 1946. Since the execution of her

Will, and since the date of her death, there have been significant changes in the cost of hospital care and in the assumption of public responsibility for the care of charity patients.

(13) Since the execution of the Will of Mrs. Kate G. Bitting Reynolds in 1934, and since her death on September 23, 1946, the financial needs which the Testatrix intended to directly subsidize have been reduced or eliminated by the initiation or augmentation of the following trends and public programs: [then follows a list of programs and trends including the federal "Medicare" and "Medicaid" program, federal grants for maternal and child welfare programs, veterans health programs, various State, county and local assistance programs, the trend toward private medical insurance protection and others].

(14) Providing health care and meeting medical needs is a fast-developing field requiring at times the use of new, innovative and experimental approaches.

(15) The Trust, devise or bequest for charity created by Mrs. Kate G. Bitting Reynolds, Deceased, for the people of North Carolina in need of medical care and assistance, has become impossible or impracticable of fulfillment; the settlor, or testatrix, has not provided, either directly or indirectly, for an alternative plan in the event of such impossibility or impracticability; and the Court, upon the application of the Trustees of the Trust, should order an administration of the trust as nearly as possible to fulfill the manifested general charitable intention of the settlor or Testatrix.

(16) As of the 4th day of May, 1970, the estimated net annual income of the Hospital Trust created under SECTION FIVE of the Will of Mrs. Kate G. Bitting Reynolds, Deceased, is approximately $941,000; the principal of said Trust is approximately $18,021,000; and the Trustees are holding an additional $2,408,000 in accumulated, but undistributed, income.

* * *

(18) The Trustees, in the application of Trust income, should be authorized to establish an Advisory Board of such individuals as the Trustees may from time to time deem best suited to enable them to apply Trust income for the manifested general charitable intention of the testatrix

and to employ such professional or administrative assistance as, in the opinion of the said Trustees, is necessary or desirable for the efficient and expeditious administration and disposition of trust funds. The Trustees should be expressly authorized to expend trust funds for the purpose of making intelligent application of Trust income and, in so doing, to provide reasonable compensation to members of the Advisory Board, to purchase qualified advice and research data and to establish an office with pertinent supplies, equipment and staff."

The judgment, based upon the findings set forth above, concluded that the testatrix expressed a general testamentary intent which has become impossible or impracticable of fulfillment in the manner prescribed in the will. Thereupon, pursuant to the authority granted in G.S. 36-23.2 and its equitable jurisdiction, the court adjudged and decreed, in pertinent part, as follows:

"(1) That the Trustees under SECTION FIVE of the Will of Mrs. Kate G. Bitting Reynolds, Deceased, by reason of the changed circumstances and conditions referred to in the FINDINGS OF FACT AND CONCLUSIONS OF LAW, are no longer required to make payments of income from the Hospital Trust to Hospitals located in North Carolina for the benefit of Charity Patients but the Trustees may and they are hereby authorized to use the income from the Hospital Trust, including accumulated income, in such manner as the Trustees, in their uncontrolled discretion, subject only to further orders of the Court, may from time to time deem best to serve, directly or indirectly, the health and medical needs of the people of North Carolina who may be in need of medical care or assistance.

In giving this broad authority to the Trustees, the Court recognizes that providing for the health and meeting the medical needs of people in North Carolina who may be in need of medical care or assistance is a fast-developing field. It is the purpose of the Court to authorize the Trustees, acting upon informed advice and counsel, to be progressive and innovative in meeting such needs and providing such care and from time to time to adopt new and untried methods in this field, and to modify, abandon and change such methods in such manner and at such times as the Trustees, in the exercise of their discretion, may deem appropriate and

proper. The Court also recognizes that it may be impossible to provide such care and assistance solely for needy persons; and the Trustees are authorized to provide such care or assistance whenever in their judgment a substantial benefit will be derived by needy persons, even though benefit is also derived by others.

(2) The Trustees are hereby authorized to establish an Advisory Board of such persons as the Trustees may from time to time deem best suited to advise and counsel them in the application of trust income toward the promotion of health and medical care for the people of North Carolina in need of medical care or assistance.

(3) In the administration of the Hospital Trust (the three-fourths portion of the residuary estate of Mrs. Kate G. Bitting Reynolds, Deceased), the Trustees should be, and they are hereby, authorized and empowered, in the exercise of their discretion, to set up reserves out of the income of the Trust and to increase, decrease, exhaust and replenish such reserves from time to time as conditions affecting the Trust and the beneficiaries thereof may, in the judgment of the Trustees, require; and the Trustees are further authorized and empowered to expend Trust funds for the purpose of making intelligent application of trust income and, in so doing, to provide reasonable compensation to members of any Advisory Board, to purchase such further qualified advice and research data as the Trustees from time to time deem necessary, and, to the extent that the Trustees may from time to time deem necessary or proper, to establish an office with pertinent supplies, equipment and staff to carry out the administration of the trust as herein authorized.

* * *

(5) This cause shall continue to be retained upon the inactive docket of this Court for further orders, with leave granted to the Trustees, or the surviving Trustees or Trustee, or any other party hereto or any other hospital or related institution or association or other similar body representing hospitals or related institutions or associations, upon ten days' written notice to the Attorney General of North Carolina and to such of the other parties named in the now caption of this JUDGMENT as may be living or in existence, or their respective counsel of record, to apply to

this Court for further orders in the premises, supplementing and further implementing this JUDGMENT."

At the suggestion of the trial court the petitioners appealed assigning "possible errors."

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., for plaintiff appellants.

Robert Morgan, Attorney General, by Christine Y. Denson, Staff Attorney, for respondent appellee State of North Carolina.

Hollowell and Ragsdale by Edward E. Hollowell for respondent appellee North Carolina Hospital Association.

GRAHAM, Judge.

It does not appear that any party has objected to the entry of the judgment tendered to the court by the trustees. The Attorney General and the North Carolina Hospital Association have filed briefs in which they join the trustees in urging that the judgment be affirmed. No briefs have been filed by any party urging the contrary.

[1, 2] A question arises as to whether the trustees may appeal as aggrieved parties within the meaning of G.S. 1-271. A party has no right to appeal from a judgment entered on his own motion. *Dillon v. Wentz,* 227 N.C. 117, 41 S.E. 2d 202; *Johnson v. Sidbury,* 226 N.C. 345, 38 S.E. 2d 82. The trustees admit in their brief that there are no aggrieved parties. The judgment appealed from was entered on the motion of the appellant trustees. Hence, this appeal is subject to being dismissed *ex mero motu* as presenting no controversy. However, this case affects the interests of substantial numbers of public and private hospitals in this State, as well as thousands of persons who are now, or in the future will be, hospitalized in North Carolina as charity patients. We have, therefore, elected to entertain the appeal in the exercise of the supervisory power vested in this Court under the provisions of G.S. 7A-32(c). We also point out that the same situation existed when the first judgment entered in this cause was appealed, and the Supreme Court entertained the appeal. *Trust Co. v. McMullan, Attorney General, supra.* (See also: *Cotton Mills v. Local 578,* 251 N.C. 218, 111 S.E. 2d 457; *State v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97; *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651.)

[3] The first questions raised by the trustees' assignments of possible errors are jurisdictional. We conclude, under the authority of the Supreme Court opinion affirming the first judgment entered in this action *(Trust Co. v. McMullan, Attorney General, supra)*, that the trial court had jurisdiction over the parties and the subject matter and did not err in permitting this action to be reopened. Although some of the parties named in the original suit are no longer in existence, appropriate parties have been substituted. The judgment of 24 May 1948 specifically provided for the retention of the case on the inactive docket for reactivation upon proper notice. It appears that the petition and proper notice were served on all parties and that they are properly before the court.

The trustees seek a determination as to whether the court had the authority to grant the broad discretionary powers to administer the trust which are enumerated in the judgment. We look first to the authority granted by statute. G.S. 36-23.2, enacted in 1967, provides as follows:

> "Charitable Trusts Administration Act.—(a) If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a device [sic] or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. In every such proceeding, the Attorney General, as representative of the public interest, shall be notified and given an opportunity to be heard. This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust or devise or bequest for charity and such trust, devise or bequest for charity fails, the intention shown in the original plan shall prevail in the application of this section.
>
> (b) The words 'charity' and 'charitable,' as used in this section shall include, but shall not be limited to, any elee-

mosynary, religious, benevolent, education, scientific, or literary purpose."

This statute represents an obvious intent on the part of the legislature to invest the superior courts of this State with the power of *cy pres*. *Cy pres*. meaning "as near as possible," is the doctrine that equity will, when a charity is originally or later becomes impossible, inexpedient, or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. Bogert, Trusts and Trustees 2d, § 431. Before the passage of this statute, our Supreme Court often held that the doctrine of *cy pres* did not obtain in this State. *Board of Education v. Wilson,* 215 N.C. 216, 1 S.E. 2d 544; *Woodcock v. Trust Co.,* 214 N.C. 224, 199 S.E. 20; *Thomas v. Clay,* 187 N.C. 778, 122 S.E. 852; *Trust Co. v. Ogburn,* 181 N.C. 324, 107 S.E. 238; *Keith v. Scales,* 124 N.C. 497, 32 S.E. 809; *Holland v. Peck,* 37 N.C. (2 Ire. Eq.) 255. However, it has nevertheless been repeatedly recognized in this jurisdiction that the failure of the method designed by the trust for carrying out a general charitable purpose does not destroy the trust. In *Johnson v. Wagner,* 219 N.C. 235, 13 S.E. 2d 419, Devin, J. (later C.J.), speaking for the court stated:

> "In this case, while the general purpose of the testator to donate property to charitable uses, and the designation of the ultimate beneficiaries for whom the trust is created, sufficiently appear, the fact seems to have been definitely established that the particular mode for the use of the designated property has failed. The gift of the property for a designated use in a particular manner has been declined as impracticable. The donation of the land for use as an assembly ground has failed, but that does not destroy the trust. It seems to be a generally recognized principle controlling the decisions of courts of chancery on the subject that when a definite charity has been created, the failure of the particular mode in which it is to be effectuated does not destroy the trust. It has been well said, 'the substantial intention shall not depend on the insufficiency of the formal intention.' *Trust Co. v. Ogburn, supra.* The general intent of the testator must prevail over the particular mode prescribed. Zollman Am. Law of Charities, sec. 137. Notwithstanding the impossibility of effectuating the particular method prescribed for carrying out the provisions of a trust, the Court will exercise its equitable jurisdiction and super-

vise the administration of the fund so as to accomplish the purposes expressed in the will. *Paine v. Forney, supra; Trust Co. v. Ogburn, supra.*"

Other cases generally applying the same principle enunciated above include: *Trust Co. v. Construction Co.*, 275 N.C. 399, 168 S.E. 2d 358; *Brooks v. Duckworth*, 234 N.C. 549, 67 S.E. 2d 752; *Hospital v. Comrs. of Durham*, 231 N.C. 604, 58 S.E. 2d 696; *Cutter v. Trust Co.*, 213 N.C. 686, 197 S.E. 542; *Trust Co. v. Ogburn*, 181 N.C. 324, 107 S.E. 238.

In 4 Scott, The Law of Trusts 3d, § 399.4 the following salient point is made: "The result of a too strict adherence to the words of the testator often means the defeat rather than the accomplishment of his ultimate purpose. He intends to make the property useful to mankind, and to render it useless is to defeat his intention. 'Under the guise of fulfilling a bequest,' said John Stewart Mill, 'this is making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow. . . . No reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found.' " (Quoting from 1 Mill, Dissertations 32, 36.)

[4] If the trial court correctly concluded that it is now impossible or impracticable to administer the trust in the manner directed by Mrs. Reynolds' will, it had plenary authority, pursuant to its inherent equitable power and under the provisions of G.S. 36-23.2, to order that it be administered as nearly as possible thereto so as to fulfill the general charitable intention of Mrs. Reynolds. Her general intent was obviously to benefit those persons in North Carolina in need of medical care and financially unable to obtain it.

We are also of the opinion that the judgment is not defective because it authorizes the trustees, in their "uncontrolled discretion" to apply the proceeds in accordance with Mrs. Reynolds' general intent, rather than undertaking to outline and direct the trustees to employ a particular substitute mode of administration. "Uncontrolled discretion," as used in the judgment, simply means that the trustees have the authority to select from among numerous modes of administration that are undoubtedly available to carry out Mrs. Reynolds' general intent. It does not mean that their discretion in the use of the trust funds is un-

bridled to the extent that they can employ the funds for purposes inconsistent with the purpose of the trust.

[5] The judgment, however, must nevertheless be reversed because the evidence presented fails to establish that the mode directed by Mrs. Reynolds for administering the trust has become either impossible or impracticable *for the reasons asserted in the petition, or because of the facts found by the court.* The trustees base their claim, as argued in the brief, upon the proposition that "since the date the will was executed and since Mrs. Reynolds' death, there has been an awakening of awareness of the medical needs of society. This awareness has resulted in the creation of numerous governmental and public programs which have practically done away with the charity patient which Mrs. Reynolds sought to benefit." This is also the basis of the court's judgment. In finding of fact number 13, and a corresponding conclusion of law, the court determined that the financial needs which Mrs. Reynolds intended to subsidize directly have been reduced or eliminated by the initiation or augmentation of certain governmental trends and programs to the point where it has become impracticable or impossible to fulfill the purpose of the trust. There is evidence, to be sure, that the programs enumerated in the court's order are now providing hospital care for numerous persons who otherwise would be classified as charity patients. This evidence, however, falls far short of showing that the charity patient, as known by Mrs. Reynolds, has virtually disappeared from the scene in North Carolina. For instance, the trustees' evidence shows that after the advent of Medicare the number of charity days of hospital care provided for patients in North Carolina decreased substantially. But 50,615 days of charity care were nevertheless still provided by 106 North Carolina hospitals in the quarter ending 30 June 1967. There is no evidence to show how much, if any, decrease has occurred since that date. Nor is there any showing as to how the number of charity patients being provided for in North Carolina hospitals today compares with the number provided for at the time Mrs. Reynolds died or at the time she executed her will. Insofar as the record shows, we are left to wonder if, in spite of all the governmental programs, charity care has not in fact increased. We take notice of the substantial increase in population and the modern trend to hospitalize the ill. Could it be that these factors, and perhaps other factors, have offset any decrease resulting from the various assistance programs?

It is significant to note that several hospitals filed answers denying that there had been a decrease in charity patients since the advent of Medicare. Duke University Hospital alleged that the days of charity care provided there increased during the year of 30 June 1966 to 30 June 1967, which is the year alleged in the petition as representing a significant decrease on account of Medicare.

We view this case as similar in many respects to the case of *West v. Lee,* 224 N.C. 79, 29 S.E. 2d 31 (1944). There, plaintiffs sought to have terminated a trust established by a will of 1895. The purpose of the trust was to provide a free permanent common school English education for poor white children of Buncombe County of eight years and over. Plaintiffs attacked the trust on the theory that the expansion of the state school system and the enlargement of opportunity adequately met every educational demand of indigent children and destroyed the object of the trust. In rejecting plaintiffs' efforts, Justice Seawell stated:

> "We agree with the encomium counsel for the appellants have addressed to public school progress. Even some of the smaller towns have a larger investment in educational facilities, and buildings more commodious and impressive than the University of North Carolina afforded when Aycock, McIver and Alderman matriculated there. The public school term has been increased under the Constitution from four to six months, and by statute to a minimum of eight months, and a maximum of nine months, if the district or the county may so request. Appropriations are large, considering per capita wealth, and the opportunities of free tuition afforded the youth of the State have been vastly enlarged. But it is not claimed by the most optimistic that this amazing progress has saturated the public demand or the public need. Teacher load is a serious problem, menacing efficiency of instruction. Individual attention to backward children is a related unsolved problem. If the Murray trust were instigated today, we could not, as a matter of law, deny it a place in the all-out educational effort upon the argument advanced, if we were permitted to entertain it at all.
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> * * *
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> Indeed, there is implied in the definition of charitable trusts, whose purposes almost necessarily are found amongst those

which all enlightened countries recognize as also obligations of government, that they may, as coadjutors, stand side by side with State agencies instituted and maintained for the same purpose.

'A charity may be defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.' Scott on Trusts, Sec. 368; *Whitsett v. Clapp*, 200 N.C., 647, 649, 158 S.E., 183.

The appellants have admitted that even in prosperous Asheville and Buncombe County, as indeed elsewhere in all the world, the Biblical adage holds true: 'Ye have the poor always with you'; and that there are, in the area covered by the trust, those who may qualify as beneficiaries. The plaintiffs, we think, are concluded by this admission."

There plaintiffs sought dissolution of the trust; whereas, here the trustees are seeking only a deviation in the method directed by the trust for the expenditure of funds. The main purpose being kept in view, considerable flexibility should always be allowed in the details of the execution of a trust, so as to adapt it to changed conditions. *Mars v. Gibert*, 93 S.C. 455, 466, 77 S.E. 131, 135. But the theory upon which the trustees have proceeded here is identical to that put forward by the plaintiffs in *West:* that is, that because of changes in conditions, the objects of the trustor's charity have become extinct, or virtually so. Here, as in *West,* the evidence fails to support such a theory.

Uncontradicted evidence of the trustees here tends to show that the demand for charitable funds (due perhaps to an escalation of hospital costs rather than an increase in the number of charity patients) has actually increased to the point where the money which can be paid by the trust to hospitals in the manner provided by the will is insignificant and of little help in encouraging hospitals to admit and care for charity patients. This is so largely because the average daily cost of hospital care in North Carolina has risen from $3.03 when Mrs. Reynolds executed her will to almost $50.00 today. The slightly more than $3.00 a day which is available from the trust income to apply toward the

daily care of each patient is now of little significance. It has been suggested that the hospital administrative cost of keeping records, reporting to the trustees and applying for proceeds under the trust, in some instances nearly equals the benefits paid. The Senior Vice President of the corporate trustee explained the dilemma of the trustees as follows:

> "In short, we were concerned that the money was not accomplishing as much as it might. *In many cases, the payments to hospitals were relatively small and were just swallowed up in the tremendous expense of hospitals.*" (Emphasis added.)

In our opinion the evidence of the trustees is inconsistent with the allegations in the petition and the court's findings that needy patients are being so adequately cared for by governmental and social programs that direct payments by charity toward their care is impossible or impracticable. In fact, according to the uncontradicted evidence, if it is now impracticable to administer the trust in the manner provided by Mrs. Reynolds, it is for the reason that the burden of caring for charity patients in hospitals has become so great that the small amount available to apply toward this cost from the trust is insignificant and can be more effectively used in other ways. It is clearly not, as found by the court, because of governmental and social programs and trends. These programs and trends should in fact reduce the burden of charity, thereby making more effective the direct payments to hospitals as directed by Mrs. Reynolds' will.

We are powerless to make findings of fact. Therefore we may not now concern ourselves with whether the trustees are entitled to the relief sought because the increased cost of charity care has made the payments under the trust impracticable, thereby making it necessary that another mode of administering the trust be employed in order to effectively carry out the general intent of Mrs. Reynolds. The fact is that relief has been granted on totally different and inconsistent findings which are unsupported by the evidence. To affirm the judgment in its present form would be to acknlowledge that governmental and social programs and trends have preempted the need for any direct charitable assistance to hospitals for the care of needy patients. This we are unprepared to do.

We reverse the judgment without prejudice to the trustees to reapply for relief on a theory more consistent with the facts shown by the evidence.

Reversed.

Judge MORRIS concurs in the result.

Judge BROCK dissents.

Judge MORRIS concurring:

I am in accord with the result reached and with the reasons therefor. In addition, however, I feel compelled to state that I have considerable reservations with respect to the propriety and legal correctness of that portion of the judgment authorizing the trustees to "establish an Advisory Board of such persons as the Trustees may from time to time deem best suited to advise and counsel them in the application of trust income toward the promotion of health and medical care for the people of North Carolina in need of medical care or assistance." The broadness of the order allowing the trustees to employ an Advisory Board could result in a complete delegation of duties by the trustees chosen by the testatrix, with the Advisory Board, for all practical purposes, acting as trustees. This, in my opinion, goes far beyond the employment, on a temporary basis, of experts for assistance and advice in a particular area and with respect to a particular question. Indeed, the judgment gives this authority to the trustees in addition to the employment of an Advisory Board.

Judge BROCK dissenting:

I do not disagree with the determination in the majority opinion that the findings of the trial tribunal are inconsistent with the evidence, and for that reason would require reversal of the judgment entered. However, I would point to an additional ground for reversal lest upon rehearing the trial tribunal might be led to believe our silence on the subject constituted approval.

Finding of Fact No. (18) is as follows:

> "(18) The Trustees, in the application of Trust income, should be authorized to establish an Advisory Board of such individuals as the Trustees may from time to time deem best suited to enable them to apply Trust income for the manifested general charitable intention of the testatrix and to employ such professional or administrative assistance

as, in the opinion of the said Trustees, is necessary or desirable for the efficient and expeditious administration and disposition of trust funds. The Trustees should be expressly authorized to expend trust funds for the purpose of making intelligent application of Trust income and, in so doing, to provide reasonable compensation to members of the Advisory Board, to purchase qualified advice and research data and to establish an office with pertinent supplies, equipment and staff."

Thereafter section (2) of the judgment provides:

"(2) The Trustees are hereby authorized to establish an Advisory Board of such persons as the Trustees may from time to time deem best suited to advise and counsel them in the application of trust income toward the promotion of health and medical care for the people of North Carolina in need of medical care or assistance."

A portion of section (3) of the judgment provides:

"(3) * * * the Trustees are further authorized and empowered to expend Trust funds for the purpose of making intelligent application of trust income and, in so doing, to provide reasonable compensation to members of any Advisory Board, to purchase such further qualified advice and research data as the Trustees from time to time deem necessary, and, to the extent that the Trustees may from time to time deem necessary or proper, to establish an office with pertinent supplies, equipment and staff to carry out the administration of the trust as herein authorized."

By the portions of the judgment above quoted, the Trustees are authorized to shift responsibility for decision making to an Advisory Board selected by them; and the Trustees are authorized to fix compensation for the members of such a board, to be paid from the Trust funds. Also, the judgment authorizes the Trustees, at the expense of the Trust, to rent office space, purchase supplies and equipment for the office, and employ a staff of personnel to carry out the administration of the Trust. Thus, the Trustees may not only shift the responsibility of decision making to an advisory board, but may also shift the actual administration of the Trust to a staff employed and housed in an office for that purpose; all at the expense of the Trust.

The compensation to the Trustees, as disclosed by petitioners' exhibit #10, is estimated to be $60,110.72 for the year 1970. It seems that the Trust is already paying a considerable sum for time and services to administer the Trust; and upon the record in this case I don't believe it is just or equitable, or within the authority of the Court, to allow the Trustees to be adequately compensated for administering the Trust, and, at the same time, at additional expense to the Trust, employ an advisory board to tell them how to administer and a staff to carry out the administration.

There is no authority granted by the Trust instrument itself which would allow the Trustees to employ an Advisory board, rent office space, purchase office supplies and equipment, or employ a staff to carry out the administration of the Trust. The implication of item 5 of *Section Seven* of the Will is to the contrary; by this section the compensation for administering the trust is clearly set out by Mrs. Reynolds. The judgment as entered, in effect, amends item 5 of *Section Seven* by considerably increasing the compensation to the Trustees; not by increasing the money paid them, but by allowing the Trust to pay someone else to furnish the services for which the Trustees are being paid.

If the Trustees are to continue in office it is only proper that they supply the functions and shoulder the responsibilities for which they are being compensated, and which they accepted when they assumed their office as Trustees.

In my opinion the trial tribunal exceeded its authority in portion of the judgment discussed in this dissenting opinion.

STATE OF NORTH CAROLINA v. ROBERT LEE TEASLEY

No. 709SC475

(Filed 21 October 1970)

1. **Indictment and Warrant § 7— order of arrest — reference to affidavit or complaint**

When the order of arrest refers to an attached affidavit or complaint, the affidavit or complaint becomes a part of the warrant of arrest. G.S. 15-20.

2. **Indictment and Warrant § 15— issuance of warrant — waiver of defects — motion to quash**

Where the record shows that the defendant appeared at the trial in the superior court, engaged in the selection of a jury, entered a plea of not guilty, and cross-examined the State's witness, the defendant waived any defect incident to the authority of the person issuing the warrant for his arrest; and the defendant's motion to quash made after the State had rested its case was addressed to the discretion of the trial judge.

3. **Indictment and Warrant § 9— quashal of warrant — mere informalities**

A warrant and the affidavit upon which it is based are tested by rules less strict than those applicable to indictments; a warrant should not be quashed or the judgment arrested for mere informalities or absence of refinements.

4. **Indictment and Warrant § 9— sufficiency of warrant**

A warrant of arrest is sufficient if it clearly gives the defendant notice of the charge against him, so that he may prepare his defense, and if it enables him to plead former acquittal or former conviction should he again be brought to trial for the same offense, it must also enable the court to pronounce judgment in case of conviction.

5. **Indictment and Warrant § 7; Automobiles §§ 3, 117— use of Uniform Traffic Ticket — charge of crime**

Although the Court of Appeals disapproves the use of the Uniform Traffic Ticket as a warrant of arrest, the Uniform Traffic Ticket in this case sufficiently charged the offenses of speeding 90 mph in a 55 mph zone and of driving while license suspended.

6. **Automobiles § 3— notice of suspension of license — validity of certification**

Certification by Motor Vehicles employee that the original notice of suspension of defendant's driver's license was addressed to the defendant and placed in the U. S. mail *held* sufficient to comply with the statutes setting forth the procedure for the giving of notice; language on the certificates which purported to show that they were sworn to and subscribed before a notary public is surplusage and does not vitiate their effect. G.S. 8-35, G.S. 20-48.

7. Automobiles § 3— suspension of license — validity of notice

Where the Department of Motor Vehicles complied with the applicable statutes in giving defendant notice that his driver's license was suspended, such compliance constituted constructive notice to defendant that his license had been suspended; the fact that the defendant moved after the date of the notice and informed the Department of his new address did not vitiate the notice, which the Department had mailed to defendant's address as shown by its records on the date of the notice. G.S. 20-16(d), G.S. 20-23, G.S. 20-48.

8. Evidence § 4— mailing of letter presumption of receipt

There is a presumption that mail, with postage prepaid and correctly addressed, will be received.

9. Automobiles § 3— notice of license suspension — statutory procedure

The statute providing for the manner in which notice of suspension of driver's license is to be given is reasonably calculated to assure that notice will reach the intended party and afford him the opportunity of resisting or avoiding the proposed suspension.

10. Automobiles §§ 3, 117— prosecutions — admission of driving status record

In a prosecution charging defendant with speeding 90 mph in a 55 mph zone and with driving while his license was suspended, the admission in evidence of defendant's driving status record was not erroneous on the ground that it showed the revocation of his license for speeding over 76 mph, where defendant did not request that the record be limited in any way.

11. Automobiles § 3— defendant's driving status — admissibility of records

The records of the Department of Motor Vehicles, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege.

APPEAL by defendant from *Copeland, S.J.*, Special March 1970 Session of Superior Court held in FRANKLIN County.

The defendant was tried upon "North Carolina Uniform Traffic Ticket No. 819725." The defendant's name and the date of the violation, "Aug. 16, 1968," appear in the first part of this instrument. Other pertinent parts thereof are as follows:

> "In the Recorder's Court, Louisburg, N.C. The affiant, being duly sworn, says that the above-named defendant, on or about the above-stated violation date in the above-named county, did unlawfully and willfully operate the above-described motor vehicle on a street or highway:
>
> 1 X. By speeding 90 MPH in a 55 MPH Zone Within city limits ( ) Yes (X) No
>
> 2 X. Driving while his license were suspended.

In violation of, and contrary to, the form of the statute in such cases made and provided and against the peace and dignity of the State.

* * *

To any officer authorized to arrest for this offense—Greeting:

You are hereby commanded forthwith, to arrest the named defendant and safely keep so that you have said defendant in the above court without delay to answer the complaint and be dealt with as the law directs."

There appears in the record, dated 26 March 1970 over the signature of Judge Copeland and under the heading "Jury, Plea, Verdict and Judgment," the following:

"In open court, the defendant appeared for trial upon the charge of speeding 90 mph in a 55 mph zone; and driving while license suspended, and thereupon entered a plea of not guilty.

Having been found guilty of the offense of speeding 90 mph in a 55 mph zone; and driving while license suspended, which is a violation of G.S. 20-180 and G.S. 20-28 ss. (a), and of the grade of misdemeanor,

It is ADJUDGED that the defendant be imprisoned for the term of two years in the common jail of Franklin County as to the count charging him with speeding 90 mph in a 55 mph zone; as to the count charging him with driving after his license was revoked or suspended, it is the judgment of the Court the defendant be confined to the common jail of Franklin County for a term of two years, to serve under the supervision of the N. C. Department of Correction."

The defendant gave notice of appeal to the Court of Appeals.

Attorney General Morgan, Assistant Attorney General Costen, and Staff Attorney Denson for the State.

Hubert H. Senter for defendant appellant.

MALLARD, Chief Judge.

There was evidence by the State that the defendant was operating an automobile on the 16th day of August 1968 on Highway U.S. 1A south of Franklinton at a speed in excess of

90 miles per hour and that at the time thereof, his operator's license and driving privilege were in a state of suspension. The evidence tended to show that the defendant had been notified by the North Carolina Department of Motor Vehicles (Department), by mail dated 5 April 1968, of the suspension of his operator's license and driving privilege from 10 April 1968 to 10 April 1969 upon a conviction for speeding in excess of 75 miles per hour and, by mail dated 24 May 1968, of the suspension of his operator's license and driving privilege from 29 May 1968 to 29 May 1969 for two convictions of reckless driving, one in North Carolina and one in Virginia. (The dates "1966" as shown in the first line of the official notices on pages 17 and 19 of the printed record are in error; the original record reveals, and the defendant conceded on the oral argument, that each of these dates should be "1968.")

The defendant did not testify but offered other testimony. His evidence tended to show that he was not driving a vehicle at the time and place in question but was somewhere else and could not have been driving the automobile.

The printed record has blank spaces in the affidavit and order of arrest portions of the instrument upon which defendant was tried where the name of the "issuing official" should be, indicating that there was no issuing official, but when the printed record is compared with the original record on file with the clerk of this court, it is clear that there was an issuing official. The defendant on oral argument concedes that there was an issuing official and that he was a justice of the peace. To assure proper consideration, the parties should not include in the record on appeal a photographic reproduction of a record without ascertaining that it is readable and an accurate reproduction. In fairness to those who prepared the printed record, it should be said that the signature of the issuing official is illegible. His title is listed on the printed record as "P"; however, upon an examination of the original record, it appears that the title of the issuing official was listed as "J.P."

[1] The affidavit upon which the warrant of arrest was based appears to have been sworn to on 16 August 1968 before this justice of the peace. A justice of the peace could issue warrants of arrest in Franklin County on 16 August 1968. G.S. 15-18. The order of arrest in this case referred to "the complaint" and both appeared on the same sheet of paper. When the order of arrest refers to an attached affidavit or complaint, the affidavit or

complaint becomes a part of the warrant of arrest. G.S. 15-20; *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966); *Moser v. Fulk,* 237 N.C. 302, 74 S.E. 2d 729 (1953); 4 Strong, N. C. Index 2d, Indictment and Warrant, § 7, p. 344.

[2] At his trial on 14 January 1969 in the district court (which was established in Franklin County on the first Monday in December 1968), the defendant made a motion to quash before entering a plea to the charges included in the warrant. After the imposition of judgment in the district court, the defendant appealed to the superior court where trial was *de novo.* The defendant did not move to quash in the superior court until after the State had presented its evidence and rested. The record reveals that the defendant contended he had not entered a formal plea; the solicitor contended he had. However, in the record under the title "Jury, Plea, Verdict and Judgment," it appears that he did enter a plea of not guilty. Moreover, the record shows that the defendant appeared at the trial in the superior court, engaged in the selection of a jury, and cross-examined the State's witness. By pleading and participating in the trial, the defendant waived any defect incident to the authority of the person issuing the warrant, and the motion to quash made after the State had rested was addressed to the discretion of the trial judge. *State v. Blacknell,* 270 N.C. 103, 153 S.E. 2d 789 (1967); 4 Strong, N. C. Index 2d, Indictment and Warrant, § 15.

[3] The defendant contends that the warrant does not sufficiently set forth the charges upon which he was tried. A warrant and the affidavit upon which it is based are tested by rules less strict than those applicable to indictments. 4 Strong, N. C. Index 2d, Indictment and Warrant, § 9, p. 350. A warrant should not be quashed or the judgment arrested for mere informalities or absence of refinements. G.S. 15-153; *State v. Wells,* 259 N.C. 173, 130 S.E. 2d 299 (1963); *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954).

[4] A warrant of arrest is sufficient if it clearly gives the defendant notice of the charge against him, so that he may prepare his defense, and if it enables him to plead former acquittal or former conviction should he again be brought to trial for the same offense. It must also enable the court to pronounce judgment in case of conviction. *State v. Dorsett* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15 (1967); *State v. Burton,* 243 N.C. 277, 90 S.E. 2d 390 (1955). See also *State v. Saffo Jacobs,* 9 N.C. App. 597, 176 S.E. 2d 833 (1970).

[5] We do not approve of the use of the uniform traffic ticket used in this case as a warrant of arrest for the reasons set forth by Judge Parker in *State v. Letterlough,* 6 N.C. App. 36, 169 S.E. 2d 269 (1969). However, in this case we hold that the warrant, when tested by the applicable rules, is sufficient to withstand the defendant's motion to quash and also his motion in arrest of judgment. *State v. Dorsett* and *State v. Yow, supra; State v. Sawyer,* 233 N.C. 76, 62 S.E. 2d 515 (1950); *State v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663 (1949); *State v. Letterlough, supra.*

The defendant also challenges the introduction into evidence of State's Exhibit 1 which is dated 17 February 1970 and consists of five pages, including the following:

1. A letter from Joe W. Garrett, Commissioner, authorizing Edward H. Wade to be the custodian of all official records of the Department and empowering Edward H. Wade to certify copies of the records of the Department under the provisions of G.S. 20-42.

2. A "Driver's License Record Check for Enforcement Agencies" on Robert Lee Teasley, 501 Chavis Street, Franklinton, North Carolina, signed by Edward H. Wade.

3. "Official Notice and Record of Suspension of Driving Privilege," dated 24 May 1968, addressed to Robert L. Teasley, Route 1, Franklinton, North Carolina, informing him, among other things, of the suspension of his driving privilege "for two offenses of reckless driving," effective 29 May 1968 to 29 May 1969, signed by Ralph L. Howland, Commissioner, and supported by a certificate dated 24 May 1968 signed by Hazel Flowers appearing on the face of the original record. (The printed record incorrectly shows this date as 5 April 1968.)

4. "Official Notice and Record of Suspension of Driving Privilege" dated 5 April 1968, addressed to Robert L. Teasley, Route 1, Franklinton, North Carolina, informing him, among other things, of the suspension of his driving privilege "for speeding over 75 MPH," effective 10 April 1968 (as shown on original record—the printed record incorrectly shows this date to be "29 May 1966") to 10 April 1969, signed by Ralph L. Howland, Commissioner, and supported by a certificate dated 5 April 1968 of Hazel Flowers appearing on the face of the original record.

[6] The certificates appearing on both of the foregoing official notices of suspension are identical except as to dates (one is dated 24 May 1968 and one 5 April 1968), and each reads:

> "I certify that I am an employee of the North Carolina Department of Motor Vehicles and that the original of this document was placed in the United States mail, postage prepaid, this date, addressed as appears hereon, which address is shown by the records of the Department.
>
> s/ Hazel Flowers
>
> Sworn to and subscribed before me this 24 day of March, 1970.
>
> (SEAL) s/ Topsy Coleman, Notary Public
>
> My commission expires: Nov. 5, 1974."

In our opinion, the words "this date" mentioned in the certificate referred to the date of the certificate and not the date it was sworn to.

We hold that the portion of the foregoing certificates which purports to show that they were "(s)worn to and subscribed" before a notary public on 24 March 1970 is surplusage and does not vitiate their effect as certificates under the provisions of G.S. 20-48 and G.S. 8-35.

In G.S. 8-35 it is provided, among other things, that:

> "Any such certificate shall be prima facie evidence of the genuineness of such certificate and seal, the truth of the statements made in such certificate, and the official character of the person by which it purports to have been executed."

Upon conviction in North Carolina of two charges of reckless driving committed within a period of twelve months, it is mandatory, under the provisions of G.S. 20-17(6) and G.S. 20-19(f), that the Department revoke the operator's license of such person for a period of twelve months. This statute (G.S. 20-17) does not specifically require notice, and revocation under this statute is not reviewable in court. *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (1968).

However, in G.S. 20-24 it is provided that when any person is convicted of any offense directing mandatory revocation of

his operator's or chauffeur's license, the court in which the conviction is had shall require the surrender of his license and forward it to the Department. This gives the licensee sufficient notice that his operator's license has been revoked.

The defendant's "Driver's License Record Check" shows that he had been convicted of reckless driving on 1 March 1968 in Oxford, North Carolina, and again on 11 March 1968 in Virginia. The Supreme Court has held in the case of *Carmichael v. Scheidt, Comr. of Motor Vehicles,* 249 N.C. 472, 106 S.E. 2d 685 (1959), that under the provisions of G.S. 20-23, it is discretionary with the Department to suspend or revoke the operator's license upon receiving notice of a conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for suspension or revocation.

In the instant case the section of the licensing statute upon which the Department acted, as appears on the original of the record on file, is partially illegible, and the printed record of the notice dated 24 May 1968 incorrectly states that the Department was acting under "G.S. 20-15A-7 & 20-23." From the remaining portion of this notice, it is clear that the Department correctly acted under the provisions of subsection (7) of section (a) and the other provisions of G.S. 20-16 which require that notice be given when only one of the convictions for reckless driving occurred in North Carolina.

The Department also has statutory authority to suspend the operator's license and driving privilege of any operator, with or without a preliminary hearing, upon a showing by its records that the licensee has been convicted of or pleaded guilty to operating a motor vehicle at a speed in excess of 75 miles per hour. G.S. 20-16(a)(10). See also *In re Revocation of License of Wright,* 228 N.C. 584, 46 S.E. 2d 696 (1948).

Upon suspending the operator's license and driving privilege of a person for any of the causes stated in G.S. 20-16, it is required by section (d) thereof that the Department shall immediately notify the licensee in writing and upon request afford him an opportunity for a hearing unless a preliminary hearing was held before his license was suspended. Under G.S. 20-48, it is required that the notice shall be given "either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records

of the Department." This statute further provides that "(t)he giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Department or affidavit of any person over twenty-one years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof."

[7] The defendant contends that the notices were addressed to him at Route 1, Franklinton, and that the "Driver's License Record Check," which is a part of State's Exhibit 1, reveals that his address was 501 Chavis Street, Franklinton. The defendant did not raise the question of a failure to receive the notice by his evidence; he raises it in his brief. The "Record Check" shows that the search date was 24 March 1970. The official notices and record of suspension show that one is dated 24 May 1968 and one is dated 5 April 1968. In this case the official notices and record of suspension were sufficient to show that the defendant's operator's license and driving privilege had been suspended and were in a state of suspension on 16 August 1968.

Our research has failed to find any statute requiring a person holding an operator's or chauffeur's license to notify the Department when he changes his address, although G.S. 20-14, after an amendment in 1969, provides for the issuance of a duplicate license "if it is necessary to change the name or address thereon." G.S. 20-67 requires a person applying for or holding a certificate of title for a motor vehicle to notify the Department within ten days after changing his address. It seems that it would be the better practice for a person holding an operator's or chauffeur's license to also notify the Department of a change of address.

From the record it appears that this defendant was an habitual and persistent violator of the laws relating to the operation of motor vehicles. He knew or should have known that his operator's license and driving privilege could be revoked or suspended upon conviction of two offenses of reckless driving within twelve months or upon conviction of the operation of a motor vehicle at a speed in excess of 75 miles per hour. The fact that he may have moved, if he did, after 5 April 1968 and thereafter informed the Department of his new address (which the record indicates) did not vitiate the notice of suspension which

was mailed to him at his address as shown by the records of the Department on 5 April 1968.

[8] There is a presumption that mail, with postage prepaid and correctly addressed, will be received. *Petroleum Corp. v. Oil Co.*, 255 N.C. 167, 120 S.E. 2d 594 (1961). The rule with respect thereto is stated in *Hagner v. United States*, 285 U.S. 427, 76 L. Ed. 861 (1932), as follows:

> "* * * The rule is well settled that proof that a letter properly directed was placed in a postoffice, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." See also *United States v. Bowen*, 414 F. 2d 1268 (3rd Cir. 1969); *United States v. DeNarvaez*, 407 F. 2d 185 (2d Cir. 1969), *Whitney v. United States*, 328 F. 2d 888 (5th Cir. 1964).

[9] We hold that G.S. 20-48, which is the statute providing for the manner in which notice is to be given, is reasonably calculated to assure that notice will reach the intended party and afford him the opportunity of resisting or avoiding the proposed suspension, as well as to give him notification of the actual suspension of his operator's license and driving privilege.

[7] The crime of driving a motor vehicle while one's operator's license is suspended is statutory. There is nothing in the statute [G.S. 20-28(a)] which would imply that knowledge or intent is a part of the crime of operating a motor vehicle after one's license has been suspended. When the Department complied with the procedure set forth in the statute as to notice of suspension of the operator's license and driving privilege, such compliance constituted constructive notice to the defendant that his license had been suspended. G.S. 20-48; *State v. Hebert*, 124 Vt. 377, 205 A. 2d 816 (1964); *Bureau of Motor Vehicles v. Fisher*, 117 Ohio App. 59, 189 N.E. 2d 744 (1962); *State v. Barber*, 24 Conn. Sup. 346, 190 A. 2d 497 (1962); *State v. Baltromitis*, 5 Conn. Cir. 72, 242 A. 2d 99 (1967).

In the case of *Shue v. Scheidt, Comr. of Motor Vehicles*, 252 N.C. 561, 114 S.E. 2d 237 (1960), the Supreme Court said:

> "The operation of a motor vehicle on a public highway is not a natural right. It is a conditional privilege which the State in the interest of public safety acting under its police power may regulate or control, and suspend or revoke the

driver's license. *In re Revocation of License of Wright,* 228 N.C. 584, 46 S.E. 2d 696; *Commonwealth v. Ellett,* 174 Va. 403, 4 S.E. 2d 762. As this Court said in *Harvell v. Scheidt, Comr. of Motor Vehicles,* 249 N.C. 699, 107 S.E. 2d 549: '. . . the suspension or revocation of a driver's license is no part of the punishment for the violation or violations of traffic laws. . . . The purpose of the suspension or revocation of a driver's license is to protect the public and not to punish the licensee.' "

The defendant cites *State v. Hughes,* 6 N.C. App. 287, 170 S.E. 2d 78 (1969), in support of his contention that notice under G.S. 20-48 is inadequate and insufficient. The Hughes case is not in conflict with the opinion in this case. The decision in Hughes turned on the fact that there was no competent evidence that any notice of suspension of the operator's license and driving privilege was mailed to the defendant. In the case before us, the State introduced the certificate of an employee of the Department that the notice of suspension had been placed in the United States mail, postage prepaid, addressed to defendant.

We hold that the proof of giving of the notice of the "Official Notice and Record of Suspension of Driving Privilege" is sufficient in this case to comply with the provisions of G.S. 20-48; that the provisions of G.S. 20-48, together with the provisions of G.S. 20-16(d), relating to the right of review, and the provisions of G.S. 20-25, relating to the right of appeal, satisfy the requirements of procedural due process; and that the trial judge correctly admitted State's Exhibit 1 into evidence. See 60 C.J.S., Motor Vehicles, § 164.32, p. 891, and 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 120, p. 682.

[10] The defendant contends that the trial judge committed error in admitting State's Exhibit 1 over his objection. He further contends that there was error in overruling his motion to strike after the solicitor read to the jury from State's Exhibit 1, as follows:

"North Carolina Department of Motor Vehicles, Driver License Record Check for Enforcement Agencies. Name and Address, Robert Lee Teasley, 501 Chavis Street, Franklinton, N. C. License number, 898866; race, Negro; birth date; month, date year, 05, 07, 43; sex, male. And down the bottom portion mail date of suspension, month, day, year, 04, 05, 68; effective date of suspension, month, day, year, down

in that column, 04, 10, 68; date eligible for reinstatement, month, date, year, 04, 10, 69. Suspension—a column headed suspension or revocation and down the column, suspension. *Column heading nature of record or reason for revocation, speeding over 76 miles per hour* and then this portion; certification, I certify that the foregoing is a true copy of the driver's license record of the within named person on file with the North Carolina Department of Motor Vehicles. Signed, Edward H. Wade, Director, Driver License Division." (Emphasis Added.)

[11] The records of the Department, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. *State v. Mercer,* 249 N.C. 371, 106 S.E. 2d 866 (1959); G.S. 8-35; G.S. 20-42(b).

The defendant in the case before us argues that he did not go upon the witness stand and did not put his character in issue, and, therefore, it was prejudicial error for the solicitor to read to the jury that his license had been suspended for speeding over 76 miles per hour.

In the case of *State v. Corl,* 250 N.C. 252, 108 S.E. 2d 608 (1959), a certified record of the Department as to the status of the defendant's operator's license and driving privilege was introduced in evidence over defendant's objection. This record revealed that the defendant had been convicted of twelve separate violations of the motor vehicle laws since 1946. The defendant did not go upon the stand and testify and did not otherwise put his character in issue. The Court said:

"In our opinion the defendant was entitled to have the contents of the official record of the status of his driver's license limited, if he had so requested, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department of Motor Vehicles the defendant's license was in a state of revocation or suspension on the date he is charged with committing the offenses for which he was being tried.

Ordinarily, where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted. Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 558, General Statutes, Volume 4A, page 175, *et seq; Brewer v. Brewer,*

238 N.C. 607, 78 S.E. 2d 719; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Hendricks,* 207 N.C. 873, 178 S.E. 557.

In the instant case, the defendant made no request that the contents of the certified record of the status of his driver's license be limited to the portion or portions thereof relating to the status of his driver's license on the date he was charged with committing the offenses for which he was being tried. Hence, this assignment of error is overruled."

In the case of *State v. Briley,* 259 N.C. 137, 129 S.E. 2d 892 (1963), the Supreme Court, in a *per curiam* opinion, said:

"The State offered in evidence a certified copy of the official record (Form DL 49) of the North Carolina Department of Motor Vehicles, Drivers License Division, of defendant's convictions for violations of the motor vehicle laws and of the Department's actions on account thereof. According to this record, defendant's operator's license was permanently revoked on March 12, 1957. Defendant objected 'to the portion that is not germane to this inquiry' and excepted to the admission of said record over his said objection. Nothing appears in the record indicating defendant designated what portion(s) of said record he considered 'not germane to this inquiry.' Hence, for reasons stated in *S. v. Corl,* 250 N.C. 252, 108 S.E. 2d 608, the assignment of error based on said exception is overruled."

In the instant case the defendant, when he objected, made no request that the certified record of the status of his operator's license and driving privilege be limited in any way. In making his motion to strike, he did not specify any particular portion of the record to be stricken. In view of the holding of the Supreme Court in *State v. Corl, supra,* and *State v. Briley, supra,* the assignments of error based upon these exceptions are overruled.

The defendant's other assignments of error have been considered, and no prejudicial error is made to appear therein.

No error.

Judges PARKER and HEDRICK concur.

KATHERINE E. KIVETT SAMONS v. DOCTOR ASSAD MEYMANDI, DOCTOR HERBERT W. VICK AND FRANK CERUZZI

No. 7012SC494

(Filed 21 October 1970)

1. **False Imprisonment § 2; Insane Persons § 1— commitment to mental hospital — legal process — sufficiency of evidence**

In plaintiff's action for false imprisonment arising out of her commitment to a mental institution for a period of 12 days, the trial court properly directed verdicts in favor of the defendants who had incorrectly filled out an application for plaintiff's commitment by the superior court clerk, since the commitment order of the clerk was issued pursuant to the clerk's own knowledge of plaintiff's condition and not upon the application of the defendants; consequently, plaintiff's commitment under the clerk's order was based upon legal process and did not constitute false imprisonment. G.S. 122-62.

2. **Rules of Civil Procedure § 59— setting aside damages — discretion of trial court**

The trial judge has discretionary power to set aside an award of damages if he believes that the damages were excessive and given under the influence of passion or prejudice, or if the evidence is insufficient to justify the verdict.

3. **Appeal and Error § 54— review of discretionary rulings**

A ruling that is within the discretion of a trial judge may not be set aside except upon a showing of abuse of discretion.

4. **False Imprisonment § 3— setting aside award of damages**

In plaintiff's action for false imprisonment arising out of her commitment to a mental institution for a period of 12 days, action of the trial court in setting aside verdict awarding plaintiff $4000 compensatory damages and $25,000 punitive damages, *held* within the trial court's discretion, which will not be disturbed on appeal in the absence of an abuse thereof.

5. **Damages § 11— award of punitive damages**

Punitive damages may be awarded only where the wrong is done wilfully or under circumstances of rudeness, oppression, or in a manner which evinces a reckless and wanton disregard of the litigant's rights.

6. **Appeal and Error § 53— error cured by verdict**

Error in submitting issue of punitive damages to the jury was cured when the trial court set aside the verdict awarding punitive damages.

7. **False Imprisonment § 2; Insane Persons § 1— emergency commitment to mental hospital — absence of legal process**

In plaintiff's action for false imprisonment arising out of her commitment to a mental institution for a period of 12 days, the act

of defendant physician in committing plaintiff to Dix Hospital under the statutory emergency proceeding without complying with the statutory requirement that his statement as to plaintiff's condition be made under oath, *is held* to constitute a deprivation of plaintiff's liberty without legal process. G.S. 122-59.

8. **Insane Persons § 1— emergency commitment statute — manner of use**

The statute authorizing the emergency commitment of a mentally ill person is a drastic remedy and must be used with care and exactness.

APPEAL by Defendant Meymandi and Plaintiff Samons from *Hobgood, Judge of Superior Court,* March 1970 Civil Session of CUMBERLAND Superior Court.

Plaintiff instituted this action for false imprisonment and abuse of process arising out of her commitment to a mental institution for a period of 12 days.

On 18 March 1969 following a telephone conversation with an unidentified woman at the Cumberland County Mental Health Center, the Assistant Clerk of the Superior Court of Cumberland County issued an order directing the Sheriff to take the plaintiff to the Mental Health Center for the purpose of an examination to determine whether she should be committed to a mental institution. Pursuant to this order the plaintiff was taken into custody on the morning of 19 March 1969 and taken to the Mental Health Center for an examination. At the Mental Health Center the plaintiff was examined by the defendant Meymandi, who was the psychiatric director of the Center.

Subsequent to the examination of the plaintiff by defendant Meymandi at the Mental Health Center, the plaintiff was returned to the office of the Clerk of Superior Court of Cumberland County by the Deputy Sheriff. At this time there was on file in the office of the Clerk of Superior Court an application to procure the admission of the plaintiff into a psychiatric hospital for mental illness. This application was signed by the defendant Ceruzzi but had not been sworn to, and that portion of the application was in blank. The application was also signed by the defendant Meymandi and bore the date of 18 March 1969, and was notarized on the same date. It also bore the signature of the defendant Vick and was notarized on the 19th of March 1969. The medical questionnaire attached to the application was filled out as were two additional questionnaires pertaining to the history of the plaintiff; these last two questionnaires having been filled out by the Assistant Clerk of Superior Court.

In the office of the Clerk of Superior Court the plaintiff protested her commitment and advised the Clerk that the defendant Vick had not examined her and that she desired to be examined by her personal physician, and the plaintiff further agreed to be available for an examination by her personal physician, Dr. McFadyen, on 20 March 1969, and would abide by the advice and decision of Dr. McFadyen.

The Clerk of Superior Court on 19 March 1969 dismissed the proceeding for that the affidavit attached to the application had not been filled out properly, and the defendant Vick had not made an examination.

After signing the order dismissing the proceeding, another affidavit to procure admission into a psychiatric hospital for the plaintiff was received in the office of the Clerk of Superior Court. This affidavit was signed by the defendant Ceruzzi and indicated that it had been sworn to before a notary public on 19 March 1969. It was also signed by the defendant Meymandi and indicated that it had been sworn to before a notary public on 19 March 1969.

The Assistant Clerk of the Superior Court who had entered the order on 18 March 1969 to have the plaintiff taken to the Mental Health Clinic for an examination and who had been handling the matter, telephoned the defendant Meymandi and informed him that she had entered an order dismissing the proceeding and that the plaintiff desired to be examined by her own physician; that the Assistant Clerk had agreed to this proceeding, and that the plaintiff's own physician could not see her until the next day. She testified, "In response to that statement, Dr. Meymandi told me he couldn't afford to wait, she had made certain threats. He said she threatened to blow up the Mental Health Center and the Hospital Authority and that he could not afford to wait until the next day. He then told me that he was going to issue an emergency commitment." The Assistant Clerk informed the defendant Meymandi that this was all right with her as she had nothing to do with emergency commitments.

The defendant Meymandi then instituted emergency hospitalization procedures against the plaintiff by filling out and signing the appropriate forms as required by G.S. 122-59. In an affidavit pursuant to this procedure, he indicated that in his opinion the plaintiff was dangerous and that he had diagnosed

her mental condition as being "schizophrenic reaction, paranoid type." He also indicated that the plaintiff had previously been in a mental institution in 1960-61 at St. Elizabeth Hospital, Washington, D. C.

Pursuant to the emergency proceeding, the defendant Meymandi then telephoned the psychiatrist at Dorothea Dix Hospital in Raleigh to co-ordinate the admission of the plaintiff at that facility.

Pursuant to the emergency proceeding instituted by the defendant Meymandi, the plaintiff was taken into custody by a Deputy Sheriff of Cumberland County on 19 March 1969 and taken to Dorothea Dix Hospital in Raleigh where she was examined and treated with medication until her release on 31 March 1969.

The record discloses that plaintiff has had a long history of mental illness, and she has received medical treatment over a period of nine or ten years, and the defendant Meymandi was acquainted with this history.

For several days immediately preceding the hospitalization proceedings, the plaintiff had been picketing various public places in and around Fayetteville, including the Mental Health Center and the Hospital Authority. She had been carrying signs expressing her grievances against various officials including the defendants Meymandi and Ceruzzi.

At the close of plaintiff's evidence all three defendants moved for a directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure. A directed verdict was granted as to defendants Vick and Ceruzzi but was denied as to defendant Meymandi. The defendant Meymandi introduced no further evidence. Issues were submitted to and answered by the jury as follows:

"1. Did the defendant, Dr. Assad Meymandi, procure the detention of the plaintiff without legal process?

ANSWER: Yes.

2. If so, was the detention of the plaintiff caused by the willful and wanton conduct of the defendant, Dr. Assad Meymandi?

ANSWER: Yes.

3. What compensatory damages, if any, is the plaintiff entitled to recover?

ANSWER: $4000.00.

4. What punitive damages, if any, is the plaintiff entitled to recover?

ANSWER: $25,000.00."

The trial judge denied a motion of the defendant Meymandi to set aside the verdict and to have judgment entered in accordance with his previous motion for a directed verdict as to the first and second issues. The trial judge in his discretion, pursuant to Rule 59(a)(6) and (7) set aside the jury verdict as to the third and fourth issues for that they were excessive and were "given under the influence of passion, and there was an insufficiency of evidence to justify the damages given by the jury."

The defendant Meymandi appealed as did the plaintiff Samons.

Downing, Downing and David by Edward J. David for plaintiff appellant and plaintiff appellee.

Nance, Collier, Singleton, Kirkman and Herndon by James R. Nance and Butler, High & Baer by Ervin I. Baer for defendant appellant Meymandi.

Anderson, Nimocks & Broadfoot by Hal W. Broadfoot for defendant appellee Ceruzzi.

McCoy, Weaver, Wiggins, Cleveland & Raper by Richard M. Wiggins and Marion C. George, Jr., for defendant appellee Vick.

CAMPBELL, Judge.

[1] Plaintiff's first assignment of error is the granting of the directed verdict in favor of the defendants Vick and Ceruzzi. Plaintiff has specifically abandoned the claim of abuse of process and asserts only the claim of false imprisonment. In *Fowle v. Fowle,* 263 N.C. 724, 140 S.E. 2d 398 (1965), it is stated:

> " 'A cause of action for false arrest or false imprisonment is based upon the deprivation of one's liberty *without* legal process. . . .' "

Here the plaintiff was deprived of her liberty on two occasions. The first time was pursuant to the order under which the plaintiff was taken into custody and carried to the Mental Health Center for an examination. The order under which this was done was issued by the Assistant Clerk of Superior Court under the powers granted the Clerk by statute. G.S. 122-62 provides:

> "*Clerk to issue an order for examination.*—When an affidavit and request for examination of an alleged mentally ill person or alleged inebriate has been made, or when the clerk of superior court has other valid knowledge of the facts of the case to cause an examination to be made, he shall direct two qualified physicians who are not directly involved with the care and treatment of the patient in the hospital to which the person may be hospitalized, to examine the alleged mentally ill person or alleged inebriate. The Clerk is authorized to order the alleged mentally ill person or inebriate to submit to such examination, and it shall be the duty of the sheriff or other law enforcement officer to see that this order is enforced. . . ."

The record in this case shows that the Assistant Clerk issued the order on 18 March 1969 pursuant to which the plaintiff was taken into custody for the purpose of an examination. The statute permits the Clerk to issue the order upon his own knowledge, and the record shows that the Assistant Clerk did have sufficient knowledge and did issue the order. The fact that the defendants Vick and Ceruzzi had not made proper affidavits or examinations had nothing to do with the issuance of this particular order. Thus, on this occasion, the plaintiff was not deprived of liberty without legal process as the order under which she was taken into custody on this occasion was a legal process. The directed verdict in favor of defendants Vick and Ceruzzi was granted properly.

[2-4] Plaintiff next assigns as error the action of the trial judge in setting aside the verdict in regard to the compensatory and punitive damages. The judgment of the trial judge recited that he was acting under the discretionary authority granted in Rule 59 of the North Carolina Rules of Civil Procedure. Rule 59 provides:

> "(a) *Grounds.*—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> * * *

(6) Excessive or inadequate damages appearing to have been given under the influence or passion or prejudice;

(7) Insufficiency of evidence to justify the verdict or that the verdict is contrary to law;

* * * "

The trial judge has discretionary power to set aside an award of damages if he believes that the damages were excessive and given under the influence of passion or prejudice, or if the evidence is insufficient to justify the verdict. A ruling that is within the discretion of a trial judge may not be set aside except upon a showing of abuse of discretion, and there is no showing of abuse of discretion under the facts of this case.

[5, 6] The defendant Meymandi on his appeal presents the question as to the sufficiency of the evidence to allow the issue of punitive damages to be submitted to the jury. " 'Punitive damages may be awarded only where the wrong is done wilfully or under circumstances of rudeness, oppression or in a manner which evinces a reckless and wanton disregard of the litigant's rights.' " *Van Leuven v. Motor Lines,* 261 N.C. 539, 135 S.E. 2d 640 (1964). We are of the opinion that the evidence in this case did not justify the submission of the punitive damage issue to the jury. The error in submitting this issue to the jury was cured, however, when the trial judge set the verdict aside.

[7] The defendant Meymandi also presents the question as to whether the first issue was properly submitted to the jury. He contends that the emergency proceedings instituted by him constituted a legal process and that therefore the plaintiff was not deprived of her liberty without legal process. He contends that the statute need not be strictly complied with. He asserts that the statute is ambiguous and was intended only to authenticate the signature of the doctor signing. The pertinent part of the statute reads as follows:

". . . The physician's statement shall be sworn to before a person authorized to take acknowledgments or witnessed by a peace officer, and shall constitute authority, without any court action, for the sheriff or any other peace officer to take custody of the alleged homicidal or suicidal person and transport him immediately to the appropriate State hospital or other suitable place of detention. . . ." G. S. 122-59.

We are of the opinion that the statute is not ambiguous; that it is sufficiently broad to take care of any emergency situation and that the Legislature meant exactly what it says. Defendant Meymandi stated that he did not comply with the statute. He stated, "I presume I signed it in front of her, but I don't recall. I did not take an oath before her at the time I signed it; as I indicated earlier, this is not a customary thing to do every time you sign a form or appear before your secretary, to be sworn in; it is literally impracticable." Since the statute was not complied with, plaintiff was deprived of her liberty without legal process.

[8] Taking a person without the intervention of any court proceeding and simply upon a physician's statement to a State Hospital for examination and treatment is a drastic procedure. Handling mentally ill persons has frequently been by means of drastic procedures. At common law there was a right to detain a mentally ill person in order to protect such person from self-injury, and the public from injury at the hands of such deranged person. This doubtless accounts for the action of the Legislature in authorizing such an emergency commitment. The action of the Legislature supplanted the common law rule. As stated in *McMichael v. Proctor,* 243 N.C. 479, 91 S.E. 2d 231 (1956),

> "But the General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter."

There being a statute which provides for a drastic remedy, it is encumbent upon all that use it to do so with care and exactness, even though the user may think it "impractical."

The judgment of Judge Hobgood failed to grant a new trial as provided for in Rule 59(d) after setting aside the verdict, although in the judgment he recited he was acting on his own initiative pursuant to Rule 59(d). The plaintiff is entitled to a new trial on the issue of "What compensatory damages, if any, is the plaintiff entitled to recover?" To that end, this case is

Remanded.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES HENRY BROWN

No. 7010SC577

(Filed 21 October 1970)

1. **Forgery § 1— elements of forgery**

The three elements necessary to constitute the common law offense of forgery are: (1) a false making or other alteration of some instrument in writing; (2) a fraudulent intent; and (3) an instrument apparently capable of effecting fraud.

2. **Forgery § 2— instrument capable of effecting a fraud — deed of trust subordination agreement**

Defendant's forgery of a signature on a deed of trust subordination agreement constituted the forgery of an instrument capable of effecting a fraud, where (1) the subordination agreement, if the signatures were genuine, would have been valid and enforceable against the persons whose signatures were forged and (2) the agreement was capable of misleading a lending institution to its prejudice.

3. **Evidence § 3— matters of common knowledge**

It is common knowledge that before advancing funds to be secured by a mortgage on real estate, parties often insist on supplementary instruments which clarify title to the property or specifically establish the priority of the mortgage.

APPEAL from *Bailey, J.*, 21 May 1970 Session of WAKE County Superior Court.

Defendant was tried under a bill of indictment charging him in separate counts with forgery and with the uttering of a forged document.

The State presented evidence which tended to show the following:

On 8 May 1964 Zebulon E. Helms and wife, Ethel A. Helms (Mr. and Mrs. Helms), executed and delivered to Raleigh Savings and Loan Association (Raleigh Savings) a deed of trust on a certain parcel of real estate located in Wake County and owned by them. The deed of trust secured a note in the amount of $14,700. It was recorded on 20 May 1964 in Book 1597, Page 281 of the Wake County Registry. In June of 1966 Mr. and Mrs. Helms conveyed the property to John B. Monday and wife, Mavis R. Monday (Mr. and Mrs. Monday). To secure all or a portion of the purchase price, Mr. and Mrs. Monday executed and delivered a deed of trust in favor of Mr. and Mrs. Helms. This deed of trust was recorded on 10 June 1966 in Book 1718, Page

297 of the Wake County Registry. Thereafter the property was conveyed by Mr. and Mrs. Monday to defendant and his wife, Geraldine G. Brown, who expressly assumed the obligation of the deed of trust to Raleigh Savings and executed and delivered a deed of trust on the property to Mr. and Mrs. Monday, securing an indebtedness of $6,500. This deed of trust was recorded on 1 September 1967 in Book 1783, Page 409 of the Wake County Registry.

On or about 6 November 1969 defendant delivered to Mr. Monday an instrument entitled "Subordination Agreement" for the purpose of having it executed by him and Mrs. Monday. The instrument provided that in consideration of $10 Mr. and Mrs. Helms and Mr. and Mrs. Monday agreed that their deeds of trust, referred to above, were therein subordinated to a renewal deed of trust from defendant and wife to Raleigh Savings, "with the full understanding that the renewal deed of trust constitutes a first lien on said property and takes precedent over the deeds of trust held by us as referred to herein." At the time the instrument was delivered by defendant to Mr. Monday, signatures, purporting to be those of Mr. and Mrs. Helms, were affixed thereto. Also, a notary certificate appearing on the instrument and certifying that Mr. and Mrs. Helms had appeared and acknowledged the execution of the agreement, had been signed and notarial seal affixed by Betty J. Bynum, an employee of Brown Property Management, Inc. Defendant represented to Mr. Monday that the instrument had been signed by Mr. and Mrs. Helms.

Mr. and Mrs. Helms denied that the signatures appearing on the document were theirs. Betty J. Bynum, the notary public who had purported to take their acknowledgment, stated that she did not see Mr. and Mrs. Helms sign the instrument. It had been left on her desk by Mr. Brown [defendant] with a note on it for her to notarize Mr. and Mrs. Helms' signatures.

Without objection by defendant, Mr. Charles L. Fulton, attorney for Mr. and Mrs. Monday, testified at length as to his understanding of the legal significance of the purported agreement, stating that had it been completed, subsequent advances made by Raleigh Savings would have taken precedence over the deeds of trust of Mr. and Mrs. Helms and Mr. and Mrs. Monday; otherwise their deeds of trust would have had priority over subsequent advances made by Raleigh Savings.

At the close of the State's evidence defendant moved for judgment as of nonsuit as to both counts in the bill of indictment. His motion was allowed as to the uttering count and denied as to the count charging forgery. Defendant offered no evidence. The jury returned a verdict of guilty of forgery. Judgment was entered thereon imposing a prison sentence of four months, suspended for a period of three years upon condition that defendant pay the cost and abide by certain probationary conditions. Defendant appealed.

Robert Morgan, Attorney General, by William Lewis Sauls, Staff Attorney, for the State.

Tharrington & Smith by Roger W. Smith for defendant appellant.

GRAHAM, Judge.

Defendant's sole assignment of error is to the court's denial of his motion for nonsuit as to the forgery count.

[1, 2] The common law definition of forgery obtains in this State since the statutes relating to forgery do not define it. *Trust Co. v. Casualty Co.*, 231 N.C. 510, 57 S.E. 2d 809. Three elements are necessary to constitute the offense: (1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. *State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22; *State v. Keller*, 268 N.C. 522, 151 S.E. 2d 56; *State v. Phillips*, 256 N.C. 445, 124 S.E. 2d 146; *State v. Diggs*, 6 N.C. App. 732, 171 S.E. 2d 230. Defendant does not challenge the sufficiency of the State's evidence to establish the first two necessary elements. He contends, however, that the third element is lacking because the subordination agreement could not affect the rights or liability of any party.

The subordination agreement is unquestionably a genuine document, save for the falseness of the signatures of Mr. and Mrs. Helms. Defendant's argument that it could not affect the rights or liabilities of anyone is based, not upon the terms of the instrument itself, but upon the terms of the original deed of trust from Mr. and Mrs. Helms to Raleigh Savings. The language relied upon is as follows:

> "[A]nd provided further that the note hereinbefore described and all such subsequent loans and advances, costs

and expenses shall mature and become due and payable not later than twenty years from the date hereof, it being understood and agreed that if any note, loan, advance or other obligation secured hereby, whether representing the initial indebtedness or additional advances, is reduced by partial payments, *further loans or advances may be made by the Association, at its election, to the parties of the first part upon request by them within the maximum amount and within the time limit above set forth, and such further obligations or advances shall be secured hereby to the same extent as the original indebtedness hereunder. . . .*" (Emphasis added).

Defendant reasons that the above language gives Raleigh Savings the right to make advances up to the original amount of the loan, and that when made, the future advances relate back under the original deed of trust, and take priority over any intervening encumbrances. Simply stated, defendants contend that the instrument in question, if genuine, would have given Raleigh Savings no rights in addition to those which it already had under its original deed of trust; nor would it have operated to the prejudice of the holders of the intervening deeds of trust since their security was already subordinate to future advances made by Raleigh Savings under the terms of its first deed of trust.

The State argues the case solely on the grounds of defendant's contention. It contends that any future advances made under Raleigh Savings' first deed of trust would not have related back and taken priority over the intervening deeds of trust, unless subordinated by a genuine instrument such as the one allegedly forged by defendant. The State cites G.S. 45-70(b) in support of its position. Defendant counters saying that the provisions of that statute are inapplicable to the situation here; and further, that G.S. 45-70(b) became effective on 1 October 1969 and cannot affect the rights and liabilities established by deeds of trust which were recorded prior to that date.

Thus, the parties have presented us with a question of real estate law, presumably of first impression in this jurisdiction, as determinative of the issue raised on this appeal. We do not, however, view the question presented as essential to a determination of whether the instrument here in question could be the subject of forgery.

In 36 Am. Jur. 2d, Forgery, § 24, p. 693, it is stated:

"A writing or instrument in order to constitute a forgery must possess some apparent legal efficacy. It is sufficient, however, to constitute a forgery if there is a reasonable possibility that the false writing or instrument may operate to cause injury, although no actual injury therefrom is necessary."

In accord: *State v. Cross and White,* 101 N.C. 770, 7 S.E. 715, Aff'd., *Cross v. N.C.,* 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287.

[3] It is common knowledge that before advancing funds to be secured by a mortgage on real estate, parties often insist on supplementary instruments which clarify title to the property or specifically establish the priority of the mortgage. This is true even where the rights and priorities of the parties could be established without the assistance of any supplementary instrument. This wise practice should be encouraged. A quit claim deed or a clarifying agreement can often prevent an expensive and time consuming lawsuit. This case is an illustration. If Raleigh Savings had made advances solely relying on the language of their first deed of trust, it would have been inviting a future dispute as to the priority of the advances. That this is so is illustrated by the uncertainty which surrounds the question of the priority of mortgages to secure future advances. (See generally Note, Mortgages to Secure Future Advances, 31 N.C.L. Rev. 504; Note, Registry of Subsequent Encumbrance as Notice to Prior Mortgagee in Mortgage to Secure Future Advances, 6 Va. L. Rev. 280; Osborne, Mortgages, §§ 116, 118, 119). It is also illustrated by the testimony of the attorney for Mr. and Mrs. Monday. He clearly interpreted the instrument in question as necessary in order to establish the legal priority of any advances made by Raleigh Savings subsequent to the recordation of its first deed of trust. The Attorney General strenuously advances the same interpretation. Under these circumstances we cannot hold that there was no reasonable possibility that the instrument in question, if genuine, could operate to cause injury.

