NORTH CAROLINA COURT OF APPEALS REPORTS

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[1] Deceased 10 September 1976.
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[1] Retired 30 September 1976.
[2] Appointed Chief Judge 1 October 1976.
[3] Appointed 1 October 1976.
[4] Appointed Chief Judge 19 August 1976.
[5] Resigned 6 July 1976.
[6] Appointed 24 September 1976.
[7] Deceased 25 July 1976.
[8] Appointed 10 September 1976.

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State v. Norman	29 N.C. App. 606	Denied, 290 N.C. 665
State v. Oldfield	29 N.C. App. 131	Denied, 290 N.C. 96
State v. Paiva	29 N.C. App. 186	Denied, 290 N.C. 311
State v. Raines	29 N.C. App. 303	Denied, 290 N.C. 311
State v. Reives	29 N.C. App. 11	Denied, 289 N.C. 728
State v. Russ	29 N.C. App. 186	Denied, 290 N.C. 781
State v. Scott	29 N.C. App. 617	Denied, 290 N.C. 666
State v. Sculley	29 N.C. App. 422	Denied, 290 N.C. 554
State v. Sharratt	29 N.C. App. 199	Denied, 290 N.C. 554
State v. Staley	28 N.C. App. 730	Allowed, 290 N.C. 554
State v. Stapleton	29 N.C. App. 363	Appeal Dismissed 290 N.C. 554
State v. Williams	29 N.C. App. 24	Denied, 289 N.C. 728
State v. Williams	29 N.C. App. 408	Allowed, 290 N.C. 554
Suburban Trust Co. v. Edwards	29 N.C. App. 422	Denied, 290 N.C. 666 Appeal Dismissed
Swaim v. Vestal	29 N.C. App. 186	Denied, 290 N.C. 311
Sweeten v. King	29 N.C. App. 672	Denied, 290 N.C. 667
Tent Co. v. Winston-Salem	29 N.C. App. 297	Denied, 290 N.C. 667
Travis v. McLaughlin	29 N.C. App. 389	Denied, 290 N.C. 555

Case	*Reported*	*Disposition in Supreme Court*
Utilities Comm. v. Edmisten, Atty. General	29 N.C. App. 428	Appeal Dismissal Denied, 290 N.C. 667
Weyerhaeuser Co. v. Supply Co.	29 N.C. App. 235	Allowed, 290 N.C. 555
Whetsell v. Jernigan	29 N.C. App. 136	Allowed, 290 N.C. 97
Williams v. Williams	29 N.C. App. 509	Denied, 290 N.C. 667
Williamson v. Wallace	29 N.C. App. 370	Denied, 290 N.C. 555
Wilson v. Turner	29 N.C. App. 101	Denied, 290 N.C. 311
Wyche v. Wyche	29 N.C. App. 685	Denied, 290 N.C. 668
Yow v. Nance	29 N.C. App. 419	Denied, 290 N.C. 312

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Case	*Reported*	*Disposition on Appeal*
Brock v. Property Tax Comm.	29 N.C. App. 324	290 N.C. 731
Comr. of Insurance v. Rating Bureau	29 N.C. App. 237	Pending
Crumpton v. Crumpton	28 N.C. App. 358	290 N.C. 651
Farmer v. Chaney	29 N.C. App. 544	Pending
Henry v. Henry	29 N.C. App. 174	Pending
Nantz v. Employment Security Comm.	28 N.C. App. 626	290 N.C. 473
Rickenbaker v. Rickenbaker	28 N.C. App. 644	290 N.C. 373
State v. Asbury	29 N.C. App. 291	Pending
State v. Atwood	27 N.C. App. 445	290 N.C. 266
State v. Finney	29 N.C. App. 378	290 N.C. 751
State v. Gainey	29 N.C. App. 653	Pending
State v. McKenzie	29 N.C. App. 524	Pending
State v. Sauls	29 N.C. App. 457	Pending
Utilities Comm. v. Edmisten, Atty. General	29 N.C. App. 258	Pending
Watkins v. City of Wilmington	28 N.C. App. 553	290 N.C. 276

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

REDEVELOPMENT COMMISSION OF THE CITY OF GREENVILLE v. LUCY K. HANNAFORD; MARTHA K. BURROUGHS; WHITE STORES, INC.; THE CITY OF GREENVILLE; THE COUNTY OF PITT

No. 753SC844

(Filed 17 March 1976)

Estoppel § 4— acceptance of benefits — quasi estoppel

Where a husband and wife owned land as tenants by the entirety, a consent judgment in an alimony action required the husband to convey the land to the wife for life with remainder in the children of the parties, and the husband executed such a deed, but the deed was not signed by the wife and was thus not legally effective to convey the remainder interest to the children, the wife, by her acceptance of the benefits of the consent decree over a period of thirty-five years, was estopped to deny that the remainder was vested in the children, and a daughter who claimed the property as residuary devisee under the wife's will was likewise estopped.

APPEAL by Respondent, Martha K. Burroughs, from *Rouse, Judge.* Judgment entered 27 August 1975, in Superior Court, PITT County. Heard in the Court of Appeals 12 February 1976.

It