In *People v. Munroe,* 100 Cal. 664, 35 P. 326, the instrument alleged to have been forged was an assignment of the unearned salary of a school teacher. It was conceded that such an assignment was void and unenforceable in court. The court held that the writing could nevertheless be the basis of a charge of forgery. The court observed: "For the purposes of the case, we conceded

at the outset that this instrument would be declared void by a court as against public policy; but, if that question were a live issue in the case, this contract might be declared valid upon the ground that a teacher in the public schools is not a public officer. Certainly, the law as to that point is not so plain but that an ordinary layman, in the exercise of the greatest care, might not be defrauded in taking an assignment of a public school teacher's unearned salary."

In *People v. Gayle,* 202 Cal. 159, 259 P. 750, defendant contended that certain contracts for the sale of land could not be subjects of forgery because they were unrecorded and therefore unenforceable. In rejecting his contentions, the court quoted from *People v. Munroe, supra,* where it was said: "To declare the law to be that all contracts which are not enforceable, because against the policy of the law, are not the subject of forgery, would be offering a *carte blanche* to the professional forger, of which he would not be slow to take advantage. . . ."

Other cases which emphasize that the determinative factor is a possibility that the instrument may operate to cause injury, rather than its technical legal effect, include the following: *Earnest v. State,* 40 Ala. App. 344, 113 So. 2d 517; *Hall v. State,* 31 Ala. App. 455, 18 So. 2d 572; *People v. Morgan,* 140 Cal. App. 2d 796, 296 P. 2d 75; *People v. Baker,* 100 Cal. 188, 34 P. 649; *Allgood v. State,* 87 Ga. 668, 13 S.E. 569; *State v. Van Auken,* 98 Iowa 674, 68 N.W. 454; *State v. Reed,* 141 Mo. 546, 42 S.W. 1149; *State v. Daems,* 97 Mont. 486, 37 P. 2d 322; *State v. Brett,* 16 Mont. 360, 40 P. 873; *Commonwealth v. Wheeler,* 200 Pa. Super. 284-300; *Commonwealth v. Brown,* 96 Pa. Super. 13; *Honeycutt v. State,* 150 Tex. Crim. 140, 199 S.W. 2d 657; *Carter v. State,* 135 Tex. Crim. 457, 116 S.W. 2d 371; *King v. State,* 42 Tex. Crim. 108, 57 S.W. 840; *Gordon v. Commonwealth,* 100 Va. 825, 41 S.E. 746; *Hendrick v. Commonwealth,* 32 Va. (5 Leigh) 707; *Lurye v. State,* 221 Wis. 68, 265 N.W. 221.

[2] The instrument in question here would have been valid and enforceable against Mr. and Mrs. Helms, had their signatures been genuine. It would have served as conclusive evidence of the rights of Raleigh Savings, rendering it unnecessary for Raleigh Savings to rely upon the uncertain legal effect of its first deed of trust. "An instrument in writing of which forgery can be predicated is one which, if genuine, could operate as the foundation of another man's liability or *the evidence of his rights.* . . ." (Emphasis added). *Barnes v. Crawford,* 115 N.C.

76, 78, 20 S.E. 386, 387. The instrument here, because of its nature, was capable of misleading Raleigh Savings to its prejudice, irrespective of its ultimate legal effect with respect to the priority of the various deeds of trust. "If, therefore, the false and fraudulent paper writing be such as that it might, from its nature, and the course of business, deceive or mislead to the prejudice of another person, the offense of forgery would be complete." *State v. Covington*, 94 N.C. 913.

We have not overlooked the authorities relied upon by defendant. *Barnes v. Crawford, supra,* was a civil action for slander. The defendant (a candidate for Congress) was alleged to have accused plaintiff of signing defendant's name to a card which called for certain congressional action. The court held that the card could not be the subject of forgery. It is obvious that the representations contained on the card could have had no possible legal effect. In *State v. Gherkin,* 29 N.C. 206, the defendant, who was co-maker of a note, was charged with falsely signing the name of a witness. The court noted that the instrument in question did not require a subscribing witness and no one could be defrauded if the witness' signature were false. The false signature would have operated to no one's prejudice unless, of course, the signature of the defendant had been false. In *State v. Lytle,* 64 N.C. 255, the bond allegedly forged was void on its face. We conclude that the factual situations in each of these cases are clearly distinguishable from the facts of the case now before us.

In our opinion the State established that the written instrument was "apparently capable of effecting a fraud" within the meaning of that phrase as interpreted by the various authorities cited herein. We conclude therefore that the trial judge correctly overruled defendant's motion for judgment as of nonsuit as to the forgery count.

No error.

Judges BROCK and MORRIS concur.

RALEIGH-DURHAM AIRPORT AUTHORITY v. GEORGE STEWART AND CLYDE LEASING, INC., TRADING AND DOING BUSINESS AS BUDGET RENT-A-CAR

No. 7010SC552

(Filed 21 October 1970)

Aviation § 1; Carriers §§ 2, 13— airport authority — control of airport premises — right of car rental firm to pick up passengers

An airport authority cannot exclude an automobile rental firm from coming upon the airport property for the sole purpose of picking up or delivering airline passengers pursuant to the specific request of the passengers, who are lessees of the firm, since the personal right of the passengers to select their own means of transportation to and from the airport is paramount to the right of the airport authority to grant an exclusive franchise to passenger carriers.

APPEAL by defendants from *Bailey, Judge* of Superior Court, June 8, 1970 Civil Session, WAKE Superior Court.

Plaintiff (Airport Authority) filed a complaint against the defendants (Budget) seeking injunctive relief and monetary damages for an alleged continuing trespass by Budget upon the property of Airport Authority. Airport Authority is a municipal corporation chartered by Public Local Laws of 1939, Chapter 168.

The basic facts were stipulated and are summarized as follows:

Airport Authority has the power and authority to supervise and administer the Airport premises which are owned by the City of Raleigh, the City of Durham, the County of Wake, and the County of Durham. The land, upon which the terminal building, parking areas, airplane landing areas and approaches to the premises are situated, was all purchased with public funds derived from other than tax sources and from funds derived from the operation of the several concessions and businesses operated thereon. The Airport Authority has contracted with three companies and authorized them to engage in the business of renting automobiles for hire at the airport in return for a guaranteed annual amount, plus a percentage of the gross receipts from the rentals. Each of these companies rents space from the airport for the storage of automobiles and for loading and unloading passengers and baggage in and from the cars rented by them. None

of these companies use the loading and unloading facilities at the airport, but are required to use other specified areas. Each of these companies maintains space for soliciting business from the public using the airport facilities.

Budget leases automobiles to individuals for a base rental fee, plus a mileage charge. It is part of a national organization operating locally on a franchise basis. It maintains a rental operation in Charlotte, Greensboro, Fayetteville and Raleigh-Durham and rents automobiles to anyone meeting its standards, which includes an acceptable driver, license, and financial responsibility. It maintains its headquarters on a tract of land located on a public road on the perimeter of the airport premises and stores on this land the cars to be rented in the Raleigh-Durham area. Budget has been leasing automobiles from this location since the Fall of 1968 and is not affiliated with or under contract to any airline. The contract of rental with Budget is evidenced by a written instrument signed by the lessee or by the exhibition of an approved credit authorization. The contract is consummated by a number of ways: (1) The lessee may appear in person at the place of business of Budget, sign several documents and accept delivery of the leased automobile; (2) The lessee may call from a public telephone from the airport for an automobile; Budget, upon receipt of the call, sends an employee with an automobile to the airport terminal, locates the prospective lessee and takes him to Budget's place of business to sign the necessary documents; (3) The lessee may make arrangements prior to arrival at the airport in which event the procedure for completing the lease documents is identical to the procedure in (2). At the termination of the lease, the lessee returns the car to Budget, and is then transported to the terminal by an employee of Budget. The transportation of the lessee to and from the terminal and premises of Budget is usually accomplished in the automobile which is the subject of the lease. Occasionally, an automobile will be left in the vicinity of the terminal to be picked up by an employee of Budget. In carrying out the above arrangements, Budget uses the driveways, waiting areas and parking facilities provided for passenger use at the terminal. Budget has no contract or authorization from the Airport Authority to use its facilities, and in fact has been specifically forbidden to do so. Budget advertises its business in news media and signs which are located off the Airport Authority premises.

The trial judge made findings of fact basically similar to those set forth above and specifically "[t]hat the roadways, park-

ing areas, loading areas, and Terminal Building at the Raleigh-Durham Airport were constructed and are maintained by the Raleigh-Durham Airport Authority for the use of travelers using the Airport and persons having business with the Airport Authority, its licensees and concessionaries, and their use is not authorized for the operation of any private business not authorized by the Authority."

The trial court concluded as a matter of law that the action of Budget "constitutes a continuing trespass on the property of the Raleigh-Durham Airport and a continuing use of the property of the Airport for its private business purposes without its permission and in defiance of its notice to the contrary." The trial court thereupon permanently enjoined Budget and hence this appeal.

Purrington & Purrington by A. L. Purrington, Jr., for plaintiff appellee.

Tally, Tally and Bouknight by J. O. Tally, Jr., and J. A. Bouknight, Jr., for defendants appellants.

CAMPBELL, Judge.

This appeal presents a problem of first impression in this jurisdiction. It is therefore deemed appropriate to review the historical background and decisions from other jurisdictions.

In earlier days and with other modes of public transportation, similar problems were incurred. Hack drivers and baggage transfer companies vied with each other for passenger patronage at railroad terminals and similar facilities used by the traveling public. Frequently, this resulted in such confusion and annoyance to travelers that some limitation on free enterprise was thought desirable. Even so, a strong minority took the view that it was against public policy to infringe on free enterprise in any way. The majority view, however, was to the effect that it was not against public policy to grant an exclusive franchise. The leading case, *Black and White T. & T. Co. v. Brown and Yellow T. & T. Co.*, 276 U.S. 518, 48 S.C. 2d 404, 72 L. Ed. 681, 57 A.L.R. 426 (1928) reveals the conflicting views. In that case a railroad operating a large city railroad passenger terminal gave an exclusive franchise to one taxicab company to serve the station. Another taxicab operator sought to declare the franchise invalid. Mr. Justice Butler, in writing the majority opinion, stated:

". . . The privilege granted to respondent does not impair the railroad company's service to the public or infringe any right of other taxicab men to transport passengers to and from the station. While it gives the respondent advantage in getting business, passengers are free to engage anyone who may be ready to serve them. The carrying out of such contracts generally makes for good order at railway stations, prevents annoyance, serves convenience and promotes safety of passengers. . . ."

It is thus seen that this position does not prevent other taxicab companies from coming onto and off the premises. They are only prohibited from soliciting business on the premises.

In *Skaggs v. Kansas City Terminal Ry. Co.*, 233 F. 827 (1916), the Federal District Court for the Western District for Missouri upheld an exclusive franchise to certain hacks to serve the Union Terminal. In sustaining the exclusive franchise, the court called attention to the fact that

". . . Adequate provision is made in the contract for all the needs of the traveling public in this regard. Manifestly, out-going passengers are in no wise affected, because plaintiffs and others have the conceded right to enter upon the premises of the Terminal Company for the purpose of actual delivery of passengers and baggage. They also have the right to receive passengers and baggage for whose transportation they shall have already received orders. The freedom of all parties to take their stands upon appropriate public places outside the limits of the premises of defendant Terminal Company affords to the public generally, including all incoming passengers, every opportunity to avail itself of their services, should it so desire. . . ."

Thus, again, the court recognized the right of members of the traveling public to select their own mode of conveyance.

In *Mader v. Topeka,* 106 Kan. 867, 189 P. 969, 15 A.L.R. 340 (1920), a city ordinance prohibiting taxicabs from creating a stand on a street unless the abutting property owner had given consent for such a stand was held valid with the court pointing out:

". . . It will be observed that this consent is not required for the purpose of passing over the streets, nor for stopping to discharge a passenger or to take on a passenger; it for-

bids the establishment of a hackstand by the proprietor of a taxicab or hack in any portion of a public street without first obtaining the written consent of the abutting owner. . . ."

Likewise, in the case of *Thompson's Express & Storage Co. v. Mount,* 91 N.J. Eq. 497, 111 A. 173, 15 A.L.R. 351 (1920), an exclusive franchise given by a railroad to one cab company was held valid, and other cab companies could not complain, the court saying:

". . . No right of a passenger is here infringed, since it is entirely open to passengers to employ any cabmen they wish. The injunction only prohibits soliciting on the station platform. . . ."

In the case of *Miami Beach Airline Service v. Crandon,* 159 Fla. 504, 32 So. 2d 153, 172 A.L.R. 1425 (1947), the Dade County Port Authority, which had control of the Miami International Airport, granted an exclusive concession to a limousine operator. A bus operator sought to compete with the limousine operator by offering service to and from the airport terminal. The Authority sought and obtained a restraining order restraining the bus operator from soliciting passengers for hire within the public airport premises and from loading passengers for hire on its buses on such premises and thus prohibited the bus operator from even entering the airport premises. This case, however, is not authority for prohibiting a for-hire vehicle entering the premises of the Airport Authority in answer to a specific request by a member of the traveling public using the airport terminal facilities. This case is only authority for the right of the Airport Authority to grant an exclusive franchise and prohibit competitors from soliciting business at the airport terminal. To like effect, see *North American Co. v. Bird,* 61 So. 2d 198, (Fla. 1952).

In *Rocky Mountain Motor Co. v Airport Transit Co.,* 124 Colo. 147, 235 P. 2d 580 (1951), an ordinance of the City of Denver granting an exclusive franchise to one taxicab company to serve the airport premises was sustained, but the court pointed out that the ordinance itself provided that any other taxicab company could convey passengers to and from the airport so that the rights of passengers would not be infringed. To like effect, see *Patton v. Administrator of Civil Aeronautics,* 217 F. 2d 395

(1954); *Friend v. Lee,* 221 F. 2d 96 (1955); *U. S. v. Jenkins,* 130 F. Supp. 808 (1955).

It is thus seen that there has developed a split of authority with regard to granting an exclusive franchise to one or a few taxicab companies to handle the business of passengers patronizing the terminal of a carrier. The majority of the jurisdictions considering the matter have sustained the right of granting an exclusive franchise, but even those jurisdictions have not prohibited a member of the traveling public from selecting someone else when desired. In other words the rights of the traveling public to select a taxicab, even though such cab has no concession or franchise to operate at the terminal, are paramount to the right of the terminal owner in granting exclusive franchises.

North Carolina has considered one aspect of the matter and has followed the majority rule to the extent of recognizing the validity of an exclusive franchise. In *Harrelson v. Fayetteville,* 271 N.C. 87, 155 S.E. 2d 749 (1967), the Supreme Court of North Carolina upheld the validity of an exclusive franchise arrangement and in so doing held that this was a proprietary function and not a governmental function.

This case, however, does not hold that the personal rights of a member of the traveling public, using the facilities of the airport terminal, may be infringed upon to the extent that the Airport Authority in the instant case is attempting.

The Airport Authority can supervise and control mercantile engagements such as would require occupancy of space or use of facilities on the premises of the airport in a manner more burdensome than or otherwise different from that accorded to a member of the traveling public. The Airport Authority has no right, however, to restrict a member of the traveling public in his personal rights. A traveler in his personal rights can arrange to be met by someone of his selection to transport him to and from the airport terminal.

In the instant case Budget is doing an act in the performance of a personal right of and for a passenger, a member of the traveling public, and the Airport Authority has no right to limit or restrict this. The mere fact that the incoming passenger has not yet signed the necessary documents before getting into the automobile brought to the terminal by Budget is not sufficient to validate what the Airport Authority is attempting to accomplish in the instant case.

The case of *Griswold v. Webb,* 16 R.I. 649, 19 A. 143, 7 L.R.A. 302 (1889), is directly in point. In that case, contrary to the rules and regulations of a public wharf, a hackney carriage drove up to a place, reserved for those with a license, for the purpose of picking up a passenger coming in on the boat. The passenger had ordered this particular hackney to pick him up. The court held that while ordinarily an exclusive franchise is recognized, nevertheless,

> ". . . the company cannot deprive a passenger of the ordinary rights and privileges of a traveler, among which is the privilege of being transported from the terminus in a reasonably convenient and usual way. A company cannot compel a passenger to take one of several carriages, or none at all; nor impose unreasonable restrictions which will amount to that. If a passenger orders a carriage to take him from the terminus, such carriage is, *pro hac vice,* a private carriage; not in the sense that the passenger has a special property in it, so as to be liable for the driver's negligence, but in the sense that it is not 'standing for hire.' . . . The driver is not engaged in his vocation of soliciting patronage, but is waiting to take one with whom a contract has already been made. No question is made that a passenger may have his own carriage enter the premises of a carrier to take him away; but to say that one who is not so fortunate as to own a carriage shall not be allowed to call the one he wants, because it is a hackney carriage, would be a discrimination intolerable in this country. . . ."

In the instant case we hold that the activities of Budget in going to and from the airport terminal to pick up and discharge airplane passengers, using the terminal and the public transportation facilities served by said terminal, are activities pertaining to personal rights of the passengers and beyond the authority of the Airport Authority to control as sought in this case.

The act of picking up a passenger who has requested or reserved a rent-a-car does not involve solicitation on the airport premises. The solicitation has obviously already occurred or the passenger would not have called in the first place. Therefore, we are of the opinion and so hold that the defendant Budget cannot be excluded from the airport property when its sole pur-

pose of going on there is to pick up or deliver a passenger pursuant to the specific request of that passenger.

Reversed.

Judges BRITT and VAUGHN concur.

ROBERT McKINDLEY PERGERSON, SR., ADMINISTRATOR OF THE ESTATE OF ROBERT McKINDLEY PERGERSON, JR. v. JAMES WILLIAMS

No. 7010SC311

(Filed 21 October 1970)

1. **Rules of Civil Procedure §§ 41, 50— judgment of dismissal — trial with jury**

Where judgment of involuntary dismissal in a trial before a jury was improperly entered under Rule 41(b), which is applicable only in a trial by the court without a jury, the Court of Appeals treated the judgment of dismissal as having been entered pursuant to a motion for a directed verdict under Rule 50(a).

2. **Rules of Civil Procedure § 50— motion for directed verdict — absence of specific grounds — review on appeal**

Where the trial court grants a directed verdict upon a motion which failed to state specific grounds therefor, the adverse party who did not object to the failure of the motion to state specific grounds cannot raise such objection on appeal. Rule 50(a).

3. **Rules of Civil Procedure § 50— motion for directed verdict — former procedure**

In determining the sufficiency of plaintiff's evidence to withstand defendant's motion for a directed verdict in a jury case, the trial court and the Court of Appeals are guided by the same principles that prevailed under the former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit.

4. **Rules of Civil Procedure § 50— motion for directed verdict — consideration of evidence**

On motion for a directed verdict, all evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving to plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor.

5. **Automobiles § 63— negligence in striking three-year-old child — sufficiency of evidence**

In an action to recover for the wrongful death of a three-year-old child who was struck by the defendant's automobile on a street, the

trial court properly granted the defendant's motion for a directed verdict where (1) there was no evidence of excessive speed or that defendant failed to keep his car under reasonable control, (2) defendant did not see the child until immediately prior to the impact, (3) and it was a matter of conjecture whether the child had been visible in or near the street for a sufficient length of time to put a reasonably careful driver on notice of the child's presence.

Judge VAUGHN dissents.

APPEAL by plaintiff from *Bailey, J.*, 7 January 1970 Civil Session of WAKE Superior Court.

Civil action to recover damages for the wrongful death of a three-year-old child.

At the trial before judge and jury the parties stipulated: The child died as a result of injuries received when he was struck about 5:30 p.m. on 5 October 1967 by an automobile being driven by defendant in a northerly direction on South Main Street just inside the southern limits of the Town of Wake Forest, N. C. South Main Street runs generally north and south, and the official speed limit at the time and place was 35 miles per hour. The width of the traveled portion of the street was about 32 feet. Parallel parking was permitted on the west side of the street, outside of the main traveled portion. At the time of the accident it was daylight, the weather was clear, and the road was dry.

Plaintiff's evidence tended to show: South Main Street where the accident occurred was level, straight, and paved, and had curbs and gutters. Along the east side of the street there was a concrete sidewalk, approximately five-feet wide, which was separated from the east curb of the street by a grassed area, which was also approximately five-feet wide. The child lived with his parents in a basement apartment in a house on the east side of the street. The entrance to the apartment was in the back yard. There was a front yard, which extended from the front of the house for a distance of about 35 feet to the east edge of the sidewalk. There were no trees or bushes in the front yard. Out near the street and in the grassed area between the sidewalk and the curb there was one tree about eight inches in diameter and a telephone pole right by the tree. There was a covered guy wire coming down from the pole, with a metal guard around it about four-inches wide. On the south side of the front yard there was a driveway leading to the back yard. On the north side of the driveway there was a City Limits sign, which was on a four-by-four post and was five or six feet up in the air.

On the City Limits sign there was also a sign saying "Bird Sanctuary." The City Limits sign was in line with the pole and the tree. Other than the City Limits sign, the telephone pole and guy wire, and the tree, there were no obstructions either in the grassed area, the sidewalk, or front yard. The sidewalk and the grassed area ended at the driveway, and south of the driveway there was an Army Surplus Store. Across the street was a service station and a dentist's office. There was a painted line on South Main Street approximately ten feet from the east side.

On the afternoon of the accident the child and his father had been playing in the back yard while the mother was at work. The father went into the house to the bathroom, leaving his son playing in the back yard and telling the child to wait on the patio for him and that he would be back in a minute. The father heard tires "squalling," ran to the back yard, then to the front yard, and saw his son lying in the street. The child died in the hospital on the next day.

Defendant, called as a witness for plaintiff, testified in substance, except where quoted, as follows: About 5:30 in the afternoon on 5 October 1967 he was driving a 1960 Chevrolet automobile in a northerly direction in the Town of Wake Forest. He was coming from work and was going into Wake Forest to pick up a newspaper. He had driven on this street before and knew what type of businesses were on that street. He knew there was an Army Surplus Store and Dr. Underwood's office and homes on the street. He knew there was a school on South Main Street just north of this area and that there was a fenced-in playground in the area of the school. He did not see any cars parked on the east side of South Main Street and didn't remember seeing any cars in front of the Army salvage store. He didn't remember seeing any cars parked in the drive next to the house and didn't know if there were any cars parked on the left side of the street. There was no traffic in his lane in front of him nor any oncoming traffic. He did strike the little boy with his car. When he saw him for the first time, "[a]ll at once he just appeared up in front of my automobile, just about the length of my car, just about that distance from him. Looked like to me he was right on top of my hood I was so close. I was probably about a car length." He didn't have any idea how wide the northbound lane was and didn't know how wide his car was. He was in the center of the lane. Other than the little boy, there was no person or anything else in the street. The windshield of his car was clear, it was not raining, and the windshield was not

cracked and did not have any paper or obstruction of any kind on it. "When the boy appeared up on the hood of my automobile he was right in the middle of the street." When he saw him for the first time the boy's head was down under the hood and defendant couldn't tell where the boy was running, but his head was bouncing up and down. He did not know why he didn't see the boy between the curb and the time he was to the middle of his car. He did not know if the boy was on the left or the right side of the street. The only time he saw him was when he was in the middle of the street. He knew of no reason that would have kept him from seeing the boy "unless it would have been those trees and things, telephone post, could have been around behind those trees; phone posts or something of that sort. There is some bushes or something along there too. I could see probably three or four hundred yards, maybe five, six, almost straightaway, no curves."

The investigating police officer testified in substance as follows: He found defendant's car sitting next to the curb on the east side of the street. Defendant told him the car had not been moved from the time it stopped after the collision until the officer arrived. There were marks on the street leading up to the automobile. One black mark, about two or two and a half feet long, led up under the right rear wheel. Other broken skid marks went back for a total of twenty-three feet to where the officer's investigation showed the child was hit. There were other skid marks in line with the one behind the car. He measured sixty-seven feet of skid marks with broken places, but, except for the two feet which led right under the wheel of defendant's car, he did not know whether they came from defendant's car. Defendant told him that the first time he saw the child was when he was on the front of his hood and radiator of his car. He inspected the car for damage and found a small place about the middle where the hood comes down on the radiator.

On cross-examination the officer testified he did not find any evidence of excessive speed, that the car was stopped just about where the child was struck, and that was right at the point of a tree and a telegraph pole.

At the close of plaintiff's evidence the court entered judgment that the case "be dismissed under Rule 41(b), that a judgment of involuntary dismissal be entered herein."

Plaintiff appealed, assigning as error "the ruling of the Court in granting the defendant's motions for judgment as of

nonsuit," and "the signing and entry of the judgment dismissing the plaintiff's action."

Hubert H. Senter and Boyce, Mitchell, Burns & Smith, by Eugene Boyce for plaintiff appellant.

Maupin, Taylor & Ellis, by Armistead J. Maupin for defendant appellee.

PARKER, Judge.

[1] The judgment appealed from recites it was entered under Rule 41(b). Except for dismissal for failure of plaintiff to prosecute or to comply with the rules of civil procedure or an order of court, which are clearly inapplicable here, Rule 41(b) deals with motions for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief *in an action tried by the court without a jury.* G.S. 1A-1, Rule 41(b). The present case was tried before judge and jury. Therefore, the reference in the judgment to Rule 41(b) was not appropriate. Federal courts, applying cognate Federal Rules of Civil Procedure, have held that "[w]here a motion for dismissal is made pursuant to Rule 41(b) in a jury case, it may properly be treated as a motion for a directed verdict under Rule 50(a)." *Wolf v. Reynolds Electrical & Engineering Co.,* 304 F. 2d 646 (9th Cir. 1962); accord, *Sano v. Pennsylvania Railroad Company,* 282 F. 2d 936 (3rd Cir. 1960); *Carroll v. Seaboard Air Line Railroad Company,* 371 F. 2d 903 (4th Cir. 1967); *Cranston Print Works Co. v. Public Service Co. of N. C.,* 291 F. 2d 638 (4th Cir. 1961); see, 2B Barron and Holtzoff, Federal Practice and Procedure, § 1074, p. 371. We shall also treat the judgment of dismissal in the present case as having been entered pursuant to a motion for a directed verdict under Rule 50(a) of the Rules of Civil Procedure.

[2] Rule 50(a) expressly requires that a motion for a directed verdict "shall state the specific grounds therefor." The record before us does not affirmatively disclose that specific grounds were stated for defendant's motion. However, plaintiff did not object at the trial to the failure of defendant to state specific grounds for his motion. "If the court denies a motion for a directed verdict which fails to state the specific grounds for the motion, the moving party may not complain of the denial on appeal. Conversely, if such a motion is granted, the adverse party who did not object to failure of the motion to state specific

grounds therefor cannot raise such objection in the appellate court." 2B Barron and Holtzoff, Federal Practice and Procedure, § 1073, p. 370; accord, *Cox v. City of Freeman, Missouri*, 321 F. 2d 887 (8th Cir. 1963). Since the defendant's motion was granted in the present case and plaintiff raised no objection at the trial that specific grounds were not stated for the motion, such an objection will not be considered on this appeal.

[3, 4] In determining the sufficiency of a plaintiff's evidence to withstand a defendant's motion for a directed verdict in a jury case, the trial court and this Court on appeal are guided by the same principles that prevailed under our former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under G.S. 1-183. *Sawyer v. Shackleford*, 8 N.C. App. 631, 175 S.E. 2d 305; *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820. All evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving to plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47. The question presented by this appeal, therefore, is whether plaintiff's evidence in this case, when so considered, was sufficient to support a jury finding of actionable negligence on the part of defendant. We agree with the trial court's conclusion that it was not.

[5] There was no evidence of excessive speed, or that defendant failed to keep his car under reasonable control, or that he failed to exercise care to avoid hitting the child as soon as he saw him. Defendant did not see the child until immediately prior to the impact. At that instant the child was already directly in front of defendant's car and in defendant's lane of travel. "The boy's head was down under the hood and defendant couldn't tell where the boy was running, but his head was bouncing up and down." It is, of course, possible to conjecture that the child had been visible in or on the side of the street for a sufficient length of time to put a reasonably careful driver on notice of his presence. It is, however, just as reasonable to conjecture that the child had suddenly darted into the street from behind the tree and telephone pole directly into the path of defendant's car. Had that been the case, then even the most careful and attentive driver could not have avoided striking him. On the evidence presented, these matters must forever remain in the realm of conjecture.

The facts here are strikingly similar to the facts in *Badger v. Medley,* 262 N.C. 742, 138 S.E. 2d 401. In that case the Supreme Court, affirming a judgment of nonsuit, said: "Assuming that defendant failed to keep a reasonable lookout, there is not sufficient evidence from which it may be inferred that his inattention was a proximate cause of the accident and that in the exercise of reasonable care he might have avoided the accident."

What was said by Campbell, Judge, in *Edens v. Adams,* 3 N.C. App. 431, 165 S.E. 2d 68, is appropriate here: "A cause of action must be something more than a guess. A resort to a choice of possibilities is guesswork, not decision. To carry the case to the jury, the plaintiffs must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts."

The judgment appealed from is

Affirmed.

Judge CAMPBELL concurs.

Judge VAUGHN dissents.

STATE OF NORTH CAROLINA v. BILLY ASHLEY TRIPP

No. 7010SC581

(Filed 21 October 1970)

1. **Assault and Battery § 5—— discharge of firearm into an automobile — sufficiency of evidence**

In a prosecution charging defendant with the unlawful discharge of a firearm into a moving automobile driven by the prosecuting witness, the State's evidence was sufficient to withstand defendant's motion for nonsuit. G.S. 14-34.1.

2. **Assault and Battery §§ 5, 15; Arrest and Bail § 1— discharge of firearm into automobile — arrest by private citizen — breach of peace — instructions**

In a prosecution charging defendant with the unlawful discharge of a firearm into a moving automobile driven by the prosecuting witness, defendant's evidence justified an instruction to the jury that at the time of the shooting he had a right to arrest the prosecuting witness for a breach of the peace and that he was attempting to carry out this right when he fired his pistol at the automobile, where the evidence tended to show that (1) the defendant, hiding in the back

seat of his wife's car, accompanied the wife to her place of employment in order to learn the identity of the man who had been propositioning her; (2) as the wife approached the plant, the prosecuting witness drove his car in such a manner as to force the wife to drive upon the curb and stop; (3) the defendant got out of his car and ordered the prosecuting witness to stop; (4) the witness attempted to run over the defendant; and (5) the defendant then fired his pistol at the witness' fleeing car "trying to bust a tire or gas tank so I could stop his car and take him to the police station." G.S. 14-34.1, G.S. 15-39.

3. **Arrest and Bail § 1— arrest by private citizen — breach of peace — time of arrest**

The right of a private citizen to arrest for a breach of the peace exists while it is continuing or immediately after it has been committed. G.S. 15-39.

4. **Arrest and Bail §§ 1, 5— arrest by private citizen — amount of force**

A private citizen making or attempting to make a lawful arrest may use reasonable force in making the arrest, and whether the force used in any particular case is reasonable and necessary or excessive and unnecessary is ordinarily a question for the jury.

APPEAL by defendant from *Bailey, J.*, 1 May 1970 (R) Criminal Session, WAKE Superior Court.

A bill of indictment proper in form charged that on 18 March 1970 defendant "unlawfully, wilfully, wantonly and feloniously did attempt to discharge and did discharge a firearm" into a 1962 Chevrolet automobile while occupied by Joseph Lawrence Freeman in violation of G.S. 14-34.1. Defendant pleaded not guilty to the charge.

Pertinent evidence presented by the State tended to show: Around 8:00 p.m. on 18 March 1970, Joseph Lawrence Freeman (Freeman), a Negro male, was alone and driving his 1962 Chevrolet convertible north on Person Street in the City of Raleigh. When he reached intersection of Person and Davie Streets, he turned left and proceeded on Davie. A Ford fastback was parked on the right hand side of Davie about halfway between Person and Blount Streets. As Freeman approached the parked Ford, defendant with a small gun in his hand jumped out of the Ford into Davie Street and yelled at Freeman to stop. Freeman did not stop but passed on by the Ford at which time defendant shot at Freeman several times, one bullet going into his car, and two others striking the rear of the car. Freeman put his head down, made a left turn on to Blount Street, and ran into another car shortly thereafter, following which he jumped from his car and ran. Freeman denied having ever seen the de-

fendant or his wife prior to that evening and denied writing defendant's wife any note.

Defendant's evidence is summarized as follows: On 17 and 18 March 1970 defendant's wife (Mrs. Tripp), a white woman, was employed at a small plant on Person Street a short distance south of the Davie Street intersection. When she returned from lunch on 17 March 1970, a young Negro male driving a black and white Chevrolet convertible, accompanied by another Negro male, drove up behind her. Mrs. Tripp went back to work and on returning to her car at 4:30 p.m., she found under her windshield wiper a note informing her that the writer would like to know her and asking her to meet him in front of the plant that night at 8:00. Mrs. Tripp did not tell her husband about the note and returned to work the next day. At lunchtime she drove her car to a Quik-Pik in the area and on the way there observed that a 1962 Chevrolet convertible was following her. After coming out of the Quik-Pik, she got in her car and the Chevrolet convertible drove up beside her. She did not know the name of the driver at that time but after the incident charged determined that it was Freeman. Mrs. Tripp had her windows closed and doors locked and Freeman knocked on the glass of her car. She shook her head at Freeman and hurriedly returned to the parking lot at the plant; as she entered the plant she saw the Chevrolet convertible pass by. That afternoon as she left her work and returned to her car, she found another note on her windshield in which the writer made reference to seeing her at the Quik-Pik and also seeing her the day before; the writer expressed his desire to see and talk with her and invited her to meet him that night at 8:00 p.m. at the plant. Mrs. Tripp hurried home, told her husband what had happened on both days and showed him the notes but was unable to provide the name of the person who had accosted her. Defendant went to the Raleigh Police Station, talked with a detective there about his wife's ordeals but preferred no charges because of inability to name the accoster; thereafter he returned home. Defendant insisted that Mrs. Tripp drive their car, with defendant concealed in the back seat, to the plant at 8:00 p.m. in order that she might get the license number on the Chevrolet convertible and that he and a friend might try to catch the person who was later determined to be Freeman and turn him over to police. Mrs. Tripp drove by the plant on Person Street at about 8:00 p.m., observed the Chevrolet convertible in the area, and obtained the license number. Following that the events hereinafter related in the opinion took place.

The jury found the defendant guilty as charged and from prison sentence of not less than two nor more than four years with recommendation that defendant be granted the option of serving his sentence under the work-release program, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Howard P. Satisky for the State.

William T. McCuiston and Michael A. Ashburn for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the failure of the court to sustain his motion for nonsuit interposed at the close of all of the evidence. We hold that the evidence was sufficient to survive the motion for nonsuit and the assignment of error is overruled.

[2] Defendant assigns as error the following instruction of the trial judge to the jury: "The defendant in this case had no right and no duty to arrest anyone or to take anyone to the police. He was not acting, if he did act, in any proper exercise or lawful authority." This assignment of error is sustained and entitles defendant to a new trial.

Defendant contends that under the evidence introduced by him he had a right and duty to arrest Freeman and was attempting to carry out this right and duty when he fired his pistol at Freeman's automobile. To properly consider this contention, it is necessary to review defendant's evidence as it related to the shooting and events *immediately* prior thereto. This evidence tended to show:

With defendant lying on the floor of the back seat, Mrs. Tripp was driving his automobile north on Person Street and stopped for a red traffic signal at the intersection of Davie Street. Freeman was then parked on Person Street, facing north, some four or five car lengths south of the intersection. When the light turned green Mrs. Tripp turned left on Davie Street; Freeman drove from his parked position north on Person to Davie where he made a left turn, drove up beside Mrs. Tripp on her left and turned sharply to the right, causing Mrs. Tripp to turn to the right, run up on the curb and stop at a point about halfway between Person and Blount Streets. Freeman's car

was then stopped at a forty-five degree angle with his right front fender very close to Mrs. Tripp's door; Mrs. Tripp was crying. Defendant jumped out of the right side of his car and as he ran around the front of his car, Freeman backed away from defendant's car and started forward on Davie Street. Defendant ordered Freeman to stop but instead of stopping Freeman tried to run over defendant who got out of his way and then fired a .22 calibre pistol at Freeman's car "trying to bust a tire or gas tank so I could * * * * stop his car and take him to the police station." Freeman proceeded on to Blount Street where he made a left turn and wrecked his automobile before getting to the next intersection.

With respect to the defendant's original plan to catch Freeman and carry him to the police, we agree with the trial judge that the defendant had no right and no duty to arrest anyone. However, when the events developed as above testified to by the defendant and his witnesses, a different situation arose.

G.S. 15-39 provides as follows:

> "Persons present may arrest for breach of peace.—Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders."

In *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100, in an opinion by Johnson, J., our Supreme Court in interpreting this statute said:

> "This statute confers on peace officers and private persons, on equal terms, the power of arrest without warrant in certain misdemeanor cases. The statute follows in the main the pre-existing principles of the common law. (Statute quoted) * * * * * the power of arrest without warrant is referable entirely to the question of breach of the peace. The test is not whether the offense is a misdemeanor, but, rather, whether an arrest is necessary in order to 'suppress and prevent' a breach of the peace. * * * * * It's (the statute) language is plain and clear. An arrest without warrant may be made under the provisions of this statute by anyone when it is necessary to 'suppress and prevent' a breach of the peace. This means that either a peace officer or a private person may arrest anyone who in his presence is (1) actually committing or (2) threatening to commit a breach of the

peace. * * * * * [W]e think a breach of the peace is threatened within the meaning of the statute if the offending person's conduct under the surrounding facts and circumstances is such as reasonably justifies a belief that the perpetration of an offense amounting to a breach of the peace is imminent. (Numerous authorities cited)."

In *State v. Lanier,* 71 N.C. 288 (1874) our Supreme Court, in passing upon the legality of an arrest by a police officer under this statute, found it appropriate to determine if the facts in that case constituted a breach of the peace. The facts were that the defendant rode a horse through the corridor of the court house when court was not in session and very few people were in the court house. We quote from the opinion:

"* * * * * [W]e think it may be conceded that the driving or riding without arms through a court house or crowded street at such a rate or in such a manner as to endanger safety of the inhabitants amounts to a breach of the peace and is an indicable offence at common law. (citation)."

If Freeman drove his car on Davie Street as stated by defense witnesses, forcing Mrs. Tripp to drive on the curb and stop, and stopping with his (Freeman's) right front fender close to her door, we think he was guilty of a breach of the peace justifying his arrest by the defendant or anyone else present at the time.

[3] The question then arises, does a person have the right to complete a citizen's arrest after the breach of the peace has terminated? It has been held that a private person's right to arrest for an affray or breach of the peace exists while it is continuing *or immediately after it has been committed.* 5 Am. Jur. 2d Arrest § 35, p. 725; *Ogulin v. Jeffries,* 121 Cal. App. 2d 211, 263 P. 2d 75. If a person's right to arrest for a breach of the peace committed in his presence terminated immediately when the breach of the peace ceased, the right of arrest would be completely negated.

[4] We next inquire as to the amount of force a person may use in making a citizen's arrest. Our Supreme Court has held that a police officer may use reasonable and necessary force in making an arrest, and whether the force used in any particular case is reasonable and necessary or excessive and unnecessary is ordinarily a question for the jury. *State v. Eubanks,* 209 N.C.

758, 184 S.E. 839. We think the same rule applies to a private citizen making or attempting to make a lawful arrest.

Freeman, as a witness for the State, denied writing the notes to Mrs. Tripp and denied that he forced her to stop on Davie Street. This being true, it was for the jury to reconcile the conflict in the testimony and to determine, upon proper instructions from the trial judge, if the defendant was properly exercising a right of arrest under G.S. 15-39 and if he was using no more force than was reasonably necessary to accomplish that purpose.

We realize that a citizen's arrest or attempted arrest can create a dangerous situation and that one who attempts it does so at his peril. However, G.S. 15-39 is a law of this State and citizens are entitled to rely on it and our courts are obligated to apply and interpret it until the General Assembly sees fit to amend or repeal.

We do not deem it necessary to discuss the other assignments of error brought forward and argued in defendant's brief as they may not arise on a re-trial of this case.

For the reasons hereinbefore stated, the defendant is awarded a

New trial.

Judges CAMPBELL and VAUGHN concur.

WENDELL TRACTOR & IMPLEMENT COMPANY, INC. v. F. W. LEE

No. 7010DC464

(Filed 21 October 1970)

1. **Courts § 11.1; Jury § 1— procedure in district court — waiver of jury trial**

Under G.S. 7A-196 prior to its amendment effective 1 January 1970, defendant is deemed to have waived his right of trial by jury in the district court, where his case was transferred to the district court from the superior court on 2 December 1968 and the defendant did not file a request for a jury trial until 26 March 1970.

2. **Evidence § 31— action on note — best evidence rule**

In an action to recover on a promissory note, defendant was not entitled to cross-examine plaintiff's witnesses concerning the terms of

a chattel mortgage which defendant had executed as security for the note, since the chattel mortgage had already been admitted in evidence and was the best evidence of its contents.

3. Principal and Agent § 4; Evidence § 36— proof of agency — admissions by agent

In an action on a promissory note, testimony by plaintiff's president was admissible to show that he was acting as the agent of an equipment finance company when he took possession of defendant's property under the terms of the chattel mortgage securing the note.

4. Judgments § 35— action on note — plea of former action

In an action on a promissory note, there was no merit to defendant's contention that the action was barred because of a former action brought by defendant against the plaintiff in a justice of the peace court, since there was evidence that the action in the justice of the peace court arose out of a mistaken issuance of summons against the defendant and that a voluntary nonsuit was entered in the action when the mistake was discovered.

5. Trial § 10— remarks of trial court — consideration of testimony — harmless effect

The defendant was not prejudiced by the trial court's remark, made upon tender of rebuttal witnesses by plaintiff, that his decision would not be affected by the witnesses' proposed testimony, where the proposed testimony was designed solely to rebut defendant's testimony which, if taken as true, could not have legally affected any of the rights of the parties in the case.

APPEAL by defendant from *Ransdell, District Judge,* 26 March 1970 Session of WAKE County District Court.

This civil action to recover on a promissory note under seal was instituted in Wake County Superior Court. Upon the establishment of district courts in the Tenth Judicial District, which includes Wake County, the case was transferred to the District Court Division where it was tried by the court without a jury. Judgment was rendered for the plaintiff and defendant appealed.

Johnson and Gamble by Richard O. Gamble for plaintiff appellee.

E. V. Wilkins and L. Austin Stevens for defendant appellant.

GRAHAM, Judge.

[1] Defendant first assigns as error the court's refusal to allow his motion for a trial by jury. The record indicates that the case was transferred from the Superior Court Division to

the District Court Division of the General Court of Justice on 2 December 1968, pursuant to G.S. 7A-259. There is no showing in the record that defendant did not receive proper notice of the order of transfer. "[A]bsent objection and exception to the order [of transfer], 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." *Kelly v. Davenport,* 7 N.C. App. 670, 173 S.E. 2d 600.

Defendant filed no request for a jury trial until 26 March 1970, the day of the trial. Under G.S. 7A-196 (prior to amendment effective 1 January 1970) a party waived the right of trial by jury by failing to file a written demand in the office of the Clerk of the 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." Defendant's request was obviously not timely, and as a result he is deemed to have waived his right of trial by jury.

G.S. 7A-196, as amended effective 1 January 1970, now provides that in all civil cases in the district court there shall be a right of trial by jury in conformity with Rules 38 and 39 of the Rules of Civil Procedure. Rule 38(b), which also became effective 1 January 1970, provides: "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading." Defendant contends that his request for a jury trial, as set forth in his motion, was within the time allowed under Rule 38(b) because he was permitted to file an amendment to his answer on the day of the trial. Even if defendant's amendment could be considered a "pleading directed to the issue," which we do not here decide, it is of no avail, because the statutory waiver had occurred before the effective date of the amendment to G.S. 7A-196 and Rule 38(b). This assignment of error is overruled.

[2] Defendant contends through his second assignment of error that the court erred in refusing to permit his counsel to cross-examine one of plaintiff's witnesses concerning the terms of a chattel mortgage which had previously been received into

evidence. Defendant had executed and delivered the chattel mortgage to the plaintiff as security for the payment of the note which is the subject of this suit. He sought to show by cross-examination that the terms of the chattel mortgage called for a public sale, and that the plaintiff had taken possession of certain of the property security and sold it at a private sale. This assignment of error is overruled. In the first place, the chattel mortgage had already been admitted into evidence at the time objections to defendant's questions concerning its terms were sustained. "A writing itself is the best evidence of its contents, and ordinarily the original writing itself is the only evidence admissible to prove its contents." 3 Strong, N.C. Index 2d, Evidence, § 31, p. 646, and cases therein cited. Secondly, all of the evidence tended to show that plaintiff had taken possession of the property as agent for Commercial Credit Equipment Corporation (Commercial Credit) pursuant to a chattel mortgage executed and delivered by defendant to secure the payment of an account with that company. Under the terms of that particular chattel mortgage, the property could be sold at private sale. The evidence also indicated that none of the proceeds of the sale was applied toward payment of defendant's debt to plaintiff. We further note that the defendant was permitted broad latitude in the cross-examination of plaintiff's witnesses with respect to the sale of the property.

[3] Defendant next contends that the court should have sustained his objection to testimony by plaintiff's president that he was acting as agent for Commercial Credit in taking possession of certain of defendant's property. We do not agree. It is true, as defendant points out, that "agency or the extent of the authority must be established by evidence *aliunde* and cannot be established by the admissions or even the sworn pleadings of the agent." 3 Strong, N.C. Index 2d, Evidence, § 36, p. 662; *Brothers v. Jernigan,* 244 N.C. 441, 94 S.E. 2d 316. However, here the evidence was offered under oath at the trial. The correct rule as to the admissibility of such evidence is set forth in *Mathis v. Siskin,* 268 N.C. 119, 150 S.E. 2d 24:

> "While extra judicial declaration of a purported agent are not admissible to show the existence of the agency or the extent of his authority to contract, the alleged agent is competent to testify that the agency existed, that he was authorized by the principal to make the contract in question, and that in making it he was acting as such agent in the

principal's behalf. *Sealey v. Insurance Co.*, 253 N.C. 774, 117 S.E. 2d 744."

[4] In defendant's further answer and defense it is alleged that this action is barred because of a former action brought by defendant against plaintiff in a justice of the peace court. Defendant contends here that the evidence offered on this question compelled a finding by the court that this action was barred. We do not agree. The note sued on here was originally for $2,411. The sum of $1340.80 was alleged to be due and owing. The suit in justice court was for an account of $120. Plaintiff's evidence tended to show that the suit in justice court was against T. W. Lee, rather than defendant, who is F. W. Lee. Summons was mistakenly issued against F. W. Lee. When the mistake was discovered a voluntary nonsuit was entered. This evidence supports the court's finding "that the plaintiff has not previously instituted an action against the defendant on account of the matters alleged in the amended complaint in this action."

Defendant contends that the court should have made a finding as to the value of the property picked up and sold by plaintiff, citing G.S. 45-21.36. The necessity of such a finding was precluded by the following finding which is supported by competent evidence:

> "5. That Commercial Credit Equipment Corporation, after default on the purchase agreement or conditional sales contract, picked up the three (3) tractors included therein, together with other equipment; that employees of the plaintiff assisted Commercial Credit Equipment Corporation in picking up the equipment, which Commercial Credit Equipment Corporation then left in the custody of the plaintiff; that all of the tractors and equipment have been sold by Commercial Credit Equipment Corporation except one (1) rotary cutter now located at the plaintiff's place of business; and that no part of the proceeds of sale of such tractors or equipment was applied to the debt owing by the defendant to the plaintiff, and the defendant is not entitled to have any part of the proceeds of sale applied to such debt."

[5] Defendant offered testimony to show that an employee of plaintiff stated at the time defendant's equipment was taken under the Commercial Credit chattel mortgage "that when they got the equipment that would be the end of it." Also, that the "Commercial Credit man" and "two other fellows" told defendant

that they were cleaning him out and that he could start over again. At the conclusion of defendant's evidence, plaintiff tendered witnesses for the purpose of rebutting this testimony. The court remarked that the proposed testimony by these witnesses that no such statements were made would not affect his decision. Defendant says this was error. We fail to see that the trial court was obligated to listen to testimony designed solely to rebut statements which, if taken as true, could not have legally affected any of the rights of the parties in this case. The court, nevertheless, permitted defendant to cross-examine the tendered witnesses. In our opinion the defendant was not prejudiced in any way by the court's statement.

We have reviewed all of defendant's assignments of error and conclude that the trial was free from prejudicial error and that the judgment entered is supported by findings based upon competent evidence.

No error.

Judges BROCK and MORRIS concur.

CATHERINE B. PURGASON v. RUTH R. DILLON

No. 7117SC7

(Filed 21 October 1970)

1. **Evidence § 50; Damages § 13— personal injury action — admissibility of medical testimony**

In an action to recover for personal injuries arising out of an automobile accident, testimony by the plaintiff's doctor furnished an adequate basis for his opinion that the plaintiff's hospitalization subsequent to the accident could have been caused by the accident, where the doctor related that he had been treating the plaintiff for a diabetic condition for several years, that he had admitted the plaintiff to a hospital at least once prior to the accident, and that the plaintiff's diabetic condition was adversely affected by emotional stress and nervousness resulting from the accident.

2. **Damages § 16— personal injury action — aggravation of injuries —instructions**

In an action to recover for personal injuries arising out of an automobile accident, there was no merit to defendant's contention that the court erred in failing to limit the damages plaintiff was entitled to recover to any additional aggravation of her pre-existing diabetic

condition, where (1) the jury was clearly instructed that plaintiff was entitled to recover compensation only for injuries found to be the direct, natural and proximate result of defendant's negligence and (2) there was nothing in the charge that would permit the jury to infer that plaintiff was entitled to damages for her diabetic condition, except insofar as it was aggravated by the accident.

3. Damages § 16— personal injury action — instructions

In an action to recover for personal injuries arising out of an automobile accident, defendant's contention that the trial court should not have given a general instruction on the elements of recovery for damages in the absence of specific evidence that plaintiff had ever earned any money or lost any time, *held* without merit, especiallly since defendant made no request for further instructions as to any phase of the case.

ON *certiorari* from *Long, J.*, 13 April 1970 Civil Session of ROCKINGHAM County Superior Court.

Plaintiff filed complaint 7 April 1967 seeking to recover for personal injuries and property damage allegedly resulting from a collision caused by the negligence of defendant. The complaint alleged that plaintiff sustained various direct injuries, and also that a pre-existing diabetic condition was aggravated by the collision. Defendant answered and denied the essential allegations of negligence and damages. The jury answered the issue of negligence in plaintiff's favor and awarded damages for personal injuries in the sum of $5,000 and for property damage in the sum of $950. From judgment entered on the verdict, defendant appealed.

C. Orville Light and A. D. Folger, Jr., for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by David A. Irvin for defendant appellant.

GRAHAM, Judge.

Defendant seeks a new trial only on the issue of damages for personal injuries.

[1] Defendant's first assignment of error is that the court erred in allowing plaintiff's doctor to testify, in response to a hypothetical question, that plaintiff's hospitalization subsequent to the accident could, or might, have been caused by the accident. The doctor, who was stipulated to be a medical expert, testified that he had treated plaintiff for a diabetic condition for several years. On at least one occasion prior to the accident he had admitted her to the hospital for treatment. When he

examined plaintiff on the date of the accident he observed contusions over the area of her right knee and was of the opinion that she had also suffered a muscular-fascia strain of the neck and shoulder regions. He further observed that plaintiff was highly nervous and upset. On subsequent examinations plaintiff complained of being tense, nervous, worried and unable to sleep. The doctor attributed this increased stress to the accident and noted a deterioration in her diabetic condition which ultimately required her admission to the hospital for treatment. He explained in detail how emotional stress adversely affects diabetes and related the deterioration of the diabetic condition to plaintiff's emotional stress.

In our opinion, this evidence furnished an adequate basis for the doctor to express his opinion as to the cause for plaintiff's hospitalization. The fact that she had been hospitalized for her diabetic condition prior to the accident certainly did not rule out the accident as a proximate cause of her having to return. This assignment of error is overruled.

[2] Defendant's second assignment of error is that in instructing the jury the court failed to limit the damages plaintiff was entitled to recover to the additional aggravation, if any, of her pre-existing diabetic condition. In the case of *Potts v. Howser*, 274 N.C. 49, 161 S.E. 2d 737, Justice Huskins, speaking for the court, quoted with approval the following principle from 25 C.J.S., Damages, § 21, p. 661:

> " 'On the other hand, where the wrongful act does not cause a diseased condition but only aggravates and increases the severity of a condition existing at the time of the injury, the injured person may recover only for such increased or augmented sufferings as are the natural and proximate result of the wrongful act, or, as otherwise stated, where a pre-existing disease is aggravated by the wrongful act of another person, the victim's recovery in damages is limited to the additional injury caused by the aggravation over and above the consequences, which the pre-existing disease, running its normal course, would itself have caused if there had been no aggravation by the wrongful injury.'
>
> An injured person is entitled to recover all damages proximately caused by the defendant's negligence. Even so, when his injuries are aggravated or activated by a pre-existing physical or mental condition, defendant is liable only to the

extent that his wrongful act proximately and naturally aggravated or activated plaintiff's condition. 'The defendant is not liable for damages . . . attributable solely to the original condition.' 22 Am. Jur. 2d, Damages § 124. Plaintiff is confined to those damages due to its enhancement or aggravation. *Louisville Taxi Cab and Transfer Co. v. Hill,* 304 Ky. 565, 201 S.W. 2d 731; *Sterrett v. East Texas Motor Freight Lines,* 150 Tex. 12, 236 S.W. 2d 776. Compare *Anderson v. Motor Co.,* 233 N.C. 372, 64 S.E. 2d 265."

At no time has plaintiff contended that her diabetic condition resulted from the accident or that she is entitled to recover damages attributable solely to this pre-existing condition. The jury was clearly instructed that plaintiff was entitled to recover compensation only for injuries found to be the direct, natural and proximate result of defendant's negligence. We find nothing in the charge that would permit the jury to infer that plaintiff was entitled to damages for her diabetic condition, except insofar as it was aggravated by the accident.

Furthermore, we do not have here the situation present in the case of *Harris v. Greyhound Corporation,* 243 N.C. 346, 90 S.E. 2d 710, which is relied upon by the defendant. There, "the [trial] court made no reference to the sharply conflicting evidence as to whether plaintiff's fall aggravated a pre-existing kidney condition or had nothing whatever to do with it; and no instruction of law was given with reference thereto." In an opinion awarding a new trial to defendant, Justice Bobbitt (now Chief Justice) pointed out that "[u]nless the plaintiff's kidney condition and operation were caused or aggravated by the fall on 21 January, 1954, the jury should have disregarded such kidney condition and operation. It was for the jury to say whether plaintiff's pre-existing kidney condition was aggravated by the fall on 21 January, 1954, and if so, to award damages only to the extent they found such pre-existing kidney condition had been aggravated by the fall on 21 January, 1954. It would seem that the court should have instructed the jury specifically bearing upon this important phase of the case."

The jury here was instructed in substance that plaintiff's hospitalization could be considered as an element of damages only if the jury found, by the greater weight of the evidence that defendant's negligence proximately caused an aggravation of plaintiff's pre-existing diabetic condition and that said aggravation proximately caused her hospitalization. The instruc-

tions, in our opinion, are not in conflict with the principles expressed in the *Harris* case.

[3] Defendant also challenges the court's instructions as to certain elements to be considered in awarding damages. Defendant requested no further instructions as to any phase of the case and at the conclusion of the charge, defendant's attorney stated: "The defendant is satisfied your honor." The portion of the charge excepted to here is similar in essential respects with the charge approved by the Supreme Court in *Johnson v. Lewis,* 251 N.C. 797, 112 S.E. 2d 512. There, as here, the appellant contended that a general instruction as to the elements of recovery for damages should not have been given in the absence of specific evidence that plaintiff had ever earned any money or lost any time. Justice Parker (later Chief Justice), speaking for the court, stated:

> "In 25 C.J.S., Damages, p. 514, it is said: 'A person is not deprived of the right to recover damages because of inability to labor or transact business in the future, because of the fact that at the time of the injury he is not engaged in any particular employment. . . . The fact that a woman attends merely to household duties will not deprive her of a right to recover for loss of earning capacity.'
>
> In *Rodgers v. Boynton,* 315 Mass. 279, 52 N.E. 2d 576, 151 A.L.R. 475, the Court said: 'It is to be noted that the plaintiff's wife recovered damages for such diminution in earning power as the auditor found was due to the injury. Her ability to work belonged to her; and if her capacity to work was lessened by her injury, then she alone was entitled to recover the value of that part of her capacity to earn of which she was deprived. Her time was her own. She had a right to work and her earnings belonged to her. Whether she was gainfully employed or not at the time of the injury, she was entitled to damages for any impairment in her capacity to work and earn. Citing cases. She was entitled to have considered in the assessment of her damages her in ability, due to the injury, to perform her household duties, just as she would be entitled to have considered any other restriction, due to the injury, of her activities.'
>
> * * *
>
> It seems that the essential elements of the measure of damages in *Rosa Lee Johnson's* case were given. Defendant re-

quested no further instructions as to damages in her case, nor any amplification of the charge on the measure of damages in her case. The award of damages in her case does not appear excessive. Following our decisions of *Pascal v. Transit Co.*, and *Lambert v. Transit Co.*, 229 N.C. 435, 50 S.E 2d 534, and of *Hill v. R.R.*, 180 N.C. 490, 105 S.E. 184, and by virtue of the authorities set forth above in respect to this part of the charge, defendant's assignment of error number 22 to the charge is overruled."

We have reviewed all of defendant's assignments of error, and in our opinion no error has been made to appear which is sufficiently prejudicial to require a new trial.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. WALTER JAMES BROWN

No. 7016SC600

(Filed 21 October 1970)

1. **Criminal Law § 166— the brief — abandonment of assignment of error**
   Assignment of error not brought forward and argued in the brief is deemed abandoned. Court of Appeals Rule No. 28.

2. **Criminal Law § 161— assignment of error — form and sufficiency**
   A mere reference in the assignment of error to the record page where the asserted error may be discovered fails completely to comply with Rules 19(c) and 21, Rules of Practice in the Court of Appeals.

3. **Criminal Law § 163— assignment of error to the charge**
   Defendant's assignments of error to the charge in this criminal case fails to comply with the Rules of the Court of Appeals.

4. **Rules of Civil Procedure § 50— motion for judgment n.o.v.**
   The motion for judgment notwithstanding the verdict is not a proper procedure in a criminal action.

APPEAL by defendant from *Clark, J.*, 20 October 1969 Session of Superior Court of ROBESON County.

Defendant was charged with public drunkenness, carrying a concealed weapon, resisting arrest and malicious damage to personal property. He was convicted on each charge in District Court and appealed to Superior Court. He was, by the jury,

found guilty of each charge. From the judgments entered on the verdicts and the imposition of sentences, defendant appealed. He was represented by privately retained counsel. Record on appeal was not docketed within the time allowed by our rules and defendant petitioned this Court for writ of *certiorari* which was allowed.

Attorney General Morgan by Staff Attorney Sauls for the State.

Arthur L. Lane for defendant appellant.

MORRIS, Judge.

The record on appeal filed by defendant was devoid of any order allowing *certiorari,* and the record as filed indicated the appeal was subject to dismissal. On oral argument, defendant moved to be allowed to file the order as an addendum to the record. This motion is allowed. Defendant's brief was not filed within the time allowed by the rules of this Court. However, in this case, in view of the fact that no objection has been interposed by the State, we are not disposed to dismiss defendant's appeal on that ground.

[1] The exceptions taken by defendant have been assembled into five groups under the heading "Assignments of Error." Group I is addressed to the court's overruling his motion for nonsuit at the close of the State's evidence and renewed at the close of all the evidence. This alleged error is not brought forward and argued in defendant's brief and is, therefore, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1969).

[2] Defendant includes 12 exceptions under Group II as follows:

"GROUP II

"EXCEPTIONS NOS. 4(R p 29), 5, 6, 7, 8 (R p 30), 9, 10, 11, 12 (R p 31), 13 (R pp 31-32), 14 (R p 32) and 17 (R p 45).

The court below allowed prejudicial, irrelevant and immaterial evidence to be adduced in the presence of the jury."

In *State v. Kirby, supra,* defendant, who had been convicted of first-degree murder, was represented on appeal by the same counsel now appearing for defendant before us. In the opinion

in that case, the Court quoted defendant's purported assignment of error as to rulings of the court on evidence. It was:

> "GROUP I—EXCEPTIONS NOS. 6 (R p 25), 7 (R pp 25-26), 8 (R p 29), 9 (R p 30), 10 (R pp 31-32), 11 (R p 39), 12, 13 (R p 40), 14 (R pp 40-41), 15 (R p 41), 16 (R p 45), 17 (R pp 45-46), 18 (R p 46), 19 (R pp 46-47), 20 (R p 47), 21, 22 (R p 48), 23 (R pp 50-51), 24 (R p 52), 25 (R p 53), 26 (R pp 55-56), 27 (R pp 56-57), 28 (R p 59), 29 (R pp 61-62), 30 (R p 62), 31 (R pp 64-65), 32 (R p 66), 33 (R p 67), 34 (R pp 68-69), 35, 36 (R p 71), 37, 38 and 39 (R p 72).
>
> 'The court below allowed prejudicial, irrelevant and immaterial evidence to be adduced in the presence of the jury to the prejudice of the defendant, and these for the Appellant are EXCEPTIONS NOS. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39.' "

With respect to this purported assignment of error the Court said: " 'The assignment must be so specific that the court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary.' *Thompson v. R.R.*, 147 N.C. 412, 61 S.E. 286.", and

> "As aptly stated in *McDowell v. Kent,* 153 N.C. 555, 69 S.E. 626, '[w]hat the Court desires, and indeed the least that any appellate court requires, is that the exceptions which are *bona fide* . . . shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance (as the case may be) as shall be necessary to present clearly the matter to be debated.' "

The Court then noted that the Rules of the Supreme Court are mandatory and will be enforced, and said "Since the Rules require that assignments of error specifically show within themselves the questions sought to be presented, it follows, therefore, that a mere reference in the assignment of error to the record page where the asserted error may be discovered—defendant's procedure here—fails completely to comply with Rules 19(3) and 21, Rules of Practice in the Supreme Court (citing cases)."

Defendant's procedure in this case, identical to his procedure in *State v. Kirby, supra,* is, of course, subject to the same treatment here. It fails completely to comply with Rules 19(c) and 21, Rules of Practice in the Court of Appeals of North Carolina, which rules were promulgated by the Supreme Court of North Carolina.

[3] We turn now to defendant's next purported assignments of error directed to alleged errors in the charge as follows:

"GROUP III

EXCEPTIONS NOS. 19 (R p 49), 20 (R p 52), 21 (R pp 52-53), 22 (R p 56), 23 (R pp 57-58), 24 (R pp 59-60) and 25 (R p 63).

The court erroneously charged the jury as to the facts, law and evidence produced in the case to the prejudice of the defendant."

and

"GROUP V

EXCEPTION NO. 24A (R p 61).

The court below neglected to properly charge the jury during its main charge to the prejudice of the defendant, thereby necessitating an additional charge which did not cure this prejudice."

In *State v. Kirby, supra,* defendant's alleged errors in the charge were presented under "Group V" in the following language:

"GROUP V — EXCEPTIONS NOS. 132 (R p 174), 135 (R pp 175-176), 136 (R p 176), 137 (R p 177), 138, 139 (R p 178), 140 (R p 179), 141 (R pp 179-180), 142, 143 (R p 180), 144 (R p 181), 144A, 144B (R p 182), 144C, 144D (R p 183), 144E (R pp 183-184), 144F (R p 184), 144G (R p 185), 144H (R pp 185-186), 144I (R p 186), 144J (R p 187), and 144K (R p 188).

'The court erroneously charged the jury as to the facts, law and evidence produced in the case to the prejudice of the defendant, and this for the appellant is EXCEPTIONS NOS. 132, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 144A, 144B, 144C, 144D, 144E, 144F, 144G, 144H, 144I, 144J, and 144K.' "

With respect to this assignment, the Supreme Court said:

"This assignment—like a hoopskirt—covers everything and touches nothing. It is based on numerous exceptions and attempts to present several separate questions of law—none of which are set out in the assignment itself—thus leaving it broadside and ineffective. 'An assignment which attempts to raise several different questions is broadside.' *Hines v. Frink and Frink v. Hines,* 257 N.C. 723, 127 S.E. 2d 509.

Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. 'When an exception relates to the charge, that portion to which the exception is taken must be set out in the particular assignment of error. A mere reference to the exception number and the page number of the record where the exception appears . . . will not present the alleged error for review. *Pratt v. Bishop,* 257 N.C. 486, 499, 126 S.E. 2d 597, 607; *Darden v. Bone,* 254 N.C. 599, 601, 119 S.E. 2d 634, 636; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271.' *Samuel v. Evans and Cooper v. Evans,* 264 N.C. 393, 141 S.E. 2d 627."

We cannot perceive that the Court could have more clearly pointed out defendant's complete failure to comply with the rules nor more clearly set out the proper procedure to be followed.

Obviously, the assignments of error attempted to be presented here are identical in form to those attempted to be presented in *Kirby.* They fail for the same reasons.

[4] Finally, defendant moved to set the verdicts aside, for judgment notwithstanding the verdicts, and for a new trial. He cites no authority in his brief in support of any of these motions, all of which are argued under "GROUP IV." Clearly the motion for judgment notwithstanding the verdicts is not a proper procedure in a criminal action. He argues that he is entitled to a new trial because the court improperly permitted prejudicial evidence to be adduced in the presence of the jury and permitted the State persistently to ask improper questions in the presence of the jury. Our voyage of discovery through the record discloses that to questions propounded to defendant's character witness by the solicitor, defendant aptly objected, his objections were sustained by the court, and, as defendant states in his brief, the

court instructed the jury that questions asked by the solicitor were not to be considered by them as evidence. Defendant did not request the court to limit the cross-examination, did not request instructions to the jury, nor did he ask for a mistrial—any one of which he could have done and should have done had he felt at trial, as he contends now, that his right to a fair trial was not being properly protected.

As was said in *Kirby, supra*:

"Defendant's failure to perfect his appeal in conformity with the rules has necessitated a judicial Easter egg hunt. No error of law appears on the face of the record proper, and our reluctant voyage through the remainder of the record has uncovered no error which would require a new trial."

No error.

Judges BROCK and GRAHAM concur.

ERNEST ELSEVIER v. GANN MACHINE SHOP, INC., AND J. R. GANN, INDIVIDUALLY

No. 7014DC535

(Filed 21 October 1970)

1. **Appeal and Error § 31— review of the charge — failure to make exceptions**

When no exception is taken to the charge and it is not contained in the record on appeal, it is presumed that the court correctly instructed the jury on every principle of law applicable to the facts.

2. **Evidence § 45— action for services rendered — value of services — admissibility of opinion evidence**

In an action by a professional engineer to recover $4,000 allegedly due him for services rendered to the individual defendants in the preparation and construction of their industrial building, there was no error in the exclusion of one defendant's opinion testimony as to the value of the services performed by the professional engineer, where (1) the defendant admitted in his answer that he had assured the plaintiff that his bill for services rendered would be paid and (2) the defendant failed to show that he had any knowledge gained from experience or observation on which to base an opinion as to the value of the services.

APPEAL by defendants from *Lee, District Court Judge,* 19 March 1970 Session of District Court held in DURHAM County.

Plaintiff's action was for the recovery of $4,000 alleged to be the balance due him for professional engineering services rendered defendants in the preparation of plans and specifications for the construction of a new industrial building and in the construction thereof.

Defendants by their answer denied owing plaintiff any sum. However, paragraph nine of the original complaint reads:

> "9. That thereafter, the plaintiff, in the month of October of 1966, went to the office of the defendant corporation and there had a discussion with certain officers and agents of the defendant corporation, who acknowledged the receipt of the plaintiff's statement for services rendered and assured the plaintiff that this would be paid and that the plaintiff would start receiving a One Thousand Dollars ($1,000.00) check commencing in February of 1967 and a check each month thereafter in the amount of One Thousand Dollars ($1,000.00) until the full Six Thousand Dollars ($6,000.00) was paid."

After the defendant Gann Machine Shop, Inc. (corporate defendant), answered the original complaint denying that it owed the plaintiff any sum, J. R. Gann (individual defendant) was made an additional party defendant, and without objection, on 6 August 1969 the complaint was amended. Paragraph nine was amended by adding thereto the following:

> "That the said J. R. Gann, individually, assured the plaintiff that the plaintiff's bill for services rendered in the amount of Six Thousand Dollars ($6,000.00) would be paid and that the plaintiff would receive One Thousand Dollars ($1,000.00) per month beginning in February of 1967 and a like payment each month thereafter until the total amount was paid."

On 29 September 1969 the individual defendant answered paragraph nine of the amended complaint as follows:

> "(9) The allegations contained in Paragraph 9 of the Amended Complaint are admitted."

Plaintiff's evidence tended to show that he is a registered professional engineer; that in 1966 he designed a new machine

shop building for the defendants; that the building was a 25,000-square-foot building, and the individual defendant told the plaintiff it would cost from $200,000 to $250,000 to construct it; that he spent from three hundred to three hundred and fifty hours in preparing the design; that the building was completed toward the end of the summer of 1966; that the individual defendant is the president of the corporate defendant; that in late August or September 1966 plaintiff sent defendants a bill for $6,000 which was a fair and reasonable amount for the services rendered; that the individual defendant told plaintiff in October 1966 that he had over-extended himself but promised to pay him the $6,000 at the rate of $1,000 per month until the entire amount was paid; that nothing was paid until October 1967 when the individual defendant paid him $1,000 and paid him another thousand dollars in November 1967; that in March 1968 the individual defendant informed him that he was not going to pay the remaining $4,000; and that the defendants are indebted to him in the sum of $4,000.

Defendants offered the individual defendant as a witness, and he testified on direct examination:

> "I did consult with Mr. Elsevier and he never told me what fee he would charge for planning a new building. I have built some buildings and a motel of precast concrete construction and am familiar with services performed by Mr. Elsevier. We used a precast concrete roof designed by N. C. Products in Raleigh. The cost of the building was approximately $132,000.00. N. C. Products prepared all of the plans for the precast concrete roof and columns and installed them."

The testimony of the defendants' witnesses Eugene D. Johnson (Johnson) and Thomas Kelley tended to show that when plaintiff was first contacted, no discussion was had concerning his fee and that the actual cost of the building was $132,150.99.

From a jury verdict and judgment entered thereon that the plaintiff recover of the defendants the sum of $4,000, the defendants appealed.

Arthur Vann for plaintiff appellee.

Lillard H. Mount, Richard M. Hutson II, and Edwin K. Walker, Jr., for defendants appellants.

MALLARD, Chief Judge.

[1] The charge of the court is not included in the record on appeal. It was stipulated by counsel that it be omitted. When no exception is taken to the charge and it is not contained in the record on appeal, it is presumed that the court correctly instructed the jury on every principle of law applicable to the facts. *Long v. Honeycutt,* 268 N.C. 33, 149 S.E. 2d 579 (1966) ; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363 (1965).

[2] The only question presented by this appeal is whether the trial court committed error in failing to allow the defendants' witnesses Gann and Johnson to give their opinion as to the value of the services performed by the plaintiff. It is not clear whether the questions were asked during the trial or after the jury verdict. The questions objected to and the answers appear for the only time in the record on appeal after the judgment and appeal entries appear. The record does not show that either question was propounded to the witness while he was testifying before the jury.

The general rule with respect to opinion evidence relating to the value of services rendered is stated in Stansbury, N. C. Evidence 2d, § 128, as follows:

> "A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property, personal property, or services. The impossibility of adequately describing the thing to be valued furnishes sufficient reason for admitting value testimony, hence it is not necessary that the witness be an expert; it is enough that he is familiar with the thing upon which he professes to put a value and has such knowledge and experience as to enable him intelligently to place a value on it. * * * "

The witness Gann did not testify that he had an opinion as to the value of the services performed by plaintiff. It was not error to exclude his answer from consideration by the jury.

The witness Johnson testified that he had previously helped build buildings and that he was familiar with the services performed by the plaintiff, but he did not testify what part he had previously taken in helping build buildings. There is nothing in the record to indicate that he had any experience with the preparation of plans and specifications or that he was familiar with the value of the services of one who prepares plans and

specifications. However, on cross-examination, he revealed his inexperience in the building trade, at least in the City of Durham, by testifying that he did not know until he applied for a building permit that he could not obtain one in the City of Durham without plans and specifications to present to the building inspector. In addition, after stating that he had an opinion as to the value of the services rendered by the plaintiff, he replied that the value was $1,500 and then added: "We paid $2,000.00 too much." This answer served to confuse his testimony. All the evidence tended to show that plaintiff had been paid only $2,000 for his services. If plaintiff had been paid $2,000 *too much,* this would indicate that the services were worth $500 less than nothing and would contradict the first part of Johnson's answer that the services were worth $1,500.

The corporate defendant did not answer paragraph nine of the amended complaint and did not object to the submission of the issue of the amount of the indebtedness, which was the only issue submitted to the jury.

The individual defendant admitted in his answer that he had approved the finished plans and design of the new building submitted by plaintiff. The individual defendant also admitted in his answer to paragraph nine of the amended complaint that he had assured the plaintiff that the plaintiff's bill for services rendered in the amount of $6,000 would be paid. We do not think that the question of the reasonable value of the services rendered by plaintiff arose at the trial, insofar as the individual defendant is concerned. The only question for determination by the jury as to the individual defendant was whether he had paid what he admitted he promised to pay.

Ordinarily, discrepancies in the testimony of a witness are to be resolved by the jury. However, the evidence in this case does not reveal that the witness Johnson had any knowledge gained from experience, information or observation concerning the value of services of a professional engineer for preparing plans and specifications for construction of a new industrial building. When the circumstances in this case are tested by the rule that the burden is on the appellant to show prejudicial error, we do not think that the exclusion from the consideration of the jury of the expressed opinion of the witness Johnson as to the value of plaintiff's services was prejudicial in this case.

In trial we find no prejudicial error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. LEOLA BETHEA

No. 7012SC443

(Filed 21 October 1970)

1. **Indictment and Warrant §§ 11, 12; Prostitution § 2— alteration of warrant — motion to quash**

Defendant's motion to quash on the ground that the warrant charging her with prostitution was altered by striking out the name of the person solicited and by inserting the name of another person directly thereunder, *held* properly denied, since, in the absence of a contrary showing in the record, there is a presumption that the alteration was made prior to the time that the warrant was signed by the magistrate.

2. **Prostitution § 2— prosecution — admission of evidence**

In a prosecution charging the defendant with prostitution, there was no error in the admission of testimony concerning the statements and activities of a Negro man who was soliciting customers on behalf of defendant.

3. **Prostitution § 2— prosecution — sufficiency of evidence**

In a prosecution on a warrant charging defendant with engaging in "prostitution by offering her body to J. R. Minnick for the price of $15.00," the evidence of defendant's guilt was sufficient to go to the jury. G.S. 14-203, G.S. 14-204(7).

4. **Criminal Law § 163— broadside exception to the charge**

A broadside exception to the charge will not be sustained.

APPEAL from *McKinnon, J.*, 31 March 1970 Criminal Term, CUMBERLAND Superior Court.

This is a criminal prosecution on a warrant charging the defendant Leola Bethea with prostitution in violation of G.S. 14-204, a misdemeanor.

The defendant was first tried and convicted in the District Court of Cumberland County. She appealed to the Superior Court of Cumberland County for trial *de novo*. The defendant's motion in the superior court to quash the warrant was denied and the defendant pleaded not guilty.

The State offered evidence tending to show that about 9:00 p.m. on 21 April 1969 officers Vernon C. Riddick and J. R. Minnick of the Fayetteville Police Department were in the Tap Room of the Prince Charles Hotel in Fayetteville, North Carolina, when they were approached by a Negro man, later identified as Mr. Moore, who told the officers that he had "a couple of chicks" that he wanted to fix them up with.

Officers Riddick and Minnick were on duty and were not in uniform. Sometime later Officer Riddick observed the same Negro man talking to two women in the lobby of the hotel. Thereafter, the officers got in Officer Riddick's automobile with the same Negro man and proceeded from the hotel to the train station where the defendant and another woman got in the back seat of the automobile. The defendant and the other woman were the same women to whom Moore was observed talking in the lobby of the hotel.

After the defendant and the other woman got into the automobile, Officer Minnick asked the Negro man where they were going and the Negro man said " . . . first let's talk business." Officer Minnick then asked the other woman where they were going and she stated that she did not know and she left it up to the Negro man. Officer Riddick asked the Negro man what it was going to cost and was told by him that it would not cost too much, but that it was really up to the girls and that he was just helping them. Officer Riddick testified that they then asked the girls what it was going to cost and what the charge was for, and the girls said, "We're going to have some fun." The officers asked the girls what kind of fun and Mrs. Bethea and the other girl stated that they would go to their apartment on Murchison Road. The officers asked how much it would be and Mrs. Bethea told them twenty dollars. Officer Minnick said that $20.00 was a little steep, and the Negro man stated that $15.00 was good. When asked again what they were going to do, the Negro man stated that they were going to take us to bed. Officer Riddick testified that Mrs. Bethea then stated that she would be willing to go for $15.00. When the automobile occupied by the two officers, the Negro man, and the two women reached Raleigh Street, it was intercepted by other officers and the defendant was placed under arrest.

The defendant offered no evidence. Her motion for judgment as of nonsuit was denied. The jury found the defendant guilty as charged. From a judgment of imprisonment of six months, the defendant appealed.

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

Marion C. George Jr., for the defendant.

HEDRICK, Judge.

[1] The defendant first assigns as error the court's denial of her motion to quash the warrant which charged that the defendant engaged "in prostitution by offering her body to J. R. Minnick for the price of $15.00."

The defendant contends that the warrant was altered or amended by striking out the name of David M. Knipe and inserting the name of J. R. Minnick. An examination of the warrant in the record reveals that the name of J. R. Minnick is written directly under the name of David M. Knipe, and that the latter name is partially obliterated by lines drawn through it; however, the record fails to disclose this alteration was made subsequent to the time it was issued by the magistrate on 22 April 1969.

In *State v. Hickman,* 2 N.C. App. 627, 163 S.E. 2d 632 (1968), Mallard, Chief Judge, stated, "Regardless of what may actually have occurred during the trial of a case the appellate court is bound by the contents of the record on appeal. The record imports verity and the Court of Appeals is bound thereby."

In *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53 (1967), the Supreme Court, speaking through Parker, Chief Justice, stated, "The record imports verity and the Supreme Court is bound thereby. The Supreme Court can judicially know only what appears of record. There is a presumption in favor of regularity. Thus, where the matter complained of does not appear of record, appellant has failed to make irregularity manifest."

In *Cook v. Georgia,* 119 Ga. 108, 46 S.E. 64 (1903), where the bill of indictment charging the defendant with murder showed on its face that the name of the victim had been interlined in lieu of another name which was crossed out, the Supreme Court of Georgia said, "But if the indictment had been demurred to upon the ground that it was defective because of an apparent alteration therein we think the demurrer would have been properly overruled. The presumption would have been that the erasure and interlineation were made before it was endorsed by the foreman."

To the same effect is *U.S. v. Chandler,* 157 F. Supp. 753 (1957), where the Court said: "In the absence of any showing to the contrary, the court must conclusively presume that the alteration was made prior to the time that the Grand Jury acted upon the indictment."

Therefore, in the absence of a showing in the record to the contrary, it is presumed that the interlineation of the name J. R. Minnick in lieu of the name of David M. Knipe was made prior to the time the magistrate signed the warrant upon which the defendant was tried in the District Court and in the Superior Court. This assignment of error is overruled.

[2] By assignment of error number two, the defendant contends that the court committed prejudicial error in allowing the State's witness to testify concerning alleged statements and activities of the Negro man sometimes referred to in the record as Mr. Moore. The evidence reveals that Moore was acting in behalf of, and for, the defendant. The defendant did not timely object to the conversation between the officers and Moore which occurred in the Tap Room. "An objection must be made in apt time, that is, as soon as the opponent has the opportunity to learn that the evidence is objectionable . . . . Unless prompt objection is made, the opponent will be held to have waived it." Stansbury N. C. Evidence 2d, § 27, p. 51. All of the other statements attributed to him occurred in the automobile in the presence of the defendant while Moore, the defendant, and the officers were negotiating as to the price to be paid to the defendant and the other woman. *State v. Russ,* 2 N.C. App. 377, 163 S.E. 2d 84 (1968). This assignment of error is overruled.

[3] The defendant assigns as error the denial of her motion for judgment as of nonsuit made at the close of all the evidence. In this assignment of error, the defendant contends again that the warrant is fatally defective. She argues that it is not alleged in the warrant, and that the evidence does not show, that she offered to have sexual intercourse with anyone. We do not agree.

G.S. 14-204(7) provides that it shall be unlawful to engage in prostitution. G.S. 14-203 defines prostitution as " . . . the offering or receiving of the body for sexual intercourse for hire. . . . " The warrant charged the defendant with engaging in prostitution by offering her body to J. R. Minnick for $15.00. The evidence when considered in its light most favorable to the State permits the inference that the Negro male, referred to as Mr. Moore, acting for the defendant and her female companion, arranged to have Officers Minnick and Riddick meet the defendant and her female companion at the Fayetteville train station, and that while the defendant and the officers were in Officer Riddick's automobile the defendant Bethea offered to have sexual intercourse with J. R. Minnick for $15.00, and for that

purpose they would go to the defendant's apartment on Murchison Road. The motion for judgment as of nonsuit was properly denied.

[4] Based on a general exception to the charge, the defendant contends that the court committed error in its charge to the jury. This is a broadside exception and will not be sustained, *State v. Evers,* 1 N.C. App. 81, 159 S.E. 2d 372 (1968); furthermore, the entire charge was not brought forward in the record on appeal; therefore, it will be presumed that the charge was correct. *State v. White,* 232 N.C. 385, 61 S.E. 2d 84 (1950).

The defendant has other assignments of error which we have carefully considered and find without merit. We conclude that the defendant had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge PARKER concur.

CECIL JACKSON, A MINOR, BY HIS NEXT FRIEND, SAM JACKSON, PLAINTIFF v. ROLAND M. COLLINS, JERRY C. ALLEN, A MINOR, AND WILTON H. ALLEN, DEFENDANTS.

No. 7016SC575

(Filed 21 October 1970)

1. **Appeal and Error § 57— waiver of jury trial — review of findings of fact**

Where the parties have waived trial by jury, and the court's findings of fact are not challenged by exceptions in the record, the findings of fact made by the judge are presumed to be supported by the evidence and are binding on appeal.

2. **Rules of Civil Procedure § 52— findings by the court — conclusions of law**

When the parties waive trial by jury and stipulate that the court can answer specific issues as to negligence and damages, the Rule requiring that the findings of fact be stated separately from the conclusions of law *is held* satisfied when the court's conclusions of law are contained in the answers to the issues and are readily distinguished from the findings of fact. G.S. 1A-1; Rule 52 (a) (1).

3. Appeal and Error § 26— exception to judgment — review on appeal

The exception to the judgment raises the question of whether the findings of fact support the conclusions of law and whether the judgment is proper in form.

4. Appeal and Error § 45— the brief — abandonment of exceptions

Exceptions not brought forward and argued in appellant's brief are deemed abandoned. Rule of Practice No. 28.

Judge BROCK concurs in result.

APPEAL by defendant Roland M. Collins from *Brewer, J.*, May 1970 Session of ROBESON Superior Court.

This is a civil action to recover compensation for personal injuries allegedly sustained by the plaintiff Cecil Jackson as a result of a collision between the automobile operated by the defendant Roland M. Collins and an automobile owned by the defendant Wilton H. Allen and operated by the defendant Jerry C. Allen. In his complaint the plaintiff alleged that the collision was the proximate result of the joint and concurring negligence of the defendant Jerry C. Allen and the defendant Collins. The defendant Jerry C. Allen and the defendant Wilton H. Allen answered denying negligence and alleged that the collision resulted from the joint and concurring negligence of the defendant Collins and another who was not a party to the action. The defendant Collins answered denying negligence and alleged that the collision resulted from the sole negligence of the defendant Jerry C. Allen in the operation of the automobile owned by the defendant Wilton H. Allen.

On 30 March 1970 it was stipulated and agreed that all parties were bound to a trial without a jury, and that subject to dismissal of parties the issues were as follows:

"1. Was plaintiff injured and damaged by the negligence of defendant Roland M. Collins, as alleged in the complaint (as amended)?

"ANSWER: _____

"2. Was the plaintiff injured and damaged by the negligence of the defendant, Jerry C. Allen, as alleged in the complaint (as amended)?

"ANSWER: _____

"3. Was Jerry C. Allen operating the 1967 Chevrolet automobile as the agent of the defendant, Wilton H. Allen?

"ANSWER: _____

"4. What amount, if any, is the plaintiff entitled to recover for his injury and damage?

"ANSWER: _____"

After the plaintiff had offered his evidence, the action was dismissed as to the defendants Wilton H. Allen and Jerry C. Allen. The motion of defendant Collins for a directed verdict made at the close of plaintiff's evidence and renewed at the close of all the evidence, and his motion for judgment notwithstanding the verdict were denied.

The court made detailed findings of fact which are summarized as follows: On 24 March 1968 at approximately 10:20 p.m. the defendant Roland M. Collins, a deputy sheriff of Robeson County, was in pursuit of a reported stolen automobile driven by Jimmy Musselwhite headed in a westerly direction. During the pursuit the defendant reached speeds in excess of 100 miles per hour and immediately prior to the collision, while crossing a bridge and approaching a curve, was traveling at the speed of 60-65 miles per hour in a 45 mile-per-hour speed zone. The plaintiff was a passenger in an automobile being driven in an easterly direction by Jerry C. Allen. The collision occurred when the automobile operated by defendant Collins crossed the center line in the curve and entered the lane in which Allen's automobile was traveling. The defendant Roland M. Collins operated his automobile at the time and place of the collision with the Allen automobile at an excessive and unlawful rate of speed, and in a careless and heedless manner in reckless disregard to the rights and safety of others. The defendant Collins was negligent in the operation of his motor vehicle at the time and place in question and his negligence was a proximate cause of the collision with the Allen vehicle and resulted in the plaintiff's receiving multiple injuries to his body, including fractures to his ribs, fracture to his right clavicle, a severe laceration of his left arm with resultant scarring and a collapsed lung, together with severe and painful injuries to his back.

Predicated upon its findings of fact, the court answered the two issues agreed upon as follows:

"1. Was plaintiff injured and damaged by the negligence of defendant, Roland M. Collins, as alleged in the complaint (as amended)?

"ANSWER: Yes.

* * *

"IV. What amount, if any, is the plaintiff entitled to recover for his injury and damage?

"ANSWER: $15,576.85."

Based on the answers to the issues as set out in the record, the court entered judgment in favor of the plaintiff and against the defendant Collins. The defendant appealed to the North Carolina Court of Appeals.

Williford, Person & Canady, by N. H. Person, for plaintiff appellee.

Johnson, Hedgpeth, Biggs & Campbell, by John Wishart Campbell, for defendant appellant.

HEDRICK, Judge.

The appellant first assigns as error, based on specific exceptions in the record, the court's rulings with respect to the admissibility of certain testimony. "In a trial before the judge, sitting without a jury, 'the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider that only which tends properly to prove the facts to be found.'" Stansbury, N.C. Evidence 2d, § 4a. Nevertheless, we have carefully examined each exception in the record as it relates to this assignment of error and conclude that the court did not commit prejudicial error in any of the challenged rulings.

[1] The appellant next assigns as error the court's denial of his motion for a directed verdict made at the close of the plaintiff's evidence and renewed at the close of all the evidence, and the court's denial of his motion for judgment notwithstanding the verdict. In the record the appellant did not except to the findings of fact made by the court. Where, as here, the parties have waived trial by jury, and the court's findings of

fact are not challenged by exceptions in the record, the findings of fact made by the judge are presumed to be supported by the evidence and are binding on appeal. *Tanner v. Ervin,* 250 N.C. 602, 109 S.E. 2d 460 (1959); *Taney v. Brown,* 262 N.C. 438, 137 S.E. 2d 827 (1964).

[2] The defendant contends that the court failed to comply with G.S. 1A-1, Rule 52(a) (1), Rules of Civil Procedure, which reads as follows:

> "(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

This contention is without merit. The parties stipulated that the court could answer specific issues as to negligence and damage. In *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639 (1951), our Supreme Court held that the rule requiring that the findings of fact be stated separately from the conclusions of law was satisfied when the separation was made in such a manner as to render the findings of fact readily distinguishable from the conclusions of law. In the instant case Judge Brewer made detailed findings of fact and stated that his answers to the issues were based thereon. Obviously, the court's conclusions of law are contained in the answers to the issues, and are readily distinguishable from the findings of fact.

[3] The exception to the judgment raises the question of whether the findings of fact support the conclusions of law, and whether the judgment is proper in form. *Taney v. Brown, supra; Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968).

We hold that the findings of fact support the conclusions of law contained in the answers to the issues and that the judgment is proper in form.

[4] The record contains other exceptions which are not brought forward and argued in the appellant's brief. These exceptions are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

We conclude that the defendant had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD concurs.

Judge BROCK concurs in the result reached.

STATE OF NORTH CAROLINA v. CHARLES FRANK SMITH

No. 7013SC502

(Filed 21 October 1970)

1. **Larceny § 6; Criminal Law § 42— larceny prosecution — admission of article stolen**

In a prosecution charging defendant with felonious breaking and entering and with the larceny of a power saw, the trial court properly admitted in evidence as an exhibit the saw which a deputy sheriff recovered from an abandoned house, since the saw had been previously identified by its owner as the property taken from his home when it was broken into.

2. **Criminal Law § 61— evidence of foot tracks**

In a prosecution charging defendant with felonious breaking and entering and with larceny, it was proper for the investigating officer to testify that he followed foot tracks leading from the house broken into to the residence of the defendant, where (1) an eyewitness to the crime had already testified concerning the defendant's commission of the crime and the exact route that he and defendant had taken from the crime scene and (2) the court instructed the jury that the foot tracks were to be considered merely as corroborative evidence.

3. **Larceny § 10; Criminal Law § 138— sentence on consolidated judgments**

Where the defendant was convicted of felonious breaking and entering and of misdemeanor larceny, and the counts were consolidated for judgment, the fact that the sentence of five to seven years' imprisonment exceeded the maximum for misdemeanor larceny did not constitute reversible error, since the sentence was within the statutory maximum allowed for felonious breaking and entering.

APPEAL by defendant from *Bickett, J.*, 20 April 1970 Session of BLADEN Superior Court.

Defendant was indicted in a two count bill charging: (1) the felonious breaking and entering on 7 March 1970 into the dwelling house occupied by Bennie Smith in Bladen County; and (2) the larceny by breaking and entering said dwelling of "one power saw of the value of One Hundred Twenty-five

Dollars ($125.00) of the goods, chattels and moneys of the said Bennie Smith then and there being found." Defendant pleaded not guilty.

The State's evidence was in substance as follows:

Bennie Smith testified: He locked his house when he left it about 1:30 on 7 March 1970. When he returned about 4:30 he noticed window panes had been broken out and his power saw was missing. He identified State's Exhibit 1, a Sears-Roebuck chain saw, as his saw. He had had it approximately two years and had given a hundred dollars for it. He next saw it on the following morning when a deputy sheriff brought it to his house.

Kenneth Lee Smith, defendant's thirteen-year-old brother, testified: He was with defendant at Bennie Smith's house on the afternoon of 7 March 1970. They observed the saw through the window. Defendant broke out two or three panes, reached in and got the saw, and took it across the road through the woods to an old abandoned house, where defendant hid it. Then they went home. Kenneth Lee Smith wore a pair of tennis shoes that day.

T. C. Bordeaux, a deputy sheriff of Bladen County, testified: On Sunday morning, 8 March 1970, he went to Bennie Smith's residence and found an entire window had been broken out. The bottom sill of the window was about four feet high. He found footprints of two subjects. One footprint indicated it might have been made by a tennis shoe. The other was made by hard-soled shoe. The tracks left from a dirt road and went toward the broken window. They led away from the window, across the dirt road, and through a wooded area to an old abandoned house, which was about a quarter of a mile from Bennie Smith's house. He followed the same tracks from the old house to defendant's residence, where he found defendant, his brother Kenneth, and their mother. Kenneth Smith then told him that defendant had broken out a window, had taken the saw, and had hid it at the old house. Kenenth Smith accompanied him back to the old house where they found the saw under the house. The saw had been in possession of the sheriff's department since it was found underneath the house. The saw, State's Exhibit 1, was received in evidence.

Ernest Caine, whose farm adjoins Bennie Smith's home, testified: He had seen defendant and his little brother going down the road towards Bennie Smith's house about 2:30 p.m. on 7 March 1970. The next morning he was with Deputy Sheriff Bordeaux at Bennie Smith's house and noticed tracks under the window which was broken out. He saw two sets of tracks leading from the road to the window. The small track was a tennis shoe track and the large track was a smooth slipper track. The tracks led away from the window, and he and the officer followed the tracks to the old abandoned house and from there to defendant's home. The little boy told them where the saw was, and they went back to the abandoned house and found the saw under the house.

On cross-examination Ernest Caine testified that when he had seen the two boys on the road, he had been disking his field. He pulled his tractor up to the highway about the time they approached. The boys stopped where he was with his tractor and stepped over in the side ditch, where they talked two or three minutes. He further testified: "The two tracks that was made there in the ditch was the same two tracks that went into Bennie Smith's house and also came back from Bennie Smith's house and went to their house. I saw the defendant standing in the tracks that was made there at my tractor . . . "

Defendant offered no evidence. The jury found him guilty of breaking and entering and larceny. The court ordered both counts in the bill of indictment consolidated for judgment and imposed sentence of imprisonment for not less than five nor more than seven years. Defendant appealed.

Attorney General Robert Morgan, by Staff Attorney William B. Ray for the State.

Robert Michael Bruce for defendant appellant.

PARKER, Judge.

[1] Appellant contends there was error when the court allowed the State to introduce in evidence as an exhibit the saw which the deputy sheriff testified he recovered from underneath the old abandoned house. Aside from the fact that the record discloses no objection or exception to the admission of this evidence, appellant's contention is without merit. Prior to admission of this evidence, the saw had been identified by its owner as the property taken from his home when it was broken into,

and defendant's own brother had testified as to defendant's breaking into the home, removing the saw therefrom, and hiding it under the old house. The evidence was clearly admissible.

[2] Appellant assigns as error the overruling of his objections to questions which the solicitor asked the deputy sheriff concerning the foot tracks. In our opinion this testimony was properly admitted in evidence. When this testimony was offered, the State's witness, Kenneth Lee Smith, had already testified as an eyewitness to defendant's commission of the crimes with which he was charged and concerning the exact route he and defendant had walked over at the time. The court instructed the jury that the evidence with reference to footprints was offered, not as substantive evidence, but merely as corroborative evidence. The case of *State v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908, cited by appellant, is clearly distinguishable on its facts. In that case there was no evidence linking defendants to the scene of the crime other than insufficiently identified footprints and tire tracks.

[3] Appellant assigns as error the judgment imposing sentence of imprisonment of from five to seven years, pointing out that the court in charging the jury on the second count failed to require the jury to find that the larceny was committed by breaking and entering. Appellant contends that, since the property stolen was not more than $200.00 in value, under the court's charge the jury's verdict on the second count amounted to a finding of guilt of misdemeanor larceny. Even so, the two counts were consolidated for judgment and the punishment imposed was within the statutory maximum authorized by the jury's verdict on the first count. "When one judgment is entered after conviction of more than one count in a multiple count bill, the judgment will be sustained if the judgment does not exceed that which is permissible on the count which carries the greater or greatest punishment." *State v. Raynes,* 272 N.C. 488, 490, 158 S.E. 2d 351, 353; *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165; *State v. White,* 2 N.C. App. 398, 163 S.E. 2d 82.

Appellant has made a number of other assignments of error, all of which we have carefully examined and in none of which we find prejudicial error.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. CESSNA AIRCRAFT CORPORATION AND CONTINENTAL MOTORS CORPORATION

No. 7010DC554

(Filed 21 October 1970)

Limitation of Actions § 4; Aviation § 4— defective airplane engine — accrual of action for damages

Cause of action against an airplane engine manufacturer for damages arising out of the failure of an engine piston and connecting rod *is held* to accrue in 1966 when the plane containing the engine was purchased and not in 1967 when the plane crashed into plaintiff's building as a result of the piston and rod failure; consequently, plaintiff's action which was instituted in 1970 was barred by the three-year statute of limitations.

APPEAL by plaintiff from *Preston, District Judge,* 27 April 1970 Session, WAKE District Court.

This action was instituted on 19 February 1970. In its complaint plaintiff alleged in pertinent part as follows:

On 10 August 1966 Ernest W. Ross (Ross) and Francis M. Beam purchased from a dealer in Kinston, North Carolina, a certain described airplane manufactured and assembled by defendant Cessna Aircraft Corporation (Cessna), the plane being equipped with an engine manufactured by defendant Continental Motors Corporation (Continental). On 21 February 1967, while Ross was flying the plane near Kinston, the No. 5 piston and the connecting rod on the No. 5 cylinder broke, the engine stopped, and the plane was forced to the ground where it collided with a building at Caswell Center belonging to plaintiff resulting in damage to the building to the extent of $3,868.14. The plane crash and resultant damage were caused by the joint and concurrent negligence of defendants in that: Continental manufactured and installed in the engine a piston and connecting rod of insufficient strength to withstand normal and foreseeable stress and strain and containing a latent defect; Continental failed to exercise reasonable care to discover said defect which in the exercise of due diligence it should have known existed; Continental failed to use reasonable care in the design, selection of material, workmanship, inspection procedures and testing for the discovery of latent defects in the pistons and connecting rods installed in said engine, which defects could have been discovered upon the exercise of reasonable care and diligence; Cessna installed into said airplane

an engine containing a piston and connecting rod with a latent defect which were of insufficient strength to withstand normal and foreseeable stress and strain and neglected to exercise reasonable care to discover said defect; Continental and Cessna failed and neglected to warn or notify the purchaser of said airplane of said latent defects.

On 20 March 1970, Continental entered a special appearance and moved to dismiss for that it was not a citizen of North Carolina, was not engaged in doing business in the State, and the court did not obtain jurisdiction by the service of process on the Secretary of State of North Carolina. On 23 April 1970 Cessna filed answer and motion for summary judgment pleading, among other things, the three years statute of limitations.

On 15 May 1970, following a hearing, the trial court entered an order allowing Continental's motion to dismiss the action as to it. On 10 June 1970, pursuant to a hearing, the court entered judgment allowing Cessna's motion for summary judgment on the ground that any claim which plaintiff might have had against Cessna arose on 10 August 1966, more than three years prior to the institution of the action, therefore was barred by the three years statute of limitations.

Plaintiff appealed from the order and judgment, assigning error.

Attorney General Robert Morgan by Assistant Attorney General Roy A. Giles, Jr. for the State.

Young, Moore and Henderson by Gerald L. Bass for defendant appellees.

BRITT, Judge.

Plaintiff assigns as error the granting of the motion to dismiss the action as to Continental. A careful review of the record impels us to conclude that the assignment is without merit and it is overruled.

Plaintiff's other assignment of error is to the granting of Cessna's motion for summary judgment based on its plea of the three years statute of limitations. We agree with the action of the trial court and its conclusion that any claim which plaintiff might have had against Cessna arose on 10 August 1966, the

date of the sale of the airplane to Ross and Beam, which date was more than three years prior to the institution of the action.

We think the decisions of our Supreme Court in *Thurston Motor Lines, Inc. v. General Motors Corporation,* 258 N.C. 323, 128 S.E. 2d 413 (1962), and *Hooper v. Lumber Company,* 215 N.C. 308, 1 S.E. 2d 818 (1939), are controlling in this case. The facts and holding in the Motor Lines case are accurately set forth in the headnote to the opinion (written by Bobbitt, J., now C.J.) as follows:

> "Plaintiff's allegations were to the effect that one defendant sold and the other defendant manufactured a motor vehicle equipped with a faulty and dangerous carburetor, that defendants knew or by the exercise of due care should have known of such defect and failed to warn plaintiff thereof, and that by reason of such defect the vehicle subsequently caught fire to plaintiff's damage. HELD: Plaintiff's cause of action, whether for negligence or for breach of warranty, accrued at the time plaintiff purchased the vehicle, since plaintiff then had a cause for action for nominal damages at least, and it appearing from the complaint that the action was not instituted until more than three years thereafter, judgment on the pleadings in favor of defendant is without error, it being immaterial that the actual or substantial damage did occur within three years of the institution of the action."

But plaintiff contends its position differs from that of plaintiff in the Motor Lines case because the plaintiff in that case was the purchaser of the alleged defective motor. In *Hooper v. Lumber Company, supra,* plaintiff instituted an action to recover damages resulting from the overflow of waters of a river alleged to have been caused by the negligent acts and omission of defendant in its logging operations in the improper construction of bridges across the river, the leaving of tree laps and debris along the river bank, and the negligent failure to remove the bridges after cessation of logging operations. Plaintiff, a lower riparian property owner, was in no way a party to or interested in the logging operations. We quote from the opinion by Seawell, J.:

> "The statute of limitations having been pleaded, the burden was on the plaintiff to show that his cause of action against

the defendant accrued within three years prior to the institution of the suit. (numerous citations)

"While the plaintiff could not have brought and maintained his action until some injury to his property had occurred by reason of the alleged negligent acts or omissions of duty of the defendant, it does not follow that the time of the injury marks the beginning point of the running of the statute of limitations.

"Logically speaking, in a matter of tort at least, it takes both the negligent act or omission of duty, and the resultant injury, to constitute a cause of action; but since these may be widely separated in point of time, a closer analysis may be necessary in applying the statute of limitations. Whatever definition of 'cause of action' may be adopted (see 1 Am. Jur., p. 404, sec. 2), and whatever distinction may be made between the 'right of action' and 'cause of action,' it seems clear that in a case of this sort both reason and authority require that the running of the statute must be computed from the time of the wrongful act or omission from which the injury resulted. *Mobley v. Murray County,* 178 Ga., 388, 173 S.E., 680. If we view the negligence or wrongful conduct complained of as a continuing omission of duty toward the plaintiff in permitting the logs, laps, and trestles to remain in the condition described, and a source of probable injury to plaintiff's land by causing obstructions in the river and consequent overflow, in order to repel the bar of the statute of limitations it must affirmatively appear from the evidence that these conditions were under control of the defendant, and the breach of duty with reference thereto had taken place some time within the period of three years preceding the injury. C.S., 441."

In the instant case, the alleged wrongful act or omission occurred on 10 August 1966 when the Cessna airplane was sold to Ross and Beam. Plaintiff makes no allegation that Cessna had any control over the airplane after that date. The assignment of error is overruled.

The order and judgment appealed from are

Affirmed.

Judges CAMPBELL and VAUGHN concur.

U. S. PIPING, INC. v. THE TRAVELERS INDEMNITY COMPANY

No. 7010DC497

(Filed 21 October 1970)

1. **Attorney and Client § 7; Costs § 4— award of attorney's fees**

Ordinarily, attorney's fees are not recoverable as an item of damages or part of the costs in litigation.

2. **Attorney and Client § 7; Insurance § 105— judgment holder's action against automobile insurer — award of attorney's fees — findings of fact**

Trial court improperly awarded attorney's fees to a judgment holder in the latter's action against an automobile liability insurer, where the trial court made no finding that there was an unwarranted refusal by the insurer to pay the claim constituting the basis of the judgment holder's suit against the insured. G.S. 6-21.1.

3. **Appeal and Error § 57— findings of fact — review on appeal**

Where a jury trial is waived, the court's findings of fact are conclusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed.

APPEAL from *Bason, District Judge,* May 1970 Session WAKE County District Court.

Plaintiff commenced this action to recover from defendant insurance company the amount of a judgment rendered against Melvin Moore in the sum of $712.00. Plaintiff alleged that the defendant was the insurer of Melvin Moore at the time Moore negligently operated his automobile so as to cause damage to the plaintiff and give rise to the judgment in plaintiff's favor. On June 23, 1966, the defendant issued a policy of liability insurance to Moore for the period June 28, 1966 to June 28, 1967. Moore paid the premium for this period but no premium was paid for any subsequent period. On November 12, 1967, Moore was involved in an automobile accident wherein an automobile belonging to plaintiff was damaged and plaintiff recovered the above-mentioned judgment. Defendant refused to defend the action brought by plaintiff against Moore.

The case was heard before Bason, District Judge, sitting without a jury and he made the following findings of fact, among others:

"(4) That at the time the accident of November 12, 1967, occurred, the accident on which the cause of action is based,

the insured, Melvin Moore, had not received a notice of cancellation, and gave the defendant insurance company's name and policy number with coverage from June 28, 1967, to June 28, 1968, in filing the insurance coverage information required by law of the owner in the event of an accident. SR-1 and SR-21 Forms, filed with the Division of Safety Responsibility of the Department of Motor Vehicles.

"(5) That the Division of Safety Responsibility of the Department of Motor Vehicles received from Melvin Moore the SR-1 and SR-21 Forms, forwarded the SR-21 Form to the defendant insurance company, but did not receive back from the defendant insurance company the same SR-21 Form with a denial of insurance coverage by the defendant insurance company on the space provided on the back side of the form.

"(6) That the defendant's Producer of Record never received a renewal of premium letter or letter of cancellation; that he duly sent in the notification of accident to the defendant immediately after November 12, 1967, and did not obtain new coverage for Melvin Moore until February, 1968.

"(7) That the Safety Responsibility Division of the Department of Motor Vehicles records indicate continuous insurance coverage of Melvin Moore.

"(8) That the internal records of the defendant insurance company show that cancellation should have been made and an FS-4 Form should have been sent.

"(9) That the defendant was aware of the controversy concerning coverage, but did not have any record of finding or saving a copy of an actual FS-4 cancellation form.

"(10) That the defendant did not give the North Carolina Department of Motor Vehicles notification of cancellation by an SR-21 or FS-4 Form effective prior to the 12th day of November, 1967.

"(11) That Melvin Moore did not pay the premium for any insurance term beyond June 28, 1967."

Upon the above findings of fact, the trial judge concluded as a matter of law that defendant had failed to carry the burden

of showing that coverage provided by an assigned risk policy had been cancelled by the defendant in accordance with the law of North Carolina; and that, therefore, plaintiff is entitled to recover of the defendant the amount of the judgment rendered against Melvin Moore. The trial judge also ordered the defendant to pay $700.00 attorney's fees to the attorneys for the plaintiff as part of the court costs. From the judgment in favor of the plaintiff and the award of attorney's fees, the defendant appealed.

Bailey, Dixon, Wooten and McDonald by Wright T. Dixon, Jr., and John N. Fountain for plaintiff appellee.

Willis Smith, Jr., for defendant appellant.

CAMPBELL, Judge.

This appeal presents two questions: (1) Was there error in awarding attorney's fees? (2) Was there error in awarding judgment in favor of the plaintiff for $712.00?

[1, 2] Ordinarily, attorney's fees are not recoverable as an item of damages or part of the costs in litigation. *Perkins v. Insurance Co.*, 4 N.C. App. 466, 167 S.E. 2d 93 (1969). The Legislature has enacted an exception to this general rule and allows the trial judge to award attorney's fees in certain situations. G.S. 6-21.1 provides:

> *"Allowance of counsel fees as part of costs in certain cases.* — In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is two thousand dollars ($2,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs."

This statute provides for three instances in which attorney's fees may be awarded: A personal injury suit, a property dam-

age suit, or a suit against an insurance company where the insured or beneficiary is the plaintiff. This action is clearly not a personal injury suit, and therefore, to award attorney's fees, one of the two latter categories would have to apply. While this action originally started as a property damage suit, it no longer falls within that category. The suit by plaintiff against Moore in which plaintiff recovered a judgment was a property damage suit. Here plaintiff seeks to hold the defendant liable for the judgment obtained against Moore. This suit is based upon the contract of insurance which Moore had with the defendant and as such is not a property damage suit.

The final category in which attorney's fees may be awarded under the statute is "suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit." In the instant case there was no finding by the trial court "that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit." Where the statute requires that the trial judge make certain findings of fact before making a discretionary ruling, failure to make the required findings negates the effect of the discretionary ruling. *Blake v. Blake,* 6 N.C. App. 410, 170 S.E. 2d 87 (1969); *Rogers v. Rogers,* 2 N.C. App. 668, 163 S.E. 2d 645 (1968). Since there was no proper finding by the trial court in the present case to sustain an award of attorney's fees, it is not necessary to decide, and we do not decide in this case, whether plaintiff qualifies as a "beneficiary" within the meaning of the statute.

[3] With regard to the second question presented by this appeal, the trial court found sufficient facts to support the award of a judgment against the defendant in the amount of $712.00. Where a jury trial is waived, 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; *Industrial Center v. Liability Co.,* 271 N.C. 158, 155 S.E. 2d 501 (1967). We have examined the record and are of the opinion that the evidence is sufficient to support the findings of fact and that the findings of fact support the conclusions of law.

For the reasons stated above the judgment of the trial

court is reversed insofar as it awards attorney's fees in the present action and is affirmed insofar as it awards judgment in favor of the plaintiff in the amount of $712.00, plus interest and costs as rendered in previous action.

Reversed in part.

Affirmed in part.

Judges BRITT and VAUGHN concur.

SADDLE CLUB, INC. v. FRANK O. GIBSON, TRADING AND DOING BUSINESS AS GIBSON TREE SERVICE

No. 7014SC588

(Filed 21 October 1970)

1. **Adverse Possession §§ 16, 17; Trespass to Try Title § 4— wrongful cutting of trees — color of title — highway right-of-way**

In an action by a restaurant to recover damages for the wrongful cutting of three trees that were growing on a 20-foot strip of land included within a Highway Department right-of-way, the restaurant's evidence was sufficient to establish that it had exercised lawful possession of the 20-foot strip under color of title for more than seven years, and that its rights to the strip were superior to those of all other parties except the State of North Carolina; consequently, the judgment of the trial court awarding the restaurant $800 in damages is affirmed. G.S. 1-45.

2. **Appeal and Error § 57— findings of fact — review on appeal**

In the absence of a jury trial, the findings of fact by the trial judge are conclusive if supported by any competent evidence; and a judgment supported by such findings will be affirmed.

APPEAL by defendant from *Canaday, Superior Court Judge,* Regular June 1970 Session of DURHAM County Superior Court.

Plaintiff instituted this action alleging that the defendant had trespassed upon its land and wrongfully cut three trees thereby damaging the land and marring the aesthetic beauty thereof. Defendant admitted cutting the three trees in question but denied that they were on the property of the plaintiff.

The case was tried without a jury.

It was stipulated that plaintiff had a deed dated 7 May 1946 and recorded 16 May 1946 in Deed Book 165 at Page 218 of the

Durham County Public Registry. This Deed recited that the grantors "have given, granted, bargained and sold, and do by these presents give, grant, bargain, sell and convey" unto the grantee land lying and being in Durham Township described as follows: Tract No. 1 which is not involved and then

> "Tract No. 2
>
> All right, title and interest which the parties of the first part now have or may have hereafter have in and to a rectangular strip of land 20 feet wide and 200 feet in length, adjacent to and adjoining Tract #1 first above described and lying between the northern boundary line of said Tract #1 and the said Highway #70 and being embraced within the right of way of said highway, it being the intention of the parties of the first part herein only to quit claim [*sic*] such right, title, and interest as they have in and to said 20-foot strip."

The deed contained full warranties as to Tract No. 1 but not as to Tract No. 2.

It was further stipulated that the three trees cut by the defendant were cut on or about August 15, 1962, and that they were located within the 20-foot strip; that the 20-foot strip is within the 100-foot highway right-of-way which the Highway Department of the State of North Carolina has.

The plaintiff offered testimony of its president to the effect that the plaintiff operated a restaurant business; that the building in which the restaurant was operated was constructed in 1946; that the three trees in question were growing in front of the restaurant building; that the 20-foot strip described as Tract No. 2 in the deed was used for parking cars and erecting signs; that oyster shells were piled in the area for the purpose of attracting attention to the business; that the plaintiff kept the grass mowed on the 20-foot strip and the area landscaped; that the State Highway Department had not made any use of the 20-foot strip referred to either before or after the trees were cut; that the plaintiff corporation was the owner of the 20-foot strip, where the trees were located, based upon the deed mentioned above.

The trial judge found as a fact that the three trees were growing on the 20-foot strip of land which was within the right-of-way of the North Carolina Highway Department "but

that this 20-foot strip area has never been used by the Highway Department for highway purposes"; that the plaintiff "has exercised dominion and control over the land and has used it for the purposes for which it was ordinarily adaptable, and has taken the profits of which it is ordinarily susceptible, and that the plaintiff has been in lawful possession of said land since the time of the recordation of the above said deed; . . . that plaintiff, since 1946, has actively possessed and used the said 20-foot tract of land by erecting signs thereon, by parking vehicles thereon, and by putting a pile of oyster shells thereon as advertisement for its oyster bar, and plaintiff has exercised dominion and control over the said 20-foot strip by landscaping it and mowing and maintaining it and that to the present time the plaintiff continues to use the said 20-foot strip, as above said; that this 20-foot strip is above the level of the paved portion of Hillsborough Road . . . . "

The trial judge then found that the cutting of the trees by the defendant constituted a trespass against the possession of the plaintiff of the 20-foot strip and awarded damages to the plaintiff in the amount of $800.00, together with interest thereon from August 15, 1962, and the court costs.

The defendant appealed from the judgment entered and assigned as error the failure to direct a verdict in favor of the defendant and the finding by the trial court "that the plaintiff was in lawful possession, either actual or constructive of the property upon which the trees were growing based upon a stipulation that the trees were within the right-of-way of the State and in the absence of evidence offered by the plaintiff that it was the owner of the land or was in lawful possession."

Edwards and Manson by W. Y. Manson for plaintiff appellee.

James R. Patton and C. Horton Poe, Jr., for defendant appellant.

CAMPBELL, Judge.

[1] This appeal presents the question as to whether plaintiff established its title to the 20-foot strip of land and the three trees growing thereon.

In a land title case plaintiff must prevail, if at all, upon the strength of its own title and not because of the weakness

or lack of title in defendant. Plaintiff undertook to do this by introducing the deed to plaintiff in 1946 and the use of the property made thereafter from 1946 until 1962. This evidence established, as the judge found, that the plaintiff was actively in possession of the 20-foot strip of land and had exercised dominion and control over it by using it for the purposes for which it was ordinarily adaptable, namely, erecting signs, parking vehicles, placing oyster shells thereon for advertising purposes, landscaping it, mowing and maintaining it and claiming title thereto subject only to the right of the State Highway Commission, which right the State Highway Commission had never attempted to exercise.

[1, 2] The evidence introduced by the plaintiff was sufficient to sustain the findings of fact of the trial judge. In the absence of a jury trial, the findings of fact by the trial judge are conclusive if supported by any competent evidence; and a judgment supported by such findings will be affirmed. *Industrial Center v. Liability Co.*, 271 N.C. 158, 155 S.E. 2d 501 (1967). The plaintiff by the deed in question showed color of title and the activities of the plaintiff on the land subsequent to the deed in 1946 up to 1962 showed possession of the premises in question for more than seven years. This was sufficient and we do not deem it necessary to again expound on how to try a land title. This is thoroughly treated in an opinion by Judge Morris of this Court in the case of *"In the Matter of Callie Hooper King, et al v. Mary Alice King Lee, et al,"* filed 16 September 1970 and reported in 9 N.C. App. 369.

While G.S. 1-45 prevents plaintiff or any other person from acquiring an *exclusive* right to the land, it does not prevent plaintiff from acquiring a right superior to that of all other persons save the State, and the stipulation that the land was within the right-of-way of the Highway Department indicates only that the State has a superior right, if it chooses to exercise it, to the land. The rights of the State do not preclude plaintiff from acquiring actual, lawful possession, and the evidence was sufficient to support a finding of fact to that effect.

Affirmed.

Judges BRITT and VAUGHN concur.

BINNING'S, INC. v. ROBERTS CONSTRUCTION COMPANY, INC., BOBBY R. ROBERTS AND RUBY M. ROBERTS

No. 7022SC536

(Filed 21 October 1970)

1. **Attorney and Client § 7— action on note — enforcement of attorneys' fees provision — sufficiency of notice to makers**

In plaintiff's action to recover on a promissory note which provided for the payment of reasonable attorneys' fees upon default by the makers, a letter mailed by plaintiff's attorneys to the makers of the note, stating that the plaintiff would enforce the attorneys' fees provision of the note, sufficiently complied with the notice requirements of G.S. 6-21.2 (5) so as to give the makers an opportunity to pay the balance of the note without incurring the expense of attorneys' fees.

2. **Attorney and Client § 7— action on note — award of reasonable attorneys' fees**

Where an unsecured promissory note provided for the payment of reasonable attorneys' fees upon default by the debtor, without specifying any specific percentage, the trial court properly allowed the plaintiff to recover as reasonable attorneys' fees 15% of the balance due on the note, as provided by statute. G.S. 6-21.2 (2), G.S. 6-21.2 (3).

APPEAL by defendants Bobby R. Roberts and Roberts Construction Company, Inc., from *Seay, J.*, June 1970 Session of DAVIDSON Superior Court.

This was a civil action commenced on 4 March 1970 based upon an unsecured promissory note executed by the defendants. The terms of the note provided that, in the event of default, all costs and expenses of collection, including reasonable attorneys' fees, were to be paid by the makers of the note. In the complaint dated 4 March 1970, the plaintiff alleged default on the note and claimed the entire principal together with interest and reasonable attorneys' fees. On 2 April 1970 the defendants answered alleging, among other things, that the plaintiff had not given notice to the defendants as provided in G.S. 6-21.2(5) that he intended to enforce the provision in the note relative to the payment of the costs of collection including reasonable attorneys' fees.

On 26 June 1970, the parties waived trial by jury and stipulated that the court could make its conclusions of law and enter judgment based on an agreed statement of facts.

The pertinent facts as stipulated by the parties are summarized as follows:

The defendants on 20 January 1970 executed and delivered to the plaintiff a promissory note in the principal sum of $25,021.87 to be due and payable on 30 January 1970, said note containing the following provision: "It is further agreed that in the event of default, all costs and expenses of collection, including reasonable attorneys' fees, shall be collectible herewith and shall be paid by the makers of this note." When the note became due, there was a default in the payment of the note and the defendants Bobby R. Roberts and Roberts Construction Company, Inc., admitted that the plaintiff was entitled to recover from the defendants the entire principal sum of $25,021.87 together with interest at the rate of 9% per annum from 30 January, 1970. No payment of any part of the principal or interest on the note had been paid. No notice as provided by G.S. 6-21.2 (5) with respect to the recovery of attorneys' fees in addition to the outstanding balance of the note was given by the plaintiff to any of the defendants prior to 2 April 1970. On 2 April 1970, a letter was mailed by Walser, Brinkley, Walser & McGirt, attorneys for the plaintiff, to the defendants, Bobby R. Roberts and Roberts Construction Company, Inc., giving the notice provided in G.S. 6-21.2 (5) that the plaintiff intended to enforce the provision in the note relative to the payment of reasonable attorneys' fees as a part of the costs of the collection of the note.

The defendant Ruby M. Roberts died while this action was pending and her executor had not been made a party to the proceedings. It was stipulated that any judgment entered in the cause would not be binding on either the plaintiff or her estate. The parties stipulated that the sole undisputed issue for determination by the court was whether the defendants Bobby R. Roberts and Roberts Construction Company, Inc., were obligated to pay the costs and expenses of collection with respect to the note including reasonable attorneys' fees in addition to the principal sum and interest due thereon.

Based on the agreed statement of facts, Judge Seay concluded as a matter of law that " . . . the notice given by the plaintiff to the said defendants was sufficient to comply with the requirements of G.S. 6-21.2 (5)," and entered judgment that the plaintiff have and recover of the defendants Bobby

R. Roberts and Roberts Construction Company, Inc., $25,021.87 representing the principal sum due on the promissory note, and the sum of $907.14 representing interest due thereon, and the further sum of $3,785.19 representing reasonable attorneys' fees.

The defendants Bobby R. Roberts and Roberts Construction Company, Inc., excepted to the court's conclusion of law and to the entry of the judgment and appealed to the North Carolina Court of Appeals.

C. Horton Poe, Jr., for the defendant appellants.

Walser, Brinkley, Walser & McGirt, by Walter F. Brinkley, for the plaintiff appellee.

HEDRICK, Judge.

[1] The exceptions in the record present the question of whether the facts admitted in the record support the conclusions of law made by the court, and whether the court committed error in entering judgment that the plaintiff recover as reasonable attorneys' fees 15% of the balance due on the note.

G.S. 6-21.2, in part, provides:

"Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, ... "

G.S. 6-21.2(5), in pertinent part, provides:

"The holder of an unsecured note . . . shall, after maturity of the obligation by default or otherwise, notify the maker . . . that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that such maker . . . has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees. If such party shall pay the 'outstanding balance' in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void . . . . "

The defendants contend that before the plaintiff would be entitled to collect reasonable attorneys' fees in this action the notice as provided in G.S. 6-21.2 (5) must have been given by the plaintiff to the defendants prior to the institution of the action. We do not agree.

The only requirement in the statute as to when notice is to be given is that it be given " . . . after maturity of the obligation by default or otherwise . . . ." We do not construe this to mean that the notice must be given prior to the institution of the action.

The letter mailed by the plaintiff's attorneys to the defendants on 2 April 1970 was sufficient compliance with G.S. 6-21.2(5) and gave the defendants an opportunity to pay the balance of the note without incurring the additional expenses of paying reasonable attorneys' fees.

G.S. 6-21.2 (2) provides:

"If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the 'outstanding balance' owing on said note, contract or other evidence of indebtedness."

G.S. 6-21.2 (3) provides:

"As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the 'outstanding balance' shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt."

[2] Having concluded as a matter of law that the plaintiff had complied with the provisions of G.S. 6-21.2 (5) with respect to notice, and since the note in the instant case provided for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, the court properly allowed the plaintiff to recover as reasonable attorneys' fees 15% of the balance due on the note together with 15% of the interest due on the note at the time suit was instituted.

The judgment appealed from is affirmed.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JOSEPH A. BILLINGER

No. 7012SC522

(Filed 21 October 1970)

1. **Automobiles § 131; Criminal Law § 114— instructions — expression of opinion**

Where an instruction in a hit-and-run prosecution could have led the jury to believe that the court was of the opinion that the defendant was the driver of the automobile, the judgment of conviction must be reversed.

2. **Criminal Law § 112— issue of guilt — burden of proof**

When a defendant pleads not guilty, the burden is on the State to prove every element of the offense beyond a reasonable doubt.

3. **Criminal Law § 118— instructions — contentions of the parties — equal stress**

While the trial court is not required to state the contentions of the litigants at all, when the court does undertake to state the contentions of one party it must also give equal pertinent contentions of the opposing party.

4. **Criminal Law § 118; Automobiles § 131— instructions — unequal stress on the contentions**

In a prosecution charging defendant with the failure to render reasonable aid and assistance in an automobile accident, trial court's instructions were erroneous in failing to give equal stress to the contentions of the defendant; moreover, the trial court, in giving the State's contentions, was not warranted in charging that the only reasonable inference to be drawn from the evidence was that defendant was the driver of the automobile involved in the accident.

APPEAL by defendant from *Clark, J.*, 27 April 1970 Session, HOKE Superior Court.

By indictments proper in form defendant was charged with (1) being the driver of a motor vehicle involved in an accident resulting in injury to certain persons and failing to stop his vehicle at the scene of the accident, and (2) being the driver of a motor vehicle involved in an accident resulting in personal injury and failing to give his name, address, operator's license number, etc., to the other persons involved in the accident, and failing to render reasonable aid and assistance to the injured persons. Defendant pleaded not guilty to all charges.

Evidence presented by the State is summarized as follows:

At around 9:00 p.m. on 25 October 1969 Mr. Smith McInnis, accompanied by his wife and her mother, was operating his automobile on Harris Avenue near Crumpler Funeral Home in the Town of Raeford. He was traveling approximately 15 m.p.h in anticipation of making a left turn and was violently struck from behind, causing considerable damage to his car and injury to himself and his companions. After the collision, Mr. McInnis observed a 1961 Chevrolet with a damaged front end near the point of impact but did not see the driver.

Witnesses Crumpler and Long were at the Funeral Home and on hearing the collision immediately rushed to the scene. Mr. Long and Mr. Crumpler saw defendant as the sole occupant of the Chevrolet and although they were not personally acquainted with defendant and did not know his name, they identified him at trial as being the sole occupant of the car.

Following the collision, Police Officer Motley investigated the accident. By checking registration files, he learned that one Ernest Jackson was the owner of the Chevrolet. After going to Jackson's home and talking with him, he went to defendant's home where he had a conversation with defendant's wife. Thereafter he had a warrant issued on information and belief charging defendant with the offenses set forth in the bills of indictment.

Defendant did not introduce any evidence and the case was submitted on the second count only. The jury found defendant guilty and from judgment imposing active prison sentence, he appealed.

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

Philip A. Diehl for defendant appellant.

BRITT, Judge.

In his first assignment of error defendant contends that the in-court identification of him given by the witness Long was tainted by an illegal out-of-court viewing of the defendant by the witness, therefore, was inadmissible. Suffice to say we have carefully considered this contention and the authorities cited by defendant in support thereof but conclude that it is without merit. The assignment of error is overruled.

[1] In his second assignment of error defendant challenges the correctness of the following instruction of the trial judge to the jury:

> "I am allowing the defendant's motion for nonsuit on that first count and as all the evidence tends to show he did stop there; so the only question before you is whether the defendant is guilty or not guilty of a second count in the bill, which I am consolidating all in one count, that of failing to give certain specified information and failing to render reasonable assistance to injured persons; that is Katie Maxwell McInnis, the wife of the witness who testified, Mr. Smith McInnis, Mr. Smith McInnis and Mrs. J. D. Maxwell, Smith McInnis' mother-in-law."

[1, 2] Defendant contends that in his portion of the charge the court expressed an opinion as to "whether a fact is fully or sufficiently proven" in violation of G.S. 1-180. We are constrained to agree with his contention. It is well settled that when a defendant pleads not guilty the burden is on the State to prove every element of the offense beyond a reasonable doubt. 3 Strong N. C. Index 2d, Criminal Law, § 112, pp. 4-5. In the instant case as submitted to the jury one of the elements of the offense necessary for the State to prove beyond a reasonable doubt was that defendant was the driver of the automobile which collided with the automobile operated by Mr. McInnis. We think the jury could reasonably conclude from the challenged instruction that the court was of the opinion that the defendant "did stop," therefore was the driver of the offending automobile. The assignment of error is sustained.

[3, 4] In his third assignment of error, defendant challenges the following instruction to the jury:

> "The State further contends and says that you may make reasonable inferences from the evidence and the evidence in this case tends to show that the assistant chief of police made an investigation, that he went to the home of the registered owner and the evidence tends to show after going to the home of the registered owner, he went directly to the home of the defendant and it was not long after that the officer took out a warrant for the defendant before a magistrate, for the defendant's arrest; *that the only inference you can draw from such evidence, and the only*

reasonable inference is that the investigation revealed that the defendant was the operator." (Emphasis ours.)

It is well settled in this jurisdiction that while the trial court is not required to state the contentions of the litigants at all, when the court does undertake to state the contentions of one party it must also give equal pertinent contentions of the opposing party. 3 Strong N. C. Index 2d, Criminal Law, § 118, p. 28; *State v. King,* 256 N.C. 236, 123 S.E. 2d 486 (1961). In the case at bar we think the able trial judge in stating contentions inadvertedly failed to give "equal stress" to the defendant. Furthermore, we do not think the inference stated in the last quoted instruction was a reasonable one for the court to include in its charge to the jury. *State v. Wyont,* 218 N.C. 505, 11 S.E. 2d 473 (1940). The assignment of error is sustained.

For errors in the charge prejudicial to the defendant, there must be a

New trial.

Judges CAMPBELL and VAUGHN concur.

IN THE MATTER OF PEGGY ANN MARTIN, JUVENILE

No. 7015DC463

(Filed 21 October 1970)

1. Infants § 10— juvenile commitment — status as undisciplined child

A finding in a juvenile commitment proceeding that a 15-year-old girl was beyond the disciplinary control of her parents or custodian and was therefore a delinquent child in need of the supervision, protection and custody of the State, *is held* sufficient to bring the girl within the statutory definition of an "undisciplined child." G.S. 7A-278(5).

2. Infants § 10— juvenile commitment — sufficiency of evidence

The commitment of a 15-year-old girl to the Department of Juvenile Corrections for placement in a school for girls was proper, where there was evidence (1) that the girl had been brought to the principal's office on four different occasions for causing trouble in the classrooms and for being disrespectful and (2) that the girl struck a teacher.

3. Infants § 10; Arrest and Bail § 9— juvenile commitment — custody pending appeal — right to bail

The statute permitting the district court to enter a temporary custody order affecting a juvenile who is appealing a commitment order of the court is not unconstitutional on the ground that the statute deprives the juvenile of the right to bail. G.S. 7A-289; U. S. Constitution, XIV Amendment.

APPEAL by juvenile Peggy Ann Martin from *Horton, District Judge,* 23 March 1970 Session, ALAMANCE District Court.

This proceeding was instituted and processed pursuant to the provisions of Article 23 of Chapter 7A of the General Statutes. As provided by G.S. 7A-281 a petition was filed on 14 January 1970 alleging, among other things, that Peggy Ann Martin (Peggy) is less than sixteen years of age and in need of the care, protection, or discipline of the State; that she had not been in school since 30 October 1969 due to her suspension on that date for an indefinite period; that her behavior was a problem from the time of her enrollment in school in September 1969 until her suspension; that she is an undisciplined child beyond the control of her parents and school authorities.

On 9 March 1970, Peggy was adjudged an indigent and an attorney was appointed for her. On 23 March 1970, a hearing was conducted with Peggy, her attorney, and others present. The evidence introduced by the State was in the person of the principal of Eastern High School whose testimony is summarized as follows: On four different occasions Peggy had been brought to his office by various teachers for causing trouble in the classrooms and for being disrespectful. Prior to her indefinite suspension on 30 October 1969, she was suspended for a brief period of time but was later readmitted after a conference with her mother. Thereafter an altercation occurred between Peggy and another pupil during the course of which a teacher was struck by Peggy. It was after this altercation that Peggy was suspended indefinitely.

Evidence presented by Peggy is summarized thusly: Mrs. Estelle Harper testified that she was the teacher that was struck by Peggy; that she knew she was not struck deliberately and that Peggy was simply attempting to reach her adversary at the time; that Peggy had always been respectful toward her. Peggy's pastor testified that she regularly attended services at his church and he had never received any report of any misbehavior on her part.

Following the hearing, the court found as a fact that Peggy was unruly in school, that she failed to obey school officials, that she was suspended from school twice during the 1969-1970 school year for disobedience, that she engaged in an altercation and fight with another fifteen year old student, and that she is a delinquent child in need of the supervision, protection and custody of the State. The court ordered that Peggy be committed to the Department of Juvenile Corrections for placement in an appropriate school for girls with recommendation that upon her entry into custody of said department that she be given a complete mental evaluation; that the commitment shall be for an indefinite period of time not to exceed Peggy's eighteenth birthday.

Peggy gave notice of appeal to this court and the District Court upon a finding that Peggy's best interests would be served by her custody being placed with the Department of Juvenile Corrections pending disposition of the case on appeal, entered an order accordingly.

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

Donnell S. Kelly for juvenile appellant.

BRITT, Judge.

Appellant contends that the District Court committed prejudicial and reversible error (1) in making "a finding of truancy where there is no evidence in the record to indicate that the truancy was willful or intentional," and (2) committing Peggy to the Department of Juvenile Corrections without privilege of bond pending disposition of her case on appeal.

[1, 2] (1) The record does not disclose that the court made a finding of truancy but the court did find, in effect, that Peggy was beyond the disciplinary control of her parents or custodian and was, therefore, a delinquent child in need of the supervision, protection and custody of the State. This was sufficient to bring Peggy's case within the definition of an "undisciplined child" as defined by G.S. 7A-278(5). We hold that the evidence was sufficient to support this finding and the finding supported the judgment which was fully authorized by G.S. 7A-286.

[3] (2) As to appellant's second contention, G.S. 7A-289 provides for an appeal to the Court of Appeals in juvenile proceedings but states:

"Pending disposition of an appeal, the court (District Court) may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or in the best interest of the state."

Appellant contends that the court's action violated her constitutional rights and that "insofar as G.S. 7A-289 purports to permit a juvenile court to deny bail pending disposition of the case on appeal, it is in conflict with the Fourteenth Amendment to the Constitution of the United States and therefore void."

We hold that the action of the District Judge was fully authorized by the statute, that Peggy's constitutional rights were not violated and that G.S. 7A-289 is not unconstitutional. See *State v. Bradsher,* 189 N.C. 401, 404, 127 S.E. 349 (1925).

The judgment of the District Court is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

KAREN MARIE MOTYKA, MINOR; FRANCES WANDA MOTYKA, MINOR; ANN ALLEN, MINOR; AND RICHARD ALLEN, MINOR; BY THEIR NEXT FRIEND, LEATA ALLEN BARNES v. J. H. NAPPIER, INDIVIDUALLY AND AS EXECUTOR OF THE WILL OF RALPH ALLEN, DECEASED

No. 7010SC563

(Filed 21 October 1970)

1. **Appeal and Error § 6— judgments appealable — denial of a motion for summary judgment**

The Court of Appeals dismisses as fragmentary an appeal from a denial of a motion for summary judgment. Rule of Practice in the Court of Appeals No. 4.

2. **Rules of Civil Procedure § 56— summary judgment — nature and effect**

Unlike the demurrer, a motion for summary judgment allows the court to consider matter outside of the complaint for the purpose of ascertaining whether a genuine issue of fact does exist; but the denial of defendant's motion for summary judgment has the same effect as the overruling of a demurrer, in that the movant has suffered no great harm as the trial continues.

3. Rules of Civil Procedure § 56— denial of motion for summary judgment — appeal

Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken.

DEFENDANT appeals from order of *Bailey, Judge,* of the Superior Court, 19 June 1970 Session of WAKE Superior Court.

Plaintiffs, being minors, filed a complaint through their next friend against the defendant, individually, and in his capacity as Executor of the Estate of Ralph Allen, deceased. Plaintiffs allege that the defendant failed to exercise due care and reasonable diligence in the sale of certain lands belonging to the estate in that he sold them hurriedly and for less than true value and thus violated his fiduciary duties. Defendant filed a demurrer to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action. This was overruled on 31 October 1969. Defendant then filed an answer denying the material allegations of the complaint and further alleging that plaintiffs were barred from bringing this action because of an election in an earlier action to set aside the sale now complained of. The new Rules of Civil Procedure having gone into effect on 1 January, 1970, plaintiffs moved for summary judgment as to the allegations in defendant's answer concerning the election of remedies, and at the same time, defendant moved for summary judgment against the plaintiffs. Defendant's motion was made under Rule 12(c) of the new Rules of Civil Procedure and pursuant to said Rule 12(c) was treated under Rule 56. Plaintiffs' motion was granted on 19 June 1970, and defendant's motion was denied on the same date. From the overruling of his demurrer, the granting of plaintiffs' motion for summary judgment as to the allegations concerning the election of remedies, and the denial of defendant's motion for summary judgment, defendant appeals to this Court.

Liles and Merriman by John W. Liles, Jr.; and Harris, Poe, Cheshire & Leager by Samuel R. Leager for plaintiffs appellees.

T. Yates Dobson, Jr., for defendant appellant.

CAMPBELL, Judge.

[1] We are of the opinion that this represents a fragmentary appeal which is improper and therefore must be dismissed.

Rule 4 of the Rules of Practice in the Court of Appeals provides:

"The Court of Appeals Will Not Entertain an Appeal:

(a) From an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. The movant may enter an exception to the order overruling the demurrer and present the question thus raised to this Court on the final appeal; provided that when the demurrant conceives that the order overruling his demurrer will prejudicially affect a substantial right to which he is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order overruling the demurrer."

While this rule has not been amended so as to correlate with the new Rules of Civil Procedure, we think it is clear that the denial of a motion by a defendant for summary judgment has the same affect as the overruling of a demurrer, and thus falls within the purview of Rule 4(a).

[2] Summary judgment is a new procedure in North Carolina, and while it may encompass more than a demurrer, it often arises in the same manner and has the same effect as the former practice with the demurrer. A demurrer was a proper method of testing the legal sufficiency of the complaint, but it was confined only to the complaint itself. A motion for summary judgment allows the Court to consider matter outside of the complaint for the purpose of ascertaining whether a genuine issue of fact does exist. This recognizes the fact that a genuine issue of fact may not exist, even though one may appear in the complaint which is well pleaded. But a denial of a motion by a defendant for summary judgment has the same effect as the overruling of a demurrer, in that the movant has suffered no great harm as the trial continues, and the movant is allowed to preserve his exception to the denial of the motion for consideration on appeal from the final judgment. The rule also provides if a substantial right has been prejudicially affected, then a petition to this Court for a writ of *certiorari* may be used. In the instant case we do not think a substantial right has been prejudicially affected by the denial of the defendant's motion for summary judgment.

G.S. 1-277 provides:

"Appeal from superior court judge.—(a) An appeal may

be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which *affects a substantial right* claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." (Emphasis added.)

[3] Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. The moving party is free to preserve his exception for consideration on appeal from the final judgment, and in case a substantial right is thought to be affected to the prejudice of the movant, then a petition for a writ of *certiorari* is available. To allow an appeal from a denial of a motion for summary judgment would open the flood gate of fragmentary appeals and cause a delay in administering justice.

For the reasons stated, the appeal is

Dismissed.

Judges BRITT and VAUGHN concur.

SUEANNE M. JERNIGAN (UNMARRIED) v. MAXINE CORE LEE AND HUSBAND, LEON LEE; WILLIAM CORE (UNMARRIED); LAURA P. ELMORE AND HUSBAND, P. W. ELMORE; ET ALS

No. 7011SC505

(Filed 21 October 1970)

1. **Wills § 36— creation of determinable fee**

A devise to a named person and his heirs in fee, with an added provision that if the named person "shall die without issue or heirs by him begotten" then the land shall pass in fee to another, *is held* to give the named person a determinable fee.

2. **Wills § 43— construction of devise — "issue or heirs by him begotten"**

The words "issue or heirs by him begotten" in a devise is construed to mean "children" rather than heirs generally.

3. **Wills § 43— "heirs of her body living at her death"**

The words "heirs of her body living at her death" is construed to mean "children."

4. Wills § 43— construction of "heirs" and "next of kin"

In a devise to a named person "and his heirs, if any, otherwise to his next of kin, who may be living at his death," the word "heirs" is construed to mean "children" and the words "next of kin" are construed to mean heirs generally.

5. Wills § 53— devise of tenancy in common

A devise to a named person and his children creates a potential tenancy in common.

6. Wills § 53— devise to tenants in common — division of land

Where no basis for a division of the land is stated in the will, as between tenants in common it is presumed that the parties will share equally.

7. Wills §§ 43, 73; Estoppel § 1— construction of will — devise to "heirs" and "next of kin" — estoppel by deed

Plaintiff seeks the construction of a will which devised a contingent interest in a tract of land to her father and his "heirs, if any, otherwise to his next of kin, who may be living at his death." Plaintiff, who was born in 1927, is the only child and heir of her father. In 1939 the father conveyed his one-half contingent interest in the tract of land to another person. The property vested in 1968. *Held*: The plaintiff is entitled to a one-half undivided interest in the tract in question, but she is estopped to deny the validity of her father's conveyance in 1939.

8. Wills § 33— Rule in Shelley's Case

The Rule in Shelley's Case is inapplicable when the word "heirs" is not used in its technical sense.

9. Wills § 33— Rule in Wild's Case

The Rule in Wild's Case is inapplicable when the named devisee and his heirs do not take an estate directly from the testator.

APPEAL by plaintiff from *Copeland, J.*, at the April 1970 Civil Session, JOHNSTON Superior Court.

In her complaint filed 12 June 1969 plaintiff alleged that this is an action for declaratory judgment relief instituted pursuant to the provisions of the Declaratory Judgment Act as set forth in G.S. 1-253 *et seq.* for the purpose of construing Item 2 and Item 4 of the Last Will and Testament of Leacy Jernigan Stewart, deceased, (Leacy) dated 11 March 1920 and of determining a question in actual controversy between the parties as to their respective rights in a tract of land described in the complaint. Plaintiff alleged that she was the rightful owner of the land. In their answers defendants admitted, or did not deny, the principal facts alleged by plaintiff but denied that plaintiff had any interest in the land. Defendants also alleged

certain facts which they contend vested them with title to the property.

On 24 March 1970 defendants filed motion for summary judgment under Rule 56(b) and (c) of the Rules of Civil Procedure. The cause came on for hearing on the motion and following hearing the court made findings of fact from the pleadings which are summarized as follows:

Leacy died testate, a resident of Johnston County, on or about 22 June 1921. At the time of her death she was fee simple owner of the tract of land in question and in her Last Will and Testament devised the land. Pertinent parts of her Will, Items 2 and 4, are as follows:

> "Item 2. I give and devise to my son, O. D. Stewart, and his heirs in fee all that tract of land in Johnston County, North Carolina, and in Banner Township, and described and defined as follows, to wit: . . . . .
>
> "Item 4. I further add to paragraph 2 in this Will as follows: that if O. D. Stewart shall die without issue or heirs by him begotten, then said tract of land shall pass in fee to Meta Stewart, and if she should die without any heir of her body living at her death, then said tract of land shall pass to Berry Jernigan and his heirs, if any, otherwise to his next of kin, who may be living at his death."

O. D. Stewart (O.D.) died in 1946 without ever having married or without ever having begotten any children. Meta Stewart Barefoot (Meta) died intestate in 1968 leaving no husband surviving and without ever having any children. Berry Jernigan (Berry), the father of plaintiff, died in 1944, predeceasing both O.D. and Meta. Plaintiff was born in 1927 and is the only child and heir of Berry.

In 1933 Johnston County instituted tax foreclosure proceedings for taxes due on the subject property; Berry was made a party to the proceedings but plaintiff was not. O.D. purchased such interest as was conveyed in the proceedings and a commissioner's quitclaim deed dated December 1938 was executed to him. In December 1939 Berry executed a warranty deed to O.D. conveying his interest in the subject property.

The relative rights of Meta and the heirs at law of O.D were adjudicated in a special proceeding filed in the office of

the Clerk of Superior Court of Johnston County wherein it was determined that Meta had a life estate in the lands with a remainder in the heirs at law of O.D. Neither Berry nor plaintiff was a party to the proceeding. Defendants in this action are, or represent, the heirs at law of O.D.

Upon the foregoing findings of fact, the court adjudged that defendants were entitled to summary judgment from which plaintiff appealed.

Britt and Ashley by Wallace Ashley, Jr., for plaintiff appellant.

Levinson and Shaw by Joseph H. Levinson for defendants appellees.

BRITT, Judge.

We hold that the court erred in granting defendants' motion for summary judgment.

[1-4] It is conceded by defendants that Item 2 and Item 4 of Leacy's Will must be read together contextually. Considering the two items together, the effect is to give O.D. a determinable fee rather than a fee simple. *Perrett v. Bird,* 152 N.C. 220, 67 S.E. 507 (1910). The event which would cause, and in fact did cause, O.D.'s estate to determine was his death without "issue or heirs by him begotten." Reading this phrase we conclude that Leacy meant "children" rather than heirs generally. *Puckett v. Morgan,* 158 N.C. 344, 74 S.E. 15 (1912); *Lockman v. Hobbs,* 98 N.C. 541, 4 S.E. 627 (1887). The same conclusion is reached with regard to the estate of Meta. Reading Item 4 as a whole it appears that the phrase "heirs of her body living at her death" meant "children." *Hampton v. Griggs,* 184 N.C. 13, 113 S.E. 501 (1922). Upon the death of Meta without children her estate was determined. The ultimate devise was to "Berry Jernigan and his heirs, if any, otherwise to his next of kin, who may be living at his death." Reading the word "heirs" and the words "next of kin" in the same sentence it is apparent that "heirs" should be read to mean "children" and "next of kin" should be read as heirs generally. *Hudson v. Hudson,* 208 N.C. 338, 180 S.E. 597 (1935); *Puckett v. Morgan, supra;* G.S. 41-6; *Smith v. Brisson,* 90 N.C. 284 (1884).

[5-7] When the phrase "Berry Jernigan and his heirs" is read "Berry Jernigan and his children" it is clear that a potential

tenancy in common was created by the will of Leacy. It is not necessary here to determine when the tenancy in common arose, because the plaintiff, having been born in 1927, was in existence during all of the time that is relevant to the calling of the roll. Upon the termination of Meta's estate, if Berry had been alive and had had a child and had made no conveyance of his interest, Berry and that child would have been tenants in common in the land devised. Since no basis for a division of the land was stated in the will, as between tenants in common it is presumed that the parties will share equally. *Loring v. Palmer,* 118 U.S. 321, 6 S. Ct. 1073, 30 L. Ed. 211 (1885). Upon the facts set forth in the pleadings, we think plaintiff now owns one-half of the land in her own right under the will. *Whitesides v. Cooper,* 115 N.C. 570, 20 S.E. 295 (1893). The one-half that her father contingently owned at the time of his conveyance in 1939 would have passed to plaintiff by descent (see G.S. 41-2) if the conveyance had not been made; however, as to her father's half plaintiff is estopped to deny the validity of his deed. *Hardy v. Mayo,* 224 N.C. 558, 31 S.E. 2d 748 (1944); 3 Strong, N. C. Index 2d, Estoppel, sec. 1, p. 578. Upon the facts pleaded, we think plaintiff is entitled to a one-half undivided interest in the land in question.

[8, 9] It might be noted that neither the Rule in Shelley's Case nor the Rule in Wild's Case applies to alter the effect of the phrase "Berry Jernigan and his heirs." The former does not apply because it is clear that "heirs" is not used in its technical sense, and this usage is necessary for the application of the rule. *Welch v. Gibson,* 193 N.C. 684, 138 S.E. 25 (1927); *Nichols v. Gladden,* 117 N.C. 497, 23 S.E. 459 (1895); 4A Thompson on Real Property, Future Interests, sec. 2010, p. 576. The Rule in Wild's Case does not apply because "Berry Jernigan and his heirs" did not take an estate directly and immediately from Leacy. *Cole v. Thornton,* 180 N.C. 90, 104 S.E. 74 (1920), 4A Thompson on Real Property, Future Interests, sec. 2008, p. 564.

For the reasons stated the judgment of the Superior Court is

Reversed.

Judges CAMPBELL and VAUGHN concur.

GLEN FOREST CORPORATION v. MICHAEL B. BENSCH AND WIFE, ELEANOR M. BENSCH

No. 7010SC447

(Filed 21 October 1970)

1. **Rules of Civil Procedure § 50— motion for directed verdict — judgment n.o.v.**

Litigant's motion for directed verdict *nunc pro tunc*, which was made *after* the jury had returned its verdict in the case, came too late to preserve its right to move for judgment notwithstanding the verdict; therefore, litigant's purported motion for judgment n.o.v. was properly denied. G.S. 1A-1, Rule 50.

2. **Rules of Civil Procedure § 59— order granting a new trial — necessity for statement of grounds**

The trial court was not required to specify the grounds for its order allowing litigant's motion to set aside the verdict and grant a new trial, since the order was not entered on the trial court's own initiative. G.S. 1A-1, Rule 59(d).

3. **Rules of Civil Procedure § 59— motion for new trial — discretion of court — review on appeal**

A motion to set aside the verdict and for a new trial is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal in the absence of abuse of discretion.

APPEAL by petitioner and respondents from *Bailey, J.*, 17 April 1970 Civil Session, Superior Court of WAKE County.

This is a proceeding under Chapter 38, General Statutes of North Carolina, to determine a boundary line, instituted by petitioner on 17 June 1968. To the judgment of the Clerk of Superior Court entered 9 July 1970, petitioner excepted and appealed to the Superior Court. The matter was tried in Superior Court by a jury, and the jury returned a verdict establishing as the boundary line the line contended for by respondents. After the coming in of the verdict, petitioner moved the court in writing under Rule 50 that it be permitted *nunc pro tunc* to move for a directed verdict as of the close of all the evidence, stating the grounds for the motion. The court allowed the petitioner to move *nunc pro tunc* for a directed verdict at the close of all the evidence but denied the motion for a directed verdict. Petitioner then filed its motion for a judgment *non obstante veredicto* under Rule 50(b), stating the grounds therefor. This motion was denied. Petitioner then moved in writing, under Rule 59(a) (5) and (7), that the court set aside the verdict and grant

a new trial, stating the grounds for the motion. This motion was allowed. Respondents appeal from the order setting aside the verdict and granting a new trial. Petitioner appeals from the order denying its motion for directed verdict and the order denying its motion for judgment notwithstanding the verdict.

Basil L. Sherrill for petitioner.

Allen Langston for respondents.

MORRIS, Judge.

PETITIONER'S APPEAL

[1] To sustain petitioner's position on this appeal would in effect work an amendment to G.S. 1A-1, Rule 50. That rule provides for a motion for a directed verdict at the close of plaintiff's evidence or at the close of all the evidence. It does not give a litigant the option of waiting until after the verdict is in to make the motion for a directed verdict to attempt to preserve his right to move for judgment notwithstanding the verdict. The language of G.S. 1A-1, Rule 50, is almost identical to the language of Rule 50, Federal Rules of Civil Procedure. The Federal Courts have often interpreted the language used in that portion of the rule with which we are now concerned. That well-recognized interpretation is that the making of an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment notwithstanding the verdict. 5 Moore's Federal Practice, § 50.08, p. 2357, (and cases there cited). In *Starling v. Gulf Life Co.*, 382 F. 2d 701 (CA 5th, 1967), appellant joined her motion for new trial with a motion for judgment notwithstanding the verdict. The Court noted that the latter motion was a nullity, because appellant had failed to move for a directed verdict and said "Since there was no motion for judgment n.o.v. in a legal sense, this court is without power to grant one and therefore must confine its consideration to the motion for new trial."

Petitioner candidly acknowledges this when it states it does not seriously contend that it was entitled to a directed verdict but wanted to preserve and protect the right to move for judgment notwithstanding the verdict. Making the motion *nunc pro tunc* does not effectively cure the defect. Petitioner's motion for directed verdict came too late and was of no effect. Without it petitioner had no standing to move for judgment notwithstanding the verdict, and the purported motion was properly denied.

RESPONDENTS' APPEAL

[2] Respondents appeal from the entry of order setting aside the verdict and granting a new trial. This motion by petitioner was made under G.S. 1A-1, Rule 59(a) (5) and (7). Respondents argue that the order granting the motion to set aside the verdict and grant a new trial cannot be effective because the court failed to specify the grounds for allowing the motion. G.S. 1A-1, Rule 59(d) provides: "Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor." The order from which respondent attempts to appeal was not, however, one entered of the court's own initiative. It was entered as the result of motion of a party, and we find nothing requiring the court to specify the grounds therefor.

[3] It has long been the rule in this State that a motion to set aside the verdict and for a new trial is "addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal." *Pruitt v. Ray,* 230 N.C. 322, 52 S.E. 2d 876 (1949). Rule 59 of the Federal Rules of Civil Procedure is comparable to G.S. 1A-1, Rule 59. We find no distinction in application of the principle. "In line with the English common law, a timely motion for new trial is addressed to the sound judicial discretion of the trial court." 6A Moore's Federal Practice, § 59.05(5), p. 3756. Respondent does not argue that there has been an abuse of discretion nor is an abuse shown by the record.

Petitioner's appeal—affirmed.

Respondents' appeal—affirmed.

Chief Judge MALLARD and Judge GRAHAM concur.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION AND OFFICE COMMUNICATIONS COMPANY, APPELLEES, v. SERVICES UNLIMITED, INC., AND TARHEEL ASSOCIATION OF RADIOTELEPHONE SYSTEMS, INC., APPELLANTS

No. 7010UC427

(Filed 21 October 1970)

1. **Utilities Commission § 9— review of Commission's order — timely appeal — jurisdiction of appellate court**

Court of Appeals was without jurisdiction to review an original order of the Utilities Commission where no appeal had been taken from the order and the time for giving notice and perfecting appeal had expired. G.S. 62-90.

2. **Utilities Commission § 1— discretionary authority of Commission — change of orders**

The statutory authority of the Utilities Commission to rescind, alter or amend any order or decision made by it, upon proper notice to parties and after opportunity for hearing, is obviously discretionary. G.S. 62-80.

3. **Utilities Commission § 1— appellate review of original order — discretion of Commission**

The Utilities Commission did not abuse its discretion in denying appellants' motion to review an original order of the Commission, where the motion was filed almost three months after the time for filing exceptions and giving notice of appeal had expired.

APPEAL by protestants from order of North Carolina Utilities Commission, dated 20 January 1970.

On 20 August 1968, Office Communications Company filed application with the Utilities Commission seeking a certificate of public convenience and necessity to provide radio paging service in connection with its telephone answering service in Winston-Salem and Forsyth County. Services Unlimited, Inc., and Tarheel Association of Radiotelephone Systems, Inc., intervened as protestants.

Hearings on the application were concluded on 8 May 1969 and on 28 July 1969 the Commission issued its order, finding and concluding that the type of service contemplated by the applicant, when used solely as an extension of and incident to its non-utility answering service, is exempt from the Commission's jurisdiction.

No party filed exceptions to any portion of the Commission's order and no notice of appeal was given. On 24 November

1969, almost four months after the Commission's order issued, protestants filed a motion and petition "for hearing and amendment of order." On 20 January 1970 the Commission denied the motion and protestants appealed.

Edward B. Hipp for North Carolina Utilities Commission.

Boyce, Mitchell, Burns & Smith by F. Kent Burns for plaintiff appellee Office Communications Company.

Allen, Steed and Pullen by Thomas W. Steed, Jr., for defendant appellant Tarheel Association of Radiotelephone Systems, Inc.

Reynolds and Farmer by Ted R. Reynolds for applicant appellant Services Unlimited, Inc.

GRAHAM, Judge.

Appellants set forth in their brief the following as the question to be decided on appeal:

> "Did the North Carolina Utilities Commission err in holding that radio paging service as sought by the applicant-appellee is not subject to the regulation of the Utilities Commission and exempt from its jurisdiction?"

[1] A consideration of appellants' question would involve a review of the Commission's original order of 28 July 1969. No appeal was taken from that order and time for giving notice and perfecting appeal has expired. G.S. 62-90. We are, therefore, without jurisdiction to review the original order, and the only question properly before us is whether the Commission erred in denying appellants' motion "for hearing and amendment of order."

[2] G.S. 62-80 provides that the Commission *may* at any time, upon proper notice to parties and after opportunity for hearing, rescind, alter or amend any order or decision made by it. This authority is obviously discretionary. An application for rehearing "is addressed to and rests in the discretion of the administrative agency. . . ." 2 Am. Jur. 2d, Administrative Law, § 537, p. 348. "[A]n appeal does not lie from the denial of a petition to rehear." *Utilities Comm. v. R.R.*, 224 N.C. 762, 32 S.E. 2d 346.

[3] Appellants contend, however, that the Commission abused its discretion in denying their motion and refusing to amend its

original order. This contention is based on allegations in the motion that G.S. 62-119 through 62-124, which became effective subsequent to the hearings on the application, require a different result than that reached by the Commission on the question of its jurisdiction to regulate the type of service which the applicant seeks to offer. However, the effective date of these statutes was 11 June 1969, more than six weeks before the Commission rendered its original order. If appellants' argument with respect to the effect and applicability of these statutes is correct, their remedy was to appeal from the original order. They failed to do so, and consequently they may not now present, through an attempt to appeal from the denial of their motion to reopen the matter, the exact question which could have been presented by a timely appeal from the original order. "A court, having power to grant a rehearing, may entertain a petition for rehearing, filed after the time for appeal from its original order has expired, but in considering whether or not to grant the rehearing, such consideration will not enlarge the time for appeal from the original order. . . ." *Utilities Comm. v. R.R., supra.*

Appellants' motion was filed almost three months after time for filing exceptions and giving notice of appeal had expired. We are of the opinion that no abuse of discretion by the Commission has been shown, and the order denying appellants' motion must, therefore, be affirmed.

Affirmed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM FLOYD HICKMAN

No. 7010SC568

(Filed 31 October 1970)

Constitutional Law § 32— right to counsel — first offense of drunken driving

A defendant charged with his first offense of drunken driving is not entitled to the appointment of counsel; therefore, the trial court is not required to go into the question of defendant's indigency. G.S. 7A-451, G.S. 20-179.

State v. Hickman

APPEAL by defendant from *Bailey, J.*, March 1970 Regular Criminal Session, Superior Court of WAKE County.

Defendant was convicted in District Court under three separate warrants charging him with driving a motor vehicle on the public streets or highways of the State of North Carolina while under the influence of some intoxicating beverage. Each charge was for a first offense. He appealed to Superior Court, entered a plea of guilty to each charge, and judgment was entered in each case. In case No. 59609, he was sentenced to six months. In case No. 61001, he was sentenced to six months to run at the expiration of the sentence in case No. 59609. In case No. 1013, he was sentenced to six months to run concurrently with the sentence imposed in case No. 61001. From entry of the judgments, defendant appealed, and, upon a determination of indigency, counsel was assigned to prosecute his appeal in *forma pauperis*. Record on appeal was not docketed within the time allowed by our rules and we allowed defendant's petition for a writ of *certiorari*.

Attorney General Morgan by Assistant Attorney General Melvin for the State.

William T. McCuiston for defendant appellant.

MORRIS, Judge.

When the defendant entered his plea of guilty to each charge, the court questioned him extensively as to the voluntariness of his plea, as to whether he understood the charges against him, whether he understood that he had the right to plead not guilty and be tried by a jury, whether he had any witnesses he wished to have appear and testify, whether any promise or threat had been made by anyone to influence him to plead guilty, whether he had made any statement to the police, whether he had any questions he wished to ask of the court. The court fully explained the possible sentences and defendant said he fully understood. He contends on appeal that the court erred in failing to inquire as to defendant's indigency and in failing to appoint counsel if the inquiry resulted in a finding of indigency.

Defendant relies on *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245 (1969). We do not agree that this case requires the appointment of counsel in the case now before us. *State v. Morris* held that a defendant who is charged with a serious offense has

a constitutional right to the assistance of counsel during his trial in the superior court and that G.S. 15-4.1, insofar as it purported to leave to the discretion of the trial judge the appointment of counsel for indigent defendants charged with serious offenses was unconstitutional. A serious offense was defined as "one for which the authorized punishment exceeds six months' imprisonment and a $500 fine." This definition was codified by the 1969 Legislature by G.S. 7A-451.

> "*Scope of entitlement.*—(a) An indigent person is entitled to services of counsel in the following actions and proceedings:
>
> (1) Any felony case, and any misdemeanor case for which the authorized punnishment exceeds six months imprisonment or a five hundred dollars ($500.00) fine; . . ."

The 1969 Legislature also amended G.S. 20-179, the statute under which the defendant in *State v. Morris, supra,* was sentenced, to provide that "Every person who is convicted of violating § 20-138, relating to habitual users of narcotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall, for the first offense, be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or imprisonment for not less than thirty (30) days, nor more than six months, or by both such fine and imprisonment, in the discretion of the court." Each offense with which defendant was charged occurred after the effective date of the amendment.

Clearly none of the charges to which defendant entered a guilty plea was within the category of serious offenses as defined in *State v. Morris, supra.* Defendant was, therefore, not entitled to appointment of counsel, and an inquiry as to defendant's indigency was not required.

In the trial in the Superior Court we find

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. ROY LEE COVINGTON

No. 7020SC547

(Filed 21 October 1970)

Homicide § 28— instructions — correlation between plea of self-defense and defendant's violent reputation

In a homicide prosecution wherein the defendant contended that he was acting in the defense of his sister when he shot the deceased and offered evidence that the deceased had a reputation as a violent and dangerous man in the community, the failure of the trial court in its instructions to make a correlation between the violent reputation of the deceased and the plea of self-defense was reversible error.

Judge VAUGHN concurs in result.

APPEAL by defendant from *Thornburg, Special Superior Court Judge,* 4 May 1970 Session of UNION Superior Court.

Defendant was tried under a bill of indictment charging him with the murder of Preston Colston on 30 September 1969. The State elected not to try the defendant for a capital offense, but instead for second-degree murder or a lesser offense. The jury returned a verdict of guilty of manslaughter.

The factual situation as revealed by the evidence shows that on the night of the shooting, the defendant was a sixteen-year-old boy living with his mother about four miles east of Monroe. A fourteen-year-old sister, Maxine, also lived there, as well as other members of the family. The deceased, a grown man, weighing over 200 pounds and over six feet tall entered the house, apparently uninvited, with a boy companion. The deceased began "messing" with Maxine, and she told him to keep his hands off her. The deceased and Maxine then had words, and he accused Maxine of cursing him, which Maxine denied to her mother. The deceased then commenced slapping Maxine and grabbed her around the neck and drug her down the hall choking her. The mother attempted to separate them but without success. The deceased stated that he was "going to beat her [Maxine's] . . . brains out." The defendant told the deceased to stop beating and choking Maxine and to leave the house. The mother also requested the deceased to leave the house. The deceased paid no attention to these requests but continued choking Maxine. The defendant then went into his room, procured a shotgun, and shot the deceased in the back, just below the left shoulder blade, producing death.

There was testimony that the deceased was a strong man who would fight and that he had a reputation as a violent and dangerous man in the community.

Attorney General Robert Morgan by Staff Attorney Donald M. Jacobs for the State.

Thomas and Harrington by Larry E. Harrington for defendant appellant.

CAMPBELL, Judge.

There are several assignments of error, and, since a new trial must be granted, we follow the rule to omit discussion of those matters not likely to recur on another hearing.

The defendant presented evidence tending to show that he acted in self-defense of his sister, an immediate member of his family.

The defendant assigns as error that the trial judge did not adequately instruct the jury on the circumstances they could consider in determining the reasonableness of the quantum of force used by the defendant to repel the assault on his sister. A careful examination of the charge reveals that in only one instance was the evidence that the deceased was a violent and dangerous man mentioned. This was done in the summation of the evidence on behalf of the defendant. There was, however, no correlation between the testimony of the violent and dangerous character of the deceased and the plea of killing in defense of the defendant's sister. Failure to make this correlation is reversible error.

In *State v. Riddle,* 228 N.C. 251, 45 S.E. 2d 366 (1947), there was mention of the fact that the deceased was a man of violent and dangerous character in connection with the plea of self-defense, but the Supreme Court held the correlation was not sufficient. In that case it is stated:

> "We think, however, that while the jury, in its process of thinking, might have made the correct application of the principle underlying the evidence, this did not relieve the court from more directly and clearly instructing them and explaining to them the bearing the reputation of the deceased as a violent man might have on defendants' reasonable apprehension of death or great bodily harm through the attack to which their evidence pointed."

In the instant case no correlation at all was made between the reputation of the deceased as a violent and dangerous person and the plea of self-defense.

For this inadvertent error in an able charge, there must be a new trial. It is so ordered.

New trial.

Judge BRITT concurs.

Judge VAUGHN concurring in result.

STATE OF NORTH CAROLINA v. SAFFO JACOBS

No. 7016SC530

(Filed 21 October 1970)

Indictment and Warrant §§ 10, 14— naming of defendant in warrant — motion to quash

Where defendant's name did not appear in the complaint and warrant for arrest, but did appear in the caption thereof, defendant's motion to quash the warrant was properly denied.

APPEAL by the State from *May, S.J.*, 7 July 1970 Regular Criminal Session, ROBESON Superior Court.

The defendant was charged in a warrant with the unlawful possession of whiskey. Upon arraignment, but prior to pleading, the defendant moved to quash the warrant. The warrant is as follows:

WARRANT NO. 70CR4787

STATE OF NORTH CAROLINA COUNTY OF ROBESON	In The General Court of Justice—District Court Division
The State of North Carolina v. Saffo Jacobs Age ?, Race I, Sex M Address Rt. # Fairmont, N. C.	COMPLAINT FOR ARREST—POSSESSION OF NONTAXPAID LIQUOR (ALCOHOLIC BEVERAGES)

The undersigned, R. C. Oliver being duly sworn, complains and says that at and in the county named above and on or about the 23 day of April, 1970, the defendant named above did unlawfully and wilfully have in his possession alcoholic beverages in the amount of 160 gallons, upon which the taxes imposed by the laws of the Congress of the United States and by the laws of the State of North Carolina had not been paid.

The offense charged here was committed against the peace and dignity of the State and in violation of G.S. 18-48.

R. C. OLIVER
Complainant
D. S. Robeson

Sworn to and subscribed before me this
23 day of April 1970.
CURTIS MCGIRT
Magistrate

WARRANT FOR ARREST

To any officer with power to execute an arrest warrant for the offense described above:

It appearing from the accusations recited in the above complaint, which is made a part of this warrant, that a criminal offense has been committed, you are commanded forthwith to arrest the defendant named above and bring him before District Court at Fairmont May 11, 1970—9:30 a.m. to be dealt with according to law.

This the 23 day of April, 1970.

CURTIS MCGIRT
Magistrate

From the allowance of defendant's motion to quash the warrant, the State appealed.

Attorney General Robert Morgan by Staff Attorney Donald M. Jacobs for the State.

Johnson, Hedgpeth, Biggs and Campbell by John Wishart Campbell for defendant appellee.

VAUGHN, Judge.

The sole question presented on this appeal is properly stated by the appellant as follows:

> "Whether the trial court erred when it allowed defendant's motion to quash the warrant on the grounds that the name of the defendant did not appear in the complaint for arrest or in the warrant for arrest, but appeared only in the caption or title?"

We hold that appellant's question should be answered in the affirmative. The complaint and the warrant are on a single page. The complaint refers to the title of the action. The warrant refers to the complaint. The complaint is, by reference, incorporated into the warrant. "When the title, the complaint and the warrant are considered together as parts of the same instrument and proceeding, they point out the defendant with due certainty as the person committing the offenses alleged. *S. v. Poythress,* 174 N.C. 809, 93 S.E. 919." *State v. Sawyer,* 233 N.C. 76, 62 S.E. 2d 515.

Reversed.

Judges CAMPBELL and BRITT concur.

WALTER G. GREEN v. WILLIAM R. BEST

No. 7015SC597

(Filed 21 October 1970)

Rules of Civil Procedure § 12; Appeal and Error § 6— orders appealable — denial of motion to dismiss complaint

The Court of Appeals will not entertain an appeal from an order denying defendant's motion to dismiss plaintiff's complaint for failure of the complaint to state a cause of action upon which relief can be granted; the defendant's remedy is to petition for writ of *certiorari.* G.S. 1A-1, Rule 12(b)(6); Court of Appeals Rule No. 4(a).

APPEAL by defendant from *Braswell, J.,* May 1970 Session, ALAMANCE Superior Court.

This is an action for slander commenced by issuance of summons and filing of complaint on 11 July 1969. An amended complaint was filed and on 8 April 1970, defendant filed a mo-

tion to dismiss the action. From an order denying his motion to dismiss, defendant attempts to appeal to this court.

Wilkinson and Vosburgh by John A. Wilkinson for plaintiff appellee.

Latham, Pickard and Ennis by James F. Latham for defendant appellant.

BRITT, Judge.

Plaintiff contends that because of Rule 4(a) of the Rules of Practice in the Court of Appeals, an appeal by defendant from the order denying his motion to dismiss plaintiff's action for that the complaint fails to state a claim upon which relief can be granted is not proper. We agree with the contention.

Although defendant does not state in his motion to dismiss the rule of Civil Procedure under which he moves, presumably it is Rule 12(b)(6). In the recent case of *Sutton v. Duke, et als,* 277 N.C. 94, 176 S.E. 2d 161 (filed 28 August 1970), opinion by Sharp, Justice, we find:

> "A motion to dismiss 'for failure to state a claim upon which relief can be granted' is the modern equivalent of a demurrer. (citations) ***** Accordingly, we treat the demurrer in this case as a motion to dismiss under our Rule 12(b)(6) and consider whether plaintiff has stated in his complaint 'a claim upon which relief can be granted'."

In like manner we feel that until Rule 4 of the Rules of Practice in the Court of Appeals is rewritten to conform with the Rules of Civil Procedure, we should treat a motion to dismiss under Rule 12(b)(6) as a demurrer and not entertain an appeal from an order denying the motion, subject to the right of the movant to petition for *certiorari* as envisioned by said Rule 4.

For the reasons stated, the appeal is dismissed.

Appeal dismissed.

Judges CAMPBELL and VAUGHN concur.

ERIC ANTHONY HODGE v. GLENN I. HODGE AND IDA M. HODGE

No. 7010DC512

(Filed 21 October 1970)

Courts § 11.1— transfer of action from superior court to district court — requisite of transfer

Where an action was instituted in the superior court prior to the establishment of the district court in the county and where no order was ever entered transferring the action from the superior court to the district court, the district court judge was without jurisdiction to enter an order in the action. G.S. 7A-258; G.S. 7A-259.

APPEAL by defendant Glenn I. Hodge from *Preston, District Court Judge,* 31 March 1970 Session of WAKE County District Court.

On 25 October 1968 the plaintiff recovered judgment against Glenn I. Hodge for $3,184.00 plus interest and cost, in the Superior Court of Wake County. Execution was returned unsatisfied. Thereafter the Clerk of Superior Court of Wake County, upon application of plaintiff, issued an order requiring both defendants to appear before a referee and answer concerning property which the defendants might have. On 11 February 1970 plaintiff filed a motion for the appointment of a receiver for defendant. The motion was filed in the office of the Clerk of Superior Court of Wake County, the caption containing the recital "IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION." On 8 April 1970 District Court Judge Edwin S. Preston signed an order which, among other things, appointed a receiver for the defendant. From the order of Judge Preston, defendant appealed.

Yarborough, Blanchard, Tucker and Denson by Alexander B. Denson for plaintiff appellee.

William T. McCuiston for defendant appellant.

VAUGHN, Judge.

Defendant brings forward several assignments of error and arguments in support thereof. We need discuss only one.

This action was instituted in the superior court prior to the establishment of district courts in Wake County. Although G.S. 7A-259 provides that, upon establishment of a district court in a district, any superior court judge authorized to hear motions,

may on his own motion transfer cases pending in the superior court to the district court, no such transfer has been made in this case. Neither plaintiff nor defendant has moved to transfer under the provisions of 7A-258. Absent an order transferring this cause from the superior court division, the district court judge was without authority to hear the motion for the appointment of a receiver. The order appealed from is hereby vacated and the cause is remanded to the Superior Court of Wake County.

Vacated and remanded.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. MARY MacKAY EDWARDS

No. 7010SC430

(Filed 21 October 1970)

Automobiles §§ 120, 129— drunken driving prosecution — erroneous definition of under the influence

In a drunken driving prosecution, the trial court's instruction that a person is under the influence of intoxicants if he has consumed a sufficient amount to make him think or act differently than he otherwise would have done, regardless of the amount that he consumed, and that one is under the influence if his mind and muscles do not normally coordinate or if he is abnormal in any degree, *held* reversible error.

APPEAL by defendant from *Bailey, J.*, 16 March 1970 Session, WAKE Superior Court.

Defendant was tried upon a warrant in District Court and found guilty of operating a motor vehicle upon a public highway on 9 December 1969 while under the influence of intoxicating liquor in violation of G.S. 20-138. She appealed to the Superior Court where she was tried *de novo* upon the warrant. From a jury verdict of guilty and judgment of confinement entered thereon, defendant appealed to this Court.

Attorney General Morgan by Assistant Attorney General Costen, for the State.

Hubert H. Senter for defendant.

BROCK, Judge.

Defendant assigns as error the portion of the instructions to the jury which defines the term "under the influence." The able and learned trial judge properly defined the term for the jury, but he then proceeded to define it again as follows:

> "A person is under the influence of intoxicants if he has consumed a sufficient amount to make him or her think or act differently than he otherwise would have done, regardless of what the amount was that he consumed. One is under the influence if his mind and muscles do not normally coordinate, or if he is abnormal in any degree from the consumption of intoxicants."

The foregoing instruction was error and we are not at liberty to speculate that the jury accepted and applied the correct definition.

New trial.

Judges MORRIS and GRAHAM concur.

RAYMOND CLOTT v. GREYHOUND LINES, INC.

No. 7010DC495

(Filed 18 November 1970)

1. **Carriers § 16— baggage in control of bus passenger — nonliability of carrier**

A bus passenger has the right to carry his baggage on the bus with him and under his control; if he does so, the baggage is in the custody of the passenger and the carrier has no responsibility with respect thereto.

2. **Bailment § 3— burden of proving bailment**

Plaintiff has the burden of proving the contract of bailment sued on, whether express or implied.

3. **Bailment § 1— delivery and acceptance of possession**

To create a bailment, there must be a delivery to and acceptance of possession of the article by the bailee.

4. **Bailment § 3— gratuitous bailment — liability of bailee — gross negligence**

Where the bailment is gratuitous, the bailee is liable only for gross negligence.

5. **Bailment § 3; Carriers § 16— loss of bus passenger's baggage — action against carrier — burden of proof**

In order for plaintiff bus passenger to make out a *prima facie* case for the recovery from defendant bus company for the loss of a leather bag on the theory of bailment, plaintiff would have to show that the bag was delivered, actually or constructively, to defendant in good condition, that defendant accepted it, actually or constructively, that thereafter the defendant had either actual or constructive possession and control of it, and that defendant failed to return it to plaintiff or returned it in a damaged condition.

6. **Bailment § 3; Carriers § 16— loss of bus passenger's baggage — insufficiency of evidence of bailment and negligence**

In this action by plaintiff bus passenger to recover from defendant bus company on the theory of bailment for the loss of a leather bag and its contents which remained on the bus after plaintiff was left behind when defendant's bus made a stop, plaintiff's evidence was insufficient to show that the bag and its contents, which plaintiff had been carrying with him on the bus, were ever in the exclusive possession and custody of defendant or that defendant was negligent in any manner, and defendant's motion for a directed verdict was properly allowed.

7. **Appeal and Error § 45— abandonment of assignment of error**

Assignment of error not brought forward and argued in appellant's brief is deemed abandoned.

Clott v. Greyhound Lines

APPEAL by plaintiff from *Ransdell, District Judge,* 31 March 1970 Session, WAKE County District Court.

Plaintiff, a merchant seaman residing in Florida and New York, instituted this action to recover from Greyhound Lines, Inc., damages for the loss or theft of his leather grip and its contents while the grip was allegedly in defendant's custody. Plaintiff alleges that on 1 December 1966 he bought a ticket from defendant for his transportation from Bushnell, Florida, to New York, New York, via Jacksonville, Florida. He was not able to check his baggage at Jacksonville because of lack of time. When the bus reached Columbia, South Carolina, plaintiff left the bus for breakfast, understanding that he would have 30 minutes because of necessary repairs, he having slept through the regular waiting time when all other passengers disembarked. However, a very few minutes later the bus left without him. He advised the dispatcher that he had been left and that his hat and leather grip containing a large sum of cash and other valuable items were on the bus. The dispatcher wired the Raleigh station and instructed the "Greyhound officials there" to have the leather grip and hat removed from the bus and kept for plaintiff. Plaintiff further alleges that "upon the arrival of the bus in Raleigh, the driver, A. H. Howell, removed the hat and leather grip from the bus, then and there assuming custody and control of said items including the contents of the leather grip, and delivered them in good condition to the Greyhound Transportation Supervisor in the Raleigh bus station for safekeeping."

Plaintiff further alleges that upon his arrival in Raleigh later the same day, he demanded that defendant deliver to him the hat and leather grip; that the hat was delivered to him but defendant refused and neglected to deliver to him the leather grip until May of 1967 at which time it was located in Chamblee, Georgia, and returned to plaintiff in a damaged condition and minus its contents.

Defendant answered denying all the material allegations of the complaint and setting up as a bar to recovery plaintiff's contributory negligence and national baggage tariff A-500D.

At the close of plaintiff's evidence, defendant moved for a directed verdict under Rule 50. The motion was allowed and plaintiff appealed.

Boyce, Mitchell, Burns & Smith by Robert E. Smith for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by I. Edward Johnson for defendant appellee.

MORRIS, Judge.

Plaintiff's evidence, in addition to his own testimony, consisted of the adverse examinations of three employees of defendant: A. H. Howell, driver of the bus; Roy Wells, Superintendent of the Raleigh Division of Greyhound; and Walter J. Rackley, a part-time dispatcher relief for Greyhound who was on duty on the date in question. Plaintiff testified that he bought a ticket in Bushnell, Florida, with the final destination to be New York, New York, via Greyhound bus. He changed busses in Jacksonville, Florida, and carried the grip with him on the bus when he boarded in Jacksonville. He testified that he was not allowed to check the bag at that time because his bus was scheduled to depart in five minutes, and all baggage had to be checked at least 20 minutes before the scheduled departure time.

The bag had in it an envelope containing $2,209 in cash; a Leica camera; Rolex watch; Hamilton watch; three bottles of perfume—Arpege, Alma and Joy; two electric razors; and his seaman's papers. Plaintiff testified that he got on the last seat "on top in the scenic cruiser, and it had a receding wall about this wide here between the seat and the motor wall, and I got on my knees and dropped the bag behind there; all the way." When the bus arrived in Columbia, South Carolina, an announcement of a stopover was made, but plaintiff paid no attention because he was "half asleep." The other passengers got off for breakfast. Plaintiff testified that later another announcement was made that the bus would be delayed for about 20 minutes and if anyone wanted coffee to go get it. Plaintiff got off the bus and went in to get coffee and doughnuts, and while he was walking out with the doughnuts, he saw the bus pulling out. He was the only passenger who had left the bus at the second announcement. Plaintiff then went to the dispatcher and "I told him that the bag was there and my hat and I had my personal things in that, and some cash in the bag also. I described the bag to him. . . . I told him where the bag was located on the bus." Plaintiff further testified that when he arrived in Raleigh later the same day, he

went to the dispatcher, whose name he thought was Rackley, and asked for his bag. The dispatcher gave him his hat but said, as to the bag, "My God, I gave it away. He said, I must have made a mistake." Plaintiff continued his trip to New York and in May 1967 received a letter from Greyhound advising that they had located the bag in Chamblee, Georgia. When the bag was returned to plaintiff, "the lock was gone off and the small lock there was jimmied, which it still is, and the entire lining was torn out of the bag, which is still there. I cemented it back, but it was all torn out. It had been ransacked."

Mr. Howell, the driver, testified that when he arrived in Raleigh he was notified that a passenger had been left in Columbia and was asked to get his baggage and bring it to the dispatcher's office. "Close as I can recall on that, it was a small—well, one of these small bags and he told me it was at the back of the bus on the rack. I went out there while they were servicing the bus and got it off and brought it to him. I gave the bag directly to Mr. Rackley. I did not notice anything unusual about the bag when I took it off of the bus. He told me that it was on the rack. Now he didn't say right rear. He said in the back. Now if I remember correctly it was on the right rear. Mr. Rackley did not tell me anything about the contents of the bag. I did not examine the bag or open it to see if it was the bag in question; that's not my job. I did not notice whether or not the bag was locked. I don't recall whether the bag had a leather grip on it, or double leather grips."

Mr. Wells, the Superintendent, testified that he was not in Raleigh that day but recalled that Mr. Rackley later told him he had received a message from Columbia concerning lost baggage containing valuables; that he contacted the driver immediately upon the arrival of the bus in Raleigh and asked him to remove the bag from the bus and that the driver did deliver the bag to Mr. Rackley, and it was placed in the dispatcher's office. Mr. Rackley had also told this witness that he was unable to locate the bag when plaintiff arrived. The dispatcher's office is small with one exit door opening to the outside of the terminal onto the loading platform.

Mr. Rackley testified that he remembered receiving a message from Columbia. "To the best of my knowledge, the message said that there was a bag and a hat behind the rear seat of a scenic cruiser type bus which is the very rear seat

on the bus. As to whether or not the message stated that there were any valuables in the bag, I don't recollect it making any statement as to any contents of the bag. It was just a bag and a hat." Mr. Rackley further testified as follows:

> "If I remember correctly, I went to the bus with the driver, but there was a lot of these cases that comes up and if I remember on this particular case I did. I went to the back of the bus with the driver. At the time I got to the back of the bus I did not find the bag behind the seat. We found a hat and no bag, there was a bag that was not behind it but there was a bag in the back of the bus and there was a passenger back there and we asked him about this bag and he said it was his bag, so then we took the hat and took it back into the dispatcher's office. As to whether neither I nor the driver took a bag off the bus, to the best of my knowledge I don't remember taking a bag because this passenger that was on the bus claimed that the only bag there was his. As to whether I examined the bag that this particular passenger had or remember looking at it, it was just a bag but we didn't examine it when the passenger said it was his we didn't do anything with it. If I remember correctly the bag that I refer to was in the back of the bus on the seat. I am not sure that is the correct place it was at but there was no bag behind the seat as I can remember."

When plaintiff arrived, Mr. Rackley delivered his hat and told him about the bag and offered to teletype the dispatcher in Richmond. Bus company personnel other than the dispatchers and drivers go in and out of the dispatcher's office.

[1] A bus passenger has the right to carry his baggage on the bus with him and under his control. If he does so, the baggage is in the custody of the passenger, and the carrier has no responsibility with respect thereto. *Neece v. Greyhound Lines*, 246 N.C. 547, 99 S.E. 2d 756 (1957). Plaintiff concedes that if he is entitled to recover, it must be under a bailment theory. Plaintiff also concedes that if a bailment exists, it is a gratuitous bailment. When plaintiff boarded the bus at Jacksonville, Florida, he carried his bag on board with him. No duty on the part of defendant arose until defendant became the bailee of plaintiff, if, in fact, a bailment arose.

[2, 3] Plaintiff had the burden of proof, by competent evidence, to show a contract of bailment, whether express or im-

plied. *Troxler v. Bevill,* 215 N.C. 640, 3 S.E. 2d 8 (1939). To create a bailment, there must be a delivery to and acceptance of possession of the article by the bailee. *Freeman v. Service Co.,* 226 N.C. 736, 40 S.E. 2d 365 (1946). "There must be such a full transfer, actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and give the bailee for the time being the sole custody and control thereof." *Wells v. West,* 212 N.C. 656, 194 S.E. 313 (1937).

[4] Where the bailment is gratuitous, the bailee is liable only for gross negligence. *Stanton v. Bell,* 9 N.C. 145 (1822); *Kindley v. Railroad,* 151 N.C. 207, 65 S.E. 897 (1909). Our Supreme Court has defined gross negligence as "something less than willful and wanton conduct." *Smith v. Stepp,* 257 N.C. 422, 125 S.E. 2d 903 (1962).

[5] Plaintiff contends that his evidence is sufficient to make out a *prima facie* case of negligence sufficient to have been submitted to the jury. In this case, in order to make out a *prima facie* case, plaintiff would have to show that the bag was delivered, actually or constructively, to defendant in good condition; that defendant accepted it, actually or constructively; that thereafter the defendant had either actual or constructive possession and control of it; and that defendant failed to return it to plaintiff or returned it in a damaged condition. See *Kindley v. Railroad, supra; Insurance Co. v. Motors,* 240 N.C. 183, 81 S.E. 2d 416 (1954); *Mills, Inc. v. Terminal, Inc.,* 273 N.C. 519, 160 S.E. 2d 735 (1968).

The plaintiff's evidence, taken in the light most favorable to him, tends to show that he was left at Columbia, that his bag remained on the bus; that the dispatcher at Columbia was advised of the situation and that the bag contained valuables; that the dispatcher in Columbia teletyped the dispatcher in Raleigh describing the bag, advising that it contained valuables, describing it and its location in the bus, and directing that it be removed from the bus when the bus arrived in Raleigh; that the Raleigh dispatcher received the message; that when the bus arrived in Raleigh the dispatcher and the driver boarded the bus and removed a bag and a hat from the bus; that the bag removed was not found where plaintiff had said he left it; that the bag removed was taken to the dispatcher's office and put on the shelf; that when plaintiff arrived in Raleigh later the same day he was given his hat but the bag was not

there; that he was told by the dispatcher that a mistake had been made and the bag given to someone else; that the dispatcher's office was small with one exit door opening to the outside of the terminal onto the loading platform; that bus company personnel other than drivers and the dispatcher go in and out of the dispatcher's office.

[6] When plaintiff was left in Columbia, there is no evidence that the bag and its contents were thereafter in the exclusive possession and custody of defendant nor is there any evidence of negligence on the part of defendant. If we assume that the bailment arose at the time a bag was taken from the bus in Raleigh, there is no evidence as to the condition of the bag at that time. Indeed, there is no evidence that the bag removed was plaintiff's bag. If it was, the evidence is uncontradicted that the bag was not found in the place where plaintiff testified he left it. If a bailment relationship arose, defendant had the duty of exercising only a slight degree of care and diligence. "Slight care has been defined as an omission of the care which even the most inattentive and thoughtless of men take of their own concerns." Lee, North Carolina Law of Personal Property, *supra*. In our opinion, plaintiff has shown absolutely no evidence of negligence on the part of defendant.

One of the bases stated for defendant's motion for a directed verdict was that plaintiff had failed to offer sufficient evidence of defendant's negligence for the case to be submitted to the jury. We agree. The motion should have been allowed.

[7] Plaintiff's assignment of error No. 2 is directed to the court's rulings on the admissibility of certain evidence offered by the plaintiff. However, this assignment of error is not brought forward and argued in plaintiff's brief and we, therefore, deem it abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

Assignment of error No. 3 is directed to the court's allowing defendant to cross examine plaintiff with respect to the applicability of certain tariffs and limitations of liability which defendant had plead in its answer but which had been stricken on motion of plaintiff. In view of the result reached in this opinion, we do not deem it necessary or appropriate to discuss this assignment of error.

Affirmed.

Judges BROCK and GRAHAM concur.

HAROLD EUGENE SMITH, JR., BY HIS NEXT FRIEND, HAROLD EUGENE SMITH, SR. v. RABON BURLESON, ARNOLD BURLESON AND C. DAVID SWIFT, ADMINISTRATOR OF THE ESTATE OF TONY BURLESON, DECEASED

No. 7025SC569

(Filed 18 November 1970)

1. **Rules of Civil Procedure § 50— motion for directed verdict — party having burden of proof**

Ordinarily, it is not permissible to direct a verdict in favor of a litigant having the burden of proof.

2. **Rules of Civil Procedure § 50— facts judicially admitted — duty of judge and jury**

When facts are judicially admitted and are no longer a subject of inquiry, it is the duty of the judge to answer the issue; the jury has no duty in such case.

3. **Negligence §§ 13, 26— plea of contributory negligence — burden of proof**

A defendant's plea of contributory negligence raises an affirmative defense, and the burden of proof upon that issue is always upon the defendant.

4. **Negligence § 30; Rules of Civil Procedure § 50— directed verdict in negligence cases — consideration of evidence**

In determining whether the trial court may properly direct a verdict in favor of the plaintiff on the issue of negligence, the applicable test is one of looking at all of the evidence, and if no other reasonable conclusion is possible then a directed verdict would be proper even though such verdict be in favor of the litigant having the burden of proof.

5. **Automobiles §§ 70, 91— automobile accident case — directed verdict in favor of plaintiff**

In plaintiff's action to recover for personal injuries sustained in an automobile accident involving his car and the two cars driven by the defendant and the defendant's brother, the trial court properly granted plaintiff's motion for a directed verdict in his favor on the issue of the defendant's negligence, notwithstanding plaintiff's failure to show which car, if any, struck his car, where the defendant's negligence was effectively established by defendant's own evidence that consisted of (1) his testimony that he had entered a guilty plea to reckless driving in connection with the accident and (2) a portion of the plaintiff's complaint alleging that the defendant had lost control of his car and had crashed into the rear left side of the plaintiff's car.

6. **Evidence § 23— admission of opponent's pleadings**

A party offering into evidence, without limitation, portions of his opponent's pleadings is bound thereby.

7. Rules of Civil Procedure § 50— directed verdict in negligence case

Where the defendant in an automobile accident case established the facts of his own negligence, the trial court properly entered a directed verdict in favor of the plaintiff. G.S. 1A-1, Rule 50(a).

Judge HEDRICK dissents.

APPEAL by defendant from *Martin (Harry C.), Superior Court Judge,* 4 May 1970 Session BURKE County Superior Court.

This was an action for personal injuries sustained by plaintiff in an automobile wreck which occurred on U. S. 64 and 70 in Burke County a few miles east of Morganton.

At the close of all of the evidence, the motion of the plaintiff for a directed verdict on the issue of negligence of the defendant Rabon Burleson was allowed. The trial court submitted an issue of contributory negligence and an issue of damages to the jury, both of which were answered in favor of the plaintiff, and judgment was signed in favor of the plaintiff.

From this judgment the defendant appealed.

The facts are set forth in the opinion.

Mitchell & Teele by W. Harold Mitchell for plaintiff appellee.

Simpson & Martin by Dan R. Simpson for defendant appellant.

CAMPBELL, Judge.

This appeal presents one question, and that is whether the trial court committed error in directing a verdict on the issue of negligence in favor of the plaintiff.

[1, 2] The burden of proof on the negligence issue rested upon the plaintiff. Ordinarily, it is not permissible to direct a verdict in favor of a litigant on whom rests the burden of proof. When facts are judicially admitted and are no longer a subject of inquiry, then it is not only permissible, but it is the duty of the judge to answer the issue. The function of the jury is to ascertain the facts. They have no duty when the facts are admitted. *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726 (1961).

In the case of *Flintall v. Insurance Co.,* 259 N.C. 666, 131 S.E. 2d 312 (1963), the court held that a peremptory instruction should have been given in favor of a litigant on whom rested the burden of proof. While the court used the term

peremptory instruction, it probably would have been preferable to have used the term directed verdict as the factual issue had been determined and thus the intervention of the jury was unnecessary.

[3] In ordinary negligence cases where the defendant pleads contributory negligence, this raises an affirmative defense and the burden of proof upon that issue is always upon the defendant. Nevertheless, the court has customarily adopted a rule of entering a judgment of nonsuit against the plaintiff when the plaintiff's own evidence establishes contributory negligence. This is tantamount to directing a verdict in favor of the party with the burden of proof.

[4] In the case of *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214 (1964), the Court stated:

> ". . . However, the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. . . ."

The test thus applied is one of looking at all of the evidence and if "no other reasonable conclusion is possible" then a directed verdict would be proper even though such directed verdict is in favor of the litigant upon whom rests the burden of proof.

This necessitates a study of the evidence adduced in the instant case.

[5] The plaintiff offered only one witness who testified to the automobile wreck itself. This witness, Carolyn Lingle (Cannon), was 17 years old on the night of 29 October 1967. She and Janice Buchanan were working in a grill on that night. She and Janice closed the grill between midnight and 1:00 a.m. Janice left with the defendant Rabon Burleson, whom she has since married, and Carolyn left with Rabon's brother, Tony Burleson. Tony was driving a 1962 black Chevrolet and Rabon was driving a 1964 red Chevrolet Impala. Carolyn and Tony left the grill first and were proceeding in a westerly direction towards Morganton on Highway 64-70. Tony was driving about 55 m.p.h., and on a straight stretch of the highway which was some six-tenths of a mile in length. Rabon passed and got in front of Tony. The two cars proceeded on down the highway about four or five car lengths apart. They went around a curve and then got on another straight stretch of road. Both drivers

accelerated their respective automobiles and attained a speed of somewhere between 80 and 100 m.p.h. Tony began to overtake Rabon, and pulled into the left lane to pass. At this time the two vehicles overtook a Mustang automobile also proceeding in a westerly direction and operated by the plaintiff. The Mustang was traveling about 55 m.p.h. Rabon pulled out into the left lane in front of Tony in order to avoid running into the rear of the Mustang. When Rabon did this, Tony applied the brakes to his car in order to avoid striking Rabon. When the brakes were applied, Tony's automobile skidded, and that was the last Carolyn remembered until she regained consciousness after the wreck.

The plaintiff sustained serious head injuries as a result of the wreck, and he did not remember any of the facts pertaining to the wreck itself.

Joseph Babb, a friend of the plaintiff who was riding in the automobile with him, had gone to sleep just prior to the wreck and knew nothing about the wreck until he "woke up" with the automobile turning over. He was rendered unconscious and regained consciousness in the hospital.

The Chevrolet driven by Tony struck a power pole. Tony was killed in the wreck.

There is nothing in the evidence offered by the plaintiff to show what, if any, vehicles struck each other. The evidence indicates that both Tony's vehicle and the plaintiff's Mustang left the hard surface of the highway and the respective occupants of both vehicles were injured.

The motion of the defendant for a directed verdict was denied. The defendant Rabon then introduced evidence.

The defendant's first witness, Ronnie Dula, testified to the effect that he was standing on a side road near his home talking to five other young men in the vicinity of an automobile. While thus engaged, he heard a loud noise like automobiles racing, and he looked up at the main highway and saw two sets of headlights. It looked as if the two automobiles were side by side, and then he heard a scraping sound, and both cars hit and started leaving the road into the pine trees. He testified, "These were the only two cars I saw." He further testified that he was not expecting a wreck to happen; that he saw the headlights coming down the road just for an instant. He had

not paid any attention to the highway before, and if anyone else had gone down the road, he had not paid any attention to them. He went to the scene and found the Chevrolet driven by Tony a complete wreck and also the Mustang driven by the plaintiff. He did not see any other automobile and did not see the Chevrolet driven by Rabon.

Gerald Russ, another witness for the defendant, testified that he and Ronnie Dula were talking when he heard a sudden burst of r.p.m.'s like cars going fast. He then looked in the direction the cars were coming and saw two sets of headlights side by side and just suddenly they went together and overturned. He testified that he did not see more than two cars. He testified that the point where he was standing was several hundred feet off the highway, and that in order to see the highway and the automobiles, he had to look through some pine trees. He testified that if any other car went by, he did not see it. He testified that the two automobiles went together and went off the road just an instant after he looked up. He stated, "I wasn't paying any attention to the highway before looking up and seeing that wreck."

Tony Nichols testified for the defendant that on this occasion he was in his front yard sitting beside some bushes on a bank smoking. He observed a Mustang pass and then a red Chevrolet (Rabon's automobile was a red Chevrolet) passed the Mustang, and then he heard another vehicle coming fast, and the next thing he knew he heard brakes and saw this last vehicle skid into the Mustang, and they went off the road. He stated that he did not see the red Chevrolet at that time. The wreck itself occurred after all the vehicles had passed where he was. He then went to the scene of the accident and saw Ronnie Dula there and "I asked him what happened." He further testified, "All I was doing was watching the two cars go off the road. I was not watching the red Chevrolet so I don't know whether it had gone out of sight by that time or not."

The defendant, Rabon Burleson testified in his own behalf. He testified, "When I passed the Mustang, Tony Burleson was behind me. He was about three or four car lengths behind me probably. After I passed the Mustang, I got back in my lane and went on down the road." He testified that he did not know anything about the accident until sometime later. He further testified that he entered a plea of guilty to reckless driving arising out of this accident.

The defendant then offered in evidence paragraph 11 of the plaintiff's complaint, which reads as follows:

"XI. That on October 29, 1967, at approximately 12:45 A.M., the minor plaintiff was driving a 1966 Ford automobile in a western direction on U. S. Highway 64-70 approximately two miles east of the city limits of Morganton, North Carolina; that at the time and place herein complained of the minor plaintiff was operating said 1966 Ford automobile in a careful and prudent manner and in compliance of all of the motor vehicles laws of the State of North Carolina; that as the minor plaintiff approached the western end of the straight section of road known as 'Drum Straight,' the defendant, Rabon Burleson, was driving his 1963 Chevrolet automobile at a high, reckless, and unlawful rate of speed in a western direction; that the minor deceased defendant, Tony Burleson, was operating the 1962 Chevrolet automobile in a western direction over Highway 64-70 at a high speed and in a reckless manner and as the two vehicles reached the section of U. S. Highway 64-70 known as 'Drum Straight,' the automobile being operated by Rabon Burleson was in front of the automobile being driven by the defendant, Tony Burleson; that as they proceeded west on 'Drum Straight,' the defendant, Rabon Burleson, increased his speed to a high and reckless rate of speed and the defendant, Tony Burleson, drove approximately 10 to 12 feet behind Rabon Burleson's automobile for a considerable distance; that both automobiles were being accelerated at a high, rapid and dangerous rate of speed and as the Rabon Burleson automobile came up behind the 1966 Mustang automobile being operated by the plaintiff in the northern lane of travel on U. S. 64-70 for automobiles traveling in a westerly direction, and at the same time, the defendant, Tony Burleson, was attempting to pass the Rabon Burleson automobile at which time the defendant, Rabon Burleson, cut to the left into the lane of travel of the Tony Burleson automobile which was in the passing lane and thereupon the said Tony Burleson and Rabon Burleson automobiles collided and the defendant, Tony Burleson, lost control of the 1962 Chevrolet automobile and said automobile crashed into the left rear of the Ford automobile being operated by the minor plaintiff knocking the automobile which the plaintiff was driving off of the road and down an embankment, turning said

automobile over several times, knocking the plaintiff about the interior of his automobile and resulting in the serious and permanent injuries hereinafter complained of."

After introducing paragraph 11 of the plaintiff's complaint, the defendant rested his case.

At the close of all of the evidence, the plaintiff took a voluntary dismissal without prejudice as against the defendants Arnold Burleson and the Estate of Tony Burleson. Both plaintiff and defendant, Rabon Burleson, moved for a directed verdict. Defendant's motion was denied, and plaintiff's motion was granted as against defendant Rabon Burleson on the issue of negligence.

The trial judge then submitted two issues to the jury, one pertaining to the contributory negligence of the plaintiff which was answered by the jury in favor of the plaintiff, and the other as to the amount of damages which was answered in favor of the plaintiff in the amount of $20,000.

The evidence introduced by the plaintiff fails to disclose what caused the Mustang to leave the highway and turn over. Thus, for failure on the part of the plaintiff to show the proximate cause of injuries sustained by him, the motion of the defendant for a directed verdict possibly should have been sustained at the close of plaintiff's evidence. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670 (1952). This situation is not presented to us, however, as the plaintiff is now in a position to rely upon all of the evidence introduced at the trial, including the evidence introduced on behalf of the defendant.

[6] The evidence on behalf of the defendant did not in any way contradict the plaintiff's evidence, but on the contrary tended to explain and fill in the missing links of the plaintiff's case. The defendant himself admitted that he had entered a plea of guilty to reckless driving in connection with this automobile wreck. He also introduced a part of the plaintiff's complaint set out above. It has long been the rule in North Carolina that a party offering into evidence, without limitation, portions of his opponent's pleadings is bound thereby. *Meece v. Dickson,* 252 N.C. 300, 113 S.E. 2d 578 (1960) ; reversed on other grounds, *Melton v. Crotts,* 257 N.C. 121, 125 S.E. 2d 396 (1962).

[7] When all of the evidence had been introduced, the facts were established and the defendant had proved himself negli-

gent. There was no factual issue of negligence remaining as a subject of inquiry, and on this issue there was no duty resting upon the jury. In a situation of this kind, it is no longer necessary for the jury to intervene, and the trial judge enters the answer to the issue. G.S. 1A-1, Rule 50(a) provides:

". . . The order granting a motion for a directed verdict shall be effective without any assent of the jury."

We therefore approve the action of the trial court in this instance.

Affirmed.

Judge BRITT concurs.

Judge HEDRICK dissents.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. WALLACE M. GAMBLE, SINGLE; JOSEPH G. GAMBLE, JR., AND WIFE, MRS. JOSEPH G. GAMBLE, JR.; WAYNE W. GAMBLE AND WIFE, SUE M. GAMBLE; HILDA GAMBLE GROSSE AND HUSBAND, WILLIAM M. GROSSE; LAURA M. GAMBLE, SINGLE; MARY E. GAMBLE, SINGLE; AND CONNIE W. GAMBLE, WIDOW AND DUKE POWER COMPANY, ADDITIONAL DEFENDANT

No. 7026SC450

(Filed 18 November 1970)

Boundaries § 2— conflicting calls in a deed — highway right-of-way — courses and distances

In this highway condemnation proceeding wherein the landowners' deed contained an inconsistent description of one of the tracts in that it provides that the western boundary line runs with the eastern margin of a specified highway right-of-way and also describes the western boundary line by courses and distances which do not follow the highway right-of-way, the trial court correctly determined that the highway right-of-way was definitely established and ascertainable on the date the property was conveyed to the landowners and constituted an artificial monument which controls the conflicting description by courses and distances.

APPEAL by plaintiff, North Carolina State Highway Commission (Highway Commission), and additional defendant, Duke Power Company (Duke), from *Clarkson, Emergency Superior Court Judge,* 9 March 1970 Civil Session of Superior Court held in MECKLENBURG County.

Highway Commission instituted this action against Wallace M. Gamble, single; Joseph G. Gamble, Jr., and wife, Mrs. Joseph G. Gamble, Jr.; Wayne W. Gamble and wife, Sue M. Gamble; Hilda Gamble Grosse and husband, William M. Grosse; Laura M. Gamble, single; Mary E. Gamble, single; and Connie W. Gamble, widow (original defendants), to condemn certain lands owned by them for highway project No. 8.1640801 in Mecklenburg County. In its complaint filed 31 January 1966, Highway Commission alleged, among other things, that the only persons who may have or who claim to have an interest in the property sought to be condemned in this action "insofar as the same can, by reasonable diligence, be ascertained" are those persons named in Exhibit "A" attached to the complaint. Exhibit "A" contained the names of the original defendants and also the name of Duke Power Company and the State Highway Commission, but Duke was not made a party when the suit was originally started. Exhibit "A" also set forth the following "Liens and Encumbrances":

"Easement of right of way and easement for flooding to Duke Power Co.

Existing easements of right of way—State Highway Commission.

1966 Ad Valorem Taxes—County of Mecklenburg"

A hearing was held by Judge Ervin at the 2 June 1969 Schedule "A" Civil Session of the Mecklenburg Superior Court, pursuant to G.S. 136-108, to determine all issues raised by the pleadings other than the issue of damages. The plaintiff and the original defendants stipulated, among other things:

"1. That the date of taking is January 31, 1966.

2. That on the date of taking the right of way for U. S. Highway No. 21 was 150 feet wide, extending 75 feet on each side of the center line.

3. That on March 19, 1962, the date of the deed from Duke Power Company to the defendant, and on July 18, 1963, the date said deed was filed for record, Duke Power Company owned the tract of land extending from the westerly boundary line of the Gamble property to the easterly right of way line of U. S. Highway No. 21 as then located."

At this hearing Judge Ervin found that the description of tract no. 2 in the deed under which the defendants held title is inconsistent in that it provides that the western boundary line

thereof runs with the eastern margin of North Carolina highway right-of-way for U. S. Highway No. 21, and this boundary line along the highway is also described by courses and distances which do not follow the highway right-of-way as it then existed or as it exists since the commencement of this condemnation action; that the eastern margin of North Carolina highway right-of-way for U. S. Highway No. 21 was definitely established and ascertainable on 19 March 1962 and as such constituted an artificial monument; that Duke owned the property on said date to the eastern margin of said highway right-of-way; that as a conflict exists between courses and distances and a fixed monument, the call for the monument will control. Based upon such findings, Judge Ervin entered an order holding that the property of the defendants extended to the eastern margin of the right-of-way for U. S. Highway No. 21 as it existed at the date of the taking on 31 January 1966. The Highway Commission appealed to the Court of Appeals. In an opinion filed 19 November 1969 and appearing in 6 N.C. App. 568, the order of Judge Ervin was vacated and the cause was remanded to the superior court "where the additional party or parties necessary to a decision may be made."

On 3 December 1969 Judge Copeland entered an order making Duke "a party-defendant to this action for the purpose of determining the location of the westerly boundary line of a tract of land described as Tract II in deed dated March 19, 1962, from Duke Power Company to Connie W. Gamble, *et al.*, recorded in Deed Book 2437, page 239, Mecklenburg County Registry." No objections or exceptions have been made to the entry of this order. On 16 December 1969 Duke filed an answer to the complaint admitting all of the allegations.

This cause was heard by Judge Clarkson, pursuant to G.S. 136-108, to determine all issues raised by the pleadings other than the issue of damages. After hearing the evidence and the parties, Judge Clarkson entered an order dated 13 March 1970, the pertinent parts of which are as follows:

> "(T)hat the deed from Duke Power Company to the original defendants, dated March 19, 1962, filed for recording on July 18, 1963, and recorded in Book 2437, at page 239, in the Mecklenburg Public Registry, is inconsistent in its description of Tract No. 2 therein in that the said deed provides that the boundary line of said tract runs with the eastern margin of N. C. Highway right of way for U. S. Highway No. 21 and said boundary along the highway is

described by courses and distances which do not follow the highway right of way as it then existed; that the map which was incorporated into the deed by reference shows the western property line of the original defendants' tract as following the highway right of way line; that the eastern margin of N. C. Highway right of way for U. S. Highway No. 21 was definitely established and ascertainable on March 19, 1962, and as such constituted an artificial monument; that Duke Power Company owned the property on said date to the eastern margin of said highway right of way; that as a conflict exists between courses and distances and a fixed monument, the call for the monument will control; and said deed conveyed to the original defendants the property to the eastern margin of U. S. Highway No. 21; and that the additional defendant, Duke Power Company, did not own any part of the land involved in this action at the time of taking and does not now claim any interest therein, except for flood and flowage easements not relevant to the boundary question in dispute;

NOW, THEREFORE, upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that as of January 31, 1966, the date of taking in this action, the property of the original defendants, Wallace M. Gamble, *et al.*, extended to the eastern margin of U. S. Highway No. 21 as it existed on March 19, 1962, and on the date of taking, and that the original defendants are entitled to recover from the plaintiff their damages caused by the taking of this additional tract of land, shown as the shaded area on that map or plat marked the Original Defendants' Exhibit No. 1, introduced herein and stipulated by the parties as an accurate and correct representation of the disputed area."

The Highway Commission and Duke appealed to the Court of Appeals.

Attorney General Morgan, Deputy Attorney General White, Assistant Attorney General Hudson, and Staff Attorney Chalmers for the North Carolina State Highway Commission, appellant.

William I. Ward, Jr., for additional defendant Duke Power Company, appellant.

Harkey, Faggart, Coira & Fletcher by Harry E. Faggart, Jr., for original defendants, appellees.

MALLARD, Chief Judge.

The plaintiff Highway Commission and the additional defendant Duke contend that the trial judge committed error in finding as a fact and concluding as a matter of law that the property of the original defendants extended to the eastern margin of the right-of-way line of U. S. Highway No. 21 as it existed on 19 March 1962 and on the date of the taking.

The description of the tract which original defendants contend includes the 21-foot strip of land involved in this controversy is contained in the deed dated 19 March 1962 from Duke to the original defendants which reads as follows:

> "BEGINNING at an iron pin, corner with Tract No. 1 above described and corner with other lands of the parties of the second part; running thence the following courses and distances with elevation 760 feet above mean sea level, U. S. G. S. datum: N 33 deg. 38' W 31.5 ft. to an iron pipe, S 75 deg. 20' W 42.7 ft., N 63 deg. 48' W 70.5 ft., N 14 deg. 48' W 104.1 ft., N 2 deg. 24' W 121.9 ft., N 23 deg. 47' W 195 ft. to an iron pipe, S 86 deg. 05' W 75.8 ft. to an iron pipe in the eastern margin of N. C. Highway right of way for U. S. Highway No. 21; thence the following courses and distances with said highway right of way limit: N 23 deg. 10' E 10 ft., N. 24 deg. 17' E 100.8 ft., N 17 deg. 56' E. 157.1 ft., N 16 deg. 35' E 136.1 ft., N 14 deg. 21' E 99.9 ft., N 12 deg. 12' E 133.6 ft. to a point in a road; thence S 85 deg. 35' E 4.5 ft. to an iron bolt in a road in the line of other lands of the parties of the second part; thence S 6 deg. 24' E 1056.7 ft. to the BEGINNING, containing 3 acres, more or less, as shown on plat dated March 7, 1962, marked Mtn. Island File No. 739-B, which is hereto attached and incorporated as a part of this instrument; and being a part of the land conveyed by F. Lee Torrence and others to Catawba Manufacturing and Electric Power Company by deed dated July 13, 1928, recorded in Book 717, Page 273, in the Mecklenburg County Registry."

The map attached to this deed and which by reference was incorporated as a part of the description shows that the western boundary line of the land conveyed to the original defendants follows the eastern line of the right-of-way of U. S. High-

way No. 21; however, the courses and distances shown on this map, as well as in the description contained in the deed, will not follow the right-of-way line as stipulated by the plaintiff and original defendants herein. The map also shows that the eastern highway right-of-way line is 96 feet from the center of the highway.

Duke argues that therefore there is a 21-foot strip of land between the western boundary of the land of the original defendants and the eastern right-of-way line of the highway. Duke further contends that it either conveyed this 21-foot strip of land to the Highway Commission or dedicated it for a highway right-of-way by the map attached to the original defendants' deed. Duke offered no evidence, but in its further answer says that it "believes that it later conveyed to the North Carolina State Highway Commission a right of way for Interstate Highway No. 77 (sic), *and it does not claim any part of the land involved in this action.*" (Emphasis added.) This allegation is not clear as to what land Duke "believes" it conveyed to the Highway Commission. It is clear, however, from its further answer that Duke does not claim any part of the land involved in this action, except a flood and flowage easement thereon, and there is no controversy presented on this record concerning this easement.

At the time Duke filed its answer disclaiming any part of the land involved in this action (except the flood and flowage easement), the plaintiff and the original defendants had already stipulated as a matter of record in the case that on the date of the taking herein, the right-of-way for U. S. Highway No. 21 was 150 feet, extending 75 feet on each side of the center line of the highway. The location of U. S. Highway No. 21 is not in dispute.

The Highway Commission and Duke contend that the court found "that the highway right-of-way was an artificial monument controlling (1) the map referred to in defendants' deed and (2) the metes and bounds description referring to other monuments, in determining the boundary of defendants' westerly property line," and in so finding committed error.

In 2 Strong, N. C. Index 2d, Boundaries, § 2, it is said:

"Where the calls are inconsistent, the general rule is that calls to natural objects control courses and distances. A

> call to a wall, or to another's line, if known or established, is a call to a monument within the meaning of this rule, *as is a call to a highway.* * * *" (Emphasis added.)

In *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519 (1967), it is said: "Where there is a conflict between course and distance and a fixed monument, the call for the monument will control."

In the case of *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603 (1950), a highway was held to be of such permanent character as to become a monument of boundary. See also *Franklin v. Faulkner,* 248 N.C. 656, 104 S.E. 2d 841 (1958).

In 12 Am. Jur. 2d, Boundaries, § 65, p. 603, the general order of preference as between different calls is stated:

> "Where the calls for the location of boundaries to land are inconsistent, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries (which are considered a sort of monument), and thereafter to courses and distances. * * *"

We are of the opinion and so hold that the evidence supports the findings of fact and the findings of fact support the conclusions of law, and Judge Clarkson correctly applied the established rules of construction relating to conflicts appearing in a description contained in a deed. The order appealed from is affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD MORGAN

No. 7029SC509

(Filed 18 November 1970)

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

Appeal is subject to dismissal where the trial court extended the time for docketing the record on appeal for 30 days in addition to the 90 days provided by Rule 5, but the record on appeal was not docketed until 122 days after the date of the judgment appealed from.

2. Criminal Law § 161— failure to group and separately number exceptions

Appeal is subject to dismissal for failure to comply with Rule 19(c) where none of the assignments of error refer to any exception upon which it purports to be based.

3. Grand Jury § 2; Indictment and Warrant § 14— motion to quash — defendant out of State when indictment returned — right of defendant to appear before grand jury

The trial court properly denied defendant's motion to quash the indictment on the ground that he was not in North Carolina when the grand jury returned the true bill against him and on the ground that neither he nor his attorney was permitted to appear before the grand jury, since one whose conduct is being investigated by the grand jury has no right, constitutional or otherwise, to appear before it.

4. Constitutional Law § 29; Grand Jury § 1— exclusion from grand jury on account of race — due process — defendant not member of excluded race

Arbitrary exclusion of citizens from service on grand juries on account of race is a denial of due process to members of the excluded race charged with indictable offenses, but ordinarily it is not deemed such denial if the defendant is not a member of or in some way associated with the excluded race.

5. Constitutional Law § 29; Grand Jury § 3— exclusion of Negroes from grand jury — white defendant — lack of evidence

The trial court did not err in the denial of defendant's motion to quash the indictment on the ground of systematic exclusion of Negroes from service on grand juries in the county, where there was no evidence that defendant, a white person, had in any way associated or made common cause with Negroes, and there was no evidence that members of the Negro race had in fact been unlawfully excluded from service on grand juries in the county.

6. Criminal Law § 15; Jury § 2— motion for change of venue and for special venire — publicity of codefendant's trial

The trial court did not abuse its discretion in the denial of defendant's motions for a change of venue and for a special venire on the ground that the trial and conviction of a codefendant at a previous term of court had received "considerable publicity," where defendant offered no evidence to show the nature or extent of this publicity or why a fair jury could not be selected from the county.

7. Criminal Law § 98— motion for sequestration of witnesses — discretion of court

Motion of defendant for sequestration of witnesses is addressed to the discretion of the court.

8. Criminal Law § 169— exclusion of testimony — record fails to show what excluded testimony would have been

The exclusion of testimony cannot be held prejudicial when the record fails to show what the excluded testimony would have been.

9. **Criminal Law § 106— testimony of accomplice — sufficiency for conviction**

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

10. **Criminal Law §§ 124, 159— recording result of jury trial — listing possible results by letter with one letter circled in ink — disapproval by Court of Appeals**

The records of a criminal trial should be made and kept in a manner which discloses clearly and unequivocally what actually occurred at the trial without the necessity of further explanation or interpretation; consequently, the Court of Appeals disapproves of a method of recording the result of a criminal jury trial whereby three possible results were listed respectively after the letters (a), (b) and (c)— namely, that at the close of the State's evidence the court ordered a verdict of not guilty, that at the close of the State's evidence defendant plead guilty, and that the jury returned a verdict finding defendant guilty of felonious breaking and entering and felonious larceny—and a circle was drawn in ink around the letter "(c)."

APPEAL by defendant from *Snepp, J.*, March 1970 Session of RUTHERFORD Superior Court.

Defendant was indicted for felonious breaking and entering and felonious larceny. He pleaded not guilty. The State presented evidence of an accomplice, who testified he accompanied defendant and one Jack McGinnis when they broke into the rear of a men's clothing store and dry cleaning plant in Rutherford County, N. C., and stole arm-loads of clothing therefrom. The proprietor testified that 54 suits and 57 pairs of men's pants, valued at $5,036.00, were missing from his premises after the breaking and entering. Other witnesses testified in corroboration. Defendant took the stand and testified he had been in Greenville, S. C., at the time in question. Defendant also presented the testimony of one other witness for the purpose of corroborating his alibi.

The jury found defendant guilty on both counts. On the charge of felonious breaking and entering, judgment was entered on the verdict sentencing defendant to prison for a term of ten years, with credit given on this sentence for time spent by defendant in custody while awaiting trial. On the conviction of felonious larceny, defendant was sentenced to prison for a term of not less than five nor more than ten years, this sentence to run at the expiration of the sentence imposed on the conviction for felonious breaking and entering. Defendant appealed.

Attorney General Robert Morgan by Staff Attorney Howard P. Satisky for the State.

Hollis M. Owens, Jr., for defendant appellant.

PARKER, Judge.

[1, 2] The judgment appealed from was dated 10 March 1970. Rule 5 of the Rules of Practice of the Court of Appeals requires that the record on appeal must be docketed within ninety days after the date of the judgment appealed from, provided that the trial tribunal may, for good cause, extend the time not exceeding sixty days. In this case the trial court did extend the time for docketing the record on appeal for an additional thirty days, thereby allowing a total of 120 days within which to docket the record on appeal. The record on appeal was not docketed until 10 July 1970, which was 122 days after the date of the judgment appealed from. For failure to docket in apt time, this appeal is subject to dismissal. *State v. Garnett,* 4 N.C. App. 367, 167 S.E. 2d 63. The record lists seventeen assignments of error. None of these refer to any exception upon which it purports to be based. Rule 19(c) of the Rules of the Court of Appeals provides: "All exceptions relied on shall be grouped and separately numbered immediately before the signature to the record on appeal. Exceptions not thus set out will be deemed to be abandoned." The failure to comply with this rule also warrants a dismissal. Nevertheless, we have carefully considered each of the assignments of error and find them to be without merit.

[3] Appellant assigns as error the denial of his motion to quash the indictment on the ground that he was not in North Carolina at the time the grand jury returned the true bill against him and on the ground that neither he nor his attorney was permitted to appear before the grand jury. Appellant contends he was thereby denied constitutional rights guaranteed him by the Sixth and Fourteenth Amendments to the Constitution of the United States. This contention is without merit. One whose conduct is being investigated by a grand jury has no right, constitutional or otherwise, to appear before it. *Duke v. United States,* 90 F. 2d 840, 112 A.L.R. 317 (4th Cir. 1937), *cert.* den. 302 U.S. 685, 82 L. Ed. 528, 58 S. Ct. 33; *Sweeney v. Balkcom,* 358 F. 2d 415 (5th Cir. 1966).

[4, 5] Defendant's contention that there was error in the denial of his motion to quash the indictment on the additional

ground that there had been systematic exclusion of Negroes from serving on grand juries in Rutherford County is also without merit. Arbitrary exclusion of citizens from service on grand juries on account of race is a denial of due process to members of the excluded race charged with indictable offenses, but ordinarily it is not deemed such denial if the defendant is not a member of or in some other way associated with the excluded race. *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870. Defendant here is a white man, and there is no evidence he had in any way associated or made common cause with Negroes. Moreover, there was no evidence that members of the Negro race had in fact been unlawfully excluded from service on grand juries in Rutherford County.

[6, 7] Appellant assigns as error the denial of his motions for a change of venue and for a special venire. These motions were made on the ground that a codefendant had been tried and convicted at a previous term of court and such trial had received "considerable publicity." Appellant offered no evidence to show the nature or extent of this publicity or why a fair jury could not be selected from Rutherford County. "A motion for a change of venue or for a special venire from another county, upon the ground of unfavorable publicity, is addressed to the sound discretion of the trial court." *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341. The trial court's ruling in exercise of his discretion is not reviewable on appeal, absent a showing of abuse of discretion. *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233. The motion of defendant for sequestration of witnesses was also addressed to the discretion of the court. *State v. Love,* 269 N.C. 691, 153 S.E. 2d 381. There being nothing in the record to suggest abuse of discretion in the rulings of the court upon any of these motions, these assignments of error are overruled.

[8] Defendant excepted to rulings sustaining objections to two questions asked during direct examination of a defense witness. The record does not show what the answers would have been had the witness been permitted to testify. The exclusion of testimony cannot be held prejudicial when the record fails to show what the excluded testimony would have been. *Gibbs v. Light Co.,* 268 N.C. 186, 150 S.E. 2d 207; *Board of Education v. Mann,* 250 N.C. 493, 109 S.E. 2d 175.

[9] We have carefully examined all of appellant's remaining assignments of error and find them without merit. There was

plenary evidence to require submission of the case to the jury. North Carolina follows the rule that testimony of an admitted accomplice, even if unsupported, is sufficient to support a conviction if it satisfies the jury of defendant's guilt beyond a reasonable doubt. *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688; *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876. The charge of the court, considered contextually, was free from prejudicial error. The sentences imposed were within applicable statutory limits.

[10] In the record on appeal in this case as originally filed, under the heading "Jury, Plea and Verdict," there appeared the following:

> "The defendant pleads Not Guilty. Whereupon the following jurors were selected, sworn and impaneled in the above-entitled case: Ralph Eugene Tate and eleven (11) others (naming them).
>
> "(a) At the close of the State's evidence, the Court orders a Verdict of Not Guilty.
>
> "(b) At the close of the State's evidence, the defendant pleads Guilty.
>
> "(c) The jury heretofore sworn and impaneled to try the issue for their verdict say that the defendant is Guilty, of the charge of Felonious Breaking and Entering and Felonious Larceny.
>
> "This the 10th day of March, 1970.
>
> "JOAN JENKINS
> "Assistant Clerk Superior Court."

A circle was drawn in ink around the letter "(c)" above. In order that the record on this appeal be made clear and consistent and speak the truth, the Attorney General filed a motion suggesting diminution of the record and supported the motion by a notation from the Assistant Clerk of Superior Court of Rutherford County to the effect that "letters A and B are to be disregarded and only the one circled applies." This method of recording what occurs in the trial of criminal cases is not approved. Such records should be made and kept only in a manner to disclose clearly and unequivocally what actually occurred at the trial, without the necessity of further explanations or interpretations. However, in the present case any ambiguity in the record was cured by the additional certification from the

Assistant Clerk of Superior Court of Rutherford County, which was filed with this Court by the Attorney General and which is allowed as an addendum to the record on appeal in this case. This certification discloses clearly and positively that at the close of the State's evidence the court did not order a verdict of not guilty, that the defendant did not plead guilty, and that the jury for their verdict did find the defendant guilty of felonious breaking and entering and felonious larceny.

In the trial and judgment appealed from, we find

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

CONTINENTAL INSURANCE COMPANY, A CORPORATION; PENNSYLVANIA LUMBERMEN'S MUTUAL INSURANCE COMPANY, A CORPORATION; AND WILSON LEWITH MACHINERY CORPORATION v. EDISON G. FOARD, D/B/A EDISON FOARD, GENERAL CONTRACTOR

No. 7026SC498

(Filed 18 November 1970)

1. **Evidence § 48— qualification of expert witness**

The fact that the trial judge reversed an earlier ruling and refused to allow a witness to testify as an expert during his testimony on the causes of a fire, *held* not prejudicial where (1) the witness himself stated that he did not consider himself an expert and (2) the trial judge again reversed himself and ruled that the witness had qualified as an "expert fireman."

2. **Rules of Civil Procedure § 26— harmless error in preventing the reading of depositions**

Trial court's error in denying plaintiffs' attorney the permission to read to the jury two depositions that were admissible under Rule 26 *held* not prejudicial under the facts of this case. G.S. 1A-1, Rule 26.

3. **Fires § 3— negligence in starting fire — damage to machinery by sprinkler system — sufficiency of evidence**

The evidence was insufficient to establish that the damage to plaintiffs' machinery by the operation of a water sprinkler system was caused by the negligence of defendant contractor in using an acetylene torch and starting a fire in the building where the machinery was stored.

APPEAL by plaintiffs from *Bryson, Superior Court Judge,* 26 January 1970 Schedule "B" Session of Superior Court held in MECKLENBURG County.

At the conclusion of the plaintiffs' evidence, the defendant made a motion for a directed verdict. From the granting of this motion, the plaintiffs appeal.

Berry & Bledsoe by Louis A. Bledsoe, Jr., and Charles O. DuBose for plaintiff appellants.

Wardlow, Knox, Caudle & Wade by J. J. Wade, Jr., for defendant appellee.

MALLARD, Chief Judge.

Plaintiff Wilson Lewith Machinery Corporation (Wilson) brought this action seeking recovery for alleged damage to machinery it owned and had stored in the basement of the Old Lance Packing Company Building (Building) located at 1300 South Boulevard in Charlotte. Wilson, joined by the other plaintiffs, alleged that the damages were caused by the actionable negligence of the defendant's agents and employees in the negligent use of an acetylene torch on the main floor of the Building, causing a fire. The fire activated the sprinkler system. Water was pumped into the Building by the fire department in controlling the fire, and this also poured water onto the equipment stored in the basement causing damage to the machinery. Plaintiff Continental Insurance Company (Continental) and plaintiff Lumbermen's Mutual Insurance Company (Lumbermen's Mutual) alleged that they were corporate entities, and as insurers, they had paid some of the damages of plaintiff Wilson caused by the water and were, to that extent, subrogated to the rights and claims of Wilson against the defendant.

Defendant Edison G. Foard, d/b/a Edison Foard, General Contractor (defendant Foard) in his answer denied that he was negligent in any respect; denied that Wilson's property was damaged; denied the corporate entity of Continental and Lumbermen's Mutual; and denied that Continental and Lumbermen's Mutual, as insurers, were subrogated to any rights of Wilson. Defendant Foard, however, admitted that Wilson owned some textile machinery which was stored in the basement of the Building being renovated.

Plaintiffs offered evidence by testimony and deposition which tended to show that the owner employed the defendant

Foard to renovate the main floor of the Building in Charlotte for a new tenant. The "Electrical Contract" for the renovation was not in defendant's contract. During the course of the renovation, it was necessary to remove some of the walls on the main floor, and while removing them, a steel door frame had to be cut and removed from the structure. An acetylene torch was used to cut through the frame, and one of defendant's employees did the cutting. It took ten to fifteen minutes to cut through the metal. This cutting was done on either Monday, 28 February 1966, or Tuesday, 1 March 1966, at about 9:00 a.m. No baffle plate was used to contain the sparks. The fire occurred in the early morning hours (around 4:30 a.m.) of Wednesday, 2 March 1966. Some debris from the destruction of the walls littered the space around the door frame, and although some of it was being carried off throughout the cutting operation, some remained in the vicinity of the cutting. The debris consisted of hollow tile, mortar mix, dust and cellotex, a type of pressed paperboard. After the steel door frame was removed, water was poured from a five-gallon can all around the immediate area as a precautionary measure.

Plaintiffs' witness, Ivan Curtis Sweatt, testified that he was employed by Vinson Realty Company and that "(o)n the day before the fire I remember that an acetylene torch was being used on the ground floor. I do not know whether it was one or two torches because there were electricians and plumbers—several people using them. I do know that an acetylene torch was being used by someone on the ground floor on Tuesday, the day before the fire."

There was also evidence for the plaintiffs which tended to show that the electricity in the walls was turned off. There were several openings to the Building which had been studded up or were locked. Defendant had the responsibility of locking the rear door but not others. Defendant's workmen were allowed to smoke while on the job, and no containers were provided for their cigarette butts. They scuffed them out on the floor. There was evidence that other people had access to the Building and others were working in the Building. At the completion of the day's work, there was no sign of fire or smoke in the area on either Monday or Tuesday. A fire alarm was turned in at 4:31 a.m. on 2 March 1966. The fire department had to knock the lock off the rear door of the Building to get to the fire. The debris around the area where the cutting had been done was smoldering. The overhead sprinkler system in the

Building had been triggered, and the fire department used water on the smoldering debris. There were holes in the floor. An expert witness testified that the cellotex would hold a spark for long periods of time while showing very little smoke.

There was some evidence in Paul Eugene Stuart's deposition, offered by plaintiffs, that some of the machines owned by Wilson were rusty on an occasion when he saw them. What caused the rust does not appear. It is not clear whether this rust was observed before or after 2 March 1966. Plaintiffs' Exhibit 4 is an envelope containing a blue plastic disc, the contents of which are not printed in the record. On the outside of this envelope there is written what is designated thereon as a "Resume of Recording" of an interview of Paul Eugene Stuart by J. E. Jackson. Plaintiffs offered this, without objection "for the purpose of corroborating or contradicting the testimony of the witnesses." On the back of plaintiffs' Exhibit 4, among other things, appears the following written in ink: "Says was no damage to the building due to the fire, since all that was burned was being torn down by them anyhow. Says he was told some textile machinery was damaged by water. He has inspected and saw rust on the machines. Says some machines at front of basement were not damaged. Did not know who owned the machine."

There was no evidence, received or rejected, that any machinery owned by Wilson was damaged by water. There was no evidence, received or rejected, of the value of any machinery owned by Wilson. Neither was there evidence, received or rejected, of any loss that Wilson sustained from fire or water damage to any textile machinery owned by it.

[1] Plaintiffs' first assignment of error is that the court, after finding that James C. Brown (Brown) was an expert fireman and that he was an expert in determining factors involving the cause of fire, then held that he was not an expert after the witness stated he did not consider himself an expert. This witness was examined by plaintiffs in the absence of the jury. The judge later reversed himself again and stated that the witness had qualified as an "expert fireman." Under the circumstances of this case, no prejudicial error is revealed by the failure to permit this witness to testify as an "expert" during the entire time he was testifying.

Plaintiffs' second and third assignments of error relate to the exclusion of certain testimony of the witness Brown. No prejudicial error appears by the exclusion of his testimony.

[2] Plaintiffs' fourth assignment of error is to the refusal of the court to permit the attorney for appellants to read to the jury the depositions of Leonard Stuart and Paul Stuart. These were admitted into evidence without objection. Both of these witnesses had testified for plaintiffs. Since plaintiffs' witnesses Leonard Stuart and Paul Stuart were employees of the defendant, it was competent for the plaintiffs to use these depositions under the provisions of Rule 26(d)(2)b., which reads:

> "(d) *Use of depositions.*—Any part or all of a deposition, so far as admissible under the rules of evidence, may be used at the trial or upon the hearing of a motion or an interlocutory proceeding or upon a hearing before a referee, against any party who was present or represented at the taking of the deposition or who had due notice thereof, as follows:
>
> * * *
>
> (2) When the deponent testifies at the trial or hearing, the deposition may be used
>
> * * *
>
> b. By the party calling deponent as a witness, as substantive evidence of such facts stated in the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness."

The record reveals that the deposition of Leonard Stuart was plaintiffs' Exhibit 5, but the instrument filed in this court purporting to be this exhibit does not carry any such identifying mark. The instrument filed here purporting to be the deposition of Paul Eugene Stuart also does not bear any exhibit number. However, someone has placed the number of this case on the front page of each of these instruments and for the purposes of this case, we will assume that the depositions here are correct copies of the ones offered. None of the parties contend otherwise. The trial court refused to permit plaintiffs' attorney to read these depositions to the jury. The two depositions combined contained over 86 typewritten pages. However, the attorney was informed that he could read these depositions to the jury during his argument. Under the provisions of G.S. 84-14, the court can limit the time that an attorney may argue to the jury. We think that it was error for the trial judge to decline

to permit the attorney to read the depositions to the jury prior to the beginning of his argument. However, due to the result reached in this case, it was not prejudicial error.

[3] At the close of the plaintiffs' evidence (the defendant offered none), the defendant Foard moved "that the Court direct a verdict in his favor in that the facts as introduced or the evidence and testimony that has been introduced in the trial of the case is insufficient for the Jury to find that the fire occurred and the damage resulted as alleged in the Plaintiff's Complaint."

The motion for a directed verdict was allowed, and this is plaintiffs' fifth assignment of error. We are of the opinion and so hold that the evidence in this case does not show that the property of Wilson was damaged by the actionable negligence of the defendant. The trial judge, under Rule 50 of the Rules of Civil Procedure, correctly allowed the defendant's motion for a directed verdict at the close of the plaintiffs' evidence on the grounds that the evidence is insufficient for a jury to find "that the fire occurred and the damage resulted as alleged in the complaint."

Affirmed.

Judges PARKER and HEDRICK concur.

ENNIE MAE PRIDGEN v. WILLIAM HUGHES AND WIFE, JERLENE HUGHES

No. 7026DC449

(Filed 18 November 1970)

1. Rules of Civil Procedure § 56— summary judgment — types of action — availability to all parties

Rule 56 of the North Carolina Rules of Civil Procedure, relating to summary judgment, is not limited in its application to any particular type or types of action, and the procedure is available to both plaintiff and defendant.

2. Rules of Civil Procedure § 56— summary judgment — negligence cases

While summary judgment will often not be feasible in negligence cases where the standard of the prudent man must be applied, it is proper in such cases where it appears that there can be no recovery even if the facts as claimed by plaintiff are proved.

3. **Rules of Civil Procedure § 56— motion for summary judgment — unsupported allegations in pleading**

The unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion for summary judgment by allowable evidentiary matter showing the facts to be contrary to those alleged in the pleadings. Rule of Civil Procedure No. 56(e).

4. **Rules of Civil Procedure § 56— motion for summary judgment — burden of proof**

The burden is on the party moving for summary judgment to establish the lack of a triable issue.

5. **Rules of Civil Procedure § 56— motion for summary judgment — supporting affidavits or other materials — burden of opposing party**

If the party moving for summary judgment by affidavit or otherwise presents materials which would require a directed verdict in his favor if presented at trial, he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him or comes forward with affidavits or other materials that show there is a triable issue of fact.

6. **Negligence § 59; Rules of Civil Procedure § 56— personal injury action — motion by defendants for summary judgment — adverse examination of plaintiff — failure of plaintiff to offer evidence**

In this action to recover for personal injuries allegedly sustained when plaintiff slipped on a throw rug in defendants' home and fell, the trial court properly allowed defendants' motion for summary judgment where the adverse examination tendered by defendants as a deposition in support of their motion shows that, nothing else appearing, defendants would be entitled to a directed verdict at trial, and plaintiff offered no evidence in opposition to the adverse examination, the unsupported allegations in plaintiff's complaint being insufficient to overcome the motion for summary judgment.

APPEAL by plaintiff from *Stukes, District Judge,* 12 March 1970 Session District Court, MECKLENBURG County.

Plaintiff instituted action to recover for personal injuries allegedly sustained when she slipped on a throw rug in defendant's home and fell. She alleged that "defendants had just recently waxed the living room floor and had placed the throw rug over the waxed floor next to the front door entrance to the living room," and "that the defendants were negligent in placing the throw rug over the recently waxed floor which would slip upon being stepped on and in failing to warn plaintiff of the dangerous condition thereby created." She alleged that she went to the residence of the defendants "pursuant to the defendants' request, to discuss some work being done by the defendant, Jerlene Hughes, for the plaintiff."

Defendants answered denying all allegations of the complaint with the exception of allegations of residence, and setting up a plea of contributory negligence on the part of plaintiff.

On March 21, 1969, defendants took the adverse examination of plaintiff. On 9 January 1970, defendants moved for summary judgment under Rule 56. The motion was in writing, properly signed, and bore the address and telephone number of counsel as required by the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure. Plaintiff's adverse examination was tendered as a deposition in support of defendants' motion for summary judgment. Hearing on the motion was had at 9 March 1970 Session of court. Plaintiff submitted no affidavits or depositions nor any other evidence permitted under the Rule, but chose to rely on her complaint. From the entry of judgment allowing the motion for summary judgment and dismissing the action, plaintiff appeals.

Chambers, Stein, Ferguson & Lanning, by James E. Lanning, for plaintiff appellant.

Marvin K. Gray, for defendant appellees.

MORRIS, Judge.

[1] Summary judgment procedure was first used in England under a rule adopted in 1855 and was applicable only to actions upon bills of exchange and promissory notes. Apparently, New York was the first State in the United States to adopt the procedure, following the English model. Clark, *Summary Judgments,* 2 F.R.D. 364 (1943). The New York rule originally applied only to a debt or liquidated demand arising on either contract or judgment for a stated sum. Subsequent amendments enlarged the categories of actions available for motion for summary judgment by plaintiff and allowed a defendant to move for dismissal in any type of case without being limited to the actions specified in the rule to which a plaintiff is limited. Clark, *Summary Judgments, supra.* Several states adopted a summary judgment rule several years prior to the adoption of the federal rules, but in most cases the rule was restricted in its application. All but New York and Michigan seem to restrict the remedy to the plaintiff. Chadbourn, *A Summary Judgment Procedure for North Carolina,* 14 N.C.L.R. 211. Among the jurisdictions having the summary judgment procedure, there is considerable divergence as to the kinds of cases in which it may be used, but

the most frequent limitation is restriction to claims for liquidated damages and to contract transactions. *A Summary Judgment Procedure for North Carolina, supra.* The adoption of the new Federal Rules of Civil Procedure in 1938 typified the trend of extending the scope of the procedure. Rule 56 of the federal rules eliminated earlier restrictions and made the procedure of summary judgment available to both plaintiff and defendant in all types of cases to which the federal rules are applicable. Gordon, *The New Summary Judgment Rule in North Carolina,* 5 Wake Forest Intramural Law Review 87 (1969). The text of Rule 56 of the North Carolina Rules of Civil Procedure and Rule 56 of the Federal Rules of Civil Procedure are practically the same. Like the federal rule, our new rule is not limited in its application to any particular type or types of action and the procedure is available to both plaintiff and defendant.

[2] While neither the federal rules nor the North Carolina rule excludes the use of the procedure in negligence actions, it is generally conceded that summary judgment will not usually be as feasible in negligence cases where the standard of the prudent man must be applied. Barron and Holtzoff, Federal Practice and Procedure (Wright Ed.) Vol. 3, § 1232.1; Gordon, The New Summary Judgment Rule in North Carolina, *supra.* But summary judgment is proper where it appears that even if the facts as claimed by the plaintiff are proved, there can be no recovery, Barron and Holtzoff, Federal Practice and Procedure, *supra,* thus providing a device for identifying the factually groundless claim or defense.

In *Bland v. Norfolk and Southern Railroad Co., Inc.,* 406 F. 2d 863 (4th Cir.) (1969), it was said: "Summary judgment is to avoid a useless trial. It is a device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts .... While a day in Court may be a constitutional necessity when there are disputed questions of fact, the function of the motion of summary judgment is to smoke out if there is any case, i.e., any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition." There the action was for personal injuries and property damage sustained by plaintiff when her car collided with a train at a railroad crossing. Defendant, by use of interrogatories, obtained plaintiff's version of the accident. She

said she had good visibility, the road was dry, she was familiar with the crossing, became aware of the train when she was traveling 30 to 35 m.p.h., that the train was about the same distance from the crossing as her car when she first saw the train, that she applied her brakes when she was 77 feet from the nearest rail. Defendant moved for summary judgment and used plaintiff's answers to the interrogatories in support of the motion. The motion was allowed by the District Court, and the Court of Appeals affirmed. For a similar situation see *Richardson v. Kubota,* 337 F. 2d 842 (4th Cir. 1964).

In the case now before us, defendants used plaintiff's adverse examination as a deposition in support of their motion. Plaintiff testified that she and defendants were next-door neighbors and that she had been in their home on other occasions, that on the afternoon of her injury she went to defendants' home for the purpose of paying the *feme* defendant Hughes $10.60 for some perfume which Mrs. Hughes had purchased for plaintiff at Montaldo's, that she entered the house at the front door, went through the living room to the dining room and sat down and talked for a while with Mr. Hughes, that the living room was lighted, that the floors were pretty and shiny but she could not say she was certain there was wax on the floor, that she did not notice the whole floor but in the area where she was sitting the floor looked the same and did not appear to be more shiny in one spot than another, that she waited a few minutes for Mrs. Hughes and started to leave, that as she started out the front door she slipped on a throw rug and fell across the arm of a chair and to the floor on the rug.

[3] Plaintiff offered no evidence of any kind. Section (e) of Rule 56 clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings. Gordon, *The New Summary Judgment Rule in North Carolina, supra.*

[4, 5] The burden is on the moving party to establish the lack of a triable issue of fact. The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counter-affidavits or other materials. *Griffith v. William Penn Broadcasting Co.* (E.D. Pa. 1945) 4 F.R.D. 475.

"But if the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact. He need not, of course, show that the issue would be decided in his favor. But he may not hold back his evidence until trial; he must present sufficient materials to show that there is a triable issue." Moore's Federal Practice, 2d Ed., Vol. 6, § 56.11(3), p. 2171.

[6] We are of the opinion that defendants have, by plaintiff's adverse examination, sufficiently met their burden of proof. Nothing else appearing, defendants would be entitled to a directed verdict at trial. *Jenkins v. Brothers,* 3 N.C. App. 303, 164 S.E. 2d 504 (1969). The unsupported allegations in the complaint are not sufficient to overcome the motion for summary judgment.

Affirmed.

Judges BROCK and GRAHAM concur.

RAWLEIGH, MOSES & CO., INC. v. CAPITAL CITY FURNITURE, INC.; RICHARD H. ROOS; PAUL B. SMYRE; DAVID J. NOLES; JOHN SHOOK; AND THEODORE MILLER

No. 7025SC590

(Filed 18 November 1970)

1. **Rules of Civil Procedure § 60— relief from default judgment — excusable neglect**

An affidavit stating (1) that a default judgment had been entered against the affiant, who was 63 years old and semi-retired; (2) that, in addition to operating his own store, the affiant had been looking after the trucking business of his two nephews, who were both seriously ill; and (3) that as a result of these duties the affiant was under tremendous physical and mental strain at the time he was served with the summons and complaint and for several weeks thereafter, *held* insufficient to support an order setting aside the default judgment on the ground of excusable neglect. G.S. 1A-1, Rule 60(b)(1).

2. **Rules of Civil Procedure § 55— action against multiple defendants — default judgment against one defendant — setting aside judgment**

In an action against the principal debtor under a factoring agreement and the five individual guarantors who were jointly and sev-

erally liable for the obligation created by the factoring agreement, it was proper for the trial court to set aside a default judgment that was entered against one of the individual guarantors and to order that the action proceed to trial on the pleadings filed by the plaintiff and the answering defendants; however, it was not proper for the trial court to permit the non-answering guarantor to file answer or other defensive pleadings, but the guarantor had to await the conclusion of trial for the entry of an appropriate judgment against him. G.S. 1A-1, Rule 55.

APPEAL by defendant Miller from *McLean, J.*, 3 August 1970 Regular Criminal Session, CATAWBA Superior Court.

This civil action was instituted by plaintiff appellant to recover sums of money advanced by it under an alleged factoring agreement with defendant Capital City Furniture, Inc. (Capital City). The complaint alleges that Capital City is the principal debtor and that the five individual defendants are guarantors of obligations created between plaintiff and Capital City under the factoring agreement.

Appellant alleges that as a result of the agreement aforesaid it purchased certain invoices from Capital City purporting to represent goods sold to the firm, corporation or person named in the invoices and that appellant has not been paid by either of those firms, corporations or persons, or by Capital City or by any guarantor. Appellant contends that Capital City and the individual defendants "are obligated to pay to the plaintiff, both collectively, individually, jointly and severally, the sum of $18,746.39, plus interest until the date it is paid."

Summons was issued and complaint filed on 4 June 1970 and personally served on defendant Miller, appellee, on 5 June 1970. On 8 July 1970, no answer, motion for extension of time or other defense pleading having been filed by appellee, appellant filed an affidavit and motion for default judgment; on the same day the clerk entered default judgment against appellee for the sum of $18,746.39. Thereafter, on 17 July 1970 appellee filed a motion asking that the judgment be set aside. Along with the motion appellee filed an affidavit stating that he was sixty-three years old and semi-retired; that he had two nephews whom he regarded as sons and who were both seriously ill; that due to his nephews' illnesses he had to operate not only his own general store but his nephews' trucking business; and that due to the things mentioned he was under tremendous physical and mental strain at the time the summons and complaint were served and for several weeks thereafter.

Following a hearing on the motion, an order was entered finding facts substantially as contended by appellee, and concluding that the default judgment was taken and entered against appellee through his mistake, inadvertence, and excusable neglect and that appellee has a meritorious defense against the action of plaintiff; the order decreed that the default judgment entered by the clerk be set aside and that appellee be permitted to file answer to the complaint and cross-action against the other defendants. Appellant appeals from the order.

J. Carroll Abernethy, Jr. for plaintiff appellant.

Williams, Pannell and Matthews by Martin C. Pannell for defendant appellee.

BRITT, Judge.

Appellee has moved in this court that the appeal be dismissed as being premature, contending that the order of Judge McLean is interlocutory rather than final. Assuming without deciding that appellee's contention is correct, we deem the questions raised sufficiently meritorious to be considered by us at this time, therefore, we treat the purported appeal as a petition for *certiorari,* allow the petition, and proceed to pass upon the questions presented.

[1] First, we consider the question did the court err in setting aside the default judgment on the ground of excusable neglect as authorized by G.S. 1A-1, Rule 60(b)(1)? We hold that it did. Although this ground is set forth in the new Rules of Civil Procedure, it has long been recognized in this jurisdiction and our Supreme Court has spoken on the subject many times. A review of appellee's motion and affidavit impels us to conclude that appellee did not make out a case of excusable neglect any stronger than, if as strong as, the defendant made out in *Johnson v. Sidbury* 225 N.C. 208, 34 S.E. 2d 67 (1945). In that case, our Supreme Court upheld a default judgment rendered against the defendant, a medical doctor, which judgment was rendered when the defendant was under the pressure of adverse circumstances and unending demands for his professional services. We quote from the opinion as follows:

> "While his inattention and neglect are attributed to the similarity in the title of this case to a former action, and to his preoccupation in the duties of his profession, commendable and highly important though they were, we

do not think this should be held in law to constitute such excusable neglect as would relieve an intelligent and active business man from the consequences of his inattention, as against diligent suitors proceeding in accordance with the provisions of the statute." (Numerous citations)

[2] Next, we consider the question was the court justified in setting aside the default judgment on any ground? A study of the new rules and their interpretation by recognized authorities leads us to an affirmative answer to this question.

Default judgments in this jurisdiction are now governed by G.S. 1A-1, Rule 55, which appears to be a counterpart of Rule 55 of Federal Civil Procedure. Our Rule 55(a) provides for an *entry* of default by the clerk; and Rule 55(b) provides for rendition of judgment (1) by the clerk in certain cases and (2) by the judge in certain other cases. Proper procedure becomes complicated when there are several defendants and plaintiff in its complaint prays for judgment against the defendants jointly or jointly and severally. In Moore, Federal Practice and Procedure, Sec. 55.06. pp. 1819-21, we find the following:

"§ 55.06. DEFAULT JUDGMENT WHERE THERE ARE SEVERAL DEFENDANTS.

Where there are several defendants a question may arise as to whether after entry of a default against one, a default judgment can be entered immediately against the defaulting defendant or whether entry must be postponed until all the defendants are in default or the case is tried as to the defendants not in default. The latter alternative is the correct procedure where the liability of the defendants is joint. In *Frow v. De La Vega,* (15 Wall 552, 554, 2 L. Ed. 60) the leading case, Justice Bradley stated:

* * * * * *

'The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court . . . But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as

> the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all.' (citations omitted)

"If, then, the alleged liability is joint a default judgment should not be entered against a defaulting defendant until all of the defendants have defaulted; or if one or more do not default then, as a general proposition, entry of judgment should await an adjudication as to the liability of the non-defaulting defendant(s). *This rule may also be applied with propriety where the liability is both joint and several or is in some other respect closely interrelated.* These are properly procedural rules whose objective is to attain a correct application of substantive law. In a non-federal matter the effect upon a defaulting defendant of an adjudication in favor of or against a defending party should, it seems, be a subject for state law to determine; and a subject to be determined independently of state law in a federal matter. Subject to those observations, the following are propositions that are quite generally accepted. If joint liability is decided against the defending party and in favor of the plaintiff, plaintiff is then entitled to a judgment against all of the defendants—both the defaulting and non-defaulting defendants. If joint liability is decided against the plaintiff on the merits or that he has no present right of recovery, as distinguished from an adjudication for the non-defaulting defendant on a defense personal to him, the complaint should be dismissed as to all of the defendants—both the defaulting and the non-defaulting defendants. In other words where joint liability is involved a successful defense, other than a personal one, inures to the benefit of a defaulting defendant. And where the liability is joint and several or closely interrelated and a defending party establishes that plaintiff has no cause of action or present right of recovery, this defense generally inures also to the benefit of a defaulting defendant." (citations omitted; emphasis added)

Absent specific provision on our statutes covering the question of default judgment where there are multiple defendants, we are inclined to follow what appears to be the federal practice in this case. We hold: (1) that the clerk properly made, or should make, an entry of default against defendant Miller, the appellee; (2) that the judgment of default final entered by the clerk was properly set aside by Judge McLean but not for the reasons stated in his judgment; (3) that appellee is not entitled to file answer or other defense pleading; (4) that the

action proceed to trial on its merits on the complaint and answers filed by non-defaulting defendants; (5) that appropriate judgment as to appellee be entered following the trial.

The judgment of the superior court is vacated and this cause is remanded for entry of judgment and for further proceedings consistent with this opinion.

Judgment vacated and cause remanded.

Judges CAMPBELL and HEDRICK concur.

JOHN JUNIOR COOPER v. SARAH H. FLOYD, BILL FLOYD, JACK FLOYD, RUTH FLOYD HILL, AND HUSBAND, W. O. HILL, JR., HATTIE FLOYD, AND BILL FLOYD, ADMINISTRATOR OF THE ESTATE OF ED FLOYD

No. 7030SC453

(Filed 18 November 1970)

Cancellation and Rescission of Instruments § 6; Limitation of Actions § 7— action to set aside deed for forgery — statute of limitations

An action to set aside a deed on the ground of forgery is an action for relief on the ground of fraud within the meaning of G.S. 1-52(9) and is barred after three years from the date of knowledge of the forgery.

APPEAL by plaintiff from *Thornburg, S.J.*, March 1970 Regular Session of SWAIN Superior Court.

This is an action to set aside two deeds on the ground of forgery. One deed is dated 2 August 1946 and the plaintiff's signature appears on it. The plaintiff testified that he did sign some documents in August of 1946 though he had no intention to convey nor was he informed that he was conveying any interest in land at that time. The trial judge found that the plaintiff's evidence as a matter of law failed to show that plaintiff's signature on the 2 August 1946 deed was procured by undue influence or fraud. The cause of action as to this deed was abandoned on appeal.

The other deed is dated 4 December 1945. It was notarized 29 December 1945, and was recorded 30 January 1946. Plaintiff's signature appears on this deed, but his evidence tended to

show that he never appeared before a notary or signed the deed. Moreover, plaintiff did not reach his twenty-first birthday until 28 September 1946.

Plaintiff's uncontradicted testimony was that in June of 1962 he discovered the existence of two deeds bearing his name and signatures of his name as grantor on record in the Office of the Register of Deeds of Swain County. He filed suit to have the deeds set aside on 28 December 1965.

At the close of plaintiff's evidence, defendant moved for a directed verdict under Rule 50, Section A of the North Carolina Rules of Civil Procedure, on the grounds that the three-year statute of limitations, N.C. Gen. Stat. § 1-52(9), bars plaintiff's recovery. The motion was granted. From the granting of the motion for a directed verdict, the plaintiff appeals.

Clark Parker for plaintiff appellant.

Monteith, Coward and Coward by Thomas W. Jones for defendant appellees.

VAUGHN, Judge.

The only question presented by this appeal requires a determination of whether an action to set aside a deed on the grounds of forgery is barred after three years from the date of knowledge of the forgery by N.C. Gen. Stat. § 1-52(9). N.C. Gen. Stat. § 1-52(9) prescribes three years as the period within which an action "[f]or relief on the ground of fraud" must be commenced. We hold that an action to set aside a deed on the grounds of forgery is an action for relief on the grounds of fraud, and that the action is barred after three years from the date of knowledge of the forgery.

Neither appellant nor appellee has cited a case holding that relief from forgery is relief on the grounds of fraud. Our own research has disclosed no North Carolina case so holding, but a similar New Mexico statute was interpreted not to include relief for forgery in *Lotspeich v. Dean,* 53 N.M. 488, 211 P. 2d 979:

> "Appellees assert that appellants' cause of action is barred by the four year statute of limitation (Secs. 27-104, 27-106, N.M. Sts. 1941), which has reference to actions brought for relief on the ground of fraud. This statute has

application to the ordinary action based upon fraud such as suits to rescind contracts brought about by false representations of the defendant. It has no application to suits of this kind, in which the fraud charged was a collateral matter. Here the quitclaim deed is a forgery. An exact case is *Johnston Realty Corp. v. Showalter,* 80 Cal. App. 176, 250 P. 289, 291, in which the California court said: 'It is claimed by appellant that the defendant's right to hold her interest in the land, as against the deed to Julia S. Johnston, is barred by the statute of limitations, because the alleged fraud was discovered by her more than three years prior to the commencement of this action. But the defense herein, or the defendant's demand to have his title quieted against the plaintiff, is not based upon any allegation that Mrs. Fouch was fraudulently induced to execute a deed. Defendant's contention is that Mrs. Fouch never executed a deed conveying or purporting to convey to Mrs. Johnston Mrs. Fouch's one-half interest in the land. The fraudulent alteration was a thing apart from any act of Mrs. Fouch. It was neither more nor less than a forgery. Considered in that light, the alterations were no more effective than they would be if the entire instrument was forged. The statute of frauds has no application to these facts. The same is true of the doctrine of laches, invoked by appellant as a bar to defendant's claim of title.'

"Another case directly in point is *Cox v. Watkins,* 149 Kan. 209, 87 P. 2d 243, 247, in which it was stated: 'Appellants argue forgery is a fraud and that one who seeks to quiet his title clouded by a forged deed necessarily seeks relief from a fraud; hence that his action is for relief on the grounds of fraud, within the meaning of G.S. 1935, 60-306, third clause. We cannot agree with this view. Here the fraud practiced by Craig primarily was a fraud upon the grantees in the forged deeds. Plaintiff's action was not based upon that fraud, but upon her title to the property, concededly valid before the fraud was committed, and which plaintiff has done nothing to impair. Her action was to have it adjudged that her valid title remains unimpaired by whatever fraud may have been practiced by some of the defendants upon other defendants. The general rule is that when fraud is only an incident to a cause of action a statute of limitations applicable to relief against fraud cannot be invoked in a suit to quiet title or to remove a cloud there-

from. 51 C.J. 200; *Earl v. Lofquist,* 135 Cal. App. 373, 27 P. 2d 416, 419; *Noble v. Martin,* 191 Wash. 39, 70 P. 2d 1064, 1068.' "

Our statute, N.C. Gen. Stat. § 1-52(9) has been interpreted much more broadly than the New Mexico statute. An early case on the question of whether relief for undue influence is "relief on the grounds of fraud" is *Little v. Bank,* 187 N.C. 1, 121 S.E. 185:

> " . . . It will be noted from the language used, 'relief on the ground of fraud,' that the statute has and was intended to have broader meaning than the ordinary common-law actions for fraud and deceit, and in our opinion clearly applies to any and all actions legal or equitable where fraud is the basis or an essential element of the action. . . . "

The question now narrows to whether fraud is an essential element or the basis of an action to set aside a deed on the ground of forgery. "Forgery may be defined as the fraudulent making or alteration of a writing to the prejudice of another man's rights or as the false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability." 36 Am. Jur. 2d, Forgery, § 1, p. 681. In 4 Strong, N.C. Index 2d, Forgery, § 1, p. 35, forgery is defined as "the falsification of a paper, or the making of a false paper capable of effecting a fraud, with fraudulent intent." In *Trust Co. v. Casualty Co.,* 231 N.C. 510, 57 S.E. 2d 809, our Supreme Court had the opportunity to discuss the difference between false pretense and forgery in a civil case:

> ". . . The principal difference between the two, historically developed in the common law, is that forgery exclusively pertains to a writing, while false pretense covers fraudulent deceits by parol. Treatment of forgery as a separate offense came from recognition that a fraud perpetrated in altering a writing or in making a false writing tends directly to destroy the security which permanent monuments in writing give to transactions affecting the more important rights of persons privy to them. It became a separate and graver offense; but the *gist* of the forgery still is *fraud. Davenport v. Commonwealth,* 154 S.W. 2d 552, 287 Ky. 505; *Leslie v. Kennedy,* 225 N.W. 469, 249

Mich. 553; *S. v. Luff*, 198 N.C. 600, 152 S.E. 791; Burdick, Law of Crime, Vol. 2, p. 550, sec. 663."

The statute applies to all actions where fraud is the basis or an essential element, and fraud is the gist of forgery. It would appear, therefore, that North Carolina decisions dictate a different result than that reached by the New Mexico Court in *Lotspeich v. Dean, supra.* The existence of the deeds was known to plaintiff for some 3½ years before this action was instituted. The same reasons that induced enactment of a statute of limitations for relief on the grounds of fraud (See, generally, *Mask v. Tiller*, 89 N.C. 423) are equally relevant to claims grounded on alleged forgery.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. HENRY LEE HARRIS

No. 7026SC628

(Filed 18 November 1970)

1. **Arrest and Bail § 3— arrest without a warrant**

An arrest without a warrant, except as authorized by statute, is illegal.

2. **Arrest and Bail § 3; Searches and Seizures § 1— search incident to arrest — probable cause**

If an arrest without a warrant is to support an incidental search, the arrest must be made with probable cause.

3. **Arrest and Bail § 3; Searches and Seizures § 1— arrest without warrant — probable cause — search incident to arrest**

A police officer had probable cause to arrest defendant without a warrant for felonious housebreaking and felonious larceny, where the officer followed footprints from a house that had been broken and entered to a place where items stolen from the house were concealed, and a short time thereafter the officer observed defendant go directly to that place, look around and immediately return by the same route; consequently, the officer's search of defendant incident to the arrest was valid.

4. **Arrest and Bail § 5— failure of officer to use technically correct language in making arrest**

The arrest of defendant was not illegal because the officer did not use technically correct language in making the arrest, where it

is obvious that defendant understood that he was under arrest and submitted to the officer.

5. **Searches and Seizures § 1— search incident to arrest — legality — voir dire hearing — sufficiency of evidence and findings**

The facts found by the court at the conclusion of a *voir dire* hearing are supported by the evidence and are sufficient to support the court's conclusion that the arresting officer had reasonable grounds for a search of the person of defendant at the time and place of the arrest.

APPEAL by defendant from *Beal, Special Superior Court Judge,* 6 July 1970 Schedule "D" Criminal Session, MECKLENBURG Superior Court.

Defendant was charged with felonious housebreaking and felonious larceny from the home of Arnold J. Gilleland. Defendant was represented by court-appointed counsel. From judgment entered on the guilty verdict defendant appealed.

Attorney General Morgan, by Staff Attorney Ronald M. Price, for the State appellee.

James J. Caldwell for defendant appellant.

MORRIS, Judge.

Defendant's assignments of error are directed to the *voir dire* examination conducted by the court to determine the legality of the search of defendant made by the arresting officer and the admissibility in evidence of articles taken from him as the result of the search.

The arresting officer had previously testified that he was called to the residence of the prosecuting witness and arrived there about 4:00 p.m. Upon examination, he found that the rear door of the house had been pried open with some type instrument. In the bedroom all the dresser drawers had been pulled out, their contents dumped on the floor, and the drawers left on the floor. The house had been ransacked completely. Examination of the premises revealed that strand of barbed wire on top of a fence at the rear of the yard had been mashed down. The officer observed footprints across a newly plowed area behind the fence. He followed the footprints and found two portable television sets and a portable radio underneath a tree and some bushes. These were identified by Mr. Gilleland as belonging to him, and were returned to the house. The officer

testified that he was at the Gilleland residence for approximately two hours. He further testified as follows: "I went up to Hawthorne Lane near the playground of Hawthorne Junior High and parked my vehicle and sat and watched the area where the TV's were found. Shortly after dark there was a subject came across the ball field, went to the area where the TV's were left and—he looked around, turned, and came back the same direction which he had gone. At this time I cranked my car up and went down Hawthorne Lane and went around to the front of the school. I got out of the car and stood behind the school. This subject walked back towards the school and I stepped out. I identified myself and told him he was under arrest for investigation of housebreaking and larceny. After I did this, I searched him and found a beaded—"

On the *voir dire,* the officer testified to substantially the same sequence of events adding that he found on the defendant the articles previously identified by the prosecuting witness as having been taken from his home and being exhibits Nos. 1 and 2. The defendant insisted at trial and on appeal that the officer had no sufficient probable cause to make an arrest, that the arrest was therefore illegal and the search illegal and the exhibits should not be allowed in evidence.

[1] An arrest without a warrant, except as authorized by statute, is illegal. *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970). G.S. 15-41, in part, provides:

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

Defendant does not contend that the situation was such that defendant would not have evaded arrest if not immediately taken into custody. The circumstances sufficiently indicate that he would have. Defendant's contention is that the arrest was without probable cause.

[2, 3] Of course, although a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, the arrest must be made with probable cause. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Henry v. United States,* 361 U.S. 98, 4 L. ed. 2d 134, 80 S. Ct. 168 (1959), and cases there cited. We look then to the

evidence in this case to determine whether prudent men in the shoes of this officer would have seen enough to have permitted them to believe that this defendant was or had committed an offense in violation of the law. We reach an affirmative conclusion. The evidence is conclusive and uncontradicted that a crime had been committed. The officer had found footprints obviously leading from Mr. Gilleland's residence to the place where stolen items were concealed. Defendant, a short time after the items were stolen, was observed by the officer going *directly* to that place, looking around, and returning immediately by the same route. In our opinion this is sufficient to warrant the officer in believing that defendant had committed the offense.

[4] Conceding that the officer did not use technically correct language in making the arrest, "[a] formal declaration of arrest by the officer is not a prerequisite to the making of an arrest." *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967). "If the person arrested understands that he is in the power of the one arresting and submits in consequence, it is not necessary that there be an application of actual force, a manual touching of the body, or a physical restraint that may be visible to the eye." 5 Am. Jur. 2d, *Arrest,* § 1. It is obvious that the defendant understood that he was under arrest and submitted to the officer. We are not willing to hold the arrest invalid because of the language used by the officer and thereby place additional burdens on law enforcement officers. We hold that the arrest was a legal arrest and the search incident thereto valid. It follows, therefore, that the evidence obtained as the result of the search was properly admitted against the defendant.

[5] But defendant contends that the court failed to find sufficient facts at the conclusion of the *voir dire.* Defendant earnestly contends that evidence introduced which was favorable to defendant should have been included in the findings of fact. Defendant introduced no evidence on the *voir dire* examination. Most of the evidence which defendant now insists should have been included in the findings of fact was introduced by defendant after the *voir dire* was concluded. The facts found by the court are supported by the evidence, and the facts found support the court's conclusion that the "Officer had reasonable grounds upon which to conduct a search of the person of the defendant at the time and place of the arrest."

Defendant's remaining assignment of error is directed to the denial of his motions for judgment as of nonsuit made

at the close of the State's evidence and renewed at the close of all the evidence. He candidly and properly concedes that if exhibits Nos. 1 and 2 were properly admitted into evidence, there was ample evidence upon which to submit the case to the jury. Our holding with respect to the admission of the exhibits obviates the necessity for discussion of this assignment of error.

Affirmed.

Judges BROCK and GRAHAM concur.

HELSON'S PREMIUMS AND GIFTS, INC. v. JEAN PHILLIPS DUNCAN, T/A SPECIALTY BROKERS ADVERTISING

No. 7026DC634

(Filed 18 November 1970)

1. **Sales § 17; Uniform Commercial Code § 15— counterclaim for breach of warranty — sufficiency of evidence for jury**

In this action to recover the purchase price of 264 electric knives sold by plaintiff to defendant, the trial court erred in directing a verdict in favor of plaintiff on defendant's counterclaim for damages resulting from plaintiff's breach of warranty on 765 radios that were part of the order for the knives, where defendant's evidence tended to show that plaintiff made an express warranty that the radios ordered by defendant were identical to the model desired by defendant's customer and that only the model number had been changed, that the warranty was made before defendant placed her order with plaintiff and constituted a basis for the bargain, that defendant's customer refused to accept the radios delivered by plaintiff, that the two models were not identical and the model delivered by plaintiff was inferior to that desired by defendant's customer, and that defendant lost a profit of $1,807.05 as the result of cancellation of the order by her customer. G.S. 25-2-313.

2. **Evidence § 33; Damages § 13— hearsay evidence — speculative damages**

The trial court properly excluded under the hearsay rule and the speculative damages rule evidence offered by defendant that she was damaged by plaintiff's breach of warranty on radios that were refused by defendant's customer because defendant was thereafter placed on the customer's "black list" and was not allowed to bid on other contracts with the customer.

3. **Rules of Civil Procedure § 15— denial of motion to amend answer and counterclaim**

The trial court did not err in denying defendant's motion to amend her answer and counterclaim to indicate clearly that her counter-

claim was based on breach of contract, since the trial court has broad discretion in permitting or denying amendments and denial of the motion did not prejudicially affect defendant's rights. Rule of Civil Procedure No. 15(b).

APPEAL by defendant from *Stukes, District Judge,* 4 May 1970 Session, MECKLENBURG District Court.

This civil action was instituted by plaintiff to recover the sales price of certain merchandise sold by plaintiff to defendant. The complaint alleges that defendant is indebted to plaintiff in the sum of $25.70, the purchase price of a gift catalog, and the further sum of $3,165.36, the purchase price of 264 electric knives delivered on defendant's order to Union Carbide Corporation (Union Carbide) at Oak Ridge, Tennessee.

Defendant filed answer in which she denied being indebted to plaintiff for the gift catalog but admitted owing plaintiff the amount alleged in the complaint for the electric knives. Defendant further alleged counterclaims against plaintiff for $1,807.05 and $7,500 resulting from loss of profits and damages by reason of plaintiff's breach of warranty on 765 radios that were part of the order for the knives.

At trial, following introduction of portions of the complaint and answer relating to indebtedness for the knives, plaintiff's motion for directed verdict for $3,165.36 was allowed. Defendant then introduced evidence summarized as follows:

Early in 1969 defendant's salesman negotiated with Union Carbide for the sale of merchandise to it for use in an incentive program. Thereafter, defendant's salesman contacted plaintiff and requested prices on certain electric knives and on RCA Model RLD25Y (25Y) radios, items desired by Union Carbide. Regarding the radios plaintiff advised defendant's salesman that 25Y was a "last year's model" and no longer available; that 25Y had been replaced by RCA Model No. RLD21Y (21Y); that 21Y was the same radio as 25Y, just a change of model number; that the two radios had the same component parts and "if anything" 21Y was a better radio. Plaintiff was quoted by defendant as having said "Little girl, don't you worry. It's the same radio, only a newer model." On the basis of plaintiff's representations, defendant placed a bid for the contract to furnish Union Carbide 264 electric knives and 769 RCA radios; the purchase requisition from Union Carbide to defendant specified RCA Model 25Y radios. Defendant's bid was accepted

by Union Carbide and defendant on 20 February 1969 placed her order with plaintiff for the knives and radios to be shipped to Union Carbide. Although defendant's order to plaintiff specified Model 25Y radios, the specification was followed by this qualification: "(It is my understanding that you will substitute the above to RLD21Y because RLD25Y is no longer available. This is the replacement for the 25Y. The 21Y has all the same features.)" On 10 March 1969 Union Carbide notified defendant it would not accept the 21Y radios in substitution for 25Y radios. Defendant proceeded to supply Union Carbide with the electric knives at a small loss; had Union Carbide accepted the radios, defendant would have received a profit of $1,807.05 on the radios. On the same day that Union Carbide rejected the radios, defendant determined that although models 25Y and 21Y looked alike on the outside, when the cases were removed, 25Y was found to have a four inch speaker and 21Y a three and one-half inch speaker; there was also a difference in the dials of the two models.

Defendant attempted to offer evidence that following the above experience she attempted to make further sales to Union Carbide but was placed on their "black list" and no further business relations between defendant and Union Carbide were had; that defendant suffered considerable damage by reason of being placed on Union Carbide's black list. Evidence on these contentions was offered by defendant's salesman and was rejected.

At the close of all the evidence, defendant moved to amend her counterclaim but the court in its discretion denied her motion. Plaintiff moved to dismiss the counterclaim and for a directed verdict; plaintiff's motions were allowed and from judgment predicated thereon, defendant appealed.

James M. Shannonhouse, Jr., for plaintiff appellee.

Raleigh A. Shoemaker and Hugh L. Lobdell for defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the trial court committed error in directing a verdict in favor of plaintiff on defendant's counterclaim and in not submitting appropriate issues to the jury. We agree with this contention.

G.S. 25-2-313, a portion of the Uniform Commercial Code, provides as follows:

"§25-2-313. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE, DESCRIPTION, SAMPLE.—(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. (1965, c. 700, s. 1.)"

Considering defendant's evidence in the light most favorable to her, the jury could have found that plaintiff made an express warranty that the RCA Model 21Y radio was identical to 25Y, that the warranty was made before defendant placed her order with plaintiff and constituted a basis for the bargain. Evidence that Union Carbide refused to accept the radios and that the investigation of differences in the two models by defendant's salesman subsequent to Union Carbide's cancellation, if believed, was sufficient to show that the two models were not identical and that 21Y was inferior. As to defendant's damage on loss of sale of the radios, there was direct testimony to the effect that she lost a profit of $1,807.05 as the result of the cancellation order by Union Carbide. The trial court erred in directing a verdict in favor of plaintiff on defendant's counterclaim.

[2] Defendant next contends that the trial court erred in excluding testimony of defendant's witness to the effect that defendant was damaged by reason of not being allowed to bid

on other contracts with Union Carbide and consequent damages resulting to defendant. This contention is without merit as the evidence offered by defendant was inadmissible under the hearsay rule and the speculative damages rule. *Wilson v. Hartford Accident and Indemnity Co.*, 272 N.C. 183, 158 S.E. 2d 1 (1967); 3 Strong N. C. Index 2d, Damages, Sec. 8, pp. 174-175.

[3] Finally, defendant contends that the court erred in denying her motion to amend her answer and counterclaim to clearly indicate that her counterclaim was based on breach of contract. This contention is without merit as the trial court has broad discretion in permitting or denying amendments and the denial of the motion did not prejudicially affect defendant's rights. *Perfecting Service Co. v. Product Dev. & Sales Co.*, 264 N.C. 79, 140 S.E. 2d 763 (1965); G.S. 1A-1, Rule 15(b).

For the reasons stated, defendant is entitled to a

New trial.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. DONALD JAMES BENFIELD

No. 7025SC537

(Filed 18 November 1970)

Larceny § 4— sufficiency of indictment to support conviction

An indictment charging the larceny of property having a value of more than $200 is sufficient to support a conviction of larceny from the person, notwithstanding the indictment failed to allege a larceny from the person. G.S. 14-70; G.S. 14-72(b)(1).

APPEAL by defendant from *Martin, Judge of the Superior Court,* 9 March 1970 Session, BURKE Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the felony of larceny of property of a value of more than two hundred dollars.

The State's evidence tended to show the larceny of forty dollars from the person of Tom Lee Mace on 24 June 1969. The case was submitted to the jury upon the question of defendant's guilt of the offense of larceny from the person.

From a verdict of guilty, and judgment imposed thereon, defendant appealed.

Attorney General Morgan, by Staff Attorney Walker, for the State.

Thomas M. Starnes for defendant.

BROCK, Judge.

Defendant assigns as error the denial of his motion in arrest of judgment.

The bill of indictment, upon which defendant was tried, reads as follows:

> "The Jurors for the State upon their oath present, that Donald James Benfield late of the County of Burke, on the 24th day of June, in the year of our Lord one thousand nine hundred and sixty-nine, with force and arms, at and in the county aforesaid, *Two Hundred Forty Dollars in United States Currency ($240.00) of the value of more than Two Hundred Dollars,* of the goods, chattels and moneys of one Mr. & Mrs. Tom Mace then and there being found, feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." (Emphasis added.)

The State's evidence tended to show that defendant took two $20.00 bills from Mr. Mace's wallet while it was being held in Mr. Mace's hand.

The trial judge charged the jury as follows:

> "Under the evidence in this case, the court is submitting the case to you on the charge which is known in law as larceny from the person. And I charge you that the felonious or criminal taking and carrying away of the personal property of another, by force and against the will of the owner; and taking and carrying away with the then present intent on the part of the one who takes it, to appropriate it to his own use for all time, and to deprive the rightful owner of its use. And when that taking is from the person of the one owning the property, then that is what is known in law as larceny from the person."

And later he instructed the jury as follows:

"The State has the burden of proof; and I charge you that if the State has satisfied you from the evidence, and beyond a reasonable doubt, that on June 24th, 1969, between the hours of two p.m. and three-fifteen p.m. that the defendant Benfield took and carried away forty dollars ($40.00) of United States money, from the person of Tom Mace, without his consent and against his will; that such money was taken and carried away by the defendant, with the felonious intent to deprive Tom Mace of his money permanently and to convert it to the defendant's use, it would be your duty to return a verdict of guilty of larceny from the person."

From a reading of the bill of indictment it is clear that defendant was charged with the felony of larceny of property of a value of more than $200.00 (G.S. 14-70) and from the instructions given to the jury by the trial court, it can be clearly seen that defendant was found guilty of the felony of larceny from the person of the sum of $40.00 (G.S. 14-72(b)(1)).

It was stated as early as 1895 that it is not necessary for the indictment to allege that the larceny was from the person for it to be shown. *State v. Bynum,* 117 N.C. 749, 23 S.E. 218. Also it was held that an indictment for larceny charged a felony, and it was a matter of defense to mitigate the charge to a misdemeanor by showing that the property taken was a value of less than the amount prescribed by statute, and that it was neither taken from the person nor from a dwelling-house. *State v. Harris,* 119 N.C. 811, 26 S.E. 148.

The reasoning of *Bynum* and *Harris* was followed in *State v. Davidson,* 124 N.C. 839, 32 S.E. 957 (1899); *State v. R.R.,* 125 N.C. 666, 34 S.E. 527 (1899); *State v. Hankins,* 136 N.C. 621, 48 S.E. 593 (1904); *State v. Dixon,* 149 N.C. 460, 62 S.E. 615 (1908); and *State v. Flynn,* 230 N.C. 293, 52 S.E. 2d 791 (1949).

In *State v. Stevens,* 252 N.C. 331, 113 S.E. 2d 577 (1960), two defendants were charged with larceny of $104.00. They entered pleas of *nolo contendere* to larceny from the person, and were sentenced to terms of not less than three nor more than eight years and not less than three nor more than five years. On appeal the judgments were upheld by a unanimous court.

In *State v. Bowers,* 273 N.C. 652, 161 S.E. 2d 11 (1968), Justice Bobbitt (now Chief Justice) referring to the holding in *State v. Stevens, supra,* stated the following:

> "Seemingly, Stevens stands for the proposition that an indictment charging the larceny of property of the value of two hundred dollars or less is a sufficient basis for a conviction of larceny from the person or a plea of guilty or *nolo contendere* to larceny from the person. The present appeal does not necessitate reconsideration of the decision in *Stevens.* However, solicitors would do well to include in bills of indictment the words 'from the person' if and when they intend to prosecute for the felony of larceny from the person."

Therefore it seems clear that *Stevens,* as late as 1968, stands for the proposition as announced in *State v. Bynum, supra,* in 1895, that it is not necessary for the indictment to allege that the larceny was from the person for it to be shown.

Although Judge Martin has applied in this case a legal principle of long standing, it nevertheless seems to us that the State should be required to allege larceny from the person if that is the offense it intends to prove. The requirement that this should be alleged seems to be equally as compelling as the requirement of allegations that a larceny was by breaking or entering *(State v. Fowler,* 266 N.C. 667, 147 S.E. 2d 36), or was of goods of a value of more than $200.00 *(State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91). However, being bound by the decisions of the Supreme Court of North Carolina, we overrule defendant's assignment of error to the failure of the trial judge to arrest judgment.

We have considered defendant's remaining assignments of error and in our opinion they are without merit.

No error.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. BOBBY RAY JONES

No. 7014SC473

(Filed 18 November 1970)

Searches and Seizures § 1; Criminal Law § 84— search of defendant by arresting officers — second search of defendant at jail — incident to lawful arrest

Where two police officers arrested defendant on a charge of escaping from prison and frisked defendant on the spot but found no weapons, and a third officer came to the scene of the arrest and took defendant to jail, a search of defendant at the jail by the third officer without a warrant was lawfully conducted as an incident of defendant's arrest, and evidence discovered as a result of the search was properly admitted in a trial of defendant for forgery and uttering.

APPEAL by defendant from *Canaday, Superior Court Judge,* 6 April 1970 Criminal Term of DURHAM Superior Court.

On 21 July 1969 Officers Kelly and Joyner of the uniformed division of the Durham Police Department arrested the defendant Bobby Ray Jones on a charge of escaping from prison two or three months earlier. The arresting officers frisked Jones on the spot but found no weapons. The officers had no car, so they called Detective Leathers at the Durham Police station and asked that he come out to the scene of the arrest (about a ten-minute drive from the station) to escort their prisoner back to jail. Detective Leathers did so.

At the jail Detective Leathers took Jones to an interrogation room where he searched Jones and Jones' effects. Detective Leathers had neither a search warrant nor Jones' permission to search. The search was described by Detective Leathers as "customary and routine" procedure when jailing prisoners. Detective Leathers testified on *voir dire* that he was searching for proofs of any crime.

On this evidence, the trial judge concluded: That the search was made "pursuant to and incidental to a lawful arrest" and that the detective did not need a search warrant.

In the search Detective Leathers found a Selective Service registration card and a check, both bearing the name of Levon Stanley. Three days after the search Detective Leathers invesigated a bad check complaint from a local merchant. He found the check involved to be similar to the one that he had seized from Jones during the jail search, although it bore a different

signature and the endorsements of "Levon Stanley" on the two checks appeared to have been written by different hands. Detective Leathers continued to investigate this new turn of events and interrogated Jones at Central Prison in Raleigh in August, with the result that in February 1970, the Grand Jury indicted Jones on a charge of forgery and uttering. At Jones' trial the court admitted into evidence, over defense counsel's objections, the Selective Service registration card and the check seized by Detective Leathers during the jail search, as well as the similar check involved in the complaint which Detective Leathers investigated three days later.

The trial court denied defense motions for suppression of the evidence seized during the jail search and for judgment as of nonsuit. The defendant presented no evidence. Jones was convicted as charged and sentenced to a term of eight (8) to ten (10) years in prison. From the conviction, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., and Staff Attorney Ronald M. Price for the State.

A. H. Borland for defendant appellant.

VAUGHN, Judge.

The sole question presented on this appeal is properly stated by the appellant as follows:

> "Whether, under the facts of this case the trial court committed reversible error, requiring a new trial in denying defense motions for suppression of illegally seized evidence and for judgment as of nonsuit?"

We hold that appellant's question should be answered in the negative. Appellant had been arrested, his person was validly under the physical dominion of the law, and there is nothing in the record to indicate that the search at the police station was unreasonable. The search being proper, any evidence obtained thereby was properly admitted. *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477; *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269.

We do not agree with defendant's contention that this search violated any of defendant's rights under the United States Constitution. In *Charles v. United States,* 278 F. 2d 386 (9th Cir. 1960), *cert.* den. 364 U.S. 831, 81 S. Ct. 46, 5 L. Ed.

2d 59, rehearing denied, 364 U.S. 906, 81 S. Ct. 230, 5 L. Ed. 2d 198, the defendant was arrested at his home upon two warrants charging him with threatening and assault and battery. The defendant was frisked immediately upon arrest. A short time later, defendant's pockets were searched, and a packet of marijuana was disclosed. The defendant was then arrested for unlawful possession of narcotics. In discussing the propriety of admitting the marijuana into evidence, the Ninth Circuit Court of Appeals said:

> ". . . [I]t seems to us that a search of the person of the accused, even for the purpose of uncovering evidence of a crime other than that which is charged, is generally incident to a valid arrest. Power over the body of the accused is the essence of his arrest; the two cannot be separated. To say that the police may curtail the liberty of the accused but refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to ignore the custodial duties which devolve upon arresting authorities. Custody must of necessity be asserted initially over whatever the arrested party has in his possession at the time of the apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, see *People v. Chiagles,* 1928, 237 N.Y. 193, 142 N.E. 583, 32 A.L.R. 676, unless they violate the dictates of reason either because of their number or their manner of perpetration."

Another similar case is *Bailey v. U.S.,* 404 F. 2d 1291 (D.C. Cir. 1968). Bailey was arrested in a restaurant on a charge of armed robbery. The arresting officers took him to the street and frisked him. Bailey was then taken to the police station and booked. A search of Bailey's clothing at the police station revealed a quantity of heroin capsules. The Court of Appeals for the District of Columbia Circuit held that the search at the police station was "clearly reasonable," citing *Charles v. United States, supra.*

Appellant asserts that *Chimel v. California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 limits the scope of a search of a prisoner at police headquarters. That question was considered in January of 1970 by the First Circuit Court of Appeals in *United States v. DeLeo,* 422 F. 2d 487 (1st Cir. 1970), *cert.* den. 397 U.S. 1037, 90 S. Ct. 1355, 25 L. Ed. 2d 648. DeLeo was

arrested at a drugstore on charges of federal bank robbery. The arresting officer frisked him at the place of arrest. Forty minutes later at local F.B.I. headquarters, agents again searched DeLeo and found incriminating evidence. The Court considered the line of cases (specifically including *Charles v. United States, supra)* holding that a second search at police headquarters is valid, and concluded:

> "We disagree that *Chimel v. California, supra,* has overruled these cases. We are disinclined to read *Chimel* as teaching new doctrine on the subject of search of an accused shortly after his arrest at the first place of detention; the rationale of *Chimel* does not require its extension to cases like that at bar, for the evil sought to be rooted out is not present."
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> * * * *
>
> "The difference between the situation in *Chimel* and that in the case before us is this: the arrest of a suspect in a particular place—be it his apartment, office, or house—has no such nexus with that place as, without more (i.e., a valid search warrant), would justify searching the premises; but the fact that a suspect arrested in a public place, has been subjected only to a hasty search for obvious weapons has a reasonable nexus with the necessity of conducting a more deliberate search for weapons or evidence just as soon as he is in a place where such a search can be performed with thoroughness and without public embarrassment."

Appellant's assignment of error with respect to the denial of his motion for judgment as of nonsuit at the close of the State's evidence is without merit. The evidence was sufficient to go to the jury.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. THOMAS STEVENS

No. 7027SC471

(Filed 18 November 1970)

1. **Criminal Law § 104— defendant's waiver of first nonsuit motion**

By introducing evidence, a defendant waives his first motion for nonsuit, which is made at the close of the State's evidence. G.S. 15-173.

2. **Criminal Law § 176— motion for nonsuit — review on appeal**

On appeal from the denial of defendant's motion for nonsuit made at the close of all the evidence, including defendant's evidence, the Court of Appeals will consider all of the evidence to determine its sufficiency to carry the case to the jury; if the evidence in its entirety, taken in the light most favorable to the State, is sufficient to support the verdict, the appeal must fail.

3. **Forgery § 2— prosecution for forgery and attempted forgery — sufficiency of evidence**

In a prosecution for forgery of a check and for attempting to utter the same check knowing it to have been forged, the State's evidence on each charge was sufficient to be submitted to the jury; the fact that the defendant was unsuccessful in his attempt is immaterial.

APPEAL by defendant from *Falls, J.*, 11 May 1970 Session of LINCOLN Superior Court.

Defendant was indicted on a two-count bill charging that he (1) forged a particularly described check and (2) attempted to utter the same check knowing it to have been forged. He pleaded not guilty to both counts. The check described in the indictment was dated 5 February 1970, was drawn on First Citizens Bank & Trust Co., Lincolnton, N. C., was payable to John Brown in the amount of $85.75, and purported to bear on the face of the check the signature of David Clark as drawer and on the back of the check the signature of John Brown as endorser.

The State offered evidence in substance as follows:

A bank employee testified that sometime in January or February, 1970, she saw defendant in First Citizens Bank & Trust Co. in Lincolnton. Defendant wanted to pick up a checkbook, saying he wished to buy furniture and had left his checkbook at home. He did not have an account at the bank.

David Clark, whose name appeared on the face of the check as drawer, testified that the signature on the check described

in the indictment was not his signature, that he did not authorize anyone to sign the check on his behalf, and that he had no account at the bank in February, 1970. Clark also testified that a couple of years previously defendant had worked for him at his chicken farm and while so employed had been paid by payroll check.

Jack Rhodes, who operated a service station in Lincolnton, testified that on 6 February 1970 defendant came in his place of business and wanted to cash the check described in the indictment, telling Rhodes that the check had been given to defendant as a payroll check from Dave Clark's poultry farm. Rhodes refused to cash the check and defendant left, after which Rhodes called Dave Clark and then called the police.

A police officer testified that on 6 February 1970 he received a call to go to Rhodes Service Station, where Mr. Rhodes told him what had occurred. About two hours later he found defendant standing in front of another service station. Defendant was staggering and the officer arrested him for public drunkenness and for carrying a concealed weapon. Upon searching defendant, the officer found the check in defendant's left-hand coat pocket.

At this point in the trial the State rested and defendant moved for nonsuit, which motion was overruled.

Defendant took the stand and testified that he had never had the check in his possession, had not presented it to Jack Rhodes and asked him to cash it, had not been in Mr. Rhodes' place of business, had not had the check on his person when he was arrested, and that he knew nothing about it. Defendant also testified he had never been to school and that the only writing he could do was to sign his name.

In rebuttal, the State recalled Jack Rhodes to the stand and also called Rhodes' son as a witness. Both testified they saw defendant sign the back side of the check when he was in the service station asking them to cash it. The son also testified defendant told him at the time that he worked for Dave Clark.

At the close of all the evidence, defendant again moved for nonsuit. The motion was overruled and the jury found defendant guilty on both counts. From judgment imposing prison sentences, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Myron C. Banks for the State.

Sheldon M. Roper for defendant appellant.

PARKER, Judge.

[1, 2] The only assignments of error brought forward in appellant's brief are directed to the refusal to grant his motions for nonsuit. By introducing evidence, defendant waived his first motion, which was made at the close of the State's evidence. G.S. 15-173; *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897. On this appeal, therefore, we consider all of the evidence to determine its sufficiency to carry each of the two cases charged against defendant to the jury. If the evidence in its entirety, taken in the light most favorable to the State, is sufficient to support the verdict, defendant's appeal must fail. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916.

[3] There was here ample evidence to carry the case charged in each count of the indictment to the jury. There was direct evidence that the check had been forged; the purported drawer testified he had not signed or authorized anyone else to sign his name thereto. There was direct evidence the defendant was in possession of and attempted to utter the check; two witnesses testified they saw him endorse the name of the purported payee on the back of the check when he presented it to them and requested them to cash it. These witnesses also testified that while so doing defendant represented the check to be a valid instrument which had been given him by the purported drawer as a payroll check. These circumstances were sufficient to support a jury finding that defendant had himself forged the check. *State v. Welch,* 266 N.C. 291, 145 S.E. 2d 902; Annotation, 164 A.L.R. 621; 36 Am. Jur. 2d, Forgery, § 44, p. 706. The check on its face was an instrument apparently capable of effecting a fraud, and it is immaterial that defendant was unsuccessful in his attempt. The State's evidence was sufficient to permit the jury finding defendant guilty of all essential elements of each of the crimes with which he was charged. *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22. In so doing the jury simply chose not to believe defendant's testimony in denial.

In the trial and judgments appealed from we find

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

W. C. PALMER AND WIFE, HAZEL H. PALMER v. M. R. S. DEVELOPMENT CORPORATION

No. 7025SC555

(Filed 18 November 1970)

1. **Attachment § 7— failure to post increased bond required by court order — dismissal of attachment — authority of court**

A judge of the superior court had authority to require plaintiffs in attachment to increase their bond required by G.S. 1-440.10 or have their attachment dismissed and to dismiss the attachment by a second order in which he found that the increased bond required by his previous order was not posted within the time specified.

2. **Attachment § 7— amount of plaintiffs' bond — jury trial**

Plaintiffs in attachment were not entitled to a jury trial on the question of increasing the bond required by G.S. 1-440.10, the size of a plaintiff's bond not being within the "issues" envisioned by G.S. 1-440.36(c).

APPEAL by plaintiffs from *Beal, Special Judge,* in Chambers, Lenoir, N. C., 8 May 1970 and 15 May 1970.

In their complaint, filed in CALDWELL Superior Court on 23 April 1970, plaintiffs allege: Defendant is a North Carolina corporation. On 5 May 1969 the parties entered into a written contract whereby plaintiffs agree to sell, and defendant agreed to purchase, certain lands in Watauga County belonging to plaintiffs. Defendant owes plaintiffs $42,300 less credits of approximately $18,500 on said contract. Defendant owns certain other lands in Watauga County which are heavily encumbered; defendant is attempting to sell its lands and all of its assets with intent to defraud its creditors and particularly plaintiffs. Plaintiffs ask for judgment in the sum of $23,800 and that defendant's lands be attached.

On the same day they filed their complaint, plaintiffs filed an affidavit as required by G.S. 1-440.11 and a bond or undertaking as required by G.S. 1-440.10 in amount of $200. An Assistant Clerk of the Superior Court of Caldwell County issued a warrant of attachment addressed to the Sheriff of Watauga

County and on 24 April 1969 said sheriff levied on approximately seventy-five acres of land belonging to defendant in Watauga County.

On 6 May 1970, defendant filed a written motion in Caldwell Superior Court asking that the action be dismissed, that the attachment be dismissed pursuant to G.S. 1-440.36, or that plaintiffs' undertaking be increased $500,000. On the same day plaintiffs, pursuant to G.S. 1-440.36, filed written request for a jury trial on all issues raised by defendant's motion.

On 20 May 1970 an order signed by Judge Beal dated 8 May 1970, *"nunc pro tunc,"* was filed, the order being summarized as follows: This cause came on to be heard on 1 May 1970 upon a special appearance by defendant asking that the order of attachment be dismissed or that plaintiffs' undertaking be increased $500,000. Attorneys for all parties were present, but plaintiffs' attorney complained that he had only two hours notice of the hearing. After considering an affidavit presented by defendant and the contentions of the parties, the court found that the $200 undertaking posted by plaintiffs did not provide reasonable protection to defendant in the event that plaintiffs failed to prevail and that the undertaking should be increased to $75,000. It was ordered that plaintiffs post a bond of $75,000 by 5:00 P.M. on 5 May (1970) "or the attachment be dismissed."

On 20 May 1970 an order signed by Judge Beal dated 8 May 1970 was filed, this order being summarized in pertinent part as follows: Plaintiffs having given notice of appeal from the order of 1 May 1970 requiring plaintiffs to post a bond for $75,000 by 5:00 P.M. on 5 May 1970 or the attachment would be dismissed, and the court concluding that plaintiffs are not entitled to a jury trial on the question of the amount of bond plaintiffs should post, and the court finding that plaintiffs failed to post bond for $75,000 as heretofore ordered and that the only bond now posted is the original $200 bond, the order of attachment is dismissed.

Plaintiffs appeal from the orders of Judge Beal.

West and Groome by H. Houston Groome, Jr. for plaintiffs appellants.

Collier, Harris and Homesley by Richard M. Pearman, Jr. for defendant appellee.

BRITT, Judge.

[1] Although cretain proceedings in this case as revealed by the record, particularly the brief notice of hearing provided plaintiffs or their attorneys and the filing of orders twelve days after rendition, are not to be commended, we hold that Judge Beal exercised lawful authority in requiring plaintiffs to increase their bond or have their attachment dismissed, and dismissing the attachment when plaintiffs failed to post the additional bond within the time fixed.

G.S. 1-440.40(a) provides that "(a)t any time before judgment in the principal action, on motion of the defendant, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of the plaintiff." G.S. 1-440.9 authorizes a court of proper jurisdiction to fix all necessary procedural details in any matter pending under the provisions of Article 35 of Chapter 1 entitled "Attachment" where the statute fails to make definite provision.

Article 35 does not specifically authorize the court to dissolve or dismiss an attachment when a plaintiff fails to carry out the court's order to increase the bond, but pursuant to the general authorization of G.S. 1-440.9 to fix all procedural details not specified elsewhere, and in aid of its own jurisdiction over the matter, we think the court has authority to dissolve an attachment after the court's lawful order has not been carried out. *Luff v. Levey*, 203 N.C. 783, 166 S.E. 922 (1932), is distinguishable from the instant case. In the Luff case the Superior Court in a single order provided that plaintiff's bond should be increased a specified sum and "upon failure of the plaintiff to comply with this order, within the above time specified, the attachment heretofore issued in this cause shall be vacated and discharged *ipso facto*, without further action by the court." The Supreme Court held that while the order requiring an increased bond was wholly valid, the condition annexed was invalid. In the instant case Judge Beal entered a second order in which he found that the increased bond required by his previous order was not posted within the time specified and because thereof dismissed the attachment.

[2] Plaintiff's contention that they were entitled to a jury trial on the question of increasing the bond is without merit. We do

not think the "issues" envisioned by G.S. 1-440.36(c) include the size of a plaintiff's bond.

The orders of the superior court appealed from are

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. GARY YOST

No. 7026SC631

(Filed 18 November 1970)

1. **Criminal Law §§ 7, 121— defense of entrapment — sufficiency of evidence**

The evidence in a burglary prosecution failed to support defendant's contention that he was tricked by a procured police agent into entering the home named in the indictment so that he could be arrested by the officers waiting inside; consequently, the trial court was not required to instruct the jury on the defense of entrapment.

2. **Criminal Law § 121— instructions on entrapment**

In order for defendant to be entitled to have the defense of entrapment submitted to the jury, there must be credible evidence tending to support defendant's contention that he was a victim of entrapment as that term is known to the law.

3. **Criminal Law § 7— defense of entrapment — intent to commit crime**

In order to have entrapment there must be an intent to commit a crime; the essential question is usually whether such intent originated in the mind of the defendant or resulted from inducement by a law enforcement officer or his agent.

APPEAL from *Snepp, J.*, 13 July 1970 Schedule "B" Criminal Session of MECKLENBURG County Superior Court.

Defendant was tried for second degree burglary under a bill of indictment charging him with first degree burglary. The jury returned a verdict of guilty of felonious breaking or entering. Judgment of imprisonment for a term of ten years was pronounced upon the verdict and defendant appealed.

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

Whitfield, McNeely and Echols by Paul L. Whitfield for defendant appellant.

GRAHAM, Judge.

[1] Defendant's sole contention on appeal is that the court erred in failing to charge the jury on the defense of entrapment.

[2] "In order for defendant to be entitled to have the defense of entrapment submitted to the jury, there must be credible evidence tending to support defendant's contention that he was a victim of entrapment as that term is known to the law." 3 Strong, N.C. Index 2d, Criminal Law, § 121. In our opinion the defense of entrapment does not arise from any evidence presented by the State or the defendant.

The State's evidence tended to show that defendant, Jackie Foster, and an unidentified third man entered the dwelling house of Mrs. O. F. Smetana in the City of Charlotte at approximately 8:00 p.m. on the evening of 27 February 1970. The house was dark and the doors were closed. Defendant was wearing work gloves and carrying a screwdriver. The three men went immediately to a closet containing a safe and opened the closet door; whereupon, three police officers, who had been concealed in the house, stepped forward and arrested defendant and Foster. The third man ran and was not apprehended. The police officers had entered the house with permission of the owner after having received information that there would be a break-in there on that night.

Defendant testified that in the early evening of the alleged break-in, he and Jackie Foster met a man in a pool hall who offered to give them information about the missing "Goode Diamond." Defendant had been searched several times for the diamond and was interested in locating it so he could "get the police officers off my back." The man, who was apparently never introduced to defendant, invited defendant and Foster to his home for drinks and to discuss the missing diamond. The three men then rode to the Smetana home in a Cadillac automobile operated by an unidentified fourth man. The driver remained outside in the car. The other three men went through the carport and into the kitchen of the Smetana home. Foster and defendant were instructed by their companion to go to the living room and turn on the light while he mixed them a drink. As they entered a hallway defendant and Foster were seized by police officers. The third man stated to the police, "[h]ere is your body." One of the officers replied, "Get the hell on out of

here now I will take care of it from here." The third man then left the house, got into the Cadillac automobile and left. Defendant insisted that he thought he was entering the home of the man who had invited him there; that he had no intention of committing larceny or any other crime inside the house, and that he was not wearing gloves or carrying a screwdriver at the time. Rebuttal evidence for the State denied that there had been any conversation between the third man and a police officer inside the house, and denied that the police had made "any prior arrangement" with the third man.

[3] In order to have entrapment there must be an intent to commit a crime. The essential question is usually whether such intent originated in the mind of the defendant or resulted from inducement by a law enforcement officer or his agent. *State v. Wallace,* 246 N.C. 445, 98 S.E. 2d 473; *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191. There is nothing in the State's evidence to indicate that the police officers had procured the third man, or anyone else, to act as agent for them in inducing defendant to enter the Smetana home for any purpose. "[T]o hold that entrapment is a defense . . . when the inducement comes from a third party unconnected with the State, would gravely imperil the proper enforcement of the criminal law. For instance, if two defendants committed burglary, and one could satisfy the jury, that he was entrapped into committing the crime by his co-defendant, he would go scot free." *State v. Jackson,* 243 N.C. 216, 220, 90 S.E. 2d 507, 510.

Defendant's evidence tends to show that he was tricked into going into the Smetana house so that he could be arrested, and that he entered the house without any criminal intent. If this evidence be taken as true, defendant should have been acquitted, not because he was entrapped to commit a crime within the meaning of that term, but because entering the house under such circumstances would not have been wrongful. This is so irrespective of whether the third man was acting as an agent of the police. The court clearly submitted this phase of the case to the jury, instructing them:

> "Now, I instruct you that the breaking or entering was not wrongful if it was committed by the defendant under the belief that he was entering the property of someone who was with him and with that person's permission."

The jury was further instructed to find the defendant not guilty if they had a reasonable doubt as to whether he entered the house without Mrs. Smetana's consent and wrongfully. We are of the opinion that the court's instructions gave defendant the benefit of every theory of defense which arose upon the evidence.

No error.

Judges BROCK and MORRIS concur.

RAAB & COMPANY, INC. v. INDEPENDENCE CORPORATION

No. 7026DC566

(Filed 18 November 1970)

Contracts § 6; Brokers and Factors § 6— action to recover lease commissions — unlicensed out-of-state plaintiff — standing to sue

A foreign real estate firm that had not secured a North Carolina real estate license and a certificate of authority to transact business in the state could not maintain an action to recover commissions on the lease of real estate in this state. G.S. 93A-2(a); G.S. 93A-8.

APPEAL by plaintiff from *Abernathy, District Court Judge,* 20 April 1970 Session of District Court held in MECKLENBURG County.

Plaintiff, a Virginia corporation, brought this action against defendant, a North Carolina corporation, to recover commissions on real estate leases which the defendant, as lessor, had entered into with two tenants, Fields Jewelers, Inc., and Belcraft Hosiery Shops, Inc. Plaintiff's evidence tended to show that it acted as defendant's agent in a lease with J. H. Fields, Inc., as early as 1953. In 1966 it acted as agent for defendant in extending the 1953 lease, but this extension was with Fields Jewelers, Inc., the successor to J. H. Fields, Inc. Again in 1967, plaintiff acted as agent in an extension of the 1953 lease through 30 June 1968. In its second cause of action plaintiff alleged that it acted as agent for defendant in a lease with Norman Aizer, t/a Belcraft Hosiery Shops (Aizer), in 1958 and in extensions of that lease through 31 January 1968. The allegations and the evidence tend-

ed to show that the leases upon which plaintiff brought this action were new and separate leases with Fields Jewelers, Inc., the alleged and admitted successor to J. H. Fields, Inc., and with Belcraft Hosiery Shops, Inc. (Plaintiff attempted to allege the latter was successor to Aizer.) There is no allegation or evidence that plaintiff acted as defendant's agent in connection with those leases. Defendant contended that it was entitled to commissions under the new leases. Prior to the presentation of evidence, plaintiff stipulated that it had not secured a certificate of authority to do business in the State of North Carolina as required in Chapter 55 of the General Statutes and that it had not secured a real estate license as provided in Chapter 93A of the General Statutes of North Carolina.

At the conclusion of all the evidence, defendant made a motion "to dismiss for failure to prove a case." It was allowed and from the granting of this motion, plaintiff appealed.

Fairley, Hamrick, Montieth & Cobb by Laurence A. Cobb for plaintiff appellant.

Palmer, Jonas & Mullins by Michael P. Mullins for defendant appellee.

MALLARD, Chief Judge.

Henry S. Raab testified for the plaintiff that he is president of the plaintiff; that his corporation had acted as rental agent for the defendant corporation performing services for defendant in this capacity prior to the most recent rental agreements; and that plaintiff was not afforded an opportunity to participate in the negotiations of the new leases. He testified that his corporation had not obtained a certificate of authority to transact business in North Carolina. Raab also testified that he has procured tenants in other cities in North Carolina; that "(m)y corporation is not licensed as a real estate agent in the State of North Carolina"; that "(m)y corporation is a Virginia corporation"; and that "(o)ur corporation has not obtained a Certificate of Authority to transact business in North Carolina."

Defendant's exhibit one is a letter dated 22 February 1965 to the president of the defendant corporation in Charlotte which plaintiff's witness Raab admitted writing. This letter reads as follows:

"RAAB AND CO., INC.
REAL ESTATE

Main St. at 5th
Richmond, Va. 23219
February 22, 1965

Mr. Porter B. Byrum
President
Independence Corporation
Independence Building
Charlotte, North Carolina

Dear Mr. Byrum:

This will acknowledge receipt of your letter of February 19, 1965.

We have been in business 50 years, and the enclosed copy of letters, particularly the one from the First and Merchants National Bank, should convince you of our honesty and integrity.

We collect thousand (sic) of dollars rent for estates in your city that are handled by the American Commercial Bank, who could tell you anything you want to know concerning us.

Trusting this will satisfy you,

Cordially yours,
/s/ Henry S. Raab
FOR THE COMPANY"

G.S. 93A-2(a) defines a real estate broker as follows:

"A real estate broker within the meaning of this chapter is any person, partnership, association, or corporation, who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others."

G.S. 93A-8 provides:

"Any person violating the provisions of this chapter shall

upon conviction thereof be deemed guilty of a misdemeanor and shall be punished by a fine or imprisonment, or by both fine and imprisonment, in the discretion of the court."

In the case of *McArver v. Gerukos,* 265 N.C. 413, 144 S.E. 2d 277 (1965), the Supreme Court said:

"If the statute, so construed, makes the doing of an act a criminal offense, one who has contracted to do the forbidden act may not, after performing his contract, sue in the courts to recover the agreed consideration for such performance. *Cauble v. Trexler,* 227 N.C. 307, 42 S.E. 2d 77; *Courtney v. Parker,* 173 N.C. 479, 92 S.E. 324; *Cansler v. Penland,* 125 N.C. 578, 34 S.E. 683; Restatement of Contract, § 580; Anno., Validity of Contract in Violation of Statute, 55 A.L.R. 2d 481, 483."

In *Builders Supply v. Midyette,* 274 N.C. 264, 162 S.E. 2d 507 (1968), the Court held:

"Upon Bryan's stipulation that at all times pertinent to this litigation it was not licensed to construct buildings 'where the cost is $20,000.00 or more,' Judge McKinnon correctly dismissed its action against owners for the balance due under the terms of the contract upon which it had sued. *McArver v. Gerukos,* 265 N.C. 413, 144 S.E. 2d 277; *Tillman v. Talbert,* 244 N.C. 270, 93 S.E. 2d 101; *Courtney v. Parker,* 173 N.C. 479, 92 S.E. 324. * * * "

Plaintiff's only assignment of error is that "(t)he Court erred in granting Defendant's motion to dismiss for failure to prove a case and in entering judgment dismissing the case with prejudice."

When the above quoted statutes and the principles of law enunciated in *McArver v. Gerukos, supra,* and *Builders Supply v. Midyette, supra,* are applied to the facts of this case, we are of the opinion and so hold that the court correctly allowed defendant's motion to dismiss the claim of the plaintiff.

Affirmed.

Judges PARKER and HEDRICK concur.

BEULAH HAWKINS SMITH v. RALPH FONZO DIGH AND WIFE, LONNIE MULL DIGH

No. 7025SC486

(Filed 18 November 1970)

Boundaries § 8— action to establish true boundary line — plea in bar — boundary line agreement

A boundary line agreement executed by the plaintiff and the defendants is an effective plea in bar to the plaintiff's proceeding to establish the true boundary line between her property and the property of defendants, notwithstanding (1) the plaintiff failed to acknowledge her signature to the agreement before a notary public and (2) the plaintiff did not know where the line would be located on the ground at the time she signed the agreement.

APPEAL by plaintiff from *Martin, Harry C., Judge of Superior Court,* 1 June 1970 Session, BURKE Superior Court.

This is a special proceeding instituted by plaintiff on 1 May 1969 under G.S., Chap. 38 alleging a necessity to establish the true location of the boundary line between property of plaintiff and property of defendants.

Defendants filed answer wherein they deny there is any dispute as to the true location of the boundary line between the properties; and affirmatively plead a boundary line agreement executed by the parties as a bar to plaintiff's right to prosecute this proceeding.

The plea in bar was overrruled and denied by the Clerk of Superior Court of Burke County, and defendants appealed. The plea in bar was thereafter heard *de novo* before Judge Martin who ruled that the Clerk's order was erroneous, and adjudged that the agreement of the parties constituted an estoppel and a bar to the maintenance of this proceeding.

The plaintiff's relevant evidence before Judge Martin consisted of testimony by plaintiff. Her testimony tended to show the following: A controversy arose in June 1968, or earlier, between the parties as to the true location of the boundary line between their properties. A survey and a map were made, and on 22 June 1968 plaintiff signed an agreement on the map which read:

"North Carolina

Burke County

We, Ralph F. Digh and Mrs. Beulah Smith, do affirm that the 'agreed line' as noted on this map is in accordance with our agreement and that the property line between us shall hereafter be this 'agreed line.' I, Ralph F. Digh, will not claim any property south of this line; and, I, Mrs. Beulah Smith, will not claim any property north of this line."

This agreement was also signed by defendant Ralph F. Digh on 22 June 1968, and an acknowledgment before a notary appears on the map. However, according to Mrs. Smith's testimony, plaintiff did not sign before a notary public nor acknowledge her signature before one.

Defendants' relevant evidence before Judge Martin consisted of two exhibits: "Exhibit A" was a map recorded in Map Book 5, page 64, entitled "Agreed Line Survey between R. F. Digh and Mrs. Beulah Smith." Upon this map appeared the "agreement" signed and testified to by plaintiff. "Exhibit B" was an instrument entitled "Acknowledgment of Boundary Line Agreement." This instrument was dated 18 July 1969, and signed by both defendants; in it defendants agree to and acknowledge the boundary line as shown on the map recorded in Map Book 5, page 64.

From Judge Martin's order sustaining defendants' plea in bar and dismissing plaintiff's action, plaintiff appealed.

Simpson & Martin, by Dan R. Simpson for plaintiff.

Patton, Starnes & Thompson, by Thomas M. Starnes for defendants.

BROCK, Judge

It is noteworthy that plaintiff filed no denial to defendants' plea in bar which consisted of their affirmative allegation of an agreement as to the location of the boundary line. Also plaintiff admitted the execution of the agreement on 22 June 1968. She does not allege or testify that she was tricked or defrauded in any way; she merely testifies that she did not sign before a notary.

As between plaintiff and defendants it is immaterial whether her signature to the agreement was acknowledged before a

notary public, or other officer. ". . . [A] deed becomes effective as a transfer of title as between the parties to it immediately upon its execution and delivery notwithstanding the lack of an acknowledgment, and binds not only the parties but also their heirs." *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316.

Plaintiff testified that at the time she signed the agreement she did not know where the line would be located on the ground. However, in the absence of some fraud, trick, or mutual mistake, plaintiff's lack of knowledge of where the line would be located on the ground does not invalidate her agreement; there is no allegation, or evidence, of fraud, trick or mutual mistake. And we note that plaintiff also testified: "They surveyed the line before the map was signed; they just put in some stakes on the ground where the line was;" and, "Before the map was signed, they did go down there and survey a line and set up some stakes and put in a concrete monument."

It seems, therefore, that plaintiff's testimony concerning no acknowledgment of her signature to the agreement before a notary public or other officer, and her testimony that at the time she signed the agreement she did not know where the line would be located on the ground, are, standing alone, irrelevant upon the plea in bar. So, the only question remaining was a question of law as to the effect of the agreement upon plaintiffs right to prosecute this action. Judge Martin ruled " . . . [A]s a matter of law, the agreement set forth and recited on the above said recorded map or plat constitutes an estoppel and is a bar to the maintenance of this proceeding by the petitioner." With this ruling we agree. *Lowder v. Smith,* 201 N.C. 642, 161 S.E. 223.

In the hearing before Judge Martin and in his order sustaining defendants' plea in bar we find no prejudicial error.

Affirmed.

Judges MORRIS and GRAHAM concur.

JOANNE MORRIS TATE v. CLARENCE GARREN TATE, JR.

No. 7026DC466

(Filed 18 November 1970)

Divorce and Alimony § 22— modification of support order — jurisdiction and venue

An action seeking the modification of a child support order must be maintained in the court which entered the order. G.S. 50-13.5; G.S. 50-13.7.

APPEAL by plaintiff from *Gatling, District Judge,* 6 April 1970 Session of MECKLENBURG District Court.

Plaintiff filed a complaint in the District Court Division of the General Court of Justice of Mecklenburg County alleging, among other things,

> "3. That the plaintiff and the defendant were married to each other on or about August 2, 1957, and were subsequently divorced on or about July 26, 1965.
>
> 4. That there were two children born to the marriage; namely: Elizabeth Lynne, age 11, and Cara Jean, age 9.
>
> 5. That the defendant is presently providing the plaintiff with the sum of $225.00 per month for the support and maintenance of the aforesaid minor children.
>
> 6. That the aforesaid sum of $225.00 per month was established pursuant to a court order dated July 30, 1965, entered in Forsyth County Superior Court, and which also awarded custody of the two children to the plaintiff."

The plaintiff also alleged a change of circumstances in that the needs of the plaintiff for the support of the minor children have increased due to the cost of living increase and the increased needs of the children as they get older; and that the defendant's financial condition has materially increased since the entry of the order awarding custody of the children. Plaintiff requested that she be awarded a reasonable sum for the use and benefit of the children, attorney's fees, and other relief as entitled.

Defendant moved to dismiss for failure to state a claim upon which relief can be granted and for improper venue. The court allowed defendant's motion, and plaintiff appealed to this Court.

Hamel & Cannon by Thomas R. Cannon for plaintiff appellant.

Richard A. Cohan for defendant appellee.

CAMPBELL, Judge.

The record does not reveal upon which of defendant's two grounds the trial judge dismissed the complaint. However, we will deal only with the question of venue as it is determinative. In fact it is not only venue but actually jurisdiction. Plaintiff relies heavily, in her brief, upon G.S. 50-13.5(f) and Professor Lee's comments on that statute in 3 Lee, North Carolina Family Law, § 222, (Supp. 1968). However, a close reading of the statute and Professor Lee's comments indicate that the statute does not apply in a situation such as we have here. The statute provides:

> "(f) Venue.—An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard."

This statute contemplates only the institution of an action for custody and support. It does not affect the situation that we have here where custody and support have already been determined and one of the parties seeks a modification of the order establishing custody and support. In such a case, the court

first obtaining jurisdiction retains jurisdiction to the exclusion of all other courts and is the only proper court to bring an action for the modification of an order establishing custody and support. In *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967), in referring to the nature of an award for custody and support, the court stated:

> "It is generally recognized that decrees entered by our courts in child custody and support matters are impermanent in character and are *res judicata* of the issue *only so long as the facts and circumstances remain the same as when the decree was rendered.* The decree is subject to alteration upon a change of circumstances affecting the welfare of the child. . . ."

G.S. 50-13.7 provides the manner in which an order for custody or support may be modified:

> *"Modification of order for child support or custody.*— (a) An order of a court of this State for custody or support, or both, 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."

Professor Lee, referring to G.S. 50-13.7(a), states the following:

> "Except as provided in N. C. Gen. Stat. § 50-13.5(f), the ordinary rule of civil procedure applies, namely, the first court to acquire jurisdiction of a cause retains jurisdiction to the exclusion of other courts. Thus, if a judgment involving the custody and the support of a minor child has been entered in this State (as in a habeas corpus proceeding, or in an action for divorce from bed and board, or in an action for alimony without divorce, or in a civil action), the judge trying a subsequent action for absolute divorce cannot interfere with the earlier judgment. Only the court of this State having entered the earlier judgment for custody and support of the minor child may modify or vacate it, upon a motion in the cause and a showing of a change of circumstances." 3 Lee, North Carolina Family Law, § 222, (Supp. 1968).

Under the principles set forth in the opinion above, only the Superior Court of Forsyth County is the proper court to entertain an action seeking to modify the earlier order awarding

custody and support, and for that reason, the judgment of the District Court of Mecklenburg County dismissing the action must be affirmed.

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. HAYES E. WARD

No. 7013SC574

(Filed 18 November 1970)

1. **Assault and Battery § 15— self-defense — definition in charge — failure to define in relation to lesser offenses submitted to jury**

Where the trial court completely and correctly defined self-defense following the definition of assault with a deadly weapon with intent to kill inflicting serious injury, the court did not err in failing again to define self-defense as it related to each of the lesser offenses which were submitted to the jury.

2. **Criminal Law § 169— admission of evidence over objection — error cured by defendant's testimony to same effect**

In this prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, error, if any, in the admission over defendant's objection of a deputy sheriff's testimony as to the sobriety of defendant when he was arrested was cured by defendant's testimony to the same effect.

3. **Assault and Battery § 13— propensity of victim for violence — instruction of witness to give responsive answer to a question**

Where a witness, in response to a question as to the propensity of the prosecuting witness for violence, started to answer, "Up until about 5 years ago . . .," the trial court did not err in instructing the witness to give a responsive answer to the question.

4. **Assault and Battery § 15— instruction that shotgun is a firearm**

Portion of the charge in which the jury was peremptorily instructed that a .410-gauge shotgun is a firearm within the meaning of the law was free from prejudicial error when considered contextually.

5. **Criminal Law § 102— questions asked by solicitor which were not answered — prejudice to defendant**

Defendant was not prejudiced by questions asked by the solicitor to which defendant objected where, upon objection by defendant, the solicitor went to other matters and the questions to which objections were lodged were never answered, and it does not appear that the questions were asked for the purpose of getting before the jury prejudicial matters which the law does not permit them to hear.

State v. Ward

APPEAL by the defendant from *Bickett, J.*, 20 April 1970 Session of BLADEN Superior Court.

The defendant, Hayes E. Ward, was tried on a bill of indictment charging assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. Ward pleaded not guilty.

The evidence for the State tended to show the following: Norma Mae Ward, wife of the defendant, had separated from the defendant, and at the time of the alleged assault was residing in a trailer situated about 30 feet from her brother's house on her brother's property. On the night of 30 December 1969, Hayes E. Ward drove to his wife's trailer, and got out of his car with something resembling a tobacco stick in his hands. Gordon Hall, Ward's brother-in-law, was awakened by the barking of his dogs and came out on the front porch of his house. Hall called to Ward not to go over there and start trouble, and then started walking toward the trailer. As Hall came around the end of the trailer, Ward shot him with a .410-gauge shotgun.

The evidence for the defendant tended to show the following: On the night of 30 December 1969, Ward went to his wife's trailer. Just as he got out of his car, Gordon Hall came out of his house with a 12-gauge shotgun in his hands, shouting to him that he had "no business here." Ward ran behind the trailer when he saw Hall's gun and tried to run away, but Hall followed Ward, shouting obscenities to Ward, challenging him to "come on out here and fight like a man." Ward had a gun in his possession at the time because he had previously been shot by his wife's boyfriend. Hall came around a corner of the trailer. As Hall was raising his gun to his shoulder, Ward shot Hall. The jury returned a verdict of guilty of assault with a firearm inflicting a serious injury; the court imposed judgment of imprisonment in the State's prison for not less than three (3) years nor more than five (5) years. From the verdict and judgment, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Sidney S. Eagles, Jr., and Staff Attorney Russell G. Walker, Jr., for the State.

Joseph B. Chandler, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant assigns as error the failure of the court to define self-defense as it related to each of the offenses of which he could have been found guilty. The definition of self-defense was given completely and correctly following the definition of assault with a deadly weapon with intent to kill inflicting serious injury. After defining the crime of assault with a firearm inflicting serious injury, the court instructed the jury that if they were not satisfied of guilt beyond a reasonable doubt, they should return a verdict of not guilty, "bearing in mind, ladies and gentlemen of the jury, the definition which the Court has given you in connection with self-defense." In *State v. Davis,* 265 N.C. 720, 145 S.E. 2d 7, *cert.* den. 384 U.S. 907, the Court defined "assault" in instructing the jury on assault with intent to commit rape. Thereafter, in explaining the law with respect to an assault with a deadly weapon, the judge said: " 'The court will not again define what is meant by assault because the same definition applies here as in the other except that this is with a deadly weapon.' And in explaining assault on a female the court said: 'the same definition of assault that I have heretofore given you applies in this case, on this count.' " Defendant contended that reference to a former definition was confusing to the jury. The Court said: "We cannot say as a matter of law that the jury were, or might have been, confused by instructions which are clear, simple and unambiguous. There is no requirement of law that a trial judge must repeat a definition each time the word or term (once defined) is repeated in the charge. *State v. Young,* 286 S.W. 29 (Mo.). See also *State v. Tyndall,* 230 N.C. 174, 52 S.E. 2d 272; *State v. Killian,* 173 N.C. 792, 92 S.E. 2d 499." See also *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858, where the Supreme Court held it unnecessary to repeat the definition of "malice" each time the word or term is repeated in the charge.

[2] The deputy sheriff who investigated the incident was asked about the sobriety of the defendant when he was arrested. The response was: "I smelled the odor of alcohol on his breath . . . I couldn't tell at that time that he was affected by it." Later during cross-examination, the defendant testified that he had three drinks between five and six o'clock, that he was not drunk and that he drank nothing else after six o'clock.

Any error which might have been committed in admitting Deputy Sheriff Hester's testimony as to defendant's sobriety

was cured by defendant's own testimony to the same effect. Stansbury, North Carolina Evidence 2d, § 30, states the rule that when evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. The North Carolina Supreme Court has recently followed this rule in a similar case where defendant subsequently testified without objection to facts which had been admitted over objection when testified to by an earlier witness. *State v. McDaniel,* 272 N.C. 556, 158 S.E. 2d 874. The rule was adhered to following a remand of the *McDaniel* case by the United States Supreme Court. *State v. McDaniel,* 274 N.C. 574, 164 S.E. 2d 469.

[3] Defendant's next assignment of error is directed to the examination of the deputy sheriff with reference to the character of the prosecuting witness, Gordon Hall. Defendant's counsel asked the deputy sheriff if he knew the reputation of the prosecuting witness with respect to his propensities toward violence. After receiving an affirmative answer, defendant's counsel asked, "What is that reputation?" The witness answered, "Up until about 5 years ago he used to fight . . . " The court sustained an objection and instructed the witness to give a responsive answer to the question. The witness said, "I don't know it now to be that." No subsequent questions concerning the reputation of the prosecuting witness five years ago were asked. We see no error in limiting a witness to an answer that is responsive to the question propounded.

[4] Defendant also assigns as error a portion of the trial court's charge to the jury in which the jury was peremptorily instructed that a .410-gauge shotgun is a firearm within the meaning of the law. We have carefully reviewed that portion of the charge, and considering it contextually, we find that it was free from prejudicial error, and the assignment of error relating thereto is overruled.

[5] Defendant's remaining assignments of error relate to questions propounded by the prosecutor. The questions were objected to, and upon hearing the objection, the solicitor went to other matters and the question to which objections were lodged were never answered. It does not appear that these questions were asked for the purpose of getting before the jury prejudicial matters which the law does not permit them to hear. In *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512, the Court said, "Ordinarily, merely asking the question will not be held preju-

dicial. *State v. Williams,* 255 N.C. 82, 120 S.E. 2d 442; *State v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281. Compare *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762." *Phillips, supra,* is factually distinguishable from the case at hand. There, the solicitor asked seventeen questions insinuating various wrongdoings of the defendant. Objections to only three questions were sustained, and the defendant answered the remaining fourteen. The Court held that the solicitor had *persistently* violated the rules of practice governing cross-examination to such an extent as to deprive the defendant of that fair trial to which all men are entitled. No such abuse appears in the present case. The defendant has had a fair and impartial trial free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JAMES LEON KENDRICK

No. 7026SC425

(Filed 18 November 1970)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— testimony by accomplice — sufficiency of evidence for jury**

The testimony of defendant's accomplice was sufficient to require submission to the jury of issues as to defendant's guilt of aiding and abetting in the crimes of felonious breaking or entering and felonious larceny.

2. **Criminal Law §§ 106, 112— instructions — sufficiency of testimony by accomplice to support guilty verdict**

The trial court did not err in instructing the jury that it could return a verdict of guilty if it was satisfied beyond a reasonable doubt from the unsupported testimony of defendant's accomplice that defendant was guilty.

3. **Criminal Law § 9— aiding and abetting — instructions — felonious intent**

In a prosecution for felonious breaking or entering which was submitted to the jury on the theory of aiding or abetting in the crime, the trial court erred in failing to require the jury to find that defendant shared in the felonious intent of the perpetrator in order to find defendant guilty of aiding or abetting in the breaking or entering.

4. **Criminal Law § 2— proof of "intent" — what jury may consider**

Intent is a mental attitude which seldom can be proved by direct

evidence, but must ordinarily be proved by circumstances from which it can be inferred; in determining the presence or absence of this element the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged.

ON *certiorari* to review trial before *Falls, J.*, 27 October 1969 Session, MECKLENBURG Superior Court.

Defendant was charged with the offenses of felonious breaking or entering, and felonious larceny.

The State's evidence tended to show that during the early hours of the morning of 13 August 1969 the Oaklawn Super Market was broken into and a quantity of merchandise was stolen therefrom. Charges of felonious breaking or entering and felonious larceny were also lodged against Edson Beckham Mickles and Billy Frank Anderson. Kendrick, the defendant involved in this appeal, and Mickles were placed on trial together, and Anderson testified for the State. Kendrick and Mickles offered no evidence.

The testimony of Anderson tended to show that Mickles broke and entered the Oaklawn Super Market; that he, Anderson, also went in the building; that Kendrick was standing on the other side of the street; that Anderson and Mickles handed two bags of items taken from the store to Kendrick; and the three then went to an apartment nearby.

The jury found Kendrick and Mickles guilty as charged.

An appeal by Mickles is separately pending in this Court.

Attorney General Morgan, by Staff Attorney Blackburn, for the State.

Hamel & Cannon, by Reginald S. Hamel, for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial court denied defendant's motions to dismiss. The testimony of Anderson, the accomplice, was sufficient for submission to the jury upon the issue of aiding or abetting; this assignment of error is overruled.

[2] Defendant assigns as error that the trial court instructed the jury that it could return a verdict of guilty if it was satisfied

beyond a reasonable doubt from the unsupported testimony of the accomplice that defendant was guilty. Defendant argues that the unsupported testimony of an accomplice should not support a verdict of guilty. Judge Falls instructed the jury in accordance with the rule of long standing in this state. See *State v. Terrell,* 256 N.C. 232, 123 S.E. 2d 469. This assignment of error is overruled.

[3] Defendant assigns as error that the trial court did not require the jury to find defendant knew of the felonious intent of the perpetrator, or had a felonious intent himself, before it could find him guilty of aiding or abetting in the felony.

There was no substantive evidence, either direct or circumstantial, which would tend to show a physical participation by Kendrick in the breaking or entering the building. The strongest inference that could be drawn from the evidence was that the defendant was standing across the street acting as a lookout. Clearly the evidence tended to show that Kendrick assisted in carrying away the stolen merchandise, but this was handed to him outside of the store by Anderson and Mickles.

Because of this state of the evidence the trial court undertook to submit the case against this appealing defendant (Kendrick) to the jury upon the theory of aiding or abetting in the breaking or entering. However, the instructions given to the jury failed to require a finding by the jury that the aider or abettor shared in the felonious intent of the perpetrator.

"To constitute one a principal in the second degree, he must not only be actually or constructively present when the crime is committed, but he must aid or abet the actual perpetrator in its commission. (Citations omitted.) A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator (citations omitted), and renders assistance or encouragement to him in the perpetration of the crime. (Citations omitted.) While mere presence cannot constitute aiding and abetting in legal contemplation, a bystander does become a principal in the second degree by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator for the purpose of assisting, if necessary, in the commission of the crime, and his presence and purpose do, in fact, encourage the actual perpetrator to commit the crime. (Citations omitted.)" *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5.

[4] Intent is a mental attitude which seldom can be proved by direct evidence, but must ordinarily be proved by circumstances from which it can be inferred. 2 Strong, N.C. Index 2d, Criminal Law, § 2, p. 481. And in determining the presence or absence of the element of intent the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged. *State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473.

For prejudicial error in the charge to the jury there must be a

New trial.

Judges BRITT and HEDRICK concur.

IN RE: LUTHER LEE GARCIA

No. 7026DC527

(Filed 18 November 1970)

Infants § 10; Constitutional Law § 32— juvenile hearing — right to counsel — waiver of rights

In a juvenile delinquency hearing, it was not sufficient that the court informed the juvenile's mother that she could have an attorney to represent her son, if she so desired; there must also be a showing (1) that the mother was advised of the right to have appointed counsel in case she was indigent and (2) that the mother knowingly waived such right. G.S. 7A-285.

APPEAL by juvenile Garcia from *Gatling, District Judge,* 20 April 1970 Session of MECKLENBURG District Court.

A hearing was held in the District Court upon a petition to determine whether the juvenile appellant was delinquent. The hearing was held on 22 April 1970 with only the juvenile, his mother, and the court officials present. No record of the proceedings was made and the presiding judge entered an order finding the juvenile delinquent and committing him to the North Carolina Board of Juvenile Correction for an indefinite period. At a subsequent hearing on 24 April 1970, at which the juvenile's mother and an attorney were present, the order of 22 April 1970 was suspended and the juvenile was placed on probation for eighteen months with certain conditions attached.

Upon notice of appeal by the juvenile, the trial judge filed, on 15 June 1970, a summary of the evidence and finding of facts in lieu of the transcript as authorized by Rule 19(g) of the Rules of Practice in the Court of Appeals. This summary presented the facts upon which the petition was presented and tended to show that the juvenile engaged in disorderly conduct arising out of an incident at a gathering of people at the County Office Building in Charlotte. The summary also contained the statement "[t]hat the mother of Luther Lee Garcia, Mary Oxendine, had been previously informed that she could have an attorney to represent her son, if she so desired." No other mention was made concerning representation by an attorney.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

Casey and Daly, P.A. by George S. Daly, Jr., for juvenile appellant.

CAMPBELL, Judge.

Appellant makes two assignments of error: (1) That the trial court erred in failing to give adequate notice of the right to counsel to the juvenile and his mother; and (2) That the trial court erred in failing to provide for the recording of the proceedings at the hearing below. As it is not necessary for a determination of the appeal, we will not discuss the second assignment of error.

The Supreme Court of the United States sets forth the requirements that must be followed in juvenile hearings with respect to representation by counsel in *In Re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967). There, the court stated:

> "We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.
>
> At the *habeas corpus* proceeding, Mrs. Gault testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of

> the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. Mrs. Gault's knowledge that she could employ counsel was not an 'intentional relinquishment or abandonment' of a fully known right."

A little over a month after the decision in *Gault* came out, our General Assembly enacted G.S. 110-29.1, which provided:

> " . . . Any judge authorized to conduct hearings in juvenile court matters, shall, prior to conducting a hearing pursuant to G.S. 110-29, in which a finding of delinquency and commitment to an institution is possible, inform the child and his parent or parents that the child is entitled to representation by counsel, and that if they are financially unable to retain counsel, the court will appoint counsel to represent the child. . . . "

This statute was considered in *In Re Haas,* 5 N.C. App. 461, 168 S.E. 2d 457 (1969). This section was repealed by Session Laws 1969, Chap. 911, § 1, when the laws pertaining to juvenile hearings were rewritten. At the same time, a similar, but not so definite, provision was enacted in G.S. 7A-285. That provision provides as follows:

> " . . . In the adjudication part of the hearing, the judge shall find the facts and shall protect the rights of the child and his parents in order to assure due process of law, including the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross examine witnesses, and the privilege against self-incrimination. In cases where the petition alleges that a child is delinquent or undisciplined and where the child may be committed to a State institution, the child shall have a right to assigned counsel as provided by law in cases of indigency."

In the present situation, there is a finding in the summary filed by the trial judge to the effect that the juvenile's mother knew or had been informed that she could have an attorney rep-

resent her son if she so desired. But there is nothing to show that she was advised of her rights to have an attorney appointed for her if she was unable to afford one herself or that she knowingly waived such right. She was not "confronted with the need for specific consideration of whether they did or did not choose to waive the right" to counsel. This is required by *Gault*, and the language of the General Statutes of North Carolina demands no less. It seems clear that the Legislature, in 1969, intended only to recodify this right, rather than lessen it.

As the complete right to counsel was not afforded the appellant and no waiver of this right is shown, the order of the trial court must be reversed.

Reversed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. CLAUDE FRANKLIN MOFFITT

No. 7026SC543

(Filed 18 November 1970)

1. Indictment and Warrant § 14— return of second indictment — grounds for quashal

Defendant's motion to quash the bill of indictment returned against him in May 1970 on the ground that an earlier bill charging the same offenses had been returned against him in January 1970, *held* properly denied, and especially so since the earlier bill was fatally defective.

2. Forgery § 2— indictment — averment of forged words

An indictment charging the offense of forgery must aver the words alleged to have been forged by the defendant.

3. Indictment and Warrant § 7— return of a second indictment

Where an indictment is of doubtful validity, it is proper to send a second bill.

4. Forgery § 2— prosecution — admission of evidence

In a forgery prosecution, the trial court properly admitted testimony showing who had possession of the check writing machine used in the forgery; the court also properly admitted the check writing machine itself and the alleged forged instrument.

State v. Moffitt

APPEAL by defendant from *Bryson, J.*, 11 May 1970 Schedule "B" Criminal Session, MECKLENBURG Superior Court.

Defendant was charged with forgery and uttering a forged instrument in violation of G.S. 14-119 and 14-120. Before pleading to the bill of indictment defendant moved that the bill be quashed. The motion was denied and defendant pleaded not guilty.

The State's evidence tended to show: On 4 October 1969 one Thaggard stole several blank checks from the Charlotte Body Works. On or about the same day Thaggard, one Hall, and defendant were together in a shopping center parking lot in Charlotte. Defendant took one of the checks that Thaggard had stolen, wrote Thaggard's name on the check as payee, signed the name of V. C. Kiser, Jr. to the check, and imprinted the sum of $121.00 on the check by use of a check writing machine. Defendant then delivered the check to Thaggard who carried it into a near-by store, endorsed it, paid $92.00 on an account and received the balance in cash which he thereafter divided with Hall and defendant. The above testimony was given by Thaggard. Hall testified and corroborated Thaggard; he further stated that he saw the check writing machine in defendant's possession. A police officer testified that he saw the check writing machine in the trunk of a car in Burlington and that the machine was in the possession of defendant and three other men. The forged check and machine were introduced in evidence over defendant's objection.

The jury found the defendant guilty of both charges and from judgment imposing prison sentences, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Roy A. Giles, Jr., for the State.

William D. McNaull, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant's first assignment of error relates to the refusal of the trial judge to quash the bill of indictment on which defendant was tried, it being returned at the 11 May 1970 session of the court. Defendant contends that another bill charging the same offenses was returned against him at the 5 January 1970 session and that no disposition had been made of the former bill. The assignment of error is without merit. In *State v. Hastings*, 86 N.C. 596 (1882), defendant was tried on a third bill of

indictment charging the same offense, and the Supreme Court in upholding the trial judge's refusal to quash the third bill said:

> "The motion was properly denied, for the former bills in connection with the facts stated constitute no legal impediment to the putting the defendant on trial upon the last and more perfect bill, at the election of the Solicitor. This is the recognized practice, and is convenient and necessary in the administration of the criminal law for the removal of all grounds of exception to the form of the bills previously sent, or for any irregularity in the manner of acting upon them. *State v. Dixon,* 78 N.C. 558."

[2, 3] Furthermore, it appears that the former bill returned in the case at bar was fatally defective in that it failed to aver the words alleged to have been forged by defendant. *State v. Coleman,* 253 N.C. 799, 117 S.E. 2d 742 (1960); *State v. Cross,* 5 N.C. App. 217, 167 S.E. 2d 868 (1969). Our Supreme Court has held that where an indictment is of doubtful validity, it is proper to send a second bill. *State v. Lee,* 114 N.C. 844, 19 S.E. 2d 375 (1884). The assignment of error is overruled.

[4] Defendant assigns as error the allowing of testimony as to whose possession the check writing machine was in and admitting into evidence the instrument alleged to have been forged and the check writing machine. We hold that the court did not err in admitting this evidence and the assignments of error relating thereto are overruled.

Defendant assigns as error certain portions of the trial court's charge to the jury. We have carefully considered the charge, with particular reference to the challenged instructions, and find that it was free from prejudicial error. The assignments of error relating thereto are overruled.

Finally, defendant assigns as error the failure of the trial court to grant his motions for nonsuit. A review of the testimony impels the conclusion that the evidence was ample to survive the motions for nonsuit and the assignment of error relating thereto is overruled.

The defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. CARY WORTH JERMAN

No. 7026SC406

(Filed 18 November 1970)

1. **Homicide § 21— second-degree murder prosecution — sufficiency of evidence**

The State's evidence in this second-degree murder prosecution was sufficient to be submitted to the jury.

2. **Criminal Law § 106— sufficiency of evidence to withstand nonsuit motion**

Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that the defendant committed it, the motion for nonsuit should be overruled.

3. **Criminal Law § 132— motion to set aside verdict**

The motion to set aside the verdict as being contrary to the evidence is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal in the absence of manifest abuse of discretion.

APPEAL from *Anglin, J.*, 16 March 1970 Schedule "C" Criminal Session, MECKLENBURG Superior Court.

Defendant Jerman was charged with second-degree murder as a result of the fatal shooting of Glenn Trull at the place of business of the deceased on 9 August 1969. The State's evidence consisted of the testimony of five witnesses. The first witness, W. R. Trull, a member of the Meckenburg County Police force, testified that he observed the premises in question on 9 August 1969 and that when he arrived at the scene, the deceased was lying on the floor in a pool of blood with two bullet holes in his chest. Ronnie Ballard testified that he saw the defendant enter the barber shop of the deceased carrying a rifle. He then testified that the deceased went into the back part of his barber shop and that the defendant followed him. "The defendant, Mr. Jerman, went to the room and pushed the door open and there were some words, and then Mr. Jerman started shooting. He was shooting in the room. I saw the defendant, Cary Worth Jerman, shoot Glenn Trull." On redirect examination, Mr. Ballard identified the defendant as being the man that he saw shoot the deceased. "Yes sir, I can point him out. The defendant. In relation to the three people sitting at the table, he is in the middle." Joe Enos Lopez, Jr., then testified that he saw a man come through the door with a rifle. At this time he

grabbed up his two children and ran out the door, and he could not identify the man who came in with the rifle. Raymond John LeCosse then testified that he saw the defendant leave the barber shop and get in his pickup truck. Dr. Hobart R. Wood testified that he was a Medical Examiner for Mecklenburg County and that he performed an autopsy on the deceased. Defendant then stipulated through his counsel, that Glenn Roscoe Trull died of gunshot wounds on 9 August 1969.

At the close of the State's evidence, defendant's motion for judgment as of nonsuit was denied. Defendant offered no evidence but renewed his motion which was again denied. The jury returned a verdict of guilty, and defendant moved to set the verdict aside as being contrary to the evidence. This motion was denied.

Attorney General Morgan by Staff Attorney Thomas B. Wood for the State appellee.

W. H. Scarborough for defendant appellant.

MORRIS, Judge.

[1, 2] Defendant's first two assignments of error are directed to the denial of his motions for judgment as of nonsuit. Our Supreme Court has said in *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967), that "(u)pon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered by the court in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence." Our Supreme Court has also said that "(r)egardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled." *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968), and cases there cited. This Court has laid down the same tests in *State v. Williams,* 3 N.C. App. 463, 165 S.E. 2d 52 (1969). Applying these principles to the evidence in this case, it is obvious that there was plenary evidence from which the jury could find that the offense charged had been committed and that the defendant committed it. These assignments of error are overruled.

[3] "The motion to set aside the verdict as being contrary to the evidence was addressed to the sound discretion of the trial

judge, whose ruling is not reviewable on appeal in absence of manifest abuse of discretion." *State v. Massey,* 273 N.C. 721, 161 S.E. 2d 103 (1968). No abuse of discretion has been shown.

In the trial of this case in the Superior Court, we find

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOHNNY MOORE

No. 7015SC525

(Filed 18 November 1970)

1. **Criminal Law § 76— voluntariness of statements — sufficiency of finding that defendant understood his rights**

On a preliminary hearing to determine the voluntariness of defendant's statements to investigating officers, the trial court properly found, upon plenary evidence, that the defendant, a graduate student, was warned of his constitutional rights before interrogation and that the defendant understood those rights; the fact that defendant himself did not affirmatively testify that he understood those rights does not prohibit such a finding.

2. **Forgery § 2— uttering forged checks — sufficiency of evidence**

In a prosecution charging defendant with the felony of uttering two forged checks in the amounts of $125 and $135, the State's evidence was sufficient to be submitted to the jury on the question of defendant's guilt or innocence of the charges.

3. **Forgery § 2— uttering forged checks — validity of punishment**

In a prosecution charging defendant with the felony of uttering two forged checks in the amounts of $125 and $135, the imposition of consecutive prison sentences of six years and four years does not constitute cruel and unusual punishment.

4. **Constitutional Law § 36— cruel and unusual punishment**

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

APPEAL by defendant from *Beal, Judge of the Superior Court,* 18 May 1970 Session, ORANGE Superior Court.

Defendant was tried on two bills of indictment each charging him with the felony of uttering a forged check knowing it to have been forged.

One bill of indictment charged defendant with uttering a forged check in the amount of $125.00 by depositing the check in his wife's checking account at First Union National Bank in Chapel Hill, North Carolina, on 6 March 1970. The check was dated 6 March 1970, drawn on The Farmers Bank of Tifton, Georgia, made payable to "cash" and signed "Diffie W. Standard."

The second bill of indictment charged defendant with uttering a forged check in the amount of $135.00 by depositing the check in his wife's checking account at First Union National Bank in Chapel Hill, North Carolina, on 23 March 1970. The check was dated 23 March 1970, drawn on The Farmers Bank of Tifton, Georgia, made payable to "cash" and signed "Diffie W. Standard."

The evidence for the State tended to show the following: Diffie W. Standard is a professor at the University of North Carolina at Chapel Hill, and shares an apartment with another professor. Diffie W. Standard first met defendant when they were both graduate students on campus in Chapel Hill. Diffie W. Standard often has visitors in his apartment, and defendant has visited there four or five times. Two blank "personalized" checks were taken from Diffie Standard's checkbook, which was sometimes kept on a desk in the apartment; these are the two checks that were later filled in by someone and deposited by defendant in his wife's account. The check drawn payable to cash in the amount of $125.00 was deposited by defendant on 6 March 1970; the one drawn payable to cash in the amount of $135.00 was deposited by defendant on 23 March 1970. As each check was forwarded to the drawee bank in Tifton, Georgia, it returned them with the notation "not like sig. on file." The checks were never charged back against the account of defendant's wife because the account did not have sufficient funds.

State's evidence further tended to show: Diffie W. Standard did not make out and sign the two checks in question, and did not authorize anyone else to do so.

From verdicts of guilty and sentences imposed thereon, defendant appealed.

Attorney General Morgan by Staff Attorney League for the State.

Karen L. Henderson for the defendant.

BROCK, Judge.

Defendant assigns as error that the trial court found as facts that defendant was warned of his constitutional rights before interrogation, and that defendant understood those rights.

[1] The trial court conducted a full preliminary hearing upon the question of the voluntariness of any statements defendant may have made to the investigating officer. Defendant offered no evidence upon the question of voluntariness, and there was no conflict in the State's evidence. There was plenary evidence to support the trial court's finding that defendant was given the "miranda warning" before he was interrogated. The fact that defendant did not affirmatively state that he understood those rights does not prohibit a finding that he did in fact understand them. It is a strain on credulity to consider that a person of defendant's educational background and advantages could not understand his basic constitutional rights after they were explained to him.

[2] Defendant assigns as error that the trial court denied defendant's motions for nonsuit on each of the charges. Defendant offered no evidence on the question of his guilt or innocence and, therefore, we have only the State's evidence to consider upon defendant's motions. In our opinion the State's evidence, when considered in the light most favorable to the State, was sufficient to require submission to the jury of the question of defendant's guilt or innocence on each of the charges.

It would serve no useful purpose to discuss the several assignments of error to the instructions given by the trial court to the jury. The cases were submitted to the jury upon applicable principles of law, and no prejudicial error has been shown.

[3, 4] Defendant assigns as error that the sentences of six years and four years to run consecutively constitute cruel and unusual punishment which is forbidden by the State and United States Constitutions. The punishment imposed is well within the statutory limits; and it has been held time and again that punishment not exceeding the statutory limit cannot be considered cruel and unusual in the constitutional sense. *State v. Powell,* 6 N.C. App. 8, 169 S.E. 2d 210.

No error.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. MAX V. ROGERS

No. 7027SC474

(Filed 18 November 1970)

Burglary and Unlawful Breakings § 6; Larceny § 8— insufficiency of instructions

In this prosecution upon a bill of indictment charging defendant with (1) the felonious breaking and entering of a dwelling with intent to steal and (2) the felonious larceny of property therefrom, the trial court erred in giving the jury instructions which are susceptible to the construction that the jury might find defendant guilty of felonious breaking and entering without finding that defendant broke and entered the dwelling with an intent to steal, and that the jury might find defendant guilty of felonious larceny without finding that defendant stole anything from the dwelling, and in failing to instruct the jury that it might return a verdict of guilty of one offense and not guilty of the other offense.

Chief Judge MALLARD concurs in the result.

APPEAL by defendant, Max V. Rogers, from *Falls, J.*, 10 March 1970 Session of GASTON Superior Court.

The defendant was charged in a two-count bill of indictment, proper in form, with: (1) breaking and entering on 3 February 1970 the home of James T. Holmsley with intent to steal property therefrom; and (2) with the felonious larceny of personal property after breaking and entering the same.

The defendant, an indigent, represented by his court-appointed attorney, pleaded not guilty. The State offered evidence tending to show that sometime between the hours of 8:00 and 11:00 a.m. on 3 February 1970 the home of James T. Holmsley located at Route 2, Cherryville, North Carolina, was broken into and certain items of personal property, including a man's yellow gold, self-winding watch belonging to Mr. Holmsley, were stolen therefrom. A witness for the State testified that he observed the defendant in the vicinity of the Holmsley home in an automobile at about 10:00 a.m. on 3 February 1970. The defendant was arrested on Main Street in Bessemer City for public drunkenness at about 2:30 p.m. on 3 February 1970, and he at that time had in his possession a man's yellow gold, self-winding watch which Mr. Holmsley identified as being the watch taken from his home earlier that day.

The defendant did not testify, but offered evidence tending to establish an alibi. The jury found the defendant guilty of

the two counts charged in the bill of indictment. The court imposed a ten-year sentence on the first count and a nine to ten-year sentence on the second count and ordered that the sentences be served consecutively.

The defendant appealed to the North Carolina Court of Appeals.

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

Jeffrey M. Guller for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the following portion of the trial judge's instructions to the jury:

> "I instruct you, members of the jury, that if you find from the evidence and beyond a reasonable doubt, the burden being upon the State to so satisfy you that on the 3rd day of February, 1970, the defendant Max Rogers broke into or entered the Holmsley dwelling and that said residence or dwelling had personal property situated therein at the time, and that the defendant broke into and entered the said dwelling house without the consent and knowledge of the owner or the owner's agent or any member of the family, it would be your duty to return a verdict of guilty as charged in the bill of indictment."

The assignment of error is sustained. The defendant was charged in a single bill of indictment with two separate offenses: (1) felonious breaking and entering and (2) felonious larceny. Upon the defendant's plea of not guilty the burden was on the State to satisfy the jury from competent evidence and beyond a reasonable doubt that the defendant was guilty of every element of each separate offense. In the instant case for the jury "to return a verdict of guilty as charged in the bill of indictment" means to find the defendant guilty of felonious breaking and entering and felonious larceny. That portion of the trial judge's instructions to the jury challenged by the defendant is erroneous in that the jury might find the defendant guilty of felonious breaking and entering without finding that the defendant broke and entered the Holmsley dwelling with the intent to steal, and also in that the jury might find the defend-

ant guilty of felonious larceny without finding that the defendant stole anything from the Holmsley dwelling. In addition, the challenged portion of the instructions fails to instruct the jury that it might return a verdict of guilty of one offense and not guilty of the other offense. Failure of the trial judge to instruct the jury with respect to these options is error. *State v. Huffman,* 8 N.C. App. 85, 173 S.E. 2d 636 (1970). For the reasons stated, the defendant is entitled to a new trial.

The defendant raises other questions in his brief which we have carefully considered but do not discuss since they probably will not arise upon a retrial.

New trial.

Judge PARKER concurs.

Chief Judge MALLARD concurs in the result.

STATE OF NORTH CAROLINA v. LARRY GRANT, JR.

No. 7028SC508

(Filed 18 November 1970)

1. **Constitutional Law § 32; Criminal Law § 21— waiver of preliminary hearing without counsel**

Defendant's constitutional rights were not violated by his waiver of a preliminary hearing in the police court without the benefit of counsel where defendant entered no plea in the police court, and the trial court properly denied defendant's motion for a preliminary hearing prior to trial in the superior court.

2. **Criminal Law § 23; Robbery § 2— common law robbery — indictment — voluntariness of guilty plea**

Defendant freely, understandingly and knowingly pleaded guilty to a valid bill of indictment charging the crime of common law robbery.

APPEAL by defendant from *Grist, J.,* 13 April 1970 Criminal Session, BUNCOMBE Superior Court.

The record in this case reveals the following proceedings:

On 26 February 1970 a warrant was issued from the Asheville Police Court charging defendant with robbery on 25 February 1970. On the warrant is an entry by the clerk of said court dated 27 February 1970 to the effect that hearing in the police court being waived by defendant, the case was bound

over to superior court. On 27 March 1970 defendant's counsel filed written motion with the clerk of superior court asking for a preliminary hearing in police court for the reason that defendant did not have counsel in the police court and his waiver of a hearing was not freely, understandingly and voluntarily made. In a bill of indictment returned at the 31 March 1970 session of Buncombe Superior Court, defendant was charged with common law robbery. When the case was called for trial in superior court, before pleading to the bill of indictment defendant's counsel called the court's attention to his motion for a preliminary hearing. The court denied the motion. Defendant then moved that the bill of indictment be quashed and that motion was denied. Defendant then pleaded guilty to the bill of indictment and after determining that the plea was freely, understandingly, and voluntarily entered, and after hearing the testimony of two witnesses, the court accepted the guilty plea and sentenced defendant to five to seven years in prison. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Roy A. Giles, Jr., for the State.

Hendon and Carson by George Ward Hendon for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the failure of the trial court to grant his motion for a preliminary hearing. We think the question raised by this assignment has been fully settled by the Supreme Court of our State in the following cases: *State v. Cason,* 267 N.C. 316, 148 S.E. 2d 137 (1966), *cert.* den. 385 U.S. 1019, 17 L. Ed. 2d 556, 87 S. Ct. 748; *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740 (1967), *cert.* den. 390 U.S. 1030, 20 L. Ed. 2d 288, 88 S. Ct. 1423. In the Cason case the court held that the waiver of preliminary hearing by a defendant without benefit of counsel cannot amount to a deprivation of defendant's constitutional rights when no plea is entered at such preliminary hearing. The record before us does not disclose that defendant entered any plea in the police court. In the Gasque case the court reaffirmed what it said in the Cason case; it further held that defendant's contention that the preliminary hearing afforded the only opportunity to ascertain the evidence of the State before trial, thereby requiring the presence of counsel to obtain this information, was without

merit since the State's witnesses can be examined by defendant before trial by permission of the court or the solicitor, or by resort to the writ of *habeas corpus*. The assignment of error is overruled.

[2] Defendant next assigns as error the failure of the trial court to grant his motion to quash the bill of indictment. Defendant submits no argument as to why the indictment is defective and we find no defect. The assignment of error is overruled.

Finally, defendant assigns as error the entry of judgment against him. We hold that the defendant freely, understandingly and knowingly pleaded guilty to a valid bill of indictment and the sentence imposed was within the limit prescribed by statute. The assignment of error is overruled.

The judgment of the Superior Court is

Affirmed.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM ALBERT WOOD, ALIAS WILLIAM ALBERT GUINN

No. 7027SC532

(Filed 18 November 1970)

Criminal Law §§ 99, 170— remarks by trial court — expression of opinion — prejudicial effect

Colloquy between the trial court and defense counsel in which the court stated, as the jury was leaving the courtroom, that the defendant ought to be kept in jail overnight, and in which the court also stated, in the absence of the jury, that the defendant "has got more reason to run now than he ever had," *held* not prejudicial. G.S. 1-180.

APPEAL by defendant from *Falls, J.*, 4 May 1970 Criminal Session of CLEVELAND County Superior Court.

Defendant was tried and convicted of second degree murder and appealed from judgment of imprisonment imposed upon the verdict.

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

Fred A. Flowers for defendant appellant.

GRAHAM, Judge.

Defendant's sole assignment of error is based upon exception to remarks made by the trial judge after defendant had concluded his evidence and the jury had been excused until 9:30 the following morning. The record reflects that the following transpired:

"THE COURT: We will take a recess until 9:30 in the morning. Members of the jury, don't let anybody talk to you about this case. Keep an open mind until the case is in your hands and you retire to the jury room and you can discuss it then in full. Take a recess, Sheriff, until 9:30 in the morning. (as members of the jury are leaving the courtroom.)

THE COURT: Is this defendant on bond? I guess he ought to be kept in jail overnight.

MR. FLOWERS: He has been around here all week, your Honor. He's been here every term. Well, I will wait until after the jury goes out.

THE COURT: (To jurors) You can go.

(After jurors leave courtroom) He has got more reason to run now than he ever had."

Defendant contends that in the above colloquy, and in particular by the statement, "He has got more reason to run now than he ever had," the trial judge expressed an opinion upon the weight of defendant's evidence in violation of the provisions of G.S. 1-180.

In *State v. Norman,* 8 N.C. App. 239, 174 S.E. 2d 41, defendant moved for a mistrial after he was seen by some jurors being handcuffed and led from the courtroom. The jurors had returned to the courtroom for articles of clothing they had left in the jury box. Defendant's motion was denied and upon appeal this court found no error. Hedrick, Judge, speaking for the court, quoted from 2 Strong, N. C. Index 2d, Criminal Law, § 98, as follows:

" 'The trial court has discretionary power to order defendant into custody during the progress of the trial, and its

action in so doing in the absence of the jury, without anything to indicate in the presence of the jury that defendant was in custody, or its action in so doing in the presence of the jury when it was apparent that the jury understood the reason for the court's action and it could not be regarded by them as a reflection on the credibility of defendant as a witness, will not be held prejudicial.' "

The record shows that after the jury verdict was returned and taken by the clerk, the court questioned each juror individually as to whether he had heard any conversation between the court and defendant's counsel at the recess of court on the preceding afternoon. Only one juror recalled having heard any discussion about taking defendant into custody. He denied that it had influenced his verdict as a juror. Defendant's counsel also examined the jurors. His examination revealed that only the single juror had heard the custody of defendant mentioned and that juror had not seen defendant taken into custody. That juror again insisted, in response to questions by defendant's counsel, that he had not been influenced by what he had heard.

It affirmatively appears from the record that the jurors had left the courtroom before the court stated, "He has got more reason to run now than he ever had." There is nothing to suggest that that statement could have been heard by any of them. In our opinion, the fact that a juror may have heard the court mention having defendant stay in jail overnight does not, standing alone, constitute prejudicial error. See *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39.

No error.

Judges BROCK and MORRIS concur.

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. v. LOLA MAE LOVIN

No. 7028SC521

(Filed 18 November 1970)

1. **Appeal and Error § 39— belated docketing of record on appeal — dismissal of appeal**

Appeal is dismissed for failure of appellant to docket the record on appeal within 90 days after the date of the order appealed from. Court of Appeals Rule of Practice No. 5.

2. **Gas § 6; Eminent Domain § 7— order allowing landowner to withdraw deposit**

In a proceeding to condemn a gas pipeline easement across the respondent's lands, the trial judge had discretionary power to allow the respondent to withdraw the deposit of $3400 paid into the court by the gas company, without prejudicing the respondent's right to continue further opposition to the condemnation. G.S. 40-19.

3. **Courts § 9— order of one judge overruling order of another judge**

One superior court judge cannot modify an order or judgment of another superior court judge, even if based upon an erroneous application of legal principles.

APPEAL by petitioner from *Hasty, Superior Court Judge,* Order of 13 April 1970, BUNCOMBE County Superior Court.

Petitioner, Public Service Company of North Carolina, Inc., instituted this action as a special proceeding, under Chapter 40 of the General Statutes, against respondent, Lola Mae Lovin to condemn a fifty-foot right-of-way and easement across the lands of the respondent for the purpose of constructing and maintaining a gas pipeline. Respondent filed an answer denying, among other things, the right of the petitioner to maintain the action. A hearing was held and an order entered on 29 October 1968 by the Clerk of the Superior Court in which the petitioner was granted a fifty-foot easement and right-of-way across the lands of respondent. Commissioners were appointed to appraise the easement and determine the compensation due to the respondent. Upon receiving the report of the Commissioners assessing damages at $3,400.00, the Clerk of the Superior Court entered an order confirming the report and both parties entered exceptions and gave notice of appeal to the Superior Court.

Respondent then filed a petition to withdraw, without prejudice to the appeal, the deposit of $3,400.00 paid into Court

by the petitioner. On 23 January 1969, Superior Court Judge Harry C. Martin ordered the clerk to pay the sum of $3,400.00 to the respondent, the same to operate as a credit without prejudice to further proceedings in the cause to determine either just compensation or to determine whether petitioner was entitled to proceed in the action with regard to its right to condemn the property of the respondents. No objection or exception to this order was made by petitioner.

Petitioner, on 21 November 1969, moved to dismiss the appeal on the grounds that the withdrawal of the deposit constituted a waiver of the exceptions of the respondent and had the effect of a full settlement. This motion was heard before Superior Court Judge Fred H. Hasty, who found facts and concluded that the withdrawal of the deposit by the respondent did not constitute a waiver of exceptions or work an estoppel and entered an order denying the motion to dismiss. From the denial of the motion to dismiss the appeal, the petitioner appeals to this Court.

Bennett, Kelly & Long; Hendon & Carson by George Ward Hendon for petitioner appellant.

Gudger, Erwin and Crow by S. J. Crow for respondent appellee.

CAMPBELL, Judge.

[1] On 13 April 1970 Judge Hasty denied petitioner's motion to dismiss respondent's appeal to the Superior Court, and petitioner gave notice of appeal to the Court of Appeals. Petitioner's record on appeal was docketed in this Court 15 July 1970. Rule 5 of the Rules of Practice in the Court of Appeals requires the record on appeal, absent an order extending the time, to be docketed within ninety (90) days after the date of the judgment or order appealed from. There is no order extending time for docketing in the record before us. Accordingly, for failure to docket the record on appeal within the time allowed by the rules, this appeal is dismissed.

[2, 3] However, we have reviewed the record and find no prejudicial error. G.S. 40-19 specifically authorizes the Judge of the Superior Court to "make such order in the premises as to him shall seem right and proper." We think that under this authority Judge Martin had the discretionary power to allow

the withdrawal of a deposit in a condemnation proceeding without prejudice to the withdrawing party to continue further litigation. It was incumbent upon the petitioner, if aggrieved by the order of Judge Martin, to object and except thereto. The petitioner did not do so, but instead sought relief by a motion before another superior court judge. One superior court judge cannot modify an order or judgment of another superior court judge, even if based upon an erroneous application of legal principles. *In re Register,* 5 N.C. App. 29, 167 S.E. 2d 802 (1969).

Appeal dismissed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. GUY SAMUEL JONES

No. 7028SC482

(Filed 18 November 1970)

Parent and Child § 9; Husband and Wife § 23; Criminal Law § 143— nonsupport prosecution — revocation of suspended sentence — findings of fact

In revoking a suspended sentence imposed in a nonsupport prosecution, the trial court was required to make specific findings of fact that the defendant's failure to make support payments to his family in compliance with the conditions of suspension was either wilful or without lawful excuse; a mere finding that the defendant "failed to make the support payments ordered in said judgment" was insufficient.

APPEAL by defendant from *Hasty, J.,* 6 April 1970 Session, BUNCOMBE County Superior Court.

Defendant was arrested as a result of an *Instanter Capias* for failure to comply with the terms of a judgment dated January 3, 1967. This judgment had been entered after a plea of guilty to a charge of wilful failure to provide adequate support for defendant's wife and three minor children. Defendant was sentenced to two years, suspended for five years upon condition that he pay into the clerk's office the sum of $200.00 per month for the use of his wife and children, that he be of general good behavior, and that he not use any intoxicating beverages or have any in his possession. Defendant had previously

been in court for failure to comply and had made up payments in arrears in May 1969.

A hearing was held on April 6, 1970 on the basis of the *Instanter Capias.* After the presentation of evidence by the defendant, which tended to show that the defendant was physically unable to work and was an habitual alcoholic, the trial judge found as a fact that "the defendant failed to make the support payments ordered in said judgment." The trial judge then made the following conclusion and order:

> "It is ADJUDGED that defendant has breached a valid condition upon which the execution of said sentence was suspended, and it is ORDERED that such suspension be revoked and that said defendant be imprisoned:
>
> For the term of six (6) months. . . ."

From this judgment and order of confinement, defendant appeals to this Court.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

Gudger, Erwin & Crow by S. J. Crow for defendant appellant.

CAMPBELL, Judge.

Defendant makes two assignments of error: (1) That the procedure by which the defendant was brought before the court on the issuance of an *instanter capias* by the Deputy Clerk of the Superior Court was improper; and (2) That the findings of fact were insufficient to support the order of the court revoking the original judgment suspending sentence and imposing imprisonment for six months. As it is not necessary for a determination of this appeal, we will not discuss the first assignment of error.

Defendant argues that the trial court was required to make specific findings of fact as to whether the conduct of the defendant was either wilful or without lawful excuse. In fact, the only finding by the trial court was that "the defendant failed to make support payments ordered in said judgment."

In *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376 (1958), the Court said the following:

"After a diligent search we have found no case, and counsel in the case have referred us to none, which holds that a court cannot revoke a suspension of sentence in a criminal case, and enforce the sentence for a breach of the condition on the part of the defendant unless such breach is wilful. Based upon the reasoning and language of the cases we have cited above, it is our opinion that all that is required to revoke a suspension of a sentence in a criminal case, and to put the sentence into effect is that the evidence shall satisfy the judge in the exercise of his sound discretion that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended and that the judge's findings of fact in the exercise of his sound discretion are to that effect."

However, the Court went on to hold that, as a prerequisite to revocation of the suspended sentence, the trial judge must make a determination of whether the failure to make the support payments was *without lawful excuse.* This was not done in the present case, therefore, the judgment putting the six months' jail sentence into effect must be vacated and this proceeding is remanded for a determination by the trial judge as to whether or not the failure of defendant to make the monthly payments for the support of his wife and children was without lawful excuse. The judge's findings of fact should be definite, and not mere conclusions. *State v. Robinson, supra.*

Remanded.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. EDWARD WILLIAM HARWOOD

No. 7028SC492

(Filed 18 November 1970)

1. Larceny § 7— felonious larceny — sufficiency of evidence for jury

In a prosecution for felonious larceny, there was ample evidence of each element of the felony of larceny as charged, including the ownership of the property by the individuals named in the indictment and the value thereof, to require submission of the case to the jury.

2. Larceny § 8— felonious larceny — instructions — valuation of stolen property

In this prosecution for felonious larceny, the trial court did not fail to define properly the method of evaluation of the stolen property.

APPEAL by defendant from *Beal, Special Judge of the Superior Court,* 23 February 1970 Special "A" Session of Superior Court held in BUNCOMBE County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the larceny of property of Eugene Swinger and Billy Ellis of the value of $540.

The evidence for the State tended to show that the defendant, together with Charles Leon Bartlett, on 31 January 1970, went to the place of business in Asheville operated as a partnership by Eugene Swinger and Billy Ellis and known as "Fritschy's Garage and Wrecker Service" (Fritschy's Garage). Bartlett backed a Ford pickup into the driveway of Fritschy's Garage and there he removed the dolly wheels and truck chains from a wrecker, without permission, and put them on the pickup. T. A. Henderson, an employee of Fritschy's Garage, testified that he saw this and took the keys out of the pickup; then "they rolled the truck off while I was calling the police." The police found the pickup about three blocks from Fritschy's Garage at a parking lot. When the police arrived, the dolly, the chains, the defendant and Bartlett were all in the pickup. The dolly wheels taken were worth about $250 and the wrecker tire chains were worth about $90, and these dolly wheels and chains were owned by Eugene Swinger and Billy Ellis as partners. The State's witness, Billy Ellis, testified: "Mr. Swinger and I owned these dolly wheels and chains as partners."

The defendant offered evidence which, in substance, tended to show that the dolly wheels and wrecker tire chains were owned by a corporation; that Eugene Swinger and Billy Ellis, as individuals, were not the owners thereof; and that the dolly wheels were worth $85.60, the chains were worth $97.45, and both had a total value of less than $200.

From a verdict of guilty as charged and the imposition of an active prison sentence of two years, the defendant appealed. The record on appeal does not show the actual sentence imposed, but the Clerk of Superior Court of Buncombe County, at the request of the Clerk of the Court of Appeals, sent a certified copy of the judgment herein showing the sentence imposed.

Attorney General Morgan and Assistant Attorney General Weathers for the State.

Fred D. Poisson for defendant appellant.

MALLARD, Chief Judge.

[1] The defendant's first assignment of error is to the denial of his motion for judgment as of nonsuit made at the close of all the evidence. There was ample evidence of each element of the felony of larceny as charged, including the ownership of the property and the value thereof, to require submission of the case to the jury, and this assignment of error is without merit.

[2] The defendant assigns as error certain portions of the charge and also asserts that the court failed to properly define the method of evaluation of the stolen property set forth in the indictment. When the charge is read as a whole, we are of the opinion and so hold that no prejudicial error is made to appear therein.

We have examined all of defendant's assignments of error that are brought forward, and in the trial we find no prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. THOMAS MEEKINS ACUFF

No. 7027SC622

(Filed 18 November 1970)

Criminal Law § 145.1— appeal from revocation of probation — intelligent waiver of rights at hearing

On appeal from a hearing in which defendant's sentence of probation was revoked, defendant's contention that his waiver of appointed counsel and a bill of particulars at the hearing was not intelligently and understandingly made, in that the court failed to advise him that his suspended sentence could be activated as a result of the hearing, *held* without merit.

State v. Acuff

APPEAL by defendant from *Falls, Judge,* 8 July 1970 Session of CLEVELAND County Superior Court.

Defendant, in June 1967, entered a plea of guilty to the charge of the unlawful burning of an automobile with the felonious intent to injure the insurer of the automobile. At that time he waived the appointment of counsel. He was sentenced to from three to five years in prison. The sentence was suspended, and he was placed on probation for five years. Two of the terms of the probationary judgment were that he not violate any state or federal laws and that he remain within a specified area and not change his residence without written consent. In September 1967, he entered a plea of guilty to driving with no liability insurance and no registration. At that time, the probation officers did not ask that his probation be revoked. In June 1970, he left the State without permission to take a friend to Indiana, developed car trouble, and was "bumming" back to North Carolina. On July 1, 1970, he was taken into custody by officers in Cincinnati, Ohio. On July 7, 1970, he was returned by his probation officer to North Carolina. The next day he was taken to superior court for a revocation hearing, having indicated his desire to waive his right to a bill of particulars and appointed counsel. In open court, he orally waived his right to a bill of particulars and counsel and also signed a written waiver for each. From the entry of judgment activating the sentence, he appealed, represented by court appointed counsel.

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

J. A. West for defendant, appellant.

MORRIS, Judge.

On appeal defendant contends that he did not intelligently and understandingly waive his rights because the court failed to advise him that the result of the hearing could be that he would have to serve the three to five year sentence; and, therefore, the court committed reversible error in entering the order revoking his probation and putting the three to five year sentence into effect. He does not contend that the facts found were not supported by competent evidence.

The record reveals that when the court was advised that defendant wished to waive his right to counsel and a bill of particulars, he questioned the defendant thoroughly in open

court. From the questions asked by the court and the unequivocal answers of the defendant, there can be no doubt but that the defendant clearly understood that he had a right to have a bill of particulars served on him twenty-four hours before the hearing, had a right to counsel, to have counsel appointed if he could not afford counsel, and had a right to waive these rights if he so desired. In addition, he signed written waivers of both rights.

Defendant cites no authority for his contention that the court erred in failing to advise defendant that his suspended sentence could be activated. It is obvious that defendant was aware of that possibility and had been aware of it since the entry of the probationary judgment in 1967. Signifying his consent to the terms of the probation, defendant signed the order which contained the following: "If you violate any of the conditions of your probation or orders of your probation officer you will be subject to arrest upon order of the Court, or by the probation officer. At any time within the period of your probation, the Court may, if it see fit, impose the Judgment and sentence it might have imposed in the first instance."

In the proceedings in the superior court, we find

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. SAMMIE MOBLEY

No. 7026SC553

(Filed 18 November 1970)

1. **Larceny § 4— indictment — identification of items stolen**

An indictment charging the larceny of "an undetermined amount of beer, food and money of the value of $25.00 . . . of the said Evening Star Grill" sufficiently identified the items stolen.

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

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 must give the State the benefit of every reasonable inference which may be legitimately drawn therefrom.

3. **Larceny § 7; Burglary and Unlawful Breakings § 5— prosecution — sufficiency of evidence**

The State's evidence in a breaking and entering and larceny prosecution was sufficient to be submitted to the jury.

4. Criminal Law § 163— exceptions to the charge

Exceptions to the charge which appear only in the purported assignments of error are ineffective to challenge the correctness of the charge.

APPEAL by defendant from *Beal, Special Superior Court Judge,* 12 March 1970 Session of MECKLENBURG Superior Court.

The defendant, Sammie Mobley, was charged in a two-count bill of indictment with breaking or entering and larceny on the night of 30 December 1969, of the Evening Star Grill in Charlotte, North Carolina.

The State's evidence tended to show that the defendant was apprehended while still in the grill but made a temporary escape and was again apprehended within a very short while.

Defendant and one witness testified that they had been drinking and had returned to the witness' house about an hour before the break-in occurred, and that defendant was too drunk to come in the house. He had passed out in the car and was simply left there; and it was in this state that he was apprehended by the police. Defendant denied knowledge of the break-in.

The jury returned a verdict of guilty on both counts and from judgment thereon the defendant appealed.

Attorney General Robert Morgan by Staff Attorneys Charles A. Lloyd and Burley B. Mitchell, Jr., for the State.

Richard A. Vinroot for defendant appellant.

CAMPBELL, Judge.

[1-3] The defendant first assigns as error the denial by the trial court of defendant's motion to dismiss at the close of the State's evidence. This assignment of error is based partly on the belief that the second count in the bill of indictment is defective because it failed to identify the items stolen. There is no merit in this contention as the items were sufficiently identified, to wit: "an undetermined amount of beer, food and money of the value of $25.00—dollars, of the goods, chattels and moneys of the said Evening Star Grill." Defendant further argues under his first assignment of error that the charges under both counts should have been dismissed. In this respect, he is appar-

ently treating this as a motion for nonsuit. 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 the benefit of every reasonable inference which may be legitimately drawn therefrom. *State v. Locklear*, 7 N.C. App. 493, 172 S.E. 2d 924 (1970). Viewed in this light, there was ample evidence to go to the jury on defendant's guilt.

[4] Defendant's remaining assignments of error purport to deal with errors in numerous parts of the court's charge. However, no exception with respect to the charge appears except in the purported assignments of error. Such assignments are ineffective to challenge the correctness of the charge. *State v. Dunn*, 264 N.C. 391, 141 S.E. 2d 630 (1965). Despite the ineffective assignments of error, we have reviewed the charge and find no prejudicial error.

In the entire trial, we find no prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JIMMY LEE WINGARD

No. 7026SC513

(Filed 18 November 1970)

1. **Criminal Law § 66— validity of in-court identification of defendant — sufficiency of findings and evidence**

Trial court's findings and conclusion that the State witness' in-court identification of the defendant as the perpetrator of a common law robbery was of independent origin and was not tainted by any illegal out-of-court confrontation, *held* supported by plenary evidence.

2. **Criminal Law § 175— findings on voir dire — review on appeal**

Findings of the trial court upon *voir dire* are binding on appeal when supported by competent evidence.

APPEAL by defendant from *Anglin, J.*, 1 June 1970 Schedule "C" Criminal Session, MECKLENBURG Superior Court.

The defendant was charged in a bill of indictment, proper in form, with common law robbery. Upon a plea of not guilty,

the jury returned a verdict of guilty as charged. From a judgment imposing a ten-year sentence, the defendant appealed to the North Carolina Court of Appeals.

Robert Morgan, Attorney General, and Howard P. Satisky, Staff Attorney, for the State.

Lacy W. Blue for defendant appellant.

HEDRICK, Judge.

[1] The appellant assigns as error the court's allowing the in-court identification of the defendant by the State's only witness, Barbara R. Jones. The appellant contends that the in-court identification of the defendant by the witness was tainted by an out-of-court confrontation. After a *voir dire* examination of the witness, the court made the following findings of fact and conclusion of law:

> "That Mrs. Barbara Jones observed the man who hit Robert Gainey for a period of about ten minutes while such man was in the store during the time the robbery occurred; that she told the police that this man was very short, about five feet three or four inches tall, with 'African Bush' hair and protruding teeth; that about two weeks after the robbery a detective showed her photographs of two men and a woman and asked her about identifying them; that she told the detective she could identify the man if she saw him, but not from the photographs shown to her; that one of the photographs was of the defendant; that after the robbery she first saw the man who hit Mr. Gainey in April, 1970 'in this courtroom' at his trial in another case; that the solicitor called his name and read charges against him; that she didn't know his name until then; that no one told her that he was in the instant robbery case; that in identifying the defendant she based her opinion on what she saw at the time of the robbery; that when she saw him in the courtroom in April, he was with Mr. Lacy Blue seated at a table; that Mr. Blue is his counsel in the instant case; that from clear and convincing evidence in-court identification of the defendant by the witness Barbara Jones is of independent origin based on what she saw at the robbery and does not result from any out-of-court confrontation or from any pretrial identification procedures suggestive and conducive to mistaken identification."

[1, 2] Findings of the trial court upon *voir dire* are binding on appeal when supported by competent evidence. *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). We hold that there was plenary competent evidence to support the court's findings of fact, and clearly the findings justify the conclusion that the witness' in-court identification of the defendant as the perpetrator of the crime was of independent origin and not tainted by the out-of-court confrontation. *State v. Hughes,* 5 N.C. App. 639, 169 S.E. 2d 1 (1969); *State v. Keel,* 5 N.C. App. 330, 168 S.E. 2d 465 (1969).

We have carefully examined the entire record and hold that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge PARKER concur.

FRANK PHILLIPS, JR. v. MR. AND MRS. DAVE WISE

No. 7024SC608

(Filed 18 November 1970)

Ejectment § 10— ejectment to try title — sufficiency of findings and evidence

In plaintiff's action to recover possession of real property, wherein defendants stipulated record title in plaintiff and attempted to establish title in themselves by adverse possession, the trial judge's findings and conclusion that the plaintiff is the owner and is entitled to the realty described in the complaint, *held* supported by competent evidence.

APPEAL by defendant from *McLean, J.,* May 1970 Session of AVERY Superior Court.

This is an action to recover possession of real property. Plaintiff alleged he became owner of record in fee simple on 26 November 1965, that since said date defendants have occupied the premises as his tenants at will, and that defendants have been given reasonable notice to vacate but have refused to do so. Defendants filed answer alleging title in themselves by adverse possession. The parties waived jury trial and agreed the court might hear the evidence and determine the facts. They

also stipulated as to prior ownerships and recorded deeds, including a stipulation that plaintiff holds the record title to the lands described in the complaint by virtue of deed from John L. Phillips, Executor and Trustee of the Last Will and Testament of Willard Lindsey Phillips, which deed is of record in Book 54 of Deeds at Page 571, Avery County Registry.

From the stipulations of the parties and evidence offered, the trial court entered judgment making detailed findings of fact as to the recorded deeds by which plaintiff derived title and finding as a fact that defendants had occupied a portion of the lands permissively as tenants of Willard Lindsey Phillips, plaintiff's predecessor in title, from 1947 until his death in 1962. Based on these findings of fact, the court concluded as a matter of law that any occupancy of the lands by defendants prior to 1962 was permissive as tenants of Willard Lindsey Phillips and not adverse, that defendants are presently estopped to deny the title of Willard Lindsey Phillips or his heirs and assigns, and that plaintiff is the owner and entitled to the possession of the lands described in the complaint. From judgment in accord with these conclusions, defendants appealed.

Pritchard & Hise, by Lloyd Hise, Jr., for plaintiff appellee.

Kelly Johnson, I. C. Crawford & Robert H. Lacy, by Kelly Johnson for defendant appellants.

PARKER, Judge.

Defendants stipulated plaintiff holds record title and attempted to establish title in themselves by adverse possession. The trial judge, as the agreed trier of the facts, has found the facts contrary to defendants' contentions. His findings of fact are supported by competent evidence and the facts found support his conclusions of law. The conclusions of law in turn support the judgment. In the trial we find no error and the judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge GRAHAM concur.

In re Eldridge

IN THE MATTER OF PHYLLIS LAVERNE ELDRIDGE, 141 RIDGE AVENUE

BORN: OCTOBER 15, 1954

No. 7021DC544

(Filed 18 November 1970)

Infants § 10— undisciplined child — unlawful absence from school — lack of error in proceedings

The district court committed no prejudicial error in proceedings in which a juvenile was adjudged an undisciplined child for being unlawfully absent from school, was placed on probation after each of the first two hearings, and was assigned to the North Carolina Board of Juvenile Correction as provided by G.S. 7A-286(4)(c) after the third hearing.

APPEAL from *Alexander, District Judge,* 12 June 1970 Session of FORSYTH County District Court.

Respondent, a juvenile, was adjudged an undisciplined child by order entered in Forsyth County District Court on 13 February 1970. The adjudication followed a hearing held pursuant to G.S. 7A-285, and was based upon a finding that respondent had been unlawfully absent from school at least 26 days during the 1969-70 school year. The court thereupon ordered respondent placed on probation. One of the conditions of probation was that the child regularly attend school—if not excused for reasons of poor physical or mental health. At a subsequent hearing, respondent was found to have violated this condition; however, she was continued on probation under the additional condition that she not miss any future classes or be tardy to school. On 26 May 1970 a petition was filed seeking review of the case on the ground the child had again violated the terms of her probation by being absent from school without legitimate excuse. On 12 June 1970, after proper notice and hearing, the court made findings to this effect and ordered respondent assigned to the North Carolina Board of Juvenile Correction as provided by G.S. 7A-286(4)(c). Respondent appealed.

Attorney General Robert Morgan by L. Philip Covington, Staff Attorney, for the State.

R. Glenn Key for respondent appellant.

GRAHAM, Judge.

It is the constant duty of the District Court "to give each child subject to its jurisdiction such oversight and control as will conduce to the welfare of the child and to the best interest of the State." *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879. It appears that the juvenile here was carefully afforded all constitutional safeguards at every stage of the three separate hearings. *In re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068; *In re Gault,* 387 U.S. 1, 18 L. Ed. 2d 527, 87 S.Ct. 1428. Appellant's contention that the order of 12 June 1970 is unsupported by evidence and based upon improper conclusions is overruled. In all the proceedings affecting this juvenile we find no prejudicial error.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. JEROME McKINNON

No. 7025SC567

(Filed 18 November 1970)

Assault and Battery § 15; Criminal Law § 113— felonious assault — instructions — application of law to evidence

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death, instructions of the trial court which failed to apply the law to the evidence constituted reversible error. G.S. 1-180.

APPEAL by defendant from *Long, S.J.,* 16 March 1970 Regular Criminal Session of CATAWBA Superior Court.

Defendant was tried upon two separate bills of indictment charging him with assault with a deadly weapon with intent to kill, inflicting upon Bobby Harris and Dorothy Harris respectively serious injuries not resulting in death. The cases were consolidated for trial.

Defendant entered a plea of not guilty and offered evidence tending to show self-defense in each case. The court charged the jury that they could return verdicts of guilty as charged, guilty of one of four lesser included offenses, or not guilty.

The jury returned verdicts of guilty in each case of assault with a firearm inflicting serious injury. Judgments imposing consecutive sentences of three to five years were entered upon the verdicts and defendant appealed.

Attorney General Robert Morgan by William Lewis Sauls, Staff Attorney, for the State.

Thomas W. Warlick for defendant appellant.

GRAHAM, Judge.

Defendant assigns as error the failure of the court to declare and explain the law arising on the evidence given in the case as required by G.S. 1-180. This assignment of error is well taken. The court instructed the jury as to the necessary elements of the offense charged and each lesser included offense without any reference to the evidence offered in this case. Near the conclusion of the charge the court stated:

> "Now, members of the jury, the court will briefly recapitulate the evidence in this case which has been offered so that the law which I have given you may be applied to the evidence."

Then followed a recital of what some of the evidence tended to show, but no instruction was given as to how the law applied to it. Thus, the jury was left unaided to apply the abstract principles of law to the facts. This was error requiring a new trial. *Roberts v. Freight Carriers,* 273 N.C. 600, 160 S.E. 2d 712; *State v. Coggin,* 263 N.C. 457, 139 S.E. 2d 701; *State v. Herbin,* 232 N.C. 318, 59 S.E. 2d 635.

We do not rule on other assignments of error brought forward by defendant since the questions raised may not recur on another hearing.

New trial.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. RAYMOND A. JONES

No. 7026SC500

(Filed 18 November 1970)

Constitutional Law § 31; Escape § 1— right to subpoena witnesses — stipulation by solicitor as to what witness would have testified

In this prosecution for escape from prison, defendant's contention that the trial court erred in proceeding to trial without allowing defendant to subpoena witnesses after defendant, while being questioned by the court as to the voluntariness of his plea of guilty, stated that he desired a certain witness to testify, *held* without merit where the solicitor stipulated what the witness would have testified if present at the trial, and defendant agreed that the stipulation was satisfactory and stated that he did not still want the witness present.

APPEAL by defendant, Raymond A. Jones, from *Anglin, J.*, 9 April 1970 Session, MECKLENBURG Superior Court.

The defendant Raymond A. Jones was charged in a bill of indictment, proper in form, with felonious escape in violation of G.S. 148-45(a).

The defendant, an indigent, represented by his court-appointed attorney, entered a plea of guilty. From a judgment of imprisonment of eight months, the defendant appealed to the North Carolina Court of Appeals.

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

Richard A. Vinroot for defendant appellant.

HEDRICK, Judge.

The defendant contends that the court committed prejudicial error in proceeding to trial without allowing the defendant to subpoena witnesses. This contention is without merit. The record discloses that when the defendant was being questioned by the judge as to the voluntary character of his plea of guilty, the defendant stated that he would like to have as a witness one Major Hugh A. Logan, Jr., for this witness could and would explain to the court that he, the Major, had told a Lt. Jordan to transfer the defendant, a prisoner, over to the Highway Patrol Office to a job that he was physically able to do. The solicitor stipulated that if the witness was present he would so testify. The court asked the defendant if the stipulation was satisfactory

and if he still wanted the witness present. The defendant stated: "No, sir, that is fine." The record further discloses that the defendant entered a written plea of guilty, and that the trial judge signed an adjudication that the defendant's plea was " . . . freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency."

We have carefully examined the entire record and determine that the defendant pleaded guilty to a valid bill of indictment; that the sentence imposed is within the maximum prescribed for a violation of the statute, and that the defendant had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. CECIL THOMAS OWENS

No. 7030SC503

(Filed 18 November 1970)

Criminal Law § 143— activation of suspended sentence — subsequent offenses

No error appears on the face of the record in this appeal from an order activating defendant's suspended sentence for driving while his license was revoked on the basis of defendant's convictions of the subsequent offenses of driving while his license was revoked and public drunkenness.

APPEAL by defendant from *Thornburg, Special Superior Court Judge,* 3 March 1970 Session of Superior Court held in SWAIN County.

Attorney General Robert Morgan and Assistant Attorney General Harris for the State.

George P. Davis, Jr., for defendant appellant.

MALLARD, Chief Judge.

On 16 May 1968 the defendant, after pleading guilty to driving after his license was revoked, was sentenced to a prison

term of eighteen to twenty-four months. The execution of the prison sentence was suspended, and the defendant was placed on probation for a period of five years. One of the terms upon which the sentence was suspended was that the defendant "(v)iolate no penal law of any state or the Federal Government and be of general good behavior."

The evidence for the State tended to show, the court found as a fact, and the defendant testified and did not deny that the defendant had willfully violated the terms and conditions of the probation judgment, in that: On 6 October 1968 the defendant committed the offense of driving while license revoked (fourth offense) and on 16 December 1968 was found guilty as charged; and that on 20 October 1969, in Highlands, North Carolina, the defendant committed the offense of public drunkenness, entered a plea of guilty, and was ordered to pay the costs. Based upon such findings, the court ordered that commitment issue and defendant be required to serve the sentence imposed.

The only assignment of error presented by this appeal is to the entry of the judgment. No prejudicial error is made to appear on the face of this record. The judgment of the superior court is affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. TERRY MACK QUEEN

No. 7026SC519

(Filed 18 November 1970)

Larceny § 7— automobile larceny — recent possession doctrine — sufficiency of identification of defendant

In this prosecution for the larceny of an automobile, there was sufficient evidence of defendant's identification as the operator of the stolen automobile for submission of the case to the jury under the doctrine of recent possession.

APPEAL by defendant from *Anglin, J.*, at the regular 30 April 1970 Schedule "C" Criminal Session of MECKLENBURG Superior Court.

State v. Queen

The defendant and a codefendant, William Avery Jenkins, were arrested 2 February 1970 on the charge of larceny of more than $200.00. They were indicted at the 9 March 1970 Session of the General Court of Justice, Superior Court Division, Mecklenburg County. On 30 April 1970, they were arraigned, and having pled not guilty, they were tried by a jury. Defendant Jenkins' motion for nonsuit was granted at the end of the State's evidence; defendant Queen's motion for nonsuit was denied. A jury found defendant Queen guilty as charged. From a sentence of three (3) to five (5) years defendant appealed.

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

George S. Daly, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant, through his court-appointed counsel, contends that the trial court erred in denying his motion for nonsuit because he was not adequately identified in court. The State's evidence tended to show that a 1965 white Mustang belonging to Mr. Brooks Luckey was stolen from Mr. Luckey's home between 5:00 p.m. 1 February 1970 and 10:00 a.m. 2 February 1970. At approximately 1:45 a.m. Patrolman Ledbetter of the Mecklenburg County Police Department observed an automobile similar to the one described as stolen. The car was driven to a service station where it was parked. The driver and an occupant emerged from the car and entered the service station. Patrolman Ledbetter then went to the car, and determined that it was the car that had been stolen. The patrolman then went inside the service station and arrested the two defendants as they were coming out of the bathroom. In court Patrolman Ledbetter identified the two defendants by name as being the persons arrested and identified the operator of the Mustang as "the gentleman in the orange-gold shirt." There was adequate evidence of identification for the jury to find that Queen had in his possession an automobile recently stolen.

Defendant also contends that the judge's instructions to the jury on the doctrine of recent possession was erroneous. This assignment of error is without merit. In the entire trial we find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

IN THE MATTER OF THE CUSTODY OF CYNTHIA DIANE HOPPER, A MINOR CHILD, AND EUGENE THOMAS HOPPER, JR., A MINOR CHILD

No. 7026DC637

(Filed 18 November 1970)

Courts § 11.1; Divorce and Alimony § 22— child custody proceeding in superior court — modification of order by district court — cause not transferred to district court

The district court had no authority to modify a child custody order entered in the superior court where the cause was pending in the superior court when district courts were established in the county, and no order has been entered in the superior court transferring the cause to the district court pursuant to G.S. 7A-259, nor has a motion to transfer been made pursuant to G.S. 7A-258.

APPEAL by respondent from *Arbuckle, District Judge,* 20 July 1970 Session of MECKLENBURG County District Court.

A detailed recital of the facts could serve no useful purpose in the light of our disposition of the appeal. This proceeding was instituted on 10 April 1967 in the Superior Court of Mecklenburg County. On 25 August 1967 Judge Hasty entered an order awarding custody of two minor children of the parties to their mother, the appellant here. Subsequently district courts were established in Mecklenburg County. On 30 June 1970 appellee, the father of the children, filed a motion in the cause seeking a modification of Judge Hasty's order. On 29 July 1970 District Court Judge Arbuckle entered an order which modified Judge Hasty's order and placed the children in the custody of their father. The mother appealed to this Court asigning numerous errors in the proceeding before Judge Arbuckle.

Welling, Miller, Gertzman and Goldfarb by Charles M. Welling for respondent appellant.

Hasty and Kratt by John H. Hasty for petitioner appellee.

VAUGHN, Judge.

This proceeding was pending in the Superior Court of Mecklenburg County when district courts were established in that district. There has been neither an order entered in the superior court transferring it to the district court division pursuant to G.S. 7A-259 nor a motion therefor under G.S. 7A-258. The district court judge was, therefore, without authority to

modify the order of the superior court. *Hodge v. Hodge,* 9 N.C. App. 601, 176 S.E. 2d 795.

Several of the appellant's assignments of error have merit and would compel us to reverse the order appealed from if we dealt with the appeal on its merits. Since they may not recur, we will refrain from discussing them.

The order appealed from is hereby vacated and the cause is remanded to the Superior Court of Mecklenburg County.

Vacated and Remanded.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. STEVE CHANEY

No. 7017SC476

(Filed 18 November 1970)

Assault and Battery §§ 8, 15— felonious assault — instruction on self-defense

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the trial court erred in failing to instruct the jury on defendant's right to repel a nonfelonious assault, where defendant offered evidence that he was the victim of a nonfelonious assault and where the State's evidence would support a verdict of defendant's guilt of assault with a deadly weapon without intent to kill.

ON *certiorari* to review trial before *Collier, Judge of Superior Court,* 20 January 1969 Session, ROCKINGHAM Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with an assault upon one David Wayne Morton with a deadly weapon with intent to kill, inflicting serious bodily injury not resulting in death.

State's evidence tended to show that on Sunday afternoon, 20 October 1968, several persons gathered at Charlie Young Creek near Mayodan in Rockingham County to "make music." There was some consumption of alcoholic beverages and there was some "music." The prosecuting witness, Morton, drove up to join the group, and, without any words or provoking conduct,

defendant struck prosecuting witness on the head and face with a "pop bottle" causing serious lacerations.

Defendant's evidence tended to show that prosecuting witness, Morton, advanced on defendant with a knife and defendant struck him with the "pop bottle" in self-defense.

The jury found defendant guilty of an assault with a deadly weapon, a misdemeanor.

We allowed *certiorari* for failure of defendant's trial attorney to perfect his appeal. Trial counsel was discharged and defendant is now represented by different counsel appointed by the trial court.

Attorney General Morgan by Assistant Attorney General Melvin for the State.

Gwyn, Gwyn & Morgan, by Melzer A. Morgan, Jr., for defendant.

BROCK, Judge.

Defendant assigns as error that the trial judge failed to instruct the jury upon defendant's right to repel a nonfelonious assault; but confined defendant's right of self-defense to repelling an assault which would likely cause death or great bodily harm. Defendant cites *State v. Fletcher,* 268 N.C. 140, 150 S.E. 2d 54; *State v. Anderson,* 230 N.C. 54, 51 S.E. 2d 895; and *State v. Barnette,* 8 N.C. App. 198, 174 S.E. 2d 82 *(certiorari* denied 277 N.C. 113) in support of this assignment of error.

The evidence that defendant acted in defense of an assault upon him by prosecuting witness with a knife could constitute evidence that defendant acted to repel a felonious assault, or that he acted to repel a nonfelonious assault.

"In the absence of an intent to kill, a person may fight in his own self-defense to protect himself from bodily injury or offensive physical contact, even though not put in actual or apparent danger of death or great bodily harm." 1 Strong, N.C. Index 2d, Assault and Battery, § 8, p. 301. The jury found defendant guilty of an assault with a deadly weapon, thereby establishing that he acted without intent to kill. Therefore, it was prejudicial error that the trial court failed to instruct the

jury upon defendant's right to repel a nonfelonious assault. *State v. Fletcher, supra; State v. Anderson, supra.*

When the evidence requires a charge of self-defense, it would be the better practice for the trial court to instruct upon defendant's right to repel a nonfelonious assault in all cases where the evidence justifies submitting the charges against defendant to the jury for a possible finding of guilty of assault without intent to kill.

For error in the charge as indicated above there must be a

New trial.

Judges MORRIS and GRAHAM concur.

MRS. JULIA JAMES, MRS. NORA SADLER, MRS. HELEN VANCE, AND MRS. ANNEBELLE McCLARY v. CHARLES R. HARRIS AND WIFE, ALIENE S. HARRIS

No. 7026SC601

(Filed 18 November 1970)

Appeal and Error § 39— dismissal of appeal — belated docketing of record on appeal

Appeal is dismissed for failure of appellant to docket the record on appeal within 90 days after the date of the order appealed from. Rule of Practice No. 5.

APPEAL by plaintiffs from *Thornburg, Special Superior Court Judge,* April 1970 Civil Non-Jury Session of Superior Court held in MECKLENBURG County.

Gail F. Barber, Jamie Long, and Thomas Wyche for plaintiffs appellants.

No counsel for defendants appellees.

MALLARD, Chief Judge.

On 30 April 1970 Judge Thornburg denied pliantiffs' motion for a temporary restraining order and for an order to show cause why a temporary restraining order should not be granted. Plaintiffs gave notice of appeal to the Court of Appeals. Plaintiffs' record on appeal was docketed in this court on 1 September 1970. Rule 5 of the Rules of Practice in the Court of Appeals requires the record on appeal to be docketed within ninety days after the date of the judgment or order appealed from. In the

record before us there is no order extending the time for docketing the record on appeal. For failure to docket the record on appeal within the time allowed by the rules, this appeal is dismissed.

Appeal dismissed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. EDSON B. MICKLES

No. 7026SC632

(Filed 18 November 1970)

ON *certiorari* to review trial before *Falls, J.*, 27 October 1969 Session, MECKLENBURG Superior Court.

Defendant was charged with the offenses of felonious breaking or entering, and felonious larceny. Defendant was tried jointly with James Leon Kendrick whose appeal has been considered by opinion filed this same date. The facts as stated there apply equally to this appeal.

The State's evidence tended to show that during the early hours of the morning of 13 August 1969 the Oaklawn Super Market was broken into and a quantity of merchandise was stolen therefrom. Charges of felonious breaking or entering and felonious larceny were also lodged against James Leon Kendrick and Billy Frank Anderson. Mickles, the defendant involved in this appeal, and Kendrick were placed on trial together, and Anderson testified for the State. Kendrick and Mickles offered no evidence.

The testimony of Anderson tended to show that Mickles broke and entered the Oaklawn Super Market; that he, Anderson, also went in the building; that Kendrick was standing on the other side of the street; that Anderson and Mickles handed two bags of items taken from the store to Kendrick; and the three then went to an apartment nearby.

The jury found Mickles guilty as charged.

Attorney General Morgan by Staff Attorney Blackburn for the State.

Thomas R. Cannon for defendant.

BROCK, Judge.

It appears that the writ of *certiorari* was improvidently issued in this case. However, we have carefully reviewed the record and defendant's assignments of error, and we conclude that defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. ROBERT LEE WINCHESTER

No. 7026SC625

(Filed 18 November 1970)

ON *certiorari* to review judgment of *Falls, J.*, entered at the 12 May 1969 Schedule "B" Criminal Session, MECKLENBURG Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with felonious larceny of a 1968 Pontiac automobile valued at $2,100. He pled not guilty, the jury returned a verdict of guilty as charged, and from judgment imposing prison sentence of not less than seven nor more than ten years, he gave notice of appeal. We allowed *certiorari* on 3 September 1970.

Attorney General Robert Morgan by Assistant Attorney General Russell G. Walker, Jr., for the State.

James M. Shannonhouse, Jr., for defendant appellant.

BRITT, Judge.

In his brief defendant's court appointed counsel states that he has conscientiously examined the record in his case but is unable to find error; he asks that this court carefully review the record and grant the defendant any relief that is appropriate.

We have given the record a thorough review but detect no prejudicial error; we conclude that the defendant received a fair trial and the sentence imposed is within the limits provided by statute.

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. HERBERT COLEMAN

No. 7010SC586

(Filed 18 November 1970)

APPEAL by defendant from *Ragsdale, S.J.*, First July 1970 Regular Session, WAKE Superior Court.

Defendant was charged with operating a motor vehicle while his license was permanently revoked and while under the influence of intoxicating liquor. Upon a finding of indigency, counsel was appointed to represent him at trial. Upon his plea of not guilty, trial was by jury and a verdict of guilty was returned on each charge. Upon pronouncement of judgment the defendant, in person and without advice of counsel, gave notice of appeal. Defendant's trial attorney's request to be allowed to withdraw was allowed and defendant's present counsel was appointed to perfect his appeal.

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

R. P. Upchurch for defendant appellant.

VAUGHN, Judge.

This indigent defendant was ably represented at his trial and on this appeal. Numerous assignments of error have been brought forward and zealously argued. After careful consideration of the contentions of counsel and the entire record, we are of the opinion that defendant's trial was free of prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

AMENDMENTS TO COURT OF APPEALS RULES

ANALYTICAL INDEX

WORD AND PHRASE INDEX

AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE IN THE COURT OF APPEALS

Strike out all of Rule 4 and insert in lieu thereof the following:

4. The Court of Appeals will not entertain an appeal:

From the ruling on an interlocutory motion, unless provided for elsewhere. Any interested party may enter an exception to the ruling on the motion and present the question thus raised to this Court on the final appeal; provided, that when any interested party conceives that he will suffer substantial harm from the ruling on the motion, unless the ruling is reviewed by this Court prior to the trial of the cause on its merits, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order ruling on the motion.

The last paragraph of Rule 19(a) is stricken, and the following inserted in lieu thereof:

The pages of the record on appeal shall be numbered. On the front thereof shall be an index and at the end shall be the signature, office address and telephone number of counsel representing the appellant.
Rule 27 is amended by adding the following sentence:
At the end of the original of each brief filed shall appear the signature, office address and telephone number of counsel representing the party for whom the brief is filed.

This is to certify that the foregoing amendments to the Rules of Practice and Procedure in the Court of Appeals were prescribed and adopted by the Supreme Court in Conference on 20 January 1971, pursuant to authority contained in G.S. 7A-33.

MOORE, J.
For the Court

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ABATEMENT AND REVIVAL

§ 6. Priority of Institution of Action

Where plaintiff had failed to keep up the chain of summonses in his original action, but on 20 February 1969 plaintiff had an endorsement made on the original summons and thereafter kept the summons alive until service was had on defendant on 11 November 1969, plaintiff's action was commenced on 20 February 1969, prior to the action commenced by defendant on 10 March 1969. *Brooks v. Cain*, 274.

ADVERSE POSSESSION

§ 16. Public Ways

In action by a restaurant to recover damages for the wrongful cutting of trees that were growing on a strip of land included within a Highway Department right-of-way, the restaurant's evidence was sufficient to establish that it had lawful possession of the 20-foot strip under color of title for more than seven years. *Saddle Club v. Gibson*, 565.

ANIMALS

§ 2. Liability of Owner for Injuries Inflicted by Domestic Animal

City ordinance making it unlawful to keep within the city a dog which habitually chases or barks at pedestrians and vehicles is constitutional. *Gray v. Clark*, 319. In action for personal injuries resulting from collision between defendant's dog and plaintiff's motorcycle, plaintiff's evidence was sufficient for jury on issue of defendant's negligence in violating municipal ordinance by keeping a dog which habitually chases or barks at pedestrians and vehicles. *Ibid.*

In a veterinarian's action to recover damages for injuries received when he was kicked by defendant's horse during a pregnancy examination of the horse, trial court properly ruled on various questions involving admissibility of evidence; and trial court also properly overruled plaintiff's motion to set aside the verdict as being against the greater weight of the evidence where the only evidence relating to the vicious propensity of the horse was testimony that defendant's younger daughter fell from the horse some four years prior to plaintiff's accident. *Dixon v. Shelton*, 392.

APPEAL AND ERROR

APPEAL AND ERROR — Continued

§ 39. Time of Docketing Record on Appeal

Appellant has the responsibility for docketing the record on appeal in the form provided in the Rules. *Development Co. v. Phillips,* 158; *James v. Harris,* 733; *Public Service Co. v. Lovin,* 709.

§ 44. Time for Filing Brief

Appeal is dismissed for failure of appellant to file the brief within the time allowed by the Rules. *LeRoy, Wells, et al. v. Taylor,* 66.

§ 45. Failure to Discuss Assignments of Error in Brief

Assignments of error not brought forward and argued in the brief are deemed abandoned. *Gibson v. Montford,* 251; *Clott v. Greyhound Lines,* 604.

§ 50. Harmless and Prejudicial Error in Instructions

Where trial court inadvertently expressed its opinion in stating the contentions of the parties, the cause must be remanded for a new trial. *Voorhees v. Guthrie,* 266.

An inadvertent instruction that plaintiff driver had the burden of proof to show her contributory negligence was cured where the trial judge in other portions of the charge correctly placed the burden of proof on defendant. *Wrenn v. Waters,* 39.

§ 53. Error Cured by Verdict

Error in submitting issue of punitive damages to the jury was cured when trial court set aside verdict awarding punitive damages. *Samons v. Meymandi,* 490.

§ 54. Discretionary Matters

A ruling that is within the discretion of a trial judge may not be set aside except upon a showing of abuse of discretion. *Samons v. Meymandi,* 490.

§ 57. Findings of Fact

Findings of fact by the court have the force and effect of a jury verdict. *Stevenson v. Pritchard,* 59.

Findings of fact by the trial judge sitting without a jury are conclusive if supported by any competent evidence. *Saddle Club v. Gibson,* 565; *Piping, Inc. v. Indemnity Co.,* 561. Where the parties have waived trial by jury and the court's findings of fact are not challenged by exceptions in the record, the findings of fact made by the judge are presumed to be supported by the evidence. *Jackson v. Collins,* 548.

§ 59. Judgments on Motion for Directed Verdict

Appellant who failed to state specific grounds in his motion for directed verdict was not entitled on appeal to question the insufficiency of the evidence to support the verdict. *Wheeler v. Denton,* 167.

Where defendants failed to renew their motion for a directed verdict following plaintiffs' additional evidence, the Court of Appeals will not pass upon the sufficiency of the evidence to survive a motion for a directed verdict. *Gragg v. Burns,* 240.

APPEAL AND ERROR — Continued

Court of Appeals reviews question presented by motion for a directed verdict even though appellant's motion was not made in compliance with the Rules. *Turner v. Turner,* 336.

ARCHITECTS

Trial court erred in rendering judgment on the pleadings in favor of plaintiff in action to recover for architectural services rendered by plaintiff to defendant church. *Fishel and Taylor v. Church,* 224.

ARREST AND BAIL

§ 1. Right of Private Citizen to Make Arrest

In a prosecution charging defendant with the unlawful discharge of a firearm into a moving automobile driven by the prosecuting witness, defendant's evidence justified an instruction to the jury that at the time of the shooting he had a right to arrest the witness for a breach of the peace and that he was attempting to carry out that right when he fired his pistol at the automobile. *S. v. Tripp,* 518. The right of a private citizen to arrest for a breach of the peace exists while it is continuing or immediately after it has been committed. *Ibid.*

§ 3. Right of Officer to Arrest Without Warrant

If an arrest without an warrant is to support an incidental search, the arrest must be made with probable cause. *S. v. Harris,* 649.

A police officer had probable cause to arrest defendant without a warrant for felonious housebreaking and felonious larceny, where the officer had followed footprints from a house that had been broken and entered to a place where stolen items were concealed and later observed defendant go directly to that place. *Ibid.*

§ 5. Method of Making Arrest and Force Permissible

A private citizen making or attempting to make a lawful arrest may use reasonable force in making the arrest. *S. v. Tripp,* 518.

The arrest of defendant was not illegal because the officer did not use technically correct language in making the arrest. *S. v. Harris,* 649.

§ 9. Right to Bail

Refusal of jailer to release defendant on the night defendant gave bail bond for offense of drunken driving, and jailer's refusal to permit attorney to confer with defendant during the night in jail constituted a denial of defendant's rights; however, the jailer's behavior did not destroy validity of tests and observations made by police officers relating to defendant's intoxication, and such tests were admissible in evidence. *S. v. Hill,* 279.

Defendant's motion to dismiss the prosecution on the ground that he was held from 3 October until 11 December without a preliminary hearing and without bail was properly denied by the trial court. *S. v. Hatcher,* 352.

The statute permitting the court to enter a temporary custody order affecting a juvenile who is appealing a commitment order of the court is not unconstitutional on the ground that the statute deprives the juvenile of the right to bail. *In re Martin,* 576.

ASSAULT AND BATTERY

§ 5. Assault with Deadly Weapon

In a prosecution charging defendant with the unlawful discharge of a firearm into a moving automobile driven by the prosecuting witness, defendant's evidence justified an instruction to the jury that at the time of the shooting he had a right to arrest the witness for a breach of the peace and that he was attempting to carry out that right when he fired his pistol at the automobile. *S. v. Tripp,* 518.

§ 8. Self-Defense

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, trial court erred in failing to instruct the jury on defendant's right to repel a nonfelonious assault. *S. v. Chaney,* 731.

§ 13. Competency of Evidence

Trial court did not err in instructing the witness to give a responsive answer to a question as to the propensity of the prosecuting witness for violence. *S. v. Ward,* 684.

§ 15. Instructions

An instruction on self-defense that defendant could use no more force than was reasonably necessary in defending himself is erroneous in omitting the element of apparent necessity. *S. v. Hearns,* 42. Any error in instructing the jury as to defendant's guilt or innocence of felonious assault is cured by jury's verdict which finds defendant guilty of the lesser included offense. *Ibid.*

Portion of the charge in which the jury was peremptorily instructed that a .410-gauge shotgun is a firearm within the meaning of the law was free from prejudicial error when considered contextually. *S. v. Ward,* 684.

Where the trial court correctly defined self-defense following the definition of assault with a deadly weapon with intent to kill inflicting serious injury, the court did not err in failing to define self-defense again as it related to each of the lesser offenses which were submitted to the jury. *Ibid.* Trial court's instructions in an assault prosecution which did not apply the law to the evidence constituted reversible error. *S. v. McKinnon,* 724.

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, trial court erred in failing to instruct the jury on defendant's right to repel a nonfelonious assault. *S. v. Chaney,* 731.

ASSIGNMENTS

§ 4. Operation and Effect of Assignment

An assignee of contract proceeds was not subject to the jurisdiction of the North Carolina courts under the contract, where the assignee was not a party to the contract and had incurred no duties or liabilities thereunder. *Koppers Co., Inc. v. Chemical Corp.,* 118.

ATTACHMENT

§ 7. Bonds in Attachment

A judge of superior court had authority to require plaintiffs in attachment to increase their bond or have their attachment dismissed and to dismiss the attachment by a second order finding that the increased bond had not been posted within the time specified in the first order. *Palmer v. Development Corp.*, 668. Plaintiffs in attachment were not entitled to a jury trial on the question of increasing their bond. *Ibid.*

ATTORNEY AND CLIENT

§ 2. Admission to Practice

New York attorney who had appeared for appellants throughout the trial was denied permission to argue the case in the Court of Appeals, where it appeared that the attorney had not complied with the statutory procedure for obtaining permission to appear in particular litigation in this State. *Development Co. v. Phillips*, 158.

§ 3. Scope of Attorney's Authority

Consent by the attorneys of record raises a presumption of authority. *In re Johnson*, 24.

§ 7. Compensation and Fees

In plaintiff's action to recover on a promissory note which provided for the payment of reasonable attorneys' fees upon default by the makers, a letter mailed by plaintiff's attorneys to the makers of the note, stating that plaintiff would enforce the attorneys' fees provision, sufficiently complies with the notice requirement of the statute. *Binning's Inc. v. Construction Co.*, 569. Trial court properly allowed plaintiff to recover as reasonable attorneys' fees 15% of the balance due on the note. *Ibid.* Trial court improperly awarded attorneys' fees to a judgment holder in the latter's action against an automobile liability insurer. *Piping, Inc. v. Indemnity Co.*, 561.

AUTOMOBILES

§ 3. Driving While License Suspended

Although the use of the Uniform Traffic Ticket as a warrant of arrest is generally disapproved, such ticket in this case sufficiently charged the offenses of speeding 90 mph and driving while license was suspended. *S. v. Teasley*, 477. Where the Department of Motor Vehicles complied with the applicable statutes in giving defendant notice that his license was suspended, such compliance constituted notice to defendant that his license had been suspended. *Ibid.*

§ 6. Warranties and Fraud in Sale of Motor Vehicle

In an action to recover replacement cost of an automobile windshield, plaintiff's evidence was insufficient to support trial court's finding that the windshield wiper refill blades installed by defendant on plaintiff's windshield caused scratches on the windshield. *Stevenson v. Pritchard*, 59.

§ 19. Right of Way at Intersections

A motorist approaching an intersection on a green light must consider the possibility that someone might come into the intersection in violation of the red light. *Wrenn v. Waters*, 39.

AUTOMOBILES — Continued

§ 46. Opinion Testimony as to Speed

In manslaughter prosecution, trial court did not err in allowing three witnesses for the State to testify as to their opinion of the speed of defendant's car. *S. v. McQueen,* 248.

Where plaintiff's own evidence showed that defendant's car left skid marks of only 27 feet, opinion testimony by plaintiff's witness that defendant was driving 60 miles per hour is without probative value. *Anderson v. Mann,* 397.

§ 47. Physical Facts at Scene

Trial court did not err in admission of testimony by highway patrolman with respect to tire marks and position of the cars when he arrived at accident scene. *Gibson v. Montford,* 251.

§ 50. Sufficiency of Evidence and Nonsuit on Issue of Negligence

Trial court properly allowed motion for nonsuit as to driver of third vehicle which did not come in physical contact with colliding vehicles driven by plaintiff and the other defendant. *Gibson v. Montford,* 251.

§ 62. Negligence in Striking Pedestrian

Case was properly submitted to jury in action for personal injuries received when plaintiff pedestrian was struck by defendant's left-turning automobile at an intersection. *Pompey v. Hyder,* 30.

§ 63. Negligence in Striking Children

In an action to recover for the wrongful death of a three-year-old child who was struck by defendant's automobile on a street, trial court properly granted defendant's motion for a directed verdict when it was a matter of conjecture whether the child had been visible in or near the street for sufficient time to put a reasonably careful driver on notice of the child's presence. *Pergerson v. Williams,* 512.

§ 70. Negligence in Creating Dangerous Condition on Highway

Where defendant in an automobile accident case established his own negligence, the trial court properly entered a directed verdict in favor of plaintiff. *Smith v. Burleson,* 611.

§ 76. Contributory Negligence in Following Too Closely

Plaintiff's evidence disclosed contributory negligence as a matter of law in following a bus too closely. *Roberson v. Coach Lines,* 450.

§ 83. Pedestrian's Contributory Negligence

Pedestrian's failure to yield right-of-way was not contributory negligence per se. *Pompey v. Hyder,* 30.

Plaintiff's evidence disclosed that he was contributorily negligent as a matter of law in failing to yield the right-of-way to a vehicle upon the roadway while crossing the roadway at a point other than within a marked crosswalk or an unmarked crosswalk at an intersection. *Anderson v. Mann,* 397.

AUTOMOBILES — Continued

§ 91. Issues and Verdict

Where defendant in an automobile accident case established his own negligence, the trial court properly entered a directed verdict in favor of plaintiff. *Smith v. Burleson,* 611.

§ 112. Competency and Relevancy of Evidence in Manslaughter Prosecution

In manslaughter prosecution, trial court did not err in allowing three witnesses for the State to testify as to their opinion of the speed of defendant's car. *S. v. McQueen,* 248.

§ 117. Prosecution for Speeding

Although the use of the Uniform Traffic Ticket as a warrant of arrest is generally disapproved, such ticket in this case sufficiently charged the offenses of speeding 90 mph and driving while license was suspended. *S. v. Teasley,* 477. Defendant who failed to request that his driving status record be limited in any way cannot complain that the record showed the revocation of his license for speeding over 76 mph. *Ibid.*

§ 120. Elements of Offense of Driving Under Influence

Trial court's instruction on "under the influence" was reversible error in drunken driving prosecution. *S. v. Edwards,* 602.

§ 131. Failure to Stop After Accident

In prosecution for failure to render assistance to person injuried in automobile accident, there was sufficient evidence that a person received personal injuries in the accident for submission of the case to the jury. *State v. Chavis,* 430. The misdemeanor described in G.S. 20-166(b) is not a lesser included offense of the crime described in G.S. 20-166(c). *Ibid.*

In a prosecution charging defendant with the failure to render reasonable aid and assistance in an automobile accident, trial court's instructions were erroneous in failing to give equal stress to the contentions of the defendant. *S. v. Billinger,* 573.

Where an instruction in a hit-and-run prosecution could have led the jury to believe that the court was of the opinion that defendant was the driver of the automobile, the judgment of conviction must be reversed. *Ibid.*

AVIATION

§ 1. Airport Authorities

Airport authority cannot exclude an automobile rental firm from coming upon the airport property for the sole purpose of picking up or delivering airline passengers pursuant to the specific request of the passengers who are lessees of the firm. *Airport Authority v. Stewart,* 505.

§ 4. Injuries to Property on the Ground

Cause of action against an airplane engine manufacturer for damages arising out of the failure of an engine piston and connecting rod is held to accrue in 1966 when the plane was purchased and not in 1967 when it crashed. *S. v. Aircraft Corp.,* 557.

BAILMENT

§ 3. Liabilities of Bailee to Bailor

Plaintiff has the burden of proving the contract of bailment sued on. *Clott v. Greyhound Lines,* 604. Where the bailment is gratuitous, the bailee is liable only for gross negligence. *Ibid.* Evidence offered by plaintiff bus passenger was insufficient to be submitted to the jury in this action to recover from defendant bus company on the theory of bailment for the loss of a leather bag which remained on bus after plaintiff was left behind when defendant's bus made a stop. *Ibid.*

BASTARDS

§ 1. Wilful Refusal to Support Illegitimate Child

There was no prejudicial error in trial of defendant for refusing to support his illegitimate child, the trial court having denied defendant's motion for a blood grouping test. *S. v. Fowler,* 64.

BILLS AND NOTES

§ 22. Prosecutions for Issuing Worthless Check

In worthless check prosecution, State's evidence was sufficient to carry burden of proving defendant had no credit with drawee bank with which to pay the check on presentation. *S. v. Mayo,* 49.

BOUNDARIES

§ 2. Courses and Distances and Calls to Monument

Highway right-of-way called for in a deed was an artificial monument which controls the conflicting description by courses and distances. *Highway Comm. v. Gamble,* 618.

§ 8. Proceeding to Establish Boundary

Boundary line agreement executed by plaintiff and defendant was an effective plea in bar to plaintiff's proceeding to establish the true boundary line between her property and the property of defendants. *Smith v. Digh,* 678.

BROKERS AND FACTORS

§ 6. Right to Commissions

A foreign real estate firm that had not secured a N.C. real estate license and certificate of authority to transact business in the State could not maintain action to recover commissions on the lease of real estate in this State. *Raab & Co. v. Independence Corp.,* 674.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment

Bill of indictment sufficiently charged defendant with the felony of breaking and entering in violation of G.S. 14-54 as rewritten effective 23 May 1969. *S. v. Cleary,* 189.

CLERKS OF COURT

§ 2. Jurisdiction to Enter Judgment

It is presumed that the clerk of court had jurisdiction in a partitioning proceeding. *In re Johnson,* 102.

§ 4. Jurisdiction in Regard to Estates of Decedents

Administratrix' action for commissions was properly brought before the clerk of superior court in the first instance, and the awarding of commissions and attorneys' fees out of the assets of the estate rested within the judicial discretion of the clerk. *In re Green,* 326.

CONSTITUTIONAL LAW

§ 24. Requisites of Due Process

To subject a foreign corporation to judgment in personam requires that the corporation have certain minimum contacts with this State. *Koppers Co., Inc. v. Chemical Corp.,* 118.

§ 29. Right to Trial by Duly Constituted Jury

Trial court properly denied motion of a white defendant to quash the indictment on the ground of systematic exclusion of Negroes from service on grand juries in the county. *S. v. Morgan,* 624.

§ 30. Due Process in Trial in General

Defendants are entitled to suppress any evidence resulting from lineup procedures which the "totality of circumstances" shows were "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process. *S. v. Lynch,* 71.

Identifications of both defendants in five-man lineup and in-court identifications of both defendants by two witnesses were not tainted by earlier illegal one-man lineup of one defendant so as to lead to any irreparable mistaken identification. *S. v. Preston,* 71. Defendants' constitutional rights were not violated by denial of their motion that they be provided transcripts of four previous trials for the same offense which ended in mistrials because of hung juries. *Ibid.*

A defendant who was tried in April 1970 following his arrest on 31 October 1969 and his commitment on 11 December 1969 to a State hospital for 77-day psychiatric examination was not deprived of the right to a speedy trial. *S. v. Hatcher,* 352. Trial court was without authority to order that defendant's case not be returned to the calendar until defendant agreed in writing that he was satisfied with his court-appointed attorney and that he would cooperate with him. *S. v. Dickerson,* 387.

§ 31. Right of Confrontation and Time to Prepare Defense

Trial court did not err in denial of defendants' motion for order directing county or state to pay expenses for two out-of-state witnesses where testimony of the witnesses in previous trials for the same offense was admissible and available for use in present trial. *S. v. Preston,* 71.

A defendant in a criminal prosecution has the constitutional right to confront his accusers with other testimony, and to have a reasonable opportunity to prepare his defense. *S. v. Hill,* 279.

CONSTITUTIONAL LAW — Continued

Defendant's contention that the trial court erred in proceeding to trial without allowing defendant to subpoena witnesses after defendant, while being questioned as to the voluntariness of his plea of guilty of prison escape, stated that he desired a certain witness to testify, held without merit where the solicitor stipulated what the witness would have testified. *S. v. Jones*, 726.

§ 32. Right to Counsel

Refusal of jailer to release defendant on the night defendant gave bail bond for offense of drunken driving, and jailer's refusal to permit attorney to confer with defendant during the night in jail constituted a denial of defendant's rights; however, the jailer's behavior did not destroy validity of tests and observations made by police officers relating to defendant's intoxication, and such tests were admissible in evidence. *S. v. Hill*, 279.

In a juvenile delinquency hearing, it was not sufficient that the court informed the juvenile's mother that she could have an attorney to represent her son if she so desired; there must also be a showing that the mother was advised of the right to have appointed counsel in case she was indigent. *In re Garcia*, 691. Defendant's constitutional rights were not violated by his waiver of a preliminary hearing without benefit of counsel. *S. v. Grant*, 704.

A defendant charged with his first offense of drunken driving is not entitled to appointment of counsel. *S. v. Hickman*, 592.

A defendant may not insist that only counsel satisfactory to himself be appointed to represent him. *S. v. Dickerson*, 387.

§ 34. Double Jeopardy

Fifth trial of defendants for crime of armed robbery after four previous trials for same offense had ended in mistrials because of hung jury did not violate defendants' guaranties against double jeopardy. *S. v. Preston*, 71.

§ 36. Cruel and Unusual Punishment

Punishment not exceeding statutory limit cannot be considered cruel and unusual in the constitutional sense. *S. v. Moore*, 699.

CONTEMPT OF COURT

§ 2. Direct or Criminal Contempt

Trial judges have broad power to take whatever legitimate steps are necessary to maintain proper decorum and appropriate atmosphere during a trial, including the power to deal with an unruly defendant. *S. v. Dickerson*, 387.

§ 6. Hearings on Orders to Show Cause; Findings and Judgment

An order for defendant's arrest for wilful contempt of earlier court order requiring him to make alimony payments must be remanded where there was no evidence defendant presently possessed the means to comply with the order. *Earnhardt v. Earnhardt*, 213.

CONTRACTS

§ 2. Offer and Acceptance

Corporation's release of funds to bank constituted acceptance of the bank's offer to apply the funds for the payment of debts. *Koppers Co., Inc. v. Chemical Corp.*, 118.

§ 6. Contracts Against Public Policy

A foreign real estate firm that had not secured a N. C. real estate license and certificate of authority to transact business in the State could not maintain action to recover commissions on the lease of real estate in this State. *Raab & Co. v. Independence Corp.*, 674.

§ 12. Construction of Contracts

Rules relating to the construction of a contract. *Koppers Co., Inc. v. Chemical Corp.*, 118.

§ 18. Modification, Rescission, Abandonment, and Waiver

Trial court erred in rendering judgment on the pleadings in favor of plaintiffs in action to recover for architectural services rendered by plaintiffs to defendant church where pleadings raised issue as to whether written contract had been modified orally. *Fishel and Taylor v. Church*, 224.

§ 27. Sufficiency of Evidence in Action on Contract

Plaintiff's evidence was insufficient to show valid contract between parties for defendant to build silk screen machine to plaintiff's specifications. *Enterprises, Inc. v. Stevens*, 228.

CORPORATIONS

§ 13. Liability of Officers and Agents to Third Persons for Neglect of Duties, Fraud, etc.

A corporation's directors may be held personally liable for gross neglect of their duties, mismanagement, fraud and deceit resulting in loss to a third person, but not for errors of judgment made in good faith. *Milling Co., Inc. v. Sutton*, 181.

In a milling company's action to recover the purchase price of corn sold to a grain hauling firm, the milling company's evidence was insufficient to hold defendant, an official of the hauling firm, personally liable for the purchase price. *Ibid.*

COSTS

§ 4. Items of Cost and Amount of Allowance

Trial court improperly awarded attorneys' fees to a judgment holder in the latter's action against an automobile liability insurer. *Piping, Inc. v. Indemnity Co.*, 561.

COUNTIES

§ 6. Fiscal Management and Debt

In taxpayers' action alleging certain irregularities by the county in the purchase of land on which to locate a proposed courthouse and jail, the

COUNTIES — Continued

evidence presented by the county was sufficient to establish that the county commissioners followed correct statutory procedures relating to notice and to financing. *Davis v. Iredell County,* 381.

COURTS

§ 6. Appeal to Superior Court from Clerk

On appeal to the judge of superior court from an order of the clerk of court awarding administratrix' commissions and attorneys' fees, respondent's general exception to the clerk's order presented only the question whether the facts found support the conclusions of law. *In re Green,* 326.

§ 9. Jurisdiction of Superior Court After Order of Another Superior Court Judge

One superior court judge cannot modify an order of another superior court judge. *Public Service Co. v. Lovin,* 709.

§ 11.1. Practice and Procedure in District Court

Defendant was denied constitutional right to a jury trial where action was transferred from superior court to district court without notification to defendant, and district court subsequently denied defendant's demand for a jury trial. *Thermo-Industries v. Construction Co.,* 55.

Defendant is deemed to have waived his right to jury trial in the district court. *Tractor & Implement Co. v. Lee,* 524. The district court judge was without authority to enter an order in an action instituted in superior court prior to the establishment of the district court in the county, where no order was ever entered transferring the action to the district court. *Hodge v. Hodge,* 601; *In re Custody of Hopper,* 730.

CRIMINAL LAW

§ 2. Intent

In determining the presence or absence of intent, the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the crime. *S. v. Kendrick,* 688.

§ 7. Entrapment

Evidence in a burglary prosecution did not require an instruction on the defense of entrapment. *S. v. Yost,* 671.

§ 9. Aiding and Abetting

One who is present aiding and abetting in a crime actually perpetrated by another is equally guilty with the actual perpetrator. *S. v. Wall,* 22.

Trial court erred in failing to require the jury to find that defendant shared in the felonious intent of the perpetrator in order to find defendant guilty of aiding and abetting in the crime. *S. v. Kendrick,* 688.

§ 15. Venue

Trial court did not abuse its discretion in denying defendant's motion for a change of venue and for a special venire on the ground that the trial

CRIMINAL LAW — Continued

and conviction of a codefendant at a previous term of court had received considerable publicity. *S. v. Morgan*, 624.

§ 21. Preliminary Proceedings

Defendant's motion to dismiss the prosecution on the ground that he was held from 3 October until 11 December without a preliminary hearing and without bail was properly denied by the trial court. *S. v. Hatcher*, 352.

Defendant's constitutional rights were not violated by his waiver of a preliminary hearing without benefit of counsel. *S. v. Grant*, 704.

§ 23. Plea of Guilty

Record on appeal shows that defendant's pleas of guilty to forgery and to uttering forged checks were freely and voluntarily made. *S. v. Walker*, 271.

§ 26. Plea of Former Jeopardy

The requisites of former jeopardy. *S. v. Anderson*, 146. A solicitor's taking of *nolle prosequi* on a misdemeanor charge of assault on a female cannot support defendant's plea of former jeopardy in a prosecution for assault with intent to commit rape. *Ibid.* Fifth trial of defendants for crime of armed robbery after four previous trials for same offense had ended in mistrials because of hung jury did not violate defendants' guaranties against double jeopardy. *S. v. Preston*, 71.

A judgment of dismissal in a prior prosecution charging defendant with the felonious breaking and entering of the premises occupied by one Lloyd R. Montgomery will not support defendant's plea of former jeopardy in a new prosecution charging defendant with the felonious breaking and entering of premises occupied by one Elvira C. Montgomery. *S. v. Johnson*, 256.

A defendant who was convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction where both offenses arose out of the same occurrence. *S. v. Hatcher*, 352.

§ 29. Mental Incapacity to Plead

There was no merit to defendant's contention that he was committed to a State hospital for psychiatric evaluation without his consent. *S. v. Hatcher*, 352.

§ 42. Articles Connected with the Crime

The trial court properly admitted in evidence a power saw that was the subject of larceny. *S. v. Smith*, 553.

§ 43. Photographs

A photograph of a fingerprint, as of any other object, is admissible for the restricted purpose of explaining or illustrating to the jury testimony relevant and material to the controversy where there is evidence of the accuracy of the photograph. *S. v. Lynch*, 71.

§ 60. Evidence in Regard to Fingerprints

Trial court did not err in admission of expert testimony as to identifi-

CRIMINAL LAW — Continued

cation of defendant's fingerprint and in admission for illustrative purposes of photograph of a lifted fingerprint and the negative from which it was made. *S. v. Preston,* 71.

§ 61. Evidence as to Shoe Prints

It was proper for the investigating officer to testify that he found foot tracks leading from the house broken into to the residence of the defendant. *S. v. Smith,* 553.

§ 64. Evidence as to Intoxication

Results of breathalyzer test made in compliance with the statute are properly admitted in evidence upon showing that defendant voluntarily submitted to the test. *S. v. Hill,* 279.

§ 66. Evidence of Identity by Sight

Identification of both defendants in a five-man lineup and in-court identification of both defendants by two witnesses were not tainted by earlier illegal one-man lineup of one defendant so as to lead to any irreparable mistaken identification. *S. v. Preston,* 71.

Defendants are entitled to suppress any evidence resulting from lineup procedures which the "totality of circumstances" shows were "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process. *Ibid.*

The *Wade* and *Gilbert* decisions do not apply to a lineup conducted on 4 June 1967. *Ibid.*

Trial court's findings and conclusion that the State witness' in-court identification of the defendant as the perpetrator of a common law robbery was of independent origin and was not tainted by any illegal out-of-court confrontation, *held* supported by plenary evidence. *S. v. Wingard,* 719.

There was no merit to defendant's contention that his arrest was based on an illegal photographic identification by the prosecuting witness. *S. v. Hatcher,* 352.

Where the trial court, out of the presence of the jury, directed that the words "Police Department, Greensboro" be removed from a photograph of defendant, the words appearing on a plaque which defendant was wearing around his neck, the subsequent admission of the photograph into evidence was not erroneous. *Ibid.*

§ 73. Hearsay Testimony

Testimony by an accomplice as to statements he had made to the sheriff were not inadmissible as hearsay. *S. v. McGinnis,* 8.

§ 76. Determination of Admissibility of Confessions

Trial court erred in admission, over defendant's objection, of evidence of in-custody statements made by defendant which placed him near the crime scene without conducting a voir dire examination to determine the voluntariness of defendant's statements. *S. v. Griggs,* 402.

On a preliminary hearing to determine the voluntariness of defendant's statements to investigating officers, the trial court properly found, upon plenary evidence, that the defendant, a graduate student, was warned

CRIMINAL LAW — Continued

of his constitutional rights before interrogation and that the defendant understood those rights; the fact that defendant himself did not affirmatively testify that he understood those rights does not prohibit such a finding. *S. v. Moore,* 699.

§ 79. Acts and Declarations of Codefendants

Testimony by an accomplice as to statements he had made to the sheriff were not inadmissible as hearsay. *S. v. McGinnis,* 8.

§ 81. Best and Secondary Evidence

In prosecution for assault with intent to commit rape, the admission of parol testimony of the contents of a note handed to prosecutrix by defendant was reversible error where the State offered no evidence explaining the absence of the note. *S. v. Anderson,* 146.

§ 84. Evidence Obtained by Unlawful Means

Refusal of jailer to release defendant on the night defendant gave bail bond for offense of drunken driving and jailer's refusal to permit attorney to confer with defendant during the night in jail constituted a denial of defendant's constitutional rights; however, the jailer's behavior did not destroy validity of tests and observations made by police officers relating to defendant's intoxication, and such tests were admissible in evidence. *S. v. Hill,* 279.

A second search of defendant without a warrant after he had been arrested and taken to jail was lawfully conducted as an incident of defendant's arrest. *S. v. Jones,* 661.

§ 87. Direct Examination of Witnesses

Allowance of leading questions is a matter within discretion of trial judge. *S. v. McQueen,* 248.

§ 88. Cross-Examination

Trial court's refusal to permit defendant to cross-examine a police officer concerning warrants issued for defendant's arrest was not prejudicial. *S. v. Davis,* 53.

§ 91. Time of Trial and Continuance

Trial court was without authority to order that defendant's case not be returned to the calendar until defendant agreed in writing that he was satisfied with his court-appointed counsel and that he would cooperate with him. *S. v. Dickerson,* 387.

§ 92. Consolidation of Counts

Trial court properly consolidated for trial prosecutions against two defendants for armed robbery of Highway Patrolman. *S. v. Elliott,* 1.

§ 98. Custody of Defendant or Witnesses

Motion of defendant for sequestration of witnesses is addressed to the discretion of the court. *S. v. Morgan,* 624.

CRIMINAL LAW — Continued

Trial judges have broad power to take whatever legitimate steps are necessary to maintain proper decorum and appropriate atmosphere during a trial, including the power to deal with an unruly defendant. *S. v. Dickerson,* 387.

§ 99. Conduct of Court and Expression of Opinion During Trial

In rape prosecution, defendants were not prejudiced when trial court, in presence of defense witnesses, threatened to issue bench warrants for arrest of any witness who testified he had participated in the crime of aiding and abetting in prostitution. *S. v. Blalock,* 94. Trial court did not express an opinion in asking questions of some witnesses in rape prosecution. *Ibid.*

Colloquy between the trial court and defense counsel in which the court stated, as the jury was leaving the courtroom, that the defendant ought be kept in jail overnight, and in which the court also stated, in the absence of the jury, that the defendant "has got more reason to run now than he ever had," *held* not prejudicial. *S. v. Wood,* 706.

§ 102. Argument and Conduct of Counsel or Solicitor

Trial court properly refused to allow defendant's attorney to argue to jury the failure of defendant to testify. *S. v. Artis,* 46.

Defendant was not prejudiced by questions asked by the solicitor to which defendant objected and which were not answered by the witness. *S. v. Ward,* 684.

§ 104. Consideration of Evidence on Motion for Nonsuit

Consideration of evidence on motion for nonsuit. *S. v. Mayo,* 49; *S. v. Mobley,* 717.

By introducing evidence, a defendant waives his first motion for nonsuit. *S. v. Stevens,* 665.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

The unsupported testimony of an accomplice is sufficient to support a conviction. *S. v. Morgan,* 624; *S. v. Kendrick,* 688.

Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that the defendant committed it, the motion for nonsuit should be overruled. *S. v. Jerman,* 697.

§ 112. Instructions on Burden of Proof

Defendant was not prejudiced by trial court's charge that defendant relied on defense of alibi. *S. v. McGilvery,* 15.

When a defendant pleads not guilty, the burden is on the State to prove every element of the offense beyond a reasonable doubt. *S. v. Billinger,* 573.

§ 113. Application of Law to Statement of Evidence

Trial courts' instructions in an assault prosecution which did not apply the law to the evidence constituted reversible error. *S. v. McKinnon,* 724.

CRIMINAL LAW — Continued

§ 114. Expression of Opinion by Court on Evidence

Trial court did not express an opinion on credibility of defendant by its instruction relating to evidence of prior criminal convictions of the prosecuting witness. *S. v. Artis,* 46. Trial court did not express an opinion by use of the words "assault" and "rape" in referring to the charges against defendants. *S. v. Blalock,* 94.

Where an instruction in a hit-and-run prosecution could have led the jury to believe that the court was of the opinion that defendant was the driver of the automobile, the judgment of conviction must be reversed. *S. v. Billinger,* 573.

§ 115. Instructions on Lesser Degrees of Crime

In instructing the jury on lesser included offenses of felonious assault, the court did not err in instructing the jury to consider first the more serious charges and then move to the lesser charges only if they found defendant not guilty of the more serious offenses. *S. v. Wall,* 22.

The necessity for instructions on the lesser degree of the crime charged arises only when there is evidence to support such lesser charge. *S. v. Barber,* 210.

§ 116. Charge on Failure of Defendant to Testify

Trial court properly instructed jury with respect to defendant's right not to testify. *S. v. Artis,* 46.

Trial court in its discretion properly instructed the jury on the right of defendant not to testify in his own behalf, even though defendant made no request for such instructions. *S. v. Reaves,* 315.

§ 117. Charge on Credibility of Witness

Trial court did not express an opinion on credibility of defendant by its instruction relating to evidence of prior criminal convictions of the prosecuting witness. *S. v. Artis,* 46.

§ 118. Charge on Contentions of the Parties

In this rape prosecution, misstatements of defendants' contentions, if any, related to subordinate features of the case and did not prejudice defendants. *S. v. Blalock,* 94.

Instructions of the trial court were erroneous in failing to give equal stress to the contentions of the defendant. *S. v. Billinger,* 573.

§ 121. Instructions on Defense of Entrapment

Evidence in a burglary prosecution did not require an instruction on the defense of entrapment. *S. v. Yost,* 671.

§ 124. Sufficiency of Verdict

The Court of Appeals disapproves of a method of recording the result of a criminal jury trial whereby three possible results were listed after the letters (a), (b) and (c), and a circle was drawn in ink around the letter "(c)." *S. v. Morgan,* 624.

CRIMINAL LAW — Continued

§ 127. Arrest of Judgment

A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *S. v. Hatcher*, 352.

A defendant who was convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction where both offenses arose out of the same occurrence. *Ibid.*

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

Denial of motion to set aside verdict as contrary to weight of evidence is not reviewable on appeal absent showing of abuse of discretion. *S. v. Bell*, 65.

Motion to set aside the verdict as being contrary to the evidence is addressed to the sound discretion of the trial court. *S. v. Jerman*, 697.

§ 137. Conformity of Judgment to Indictment, etc.

The fact that the judgment and commitment in an escape prosecution erroneously referred to the escape statute as "G.S. 148.48" was not prejudicial. *S. v. Cobb*, 51.

§ 138. Severity of Sentence and Determination Thereof

Upon appeal to superior court from district court, imposition of punishment in superior court in excess of that imposed in the district court did not violate defendant's constitutional rights. *S. v. Andrews*, 67.

Where there is a verdict or plea of guilty to more than one count in a warrant or bill of indictment and the court imposes a single judgment thereon, a consolidation for the purpose of judgment will be presumed. *S. v. Crabb*, 333.

Where cases are consolidated for judgment, court has no authority to enter judgment in excess of maximum penalty applicable to any of the offenses. *Ibid.*

Where the defendant was convicted of the felony of breaking and entering and of misdemeanor larceny and the counts were consolidated for judgment, the fact that the sentence of five to seven years imprisonment exceeded the maximum for misdemeanor larceny does not constitute reversible error, since the sentence was within the maximum allowed for felonious breaking and entering. *S. v. Smith*, 553.

§ 139. Sentence to Maximum and Minimum Terms

Where defendant pleaded guilty to nonfelonious breaking and entering and nonfelonious larceny, judgment imposing a sentence of "not less than two nor more than three years" is erroneous insofar as it purports to impose a maximum term of three years, and the judgment is modified by striking therefrom the words "nor more than three" so that the sentence is two years. *S. v. Crabb*, 333.

Where sentence is to maximum and minimum terms, maximum may not exceed maximum provided by statutory limit even though minimum is within statutory limit. *Ibid.*

CRIMINAL LAW — Continued

§ 143. Revocation of Suspension of Sentence

In revoking a suspended sentence imposed in nonsupport prosecution, the trial court was required to make specific findings of fact that defendant's failure to make support payments to his family in compliance with the conditions of suspension was either wilful or without lawful excuse. *S. v. Jones,* 711. No error appears on face of record in appeal from order activating defendant's suspended sentence on the basis of defendant's convictions of subsequent offenses. *S. v. Owens,* 727.

§ 145.1. Probation

On appeal from a hearing in which defendant's sentence of probation was revoked, defendant's contention that his waiver of appointed counsel at the hearing was not intelligently made, in that the court failed to advise him that his suspended sentence could be activated as a result of the hearing, held without merit. *S. v. Acuff,* 715.

Where a defendant charged with violation of probation made a motion to be returned to the county in which he was originally placed on probation, the superior court was required by statute to grant the motion, and it was error for the judge himself to conduct a hearing on the violation. *S. v. Triplett,* 443.

§ 154. Case on Appeal

Only the judge who tried the case can extend the time for serving statement of case on appeal. *S. v. Lewis,* 323. Criminal appeal was improperly before the Court of Appeals where the service of case on appeal was not made within the 30 days allowed by the trial judge. *Ibid.* Criminal appeal is subject to dismissal where the order granting extension of time to serve case on appeal was not signed by the trial judge who signed the order appealed from. *S. v. Shoemaker,* 273.

§ 155.5. Docketing of Record on Appeal

Appeal is subject to dismissal where record on appeal was not docketed within the time allowed by the trial court's extension. *S. v. Morgan,* 624.

§ 157. Necessary Parts of Record Proper

Record proper in a criminal case consists of bill of indictment or warrant, plea, verdict and judgment. *S. v. Crabb,* 333.

§ 158. Presumptions as to Matters Omitted from Record on Appeal

Where sound motion pictures of defendant's intoxication were not made a part of the record on appeal, the question of the pictures' admissibility on the trial was not presented on appeal. *S. v. Hill,* 279.

§ 159. Form and Requisites of Transcript

The Court of Appeals disapproves of a method of recording the result of a criminal jury trial whereby three possible results were listed after the letters (a), (b) and (c), and a circle was drawn in ink around the letter "(c)." *S. v. Morgan,* 624.

CRIMINAL LAW — Continued

§ 160. Correction of Record

Case is remanded for correction of the judgment where judgment refers to "case No. 5" rather than "case No. 7." *S. v. Barber*, 210.

§ 161. Form and Requisites of Exceptions and Assignments of Error

An appeal is an exception to the judgment and presents face of record proper for review. *S. v. Hicks*, 61; *S. v. Crabb*, 333.

A mere reference in the assignment of error to the record page where the asserted error may be discovered fails to comply with the Rules of the Court of Appeals. *S. v. Brown*, 534; *S. v. Morgan*, 624.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

Defendant waived objection to evidence by failure to object in apt time. *S. v. McGinnis*, 8; *S. v. Blalock*, 94.

§ 163. Exceptions and Assignments of Error to Charge.

Defendant's assignment of error to the charge failed to comply with the Rules of the Court of Appeals. *S. v. Brown*, 534.

Exceptions to the charge which appear only in the assignments of error are ineffective to challenge the correctness of the charge. *S. v. Mobley*, 717.

§ 166. The Brief.

Assignment of error not brought forward and argued in the brief is deemed abandoned. *S. v. Blalock*, 94; *S. v. Lyles*, 448; *S. v. Brown*, 534.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

When objectionable evidence is stricken and the jury instructed not to consider it, any prejudice is ordinarily cured. *S. v. Barker*, 210.

Exclusion of testimony cannot be held prejudicial when the record fails to show what the excluded testimony would have been. *S. v. Morgan*, 624. Any error in the admission of testimony of a deputy sheriff as to the sobriety of defendant when he was arrested was cured by defendant's testimony to the same effect. *S. v. Ward*, 684.

§ 170. Harmless and Prejudicial Error in Remarks of Court

Colloquy between trial court and defense counsel in which the court stated in the absence of the jury that defendant "has got more reason to run now than he ever had" was not prejudicial. *S. v. Wood*, 706.

§ 171. Error Relating to One Count of Crime Charged

Where counts for felonious breaking and entering and misdemeanor larceny were consolidated for judgment, fact that sentence imposed exceeds that permissible for the misdemeanor is not prejudicial where it does not exceed that permitted for the felony. *S. v. Cleary*, 189.

§ 172. Whether Error is Cured by Verdict

Any error in instructing the jury as to defendant's guilt or innocence of felonious assault is cured by jury's verdict which finds defendant guilty of a lesser included offense. *S. v. Hearns*, 42.

CRIMINAL LAW — Continued

§ 175. Review of Findings

Trial court's findings on *voir dire* are binding on appeal when supported by competent evidence. *S. v. Wingard,* 719.

§ 176. Review of Judgments on Motion to Nonsuit

On appeal from the denial of defendant's motion for nonsuit made at the close of all the evidence, including defendant's evidence, the Court of Appeals will consider all of the evidence to determine its sufficiency to carry the case to the jury. *State v. Stevens,* 665.

DAMAGES

§ 3. Compensatory Damages for Injury to Person

A plaintiff who feels that he has suffered a decrease in his earning power by reason of the injuries complained of should be prepared to give detailed testimony as to his physical condition and what he was able to earn before, and in what way and to what extent the injuries have decreased his ability to earn since the accident. *Jernigan v. R. R. Co.,* 186.

§ 10. Credit on Damages for Sums Paid by Other Persons

Where it was stipulated that all of plaintiff's medical and hospital expenses had been paid by defendant's insurance carrier, it was not reversible error for the trial court to exclude from jury consideration plaintiff's evidence of hospital and medical expenses. *Taylor v. Wright,* 267.

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages

Any error by the court in striking testimony relating to damages was harmless where the issue of damages was not reached by the jury. *Hoffman v. Brown,* 36.

Trial court properly excluded under hearsay rule and speculative damages rule evidence offered by defendant that she was damaged by plaintiff's breach of warranty on radios that were refused by defendant's customer because defendant was thereafter placed on the customer's black list. *Gifts, Inc. v. Duncan,* 653.

In an action to recover for personal injuries arising out of an automobile accident, testimony by plaintiff's doctor furnished an adequate basis for his opinion that plaintiff's hospitalization subsequent to the action could have been caused by the accident. *Purgason v. Dillon,* 529.

§ 16. Instructions on Measure of Damages

Court adequately instructed jury that plaintiff's loss of past, present and future earnings should be considered as an element of damages. *Brixey v. Cameron,* 339.

Jury could not have been misled as to amount of damages planitiff was entitled to recover for aggravation of pre-existing diabetic condition. *Purgason v. Dillon,* 529.

DEEDS

§ 7. Delivery Acceptance and Registration

Plaintiffs' evidence was insufficient to rebut the presumption of delivery of a deed to the property in question arising from registration of the deed after the death of one of the two grantors. *Perry v. Suggs*, 128.

DIVORCE AND ALIMONY

§ 2. Process and Pleadings

In wife's action for alimony without divorce and for custody of the children, the trial court properly removed the case from the trial docket when the wife abandoned her claim to alimony, and defendant was not entitled to jury trial on issue of abandonment of his children. *Ferguson v. Ferguson*, 453.

§ 14. Adultery

In husband's action for absolute divorce, trial court committed prejudicial error in allowing husband to testify on cross-examination as to the adulterous conduct of his wife. *Phillips v. Phillips*, 438.

§ 18. Alimony and Subsistence Pendente Lite

Trial court's instruction on the issue as to whether the husband had offered indignities to the wife held reversible error on the ground that the jury was not instructed as to how the law should be applied to the evidence. *Turner v. Turner*, 336. Wife's evidence was insufficient to support her demands for alimony and child custody. *Taylor v. Taylor*, 260. Trial court properly denied plaintiff wife's motion for an interim award of alimony pendente lite and counsel fees. *Harper v. Harper*, 341.

There was sufficient evidence to support trial court's award of possession of home to the wife pendente lite, and to support court's findings that the wife was a dependent spouse and that the husband maliciously turned the wife out of doors. *Little v. Little*, 361. Trial court did not abuse its discretion in awarding plaintiff wife $400 per month as alimony pendente lite, in requiring defendant husband to pay wife's motel bill, and in awarding the wife $2500 for counsel fees pendente lite. *Ibid.*

§ 21. Enforcing Payment

An order for defendant's arrest for wilful contempt of earlier court order requiring him to make alimony payments must be remanded where there was no evidence defendant presently possessed the means to comply with the order. *Earnhardt v. Earnhardt*, 213.

§ 22. Jurisdiction and Procedure in Custody and Support Proceedings

It was permissible under G.S. 50-13.5(b) (3) for the wife to join with her action for alimony without divorce an action for custody and support of the minor children of the parties. *Little v. Little*, 361.

Trial court did not abuse its discretion in denial of wife's motion that husband be required to pay her travel expenses and attorneys' fees in defending against husband's motion for modification of child custody and support order, and that husband be required to post $1000 bond to assure compliance with any visitation order. *Rabon v. Ledbetter*, 376.

EJECTMENT — Continued

§ 7. Burden of Proof

In ejectment, plaintiff must prevail upon the strength of his own title and not because of the weakness or lack of title in defendant. *King v. Lee,* 369.

§ 10. Sufficiency of Evidence

In ejectment action, plaintiffs failed to show good title where they introduced a deed conveying the property to their intestate, but the only evidence of possession was that the land had been listed for taxes by the intestate prior to his death and by his estate after his death. *King. v. Lee,* 369.

In plaintiff's action to recover possession of real property, trial judge's findings and conclusion that plaintiff was the owner and entitled to the realty described in the complaint are supported by competent evidence. *Phillips v. Wise,* 721.

EMINENT DOMAIN

§ 5. Amount of Compensation

Landowner who has granted a right of way over his land must look to the contract for compensation and not to condemnation proceedings. *Feldman v. Gas Pipe Line Corp.,* 162.

The measure of damages to which landowners were entitled for the taking of a gas pipeline easement was the difference in the fair market value of the land immediately before and immediately after the taking. *Public Service Co. v. Kiser,* 202.

§ 6. Evidence of Value

In a proceeding to condemn a gasline easement across the respondents' land, the fact that the respondents' witness might have based his pre-condemnation valuation on the possibility of relocating a road on the land was not prejudicial to the gas company. *Public Service Co. v. Kiser,* 202.

§ 7. Proceeding to Take Land and Assess Compensation

In a proceeding to condemn a gas pipeline easement across repondent's lands, trial court had discretionary power to allow respondent to withdraw the $3400 deposit paid into the court by the gas company, without prejudicing respondent's right to continue opposition to the condemnation. *Public Service Co. v. Lovin,* 709.

ESCAPE

§ 1. Elements of, and Prosecutions for the Offense

State's evidence was sufficient to go to the jury on the issue of defendant's guilt of felonious escape. *S. v. Cobb,* 51.

Defendant who escaped from custody of a State Highway Department foreman did not have the right to be tried under G.S. 14-255 relating to escape of a prisoner hired out by a county or city. *S. v. Ledford,* 245. Trial court erred in failing to instruct jury that in order to convict defendant of the felony of escape it must find that defendant was imprisoned or in law-

ESCAPE — Continued

ful custody serving a sentence for a felony. *Ibid.* Properly certified copy of commitment is competent in escape prosecution to show lawful custody and type offense for which defendant was committed. *Ibid.*

Defendant's contention that the trial court erred in proceeding to trial without allowing defendant to subpoena witnesses after defendant, while being questioned as to the voluntariness of his plea of guilty of prison escape, stated that he desired a certain witness to testify, held without merit where the solicitor stipulated what the witness would have testified. *S. v. Jones,* 726.

ESTOPPEL

§ 1. Estoppel by Deed

Plaintiff seeking construction of a will which devised a contingent interest in land to her father and his "heirs, if any, otherwise to the next of kin who may be living at his death" is entitled to take a one-half undivided interest in the land; plaintiff is estopped to deny the validity of her father's conveyance of his interest in 1939. *Jernigan v. Lee,* 582.

EVIDENCE

§ 3. Facts Within Common Knowledge

The Court of Appeals takes judicial notice that 1 September 1969 was the first Monday in September. *Robbins v. Bowman,* 416.

It is common knowledge that money lenders often insist on supplementary instruments which clarify title to the property or specifically establish the priority of the mortgage. *S. v. Brown,* 498.

§ 4. Presumptions

There is a presumption that mail, with postage prepaid and correctly addressed, will be received. *S. v. Teasley,* 477.

§ 12. Privileged Communications Between Husband and Wife

In husband's action for absolute divorce, trial court committed prejudicial error in allowing husband to testify on cross-examination as to the adulterous conduct of his wife. *Phillips v. Phillips,* 438.

§ 14. Privileged Communications Between Physician and Patient

Trial court did not err in exclusion of hospital record indicating that examination of defendant's blood shortly after collision disclosed presence of substantial quanity of ethyl alcohol. *Gibson v. Montford,* 251.

§ 15. Relevancy and Competency of Evidence in General

Trial court in railroad crossing accident case properly excluded witness' guess as to how far away he could see the railroad tracks at night. *Jernigan v. R. R.,* 186.

§ 19. Evidence of Similar Facts and Transactions

Evidence that some 3½ hours after the accident complained of a towing chain was attached around the axle housing of a tractor was sufficient to support a reasonable inference that the tow chain had been attached around the axle at the time of the accident. *May v. Mitchell,* 298.

EVIDENCE — Continued

§ 23. Competency of Allegations in Pleadings

A party offering into evidence, without limitation, portions of his opponent's pleadings is bound thereby. *Smith v. Burleson,* 611.

§ 25. Photographs

Where an aerial photograph was not properly authenticated for introduction into evidence, its admission over objection was prejudicial to defendants in an action to restrain them from obstructing a public road. *Gragg v. Burns,* 240.

§ 31. Best and Secondary Evidence Relating to Writings

Defendant was not entitled to cross-examine plaintiff's witness concerning the terms of a chattel mortgage which defendant executed as security for a note, since the mortgage had already been admitted in evidence and was the best evidence of its contents. *Tractor & Implement Co. v. Lee,* 524.

§ 33. Hearsay Evidence

Trial court properly excluded under hearsay rule and speculative damages rule evidence offered by defendant that she was damaged by plaintiff's breach of warranty on radios that were refused by defendant's customer because defendant was thereafter placed on the customer's "black list." *Gifts, Inc. v. Duncan,* 653.

§ 36. Admissions and Declarations by Agent

In an action on a promissory note, testimony by plaintiff's president was admissible to show that he was acting as agent of an equipment finance company. *Tractor & Implement Co. v. Lee,* 524.

§ 45. Nonexpert Opinion Evidence as to Value

In an action by a professional engineer to recover $4000 allegedly due him for services rendered to the individual defendants in the planning of their industrial building, there was no error in the exclusion of one defendant's testimony as to the value of the services rendered by the professional engineer. *Elsevier v. Machine Shop,* 539.

§ 48. Competency and Qualification of Experts

Trial court did not abuse its discretion in refusing to rule that State's witness, who was qualified as an expert in the general practice of medicine, was also qualified as an expert in the specialized field of psychiatry. *Brixey v. Cameron,* 339.

The fact that the trial judge reversed an earlier ruling and refused to allow the witness to testify as an expert during his testimony on the causes of a fire was not prejudicial where the judge again reversed himself later. *Insurance Co. v. Foard,* 630.

§ 50. Medical Testimony

In an action to recover for personal injuries arising out of an automobile accident, testimony by plaintiff's doctor furnished an adequate basis for his opinion that plaintiff's hospitalization subsequent to the action could have been caused by the accident. *Purgason v. Dillon,* 529.

EXECUTION

§ 1. Property Subject to Execution

Where judgment against administratrix fixed no amount of assets applicable to plaintiff's claim, execution could not issue in any amount. *Brown v. Green,* 12.

EXECUTORS AND ADMINISTRATORS

§ 18. Claims Against the Estate

Where judgment against administratrix fixed no amount of assets applicable to plaintiff's claim, execution could not issue in any amount. *Brown v. Green,* 12.

§ 31. Priorities

Judgment against administratrix merely established the debt sued on and did not constitute a lien upon the lands of decedent. *Brown v. Green,* 12.

§ 37. Costs, Commissions and Attorneys' Fees

Administratrix' action for commissions was properly brought before the clerk of superior court in the first instance, and the awarding of commissions and attorneys' fees out of the assets of the estate rests within the judicial discretion of the clerk. *In re Green,* 326. Findings of the clerk of court that administratrix did not waive her commissions and had not forfeited them by neglect or malfeasance and that the administratrix in good faith employed counsel to defend the estate held sufficient to support order awarding commissions and attorneys' fees. *Ibid.*

FALSE IMPRISONMENT

§ 2. Actions

In plaintiff's action for false imprisonment arising out of her commitment to a mental hospital for 12 days, the act of defendant physician in committing plaintiff to Dix Hospital under statutory emergency procedure without complying with statutory requirement that his statement as to plaintiff's condition be made under oath, held to constitute a deprivation of plaintiff's liberty without legal process. *Samons v. Meymandi,* 490.

§ 3. Damages

In plaintiff's action for false imprisonment arising out of her commitment to a mental institution for 12 days, action of trial court in setting aside a verdict awarding plaintiff $4000 compensatory damages and $25,000 punitive damages was within the court's discretion. *Samons v. Meymandi,* 490.

FIRES

§ 3. Negligence in Causing Fire

Evidence was insufficient to establish that damage to plaintiff's machinery by the operation of a water sprinkler system was caused by negligence of defendant contractor in using acetylene torch and starting a fire in the building where the machinery was stored. *Insurance Co. v. Foard,* 630.

FORGERY

§ 1. Elements of the Crime

The elements of forgery. *S. v. Brown,* 498.

Uttering a forged instrument consists in offering to another the forged instrument with knowledge of the falsity of the writing and with intent to defraud. *S. v. Wyatt,* 420.

§ 2. Prosecution and Punishment

Issue of defendant's guilt of forging checks was properly submitted to the jury. *S. v. Wyatt,* 420. Trial court properly consolidated indictments charging defendants jointly and severally with forgery and uttering forged checks. *Ibid.*

Defendant's forgery of a signature on a deed of trust subordination agreement constituted the forgery of an instrument capable of effecting a fraud. *S. v. Brown,* 498.

State's evidence in forgery prosecution was sufficient to be submitted to the jury; the fact that defendant was unsuccessful in his forgery attempt is immaterial. *S. v. Stevens,* 665.

Trial court properly allowed in evidence the check writing machine used in the forgery. *S. v. Moffitt,* 694. An indictment charging the offense of forgery must aver the words alleged to have been forged by the defendant. *Ibid.*

State's evidence was sufficient for the jury in prosecution charging forgery of checks of $125 and $135, and imposition of consecutive sentences of 6 years and 4 years does not constitute cruel and unusual punishment. *S. v. Moore,* 699.

FORNICATION AND ADULTERY

§ 4. Sufficiency of Evidence

Evidence of defendants' guilt of fornication and adultery was properly submitted to the jury. *S. v. Robinson,* 433.

FRAUD

§ 12. Sufficiency of Evidence

In the wife's action to set aside on the ground of fraud the transfer to her husband of her interest in corporate stock and debentures, the wife's evidence was sufficient to make out a prima facie case of fraud thereby entitling her to go to the jury. *Link v. Link,* 135.

§ 13. Instructions and Damages

Trial court in a fraud action committed reversible error in failing to apply the facts to the first three issues submitted to the jury. *Link v. Link,* 135.

GAS

§ 6. Gas Line Easement

An agreement giving a gas company the right to construct gas pipelines across a described tract of land is not void for vagueness in

HIGHWAYS AND CARTWAYS — Continued

§ 11. Neighborhood Public Road

In plaintiffs' action seeking to enjoin defendants from obstructing an alleged public road, defendants were not entitled to dismissal of the action on ground that the action was one to establish a neighborhood public road. *Gragg v. Burns*, 240.

§ 15. Appeal of Establishment of Cartway

Superior court had no authority to allow petitioner in cartway proceeding to take possession of the cartway pending appeal by the landowner from the clerk to superior court. *Lowe v. Rhodes*, 111.

HOMICIDE

§ 21. Sufficiency of Evidence

State's evidence in second-degree murder prosecution was sufficient to be submitted to the jury. *S. v. Jerman*, 697.

§ 28. Instructions on Defenses

Failure of trial court in its instructions to make a correlation between the violent reputation of the deceased and the defendant's plea of self-defense was reversible error. *S. v. Covington*, 595.

§ 30. Submission of Question of Guilt of Lesser Degrees of Crime

Although evidence pointed to crime of murder and only controversy was whether defendant was the perpetrator, defendant was not prejudiced by submission to jury of issue of defendant's guilt of lesser crime of manslaughter. *S. v. Swann*, 18.

HUNTING

§ 3. Prosecutions

Warrants charging that defendants unlawfully attempted to take deer with the aid of artificial light between the hours of sunset and sunrise in an area known to be inhabited and frequented by deer is sufficient to charge the offense defined by statute. *S. v. Lassiter*, 255.

HUSBAND AND WIFE

§ 11. Construction and Operation of Separation Agreement

There is a presumption that the provisions of a valid separation agreement for the support of minor children of the marriage are just and reasonable, and the court is not warranted in ordering a change in the absence of evidence of a change in conditions. *Rabon v. Ledbetter*, 376.

§ 23. Judgment in Nonsupport Prosecution

In revoking a suspended sentence imposed in a nonsupport prosecution, the trial court was required to make specific findings of fact that defendant's failure to make support payments to his family in compliance with the conditions of suspension was either wilful or without lawful excuse. *S. v. Jones*, 711.

INDICTMENT AND WARRANT

§ 6. Issuance of Warrant

There was no merit to defendant's contention that his arrest was based on an illegal photographic identification by the prosecuting witness. *S. v. Hatcher*, 352.

§ 7. Form, Requisites and Sufficiency of Indictment and Warrant

When the order of arrest refers to an attached affidavit, the affidavit becomes a part of the warrant. *S. v. Teasley*, 477. Although the use of the Uniform Traffic Ticket is generally disapproved of as a warrant of arrest, such ticket in this case sufficiently charged the offenses of speeding 90 mph and driving while license is suspended. *Ibid.*

Where an indictment is of doubtful validity, it is proper to send a second bill. *S. v. Moffitt*, 694.

§ 9. Charge of Crime

Each count in an indictment containing several counts must be complete within itself. *S. v. Cleary*, 189.

A warrant and the affidavit upon which it is based are tested by rules less strict than those applicable to indictments. *S. v. Teasley*, 477.

§ 11. Identification of Victim in Warrant

Defendant's motion to quash on the ground that the warrant charging her with prostitution was altered by striking out the name of the person allegedly solicited and inserting the name of another person directly thereunder, held properly denied. *S. v. Bethea*, 544.

§ 13. Bill of Particulars

In a prosecution charging defendants with the unlawful hunting of deer by artificial light, a violation of G.S. 113-104, it was incumbent upon the defendants to ask for a bill of particulars if they desired to know in what area of the county the offense took place. *S. v. Lassiter*, 255.

§ 14. Grounds for Motion to Quash

Where defendant's name does not appear in the complaint and warrant for arrest but does appear in the caption thereof, defendant's motion to quash should not be allowed. *S. v. Jacobs*. 597.

Defendant's motion to quash the bill of indictment returned against him in May 1970 on the ground that an earlier bill charging the same offense had been returned against him in January 1970 was properly denied. *S. v. Moffitt*, 694. Trial court properly denied defendant's motion to quash the indictment on the ground that he was not in this State when the indictment was returned and on the ground that neither he nor his attorney was permitted to appear before the grand jury. *S. v. Morgan*, 624.

§ 15. Waiver of Defects

A defendant who entered a plea of not guilty and participated in the trial waived any defect incident to the authority of the person issuing the warrant for his arrest. *S. v. Teasley*, 477.

INDICTMENT AND WARRANT — Continued

§ 17. Variance Between Averment and Proof

Variance between indictments charging defendant with sale of marijuana on July 11 and heroin on July 8 and evidence that the marijuana was sold on July 8 and the heroin on July 11 was not fatal. *S. v. Knight,* 62.

INFANTS

§ 9. Hearing and Grounds for Awarding Custody

The trial court erred in modifying previous orders relating to the custody of a child without hearing evidence and finding facts. *In re Williams,* 24.

§ 10. Commitment of Minors for Delinquency

The statute permitting the court to enter a temporary custody order affecting a juvenile who is appealing a commitment order of the court is not unconstitutional on the ground that the statute deprives the juvenile of the right to bail. *In re Martin,* 576. Evidence and findings in this juvenile proceeding were sufficient to bring a minor girl within the statutory definition of an undisciplined child and justified the commitment of the girl to the Department of Juvenile Correction for placement in a girls' school. *Ibid.*

The district court did not err in proceedings in which a juvenile was adjudged an undisciplined child for being unlawfully absent from school and was assigned to the N. C. Board of Juvenile Correction. *In re Eldridge,* 723. In a juvenile delinquency hearing, it was not sufficient that the court informed the juvenile's mother that she could have an attorney to represent her son if she so desired; there must also be a showing that the mother was advised of the right to have appointed counsel in case she was indigent. *In re Garcia,* 691.

INSANE PERSONS

§ 1. Commitment of Insane Person to Hospitals

The statute authorizing the emergency commitment of a mentally ill person is a drastic remedy and must be used with care and exactness. *Samons v. Meymandi,* 490.

In plaintiff's action for false imprisonment arising out of her commitment to a mental hospital for 12 days, the act of defendant physician in committing plaintiff to Dix Hospital under statutory emergency proceedings without complying with statutory requirement that his statement as to plaintiff's condition be made under oath, held to constitute a deprivation of plaintiff's liberty without legal process. *Ibid.*

§ 2. Inquisition of Lunacy

Clerk of court had no authority to appoint next friend to bring action on behalf of an alleged mental incompetent where the alleged incompetent was given no notice of the petition for appointment of next friend and no hearing was held to determine his competency. *Ives v. House,* 441.

INSURANCE

INTEREST

§ 2. Time and Computation

Where jury determined that defendants were entitled to contribution from plaintiffs for mortgage payments made on property owned by them as cotenants, trial court did not err in entering judgment which allowed defendants to recover interest from dates of payments made on the mortgage. *Watson v. Carr,* 217.

JUDGMENTS

§ 13. Judgments by Default

In action for breach of contract to build a silk screen machine, trial court did not err in refusing to enter default judgment for plaintiff on ground that demurrer by defendants was frivolous and interposed for purpose of delay. *Enterprises, Inc. v. Stevens,* 228.

§ 21. Setting Aside Consent Judgment

The proper procedure to attack a consent judgment is by motion in the cause. *In re Johnson,* 102.

§ 35. Conclusiveness of Judgment and Bar

There was no merit to defendant's contention that the present action on a promissory note was barred because of a former action brought by defendant against plaintiff in a justice of the peace court. *Tractor & Implement Co. v. Lee,* 524.

§ 41. Consent Judgment as Estoppel

A consent judgment is as binding upon the parties as if it had been entered by the court in regular course. *In re Johnson,* 102.

§ 48. Property to Which Lien Attaches

A lien created by a docketed judgment does not confer an estate or interest in real estate within the meaning of the venue statute. *Wise v. Isenhour,* 237.

§ 55. Right to Interest

Where jury determined that defendants were entitled to contribution from plaintiffs for mortgage payments made on property owned by them as cotenants, trial court did not err in entering judgment which allowed defendants to recover interest from dates of payments made on the mortgage. *Watson v. Carr,* 217.

JURY

§ 1. Right to Trial by Jury

Defendant was denied constitutional right to a jury trial where action was transferred from superior court to district court without notification to defendant, and district court subsequently denied defendant's demand for a jury trial. *Thermo-Industries v. Construction Co.,* 55.

In wife's action for alimony without divorce and for custody of the children, the trial court properly removed the case from the trial docket

LARCENY — Continued

§ 5. Presumptions and Burden of Proof

Inference of guilt arising from possession of recently stolen property does not apply until the identity of the property is established. *S. v. Frazier*, 44.

§ 6. Competency and Relevancy of Evidence

The trial court properly admitted in evidence a power saw that was the subject of larceny. *S. v. Smith*, 553.

§ 7. Sufficiency of Evidence and Nonsuit

In a prosecution for armed robbery and larceny of an automobile, State's evidence was sufficient to go to the jury. *S. v. Wall*, 22.

Evidence of ownership of stolen property by the individual named in the indictment and the value thereof was sufficient to require submission of the case to the jury in felonious larceny prosecution. *S. v. Harwood*, 713.

The State's evidence in a breaking and entering and larceny prosecution was sufficient to be submitted to the jury. *S. v. Mobley*, 717.

Testimony of defendant's accomplice was sufficient to require submission to the jury of issues as to defendant's guilt of aiding and abetting in felonious breaking and entering and felonious larceny. *S. v. Kendrick*, 688. There was sufficient evidence of defendant's identification as the operator of a stolen automobile for submission of larceny case to the jury under the doctrine of recent possession. *S. v. Queen*, 728.

§ 8. Instructions

Trial court's instruction on recent possession doctrine was prejudically erroneous in failing to require the jury to find that the property found on defendant's person was the same property stolen from a building supply company. *S. v. Frazier*, 44.

In prosecution for felonious larceny committed by housebreaking, trial court erred in giving the jury instructions which are susceptible to the construction that the jury might find defendant guilty of felonious larceny without finding that defendant actually stole anything from the dwelling. *S. v. Rogers*, 702.

§ 10. Judgment and Sentence

Where counts for felonious breaking and entering and misdemeanor larceny were consolidated for judgment, fact that sentence imposed exceeds that permissible for the misdemeanor is not prejudicial where it does not exceed that permitted for the felony. *S. v. Cleary*, 189; *S. v. Smith*, 553. Where defendant pleaded guilty to nonfelonious breaking and entering and nonfelonious larceny, judgment imposing sentence of "not less than two nor more than three years" is erroneous insofar as it purports to impose a maximum term of three years. *S. v. Crabb*, 333.

LIBEL AND SLANDER

§ 2. Words Actionable Per Se

Words tending to defame a person in his trade or business are actionable per se. *Stewart v. Check Corp.*, 172.

MASTER AND SERVANT — Continued

§ 60. Unauthorized Act of Employee: Workmen's Compensation

Act of deceased electrician in knocking dust from rollers of a conveyor belt while waiting for his foreman to descend a ladder did not constitute such a departure from his employment as to remove him from protection of Workmen's Compensation Act. *Stubblefield v. Construction Co.*, 4.

§ 66. Accident Followed by Disease

As used in the statutes relating to compensation for total disability from loss of mental capacity resulting from injury to the brain, the words "mental capacity" mean that quality of mind which enables a person to act with reasonable discretion in the ordinary affairs of life and to comprehend in a reasonable manner the nature, scope and effect of his acts and conduct. *Priddy v. Cab Co.*, 291.

Question of whether there has been a total and permanent disability resulting from a loss of mental capacity caused by or resulting from an injury to the brain is one of fact. *Ibid.* The control of one's temper is a mental function within the meaning of the statutes relating to lifetime compensation for total disability from loss of mental capacity resulting from injury to the brain. *Ibid.* Evidence held sufficient to support finding by Industrial Commission that former cab driver, who suffered a brain injury when a passenger struck him on the back of the head with a pipe, is totally and permanently disabled from loss of mental capacity resulting from injury to the brain, and to support award of compensation for lifetime of claimant. *Ibid.*

§ 69. Amount and Items of Recovery Generally

As used in the Workmen's Compensation Act, "disability" means impairment of wage earning capacity rather than physical impairment. *Priddy v. Cab Co.*, 291.

§ 93. Proceedings Before Industrial Commission

Workmen's compensation claimant who stipulated that doctor's letter could be used in evidence cannot complain that the letter was incompetent as hearsay. *Rooks v. Cement Co.*, 57.

§ 94. Findings and Award of Commission

Where medical opinions of two physicians conflict as to condition of claimant in workmen's compensation proceeding, conflict does not have to be resolved in favor of claimant. *Rooks v. Cement Co.*, 57.

§ 96. Review in Court of Appeals

The Court of Appeals remands a workmen's compensation case to the Industrial Commission for findings of fact on appellant's contention that the Compromise Settlement Agreement did not coincide with his understanding with respect to reimbursements for certain medical expenses. *Julian v. Tile Co.*, 424.

MORTGAGES AND DEEDS OF TRUST

§ 7. Construction as to Debts Secured

The trial court erred in declaring that a deed of trust on plaintiffs'

MORTGAGES AND DEEDS OF TRUST — Continued

home, given to secure a note for payment of the amount of a contract for the installation of electric heat in the home, was a valid lien to the extent of judgment rendered against plaintiffs for breach of the contract. *Carpenter v. Smith,* 206.

§ 18. Cancellation of Deed of Trust

Where a judgment declared that a deed of trust on plaintiff's home, given to secure a note for payment of the amount of a contract for installation of electric heat, was a valid lien to the extent of a judgment rendered against plaintiffs in favor of defendants for breach of the contract, the deed of trust was properly cancelled when the amount of the judgment was paid, notwithstanding defendants had incurred additional expense in advertising the property for sale prior to the time the judgment was paid. *Carpenter v. Smith,* 206.

§ 26. Notice of Sale

In absence of a valid contract to do so, there is no requirement that a creditor give personal notice of foreclosure sale to a debtor who is in default or to his heirs or the representative of his estate. *Hodges v. Wellons,* 152.

§ 40. Suits to Set Aside Foreclosure

Allegations that mortgagee had been assigned all rents and income from mortgaged property as further security for the indebtedness and that such sum was sufficient to cover the monthly payments due on the indebtedness plus a reasonable compensation for collecting the rent held insufficient to state a cause of action to set aside foreclosure sale of the mortgaged property. *Hodges v. Wellons,* 152. Gross inadequacy of purchase price at a foreclosure sale, when coupled with any other inequitable element, will induce the court to interpose and do justice between the parties. *Ibid.*

MUNICIPAL CORPORATIONS

§ 24. Power to Levy Assessments for Public Improvements

The Legislature has the power to determine what property is and what property is not benefited by local improvements, and such legislative declaration is conclusive in the absence of arbitrary action. *R. R. Co. v. City of Raleigh,* 305.

Statute exempting railroad right-of-way property on which there is no building from assessment for local improvements is constitutional, and it prevents the City of Raleigh from imposing assessments for street paving upon abutting railroad right-of-way property. *Ibid.*

§ 29. Nature and Extent of Municipal Police Power

Declaration of a state of emergency and imposition of a curfew by the mayor of a municipality did not violate defendant's First Amendment rights. *S. v. Dobbins,* 452.

§ 37. Regulations Relating to Health

City ordinance making it unlawful to keep within the city a dog which habitually chases or barks at pedestrians and vehicles is constitutional. *Gray v. Clark,* 319.

MUNICIPAL CORPORATIONS — Continued

§ 39. License Taxes

Service station operator who rents space for operation of sandwich, open cup soft drink and cigarette vending machines owned by vending company is not engaged in business of retailing such products and is exempt from municipal privilege license taxes imposed for retailing such products. *Partin v. Raleigh,* 269.

NARCOTICS

§ 4. Sufficiency of Evidence

Variance between indictments charging defendant with sale of marijuana on July 11 and heroin on July 8 and evidence that the marijuana was sold on July 8 and the heroin on July 11 held not fatal. *S. v. Knight,* 62.

NEGLIGENCE

§ 5.1. Business Places; Duties to Invitees

Plaintiff's evidence that she and her five-year-old son were shopping in defendant's clothing store and that the son was injured when he fell through the plate glass door was insufficient to withstand defendant's motion for a directed verdict. *Cagle v. Robert Hall Clothes,* 243. Evidence that plaintiff customer slipped and fell on oily substance on floor of defendant's supermarket was insufficient to be submitted to the jury on issue of defendant's negligence, where there was no evidence that defendant knew or should have known of the dangerous condition or that it was created by defendant's own negligence. *Hull v. Winn-Dixie Greenville,* 234.

The doctrine of *res ipsa loquitur* does not apply in an action by a supermarket customer to recover for a fall on an oily substance on the supermarket floor. *Ibid.*

A store proprietor owes to his business invitees the duty to keep in reasonably safe condition the areas of the store where customers are expected to go so as not unnecessarily to expose customers to danger, and to warn of unsafe conditions of which the proprietor was charged with knowledge. *Redding v. Woolworth Co.,* 406.

Plaintiff invitee who was injured in defendant's store when she was forced to jerk her head violently to one side to escape a flying object made out a prima facie case of defendant's actionable negligence. *Ibid.*

§ 13. Contributory Negligence

Defendant's plea of contributory negligence raises an affirmative defense. *Smith v. Burleson,* 611.

§ 29. Sufficiency of Evidence of Negligence

In an action by a 17-year-old plaintiff for injuries sustained when the tractor he was driving at defendant's request overturned when he attempted to tow another tractor belonging to defendant, there is ample evidence to support jury finding that defendant's negligence in hooking the tow chain to the rear axle rather than to a towbar proximately caused plaintiff's injuries; the evidence is insufficient to establish plaintiff's contributory negligence. *May v. Mitchell,* 298.

NEGLIGENCE — Continued

§ 30. Nonsuit

In determining whether the trial court may properly direct a verdict in favor of the plaintiff on the issue of negligence, the applicable test is one of looking at all of the evidence, and if no other reasonable conclusion is possible then a directed verdict would be proper even though such verdict be in favor of the litigant having the burden of proof.

§ 31. Res Ipsa Loquitur

Failure of the trial court in a malpractice action to instruct the jury on the doctrine of *res ipsa loquitur* was not erroneous where plaintiff made no request for such instruction. *Smith v. Foust,* 264.

§ 38. Instructions on Contributory Negligence

An inadvertent instruction that plaintiff driver had the burden of proof to show her contributory negligence was cured when the trial judge in other portions of the charge correctly placed the burden of proof on defendant. *Wrenn v. Waters,* 39.

§ 53. Duties and Liabilities to Invitees

A store proprietor owes to his business invitees the duty to keep in reasonably safe condition the areas of the store where customers are expected to go so as not unnecessarily to expose customers to danger, and to warn of unsafe conditions of which the proprietor was charged with knowledge. *Redding v. Woolworth Co.,* 406.

§ 57. Sufficiency of Evidence in Actions by Invitees

Plaintiff's evidence that she and her five-year-old son were shopping in defendant's clothing store and that the son was injured when he fell through the plate glass door was insufficient to withstand defendant's motion for a directed verdict. *Cagle v. Robert Hall Clothes,* 243.

Evidence that plaintiff customer slipped and fell on oily substance on floor of defendant's supermarket was insufficient to be submitted to the jury on issue of defendant's negligence. *Hull v. Winn-Dixie Greenville,* 234.

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Plaintiff invitee who was injured in defendant's store when she was forced to jerk her head violently to one side to escape a flying object made out a *prima facie* case of defendant's actionable negligence. *Redding v. Woolworth Co.,* 406.

§ 59. Duties and Liabilities to Licensees

Trial court properly allowed defendants' motion for summary judgment in action to recover for injuries allegedly sustained when plaintiff slipped on a throw rug in defendants' home and fell. *Pridgen v. Hughes,* 635.

PARENT AND CHILD

§ 9. Prosecution for Nonsupport

In revoking a suspended sentence imposed in nonsupport prosecution, the trial court was required to make specific findings of fact that defend-

PLEADINGS — Continued

court did not err in refusing to enter default judgment for plaintiff on ground that demurrer by defendants was frivolous and interposed for purpose of delay. *Enterprises, Inc. v. Stevens,* 228.

§ 25. Demurrer for Misjoinder of Parties and Causes of Action

Where complaint alleged an obligation by the individual defendants and the assumption of this obligation by the corporate defendant, trial court erred in sustaining the demurrer because of misjoinder of causes and parties. *Fixture Co. v. Flowers and Monroe,* 262.

§ 26. Demurrer for Failure of Complaint to State a Cause of Action

Order sustaining demurrer to original complaint under former statute could not be *res judicata* when considering question of sufficiency of amended complaint under new Rules of Civil Procedure. *Hoover v. Hoover,* 310.

The trial court did not err in considering demurrers filed prior to the effective date of the new Rules of Civil Procedure as motions under Rule 12(b)(6). *Hodges v. Wellons,* 152.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

In milling company's action to recover purchase price of corn sold to a grain hauling firm, the milling company's evidence was insufficient to raise an inference that the hauling firm purchased the corn as the agent of an official of the company. *Milling Co. v. Sutton,* 181.

In an action on a promissory note, testimony by plaintiff's president was admissible to show that he was acting as agent of an equipment finance company. *Tractor & Implement Co. v. Lee,* 524.

PROCESS

§ 7. Personal Service on Resident Individuals

Purported service of process on N. C. resident defendant who was outside the State was void where there was no allegation that defendant departed from the State with intent to defraud his creditors or to avoid service of summons. *Robbins v. Bowman,* 416.

§ 14. Service on Foreign Corporation by Service on Secretary of State

Where a Delaware corporation and an Alabama bank entered into a contract whereby the bank agreed to use funds owing from the corporation to the bank's customers for the purpose of liquidating the customer's debts to its N. C. creditors, the contract was "to be performed in this State" within the meaning of service of process statute; consequently the bank was amenable to the jurisdiction of the courts of this State and such jurisdiction did not violate the due process clause of the Federal Constitution. *Koppers Co., Inc. v. Chemical Corp.,* 118.

PROSTITUTION

§ 2. Prosecution

Defendant's motion to quash on the ground that the warrant charging her with prostitution was altered by striking out the name of the person allegedly solicited and inserting the name of another person directly thereunder, held properly denied. *S. v. Bethea,* 544. Evidence of defendant's guilt of prostitution was sufficient to go to the jury; evidence concerning various statements and activities of a Negro man who was soliciting on behalf of defendant was properly admitted. *Ibid.*

QUIETING TITLE

§ 2. Actions to Remove Cloud From Title

In an action to remove cloud from title to real property, the trial judge erred when, upon consideration of plaintiffs' evidence alone and without permitting the defendants to introduce any evidence, he took the case from the jury and rendered judgment for the plaintiffs, who bore the burden of proof. *Lane v. Faust,* 427.

RAILROADS

§ 2. Maintenance of Overpasses

In an action for injuries received by passenger of automobile which struck a concrete column supporting a railroad overpass being constructed by defendant, plaintiff's amended complaint was sufficient under the new Rules of Civil Procedure. *Hoover v. Hoover,* 310.

§ 5. Crossing Accident

Trial court in railroad crossing accident case properly excluded witness' guess as to how far away he could see the railroad tracks at night. *Jernigan v. R. R.,* 186.

§ 7. Injuries to Passengers in Automobiles

In an action arising out of a railroad crossing accident, the trial court acted within its discretionary power in setting aside an award of $100,000 for plaintiff's personal injuries and in ordering a new trial solely on the issue of damages. *Jernigan v. R. R. Co.,* 186.

RAPE

§ 6. Instructions

Trial court did not express an opinion by use of the words "assault" and "rape" in referring to the charges against defendants. *S. v. Blalock,* 94.

§ 18. Prosecutions for Assault With Intent to Commit Rape

In prosecution for assault with intent to commit rape, trial court did not err in failing to submit to the jury the lesser included offense of assault on a female. *S. v. Barber,* 210.

REFERENCE

§ 11. Preservation of Right to Jury Trial

A compulsory reference does not deprive a party of the right to trial by jury. *Development Co. v. Phillips,* 158.

RIOT AND INCITING TO RIOT

§ 1. Nature and Elements of the Offense

Defendant's constitutional rights were not violated in this prosecution for unlawful possession of a dangerous weapon in an area in which a declared state of emergency existed. *S. v. Dobbins,* 452.

ROBBERY

§ 2. Indictment

Ownership of property taken need not be laid in any particular person to allege and prove crime of armed robbery. *S. v. McGilvery,* 15.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient for jury on issue of defendant's guilt of aiding and abetting in armed robbery of Highway Patrolman. *S. v. Elliott,* 1. There was no fatal variance between indictment charging property was taken from "residence" or "place of business" of named person and evidence that armed robbery occurred at a finance company where person named in indictment was employed. *S. v. McGilvery,* 15. In a prosecution for armed robbery and larceny of an automobile, State's evidence was sufficient to go to the jury. *S. v. Wall,* 22.

In a prosecution charging defendant with armed robbery of a patrolman, the State's evidence was sufficient to establish that the acts of violence against the patrolman and the taking of his car and pistol constituted one continuing transaction amounting to armed robbery. *S. v. Reaves,* 315.

§ 5. Instructions and Submission of Lesser Degrees of Crime

In an armed robbery prosecution, instructions on the lesser included degrees of the crime are not required when there is no evidence of such lesser crimes. *S. v. Reaves,* 315.

Trial court did not lead jury to believe that it must return verdict of guilty of armed robbery upon finding that force used was sufficient to create an apprehension of danger or to induce the victim to surrender his property. *S. v. Lyles,* 448. Evidence in armed robbery prosecution did not warrant an instruction on common law robbery. *S. v. Hatcher,* 352. In armed robbery prosecution, it was not prejudicial error for the court to inform jury that armed robbery carries a greater punishment than common law robbery. *S. v. Hill,* 410.

§ 6. Verdict and Sentence

A defendant who was convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction where both offenses arose out of the same occurrence. *S. v. Hatcher,* 352.

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

The Rules apply to an action tried subsequent to 1 January 1970. *Gragg v. Burns,* 240.

RULES OF CIVIL PROCEDURE — Continued

§ 8. General Rules of Pleadings

Order sustaining demurrer to original complaint under former statute could not be *res judicata* when considering question of sufficiency of amended complaint under new Rules of Civil Procedure. *Hoover v. Hoover*, 310.

One of the objectives of enactment of Rule 8(a)(1) was to eliminate discussion as to whether a particular allegation states an "ultimate" fact or an "evidentiary" fact or conclusion of law. *Ibid.*

§ 12. Motions for Judgment on the Pleadings

The trial court did not err in considering demurrers filed prior to the effective date of the new Rules of Civil Procedure as motions under Rule 12(b)(6). *Hodges v. Wellons*, 152.

A motion under Rule 12(b)(6) performs substantially the same function as a demurrer for failure to state facts sufficient to constitute a cause of action. *Ibid.*

A motion for judgment on the pleadings admits for the purpose of the motion the allegations of the adverse party and requires that such allegations be liberally construed. *Fishel and Taylor v. Church*, 224.

Judgment may not be entered on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. *Ibid.*

The Court of Appeals will not entertain an appeal from an order denying defendant's motion to dismiss plaintiff's complaint for failure to state a cause of action. *Green v. Best*, 599.

§ 15. Amended and Supplemental Pleadings

Trial court did not errr in denying defendant's motion to amend her answer and counterclaim to indicate clearly that her counterclaim was based on breach of contract. *Gifts, Inc. v. Duncan*, 653.

§ 26. Depositions

Trial court's error in denying plaintiff's attorney permission to read to the jury two depositions that were admissible under Rule 26 was not prejudicial. *Insurance Co. v. Foard*, 630.

§ 41. Dismissal of Actions

Where judgment of involuntary dismissal in a trial before a jury was improperly entered under Rule 41(b), which is applicable only in a trial by the court without a jury, the Court of Appeals treated the judgment of dismissal as having been entered pursuant to Rule 50. *Pergerson v. Williams*, 512.

§ 50. Motion for Directed Verdict and for Judgment Notwithstanding Verdict

Rule for determining motion for directed verdict on ground of contributory negligence. *Pompey v. Hyder*, 30. Defendant's motion for judgment of nonsuit at the close of plaintiff's evidence and at the close of all the evidence was treated as a motion for a directed verdict under Rule 50. *Wheeler v. Denton*, 167. Consideration of evidence on motion for judgment n.o.v. *Horton v. Insurance Co.*, 140.

RULES OF CIVIL PROCEDURE — Continued

Appellant who failed to state "specific grounds" in his motion for directed verdict was not entitled on appeal to question the insufficiency of the evidence to support the verdict. *Wheeler v. Denton,* 167; *Turner v. Turner,* 336; *Pergerson v. Williams,* 512.

Where defendants failed to renew their motion for a directed verdict following plaintiffs' additional evidence, the Court of Appeals will not pass upon the sufficiency of the evidence to survive a motion for a directed verdict. *Gragg v. Burns,* 240.

On motion for a directed verdict, the court must determine the sufficiency of plaintiff's evidence upon the same principles applicable in determining the sufficiency of the evidence to withstand motion for nonsuit under the former statute. *Anderson v. Mann,* 397; *Pergerson v. Williams,* 512.

Motion for judgment notwithstanding the verdict is not a proper procedure in a criminal action. *S. v. Brown,* 534. Litigant's motion for directed verdict which was made after the jury had returned its verdict in the case came too late to preserve its right to move for judgment notwithstanding the verdict; therefore, litigant's motion for judgment n.o.v. was properly denied. *Glen Forest Corp. v. Bensch,* 587.

Ordinarily, it is not permissible to direct a verdict in favor of a litigant having the burden of proof. *Smith v. Burleson,* 611.

Where defendant in an automobile accident case established his own negligence, the trial court properly entered a directed verdict in favor of plaintiff. *Ibid.*

§ 51. Instructions to Jury

The trial judge must declare and explain the law arising on the evidence as to all the substantial features of the case. *Link v. Link,* 135; *Turner v. Turner,* 336.

§ 52. Findings By the Court

Where the parties waived jury trial and stipulated that the court can answer specific issues as to negligence and damages, the Rule requiring that the findings of fact be stated separately from the conclusions of law is held satisfied when the court's conclusions of law are contained in the answers to the issues. *Jackson v. Collins,* 548.

§ 53. Referees

A compulsory reference does not deprive a party of the right to trial by jury. *Development Co. v. Phillips,* 158.

§ 55. Default Judgment

In an action against the debtor and guarantors under a factoring agreement, it was proper for the trial court to set aside a default judgment that was entered against one of the individual guarantors and to order the action to proceed to trial on pleadings filed by the parties; however, it was not proper for the trial court to permit the non-answering guarantor to file answer or other defensive pleadings. *Rawleigh, Moses & Co. v. Furniture,* 640.

RULES OF CIVIL PROCEDURE — Continued

§ 56. Summary Judgment

Summary judgment procedure is available to both plaintiff and defendant and may be used in negligence cases. *Pridgen v. Hughes*, 635. The burden is upon the party moving for summary judgment to establish the lack of a triable issue. *Ibid.* Trial court properly allowed defendants' motion for summary judgment in action to recover for injuries allegedly sustained when plaintiff slipped on a throw rug in defendants' home and fell, where adverse examination of plaintiff tendered by defendants as a deposition in support of their motion shows that defendants would be entitled to a directed verdict at trial, and defendants offered no evidence in opposition to the adverse examination. *Ibid.*

The unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion for summary judgment by allowable evidentiary matter showing the facts to be contrary to those alleged in the pleadings. *Ibid.*

Unlike the demurrer, a motion for summary judgment allows the court to consider matters outside the complaint for the purpose of ascertaining whether a genuine issue of fact does exist. *Motyka v. Nappier*, 579.

§ 59. New Trials; Amendment of Judgments

Trial court did not err in conditionally granting defendants' motion for new trial on issue of damages for loss of contents of building by fire on ground that amount awarded by jury was excessive and appeared to have been given under the influence of passion and prejudice. *Horton v. Insurance Co.*, 140.

Trial court has discretionary power to set aside award of damages if it believes the damages were excessive and given under the influence of passion or prejudice. *Samons v. Meymandi*, 490. Trial court was not required to specify the grounds for its order allowing a litigant's motion to set aside the verdict and grant a new trial. *Glen Forest Corp. v. Bensch*, 587.

§ 60. Relief from Judgment or Order

Defendant's affidavit was insufficient to support order of the trial court setting aside a default judgment against defendant on the ground of excusable neglect. *Rawleigh, Moses & Co. v. Furniture*, 640.

SALES

§ 17. Directed Verdict in Counterclaim for Breach of Warranty

Trial court erred in directing a verdict in favor of plaintiff on defendant's counterclaim for damages resulting from plaintiff's breach of warranty on 765 radios. *Gifts, Inc. v. Duncan*, 653.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

A police officer had probable cause to arrest defendant without a warrant for felonious housebreaking and felonious larceny where the officer followed footprints from a house that has been broken and entered to a place where stolen items were concealed and later observed defendant go

SEARCHES AND SEIZURES — Continued

directly to that place, and the officer's search of defendant was legal. *S. v. Harris,* 649. A second search of defendant without a warrant after he had been arrested and taken to jail was lawfully conducted as incident to defendant's arrest. *S. v. Jones,* 661.

If an arrest without a warrant is to support an incidental search, the arrest must be made with probable cause. *S. v. Harris,* 649.

STATUTES

§ 5. General Rules of Construction

A special or local act must yield to a later general act where there is a manifest legislative intent that the general act shall be of universal application. *R. R. Co. v. Raleigh,* 305.

SUNDAYS AND HOLIDAYS

Clerk of court properly extended time to file complaint to 2 September 1969 where the statutory 20-day limitation for extension of time would have fallen on Labor Day, 1 September 1969. *Robbins v. Bowman,* 416.

TAXATION

§ 6. Necessary Expenses and Necessity for Vote

In taxpayers' action alleging certain irregularities by the county in the purchase of land on which to locate a proposed government center consisting of a courthouse and jail, there was no merit to the taxpayers' contention that the purchase of the land was not a necessary expense under the Constitution and that the county commissioners exceeded their authority when they purchased these tracts without first having the purchase approved by the voters, since the tracts in question were purchased from funds already on hand in the form of surpluses in the capital improvement fund. *Davis v. Iredell County,* 381.

§ 14. License and Franchise Taxes

Service station operator who rents space for operation of sandwich, open cup soft drink and cigarette vending machines owned by vending company is not engaged in business of retailing such products and is exempt from municipal privilege license taxes imposed for retailing such products. *Partin v. Raleigh,* 269.

§ 19. Exemption from Taxation

Statute exempting railroad right-of-way property on which there is no building from assessment for local improvements is constitutional, and it prevents the City of Raleigh from imposing assessments for street paving upon abutting railroad right-of-way property. *R. R. v. Raleigh,* 305.

§ 29. Income Tax on Corporations

There was no continuity of business enterprise where corporation surviving a merger was transformed from a manufacturer of poultry feeds into a combined manufacturing and feeding operation, and the surviving corporation was not entitled to deduct the pre-merger losses of the sub-

TAXATION — Continued

merged corporations from the post-merger corporate income. *Poultry Industries v. Clayton,* 345. In determining whether there is a continuity of business enterprise after a merger, it makes no difference that there was a vertical type merger rather than a horizontal type merger. *Ibid.*

TENANTS IN COMMON

§ 3. Mutual Rights and Liabilities

Where jury determined that defendants were entitled to contribution from plaintiffs for mortgage payments made on property owned by them as cotenants, trial court did not err in entering judgment which allowed defendants to recover interest from dates of payments made on the mortgage. *Watson v. Carr,* 217. Tenants in common are entitled to an accounting from cotenant in possession, not for reasonable rental value of the property, but for rents and profits actually received from the land. *Ibid.*

TORTS

§ 7. Release from Liability

Where a passenger injured in an automobile accident settled with one tort-feasor for $3,750, the other tort-feasor, who went to trial, was entitled to have judgment of $10,000 rendered against him reduced by $3,750, but he was not entitled to have judgment reduced to $3,750. *Wheeler v. Denton,* 167.

The mere showing that there has been a settlement between an injured party and a tort-feasor is insufficient to show that there has been a lack of good faith in the settlement. *Ibid.*

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence

In action by a restaurant to recover damages for the wrongful cutting of trees that were growing on a strip of land included within a Highway Department right-of-way, the restaurant's evidence was sufficient to establish that it had lawful possession of the 20-foot strip under color of title for more than seven years. *Saddle Club v. Gibson,* 565.

TRIAL

§ 34. Statement of Contentions

It is not required that the statement of each party's contentions be of equal length. *Wheeler v. Denton,* 167.

§ 36. Expression of Opinion on Evidence in Instructions

Where trial court inadvertently expressed its opinion in stating the contentions of the parties, the cause must be remanded for a new trial. *Voorhees v. Guthrie,* 266.

§ 48. Power of Court to Set Aside Verdict

The action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion. *Jernigan v. R. R. Co.,* 186.

TRIAL — Continued

§ 51. Setting aside Verdict as Contrary to Weight of Evidence

Denial of motion to set aside verdict as contrary to weight of evidence is not reviewable on appeal absent showing of abuse of discretion. *Hoffman v. Brown*, 36; *Smith v. Foust*, 264; *Brixey v. Cameron*, 339.

§ 52. Setting Aside Verdict for Excessive or Inadequate Award

In an action arising out of a railroad crossing accident, the trial court acted within its discretionary power in setting aside an award of $100,000 for plaintiff's personal injuries and in ordering a new trial solely on the issue of damages. *Jernigan v. R. R. Co.*, 186.

§ 56. Waiver of Jury Trial

Defendant was denied constitutional right to a jury trial where action was transferred from superior court to district court without notification to defendant, and district court subsequently denied defendant's demand for a jury trial. *Thermo-Industries v. Construction Co.*, 55.

TRUSTS

§ 4. Modification of Charitable Trust

Where a trial court finds it is impossible or impracticable to administer a charitable trust in the manner directed by the settlor, the trial court has plenary authority to order that the trust be administered as nearly as possible thereto so as to fulfill the general charitable intention of the settlor. *Trust Co. v. Morgan*, 460. Court of Appeals considered the appeal by trustees of a charitable trust although there were no parties aggrieved in the legal sense. *Ibid.* In a trustee's action to modify a charitable trust which provided for direct payment of trust income to hospitals of the State for the benefit of charity patients, there was insufficient evidence to support the trial court's findings that needy patients are being so adequately cared for by governmental and social programs that direct payment by the trust is impossible or impracticable. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 15. Warranties

Trial court erred in directing a verdict in favor of plaintiff on defendant's conterclaim for damages resulting from plaintiff's breach of warranty on 765 radios. *Gifts, Inc. v. Duncan*, 653.

UTILITIES COMMISSION

§ 1. Nature and Functions of Commission

The Utilities Commission did not abuse its discretion in denying a motion to review its original order where the motion was filed almost three months after the time for filing exceptions and giving notice of appeal had expired. *Utilities Comm. v. Services Unlimited, Inc.*, 590.

§ 9. Appeal and Review

The Court of Appeals is without jurisdiction to review an original order of the Utilities Commission where no appeal has been taken from the

WILLS — Continued

§ 41. Rule Against Perpetuities

Gas pipeline easement agreement which gives gas company right to lay additional pipelines across grantor's land does not violate the rule against perpetuities. *Feldman v. Gas Pipe Line Corp.*, 162.

§ 43. "Heirs" and "Children"

Plaintiff seeking construction of a will which devised a contingent interest in land to her father and "his heirs, if any, otherwise to the next of kin who may be living at his death" is entitled to take a one-half undivided interest in the land; plaintiff is estopped to deny the validity of her father's conveyance of his interest in 1939. *Jernigan v. Lee*, 583. The words "issue or heirs by him begotten" and "heirs of her body living at her death" are construed to mean "children." *Ibid.* The words "next of kin" are construed to mean heirs generally. *Ibid.*

§ 52. Residuary Clauses

A residuary clause should be construed so as to prevent an intestacy as to any part of testator's estate. *Lesane v. Chandler*, 33.

§ 53. Whether Devisee Take in Common or in Severalty

Where no basis for a division of the land is stated in the will, as between tenants in common it is presumed that the parties will share equally. *Jernigan v. Lee*, 582.

A devise to a named person and his children creates a potential tenancy in common. *Ibid.*

§ 55. Whether Gift is Confined to Personalty or to Realty

The word "estate" in ordinary usage embraces a testator's entire property. *Lesane v. Chandler*, 33. The word "bequeath" includes both personalty and realty. *Ibid.* The words *"personal estate"* as used in the residuary clause of a will are sufficient to pass testators' real estate to his second wife. *Ibid.*

§ 73. Actions to Construe Wills

Court's findings and conclusions in a declaratory judgment action to construe a will adequately ascertained the intent of testator and the declaratory judgment is affirmed. *Kale v. Forrest*, 82.

WITNESSES

§ 10. Attendance of Witnesses

Trial court did not err in denial of defendants' motion for order directing county or state to pay expenses for two out-of-state witnesses where testimony of the witnesses in previous trials for the same offense was admissible and available for use in present trial. *S. v. Preston*, 71.

WORD AND PHRASE INDEX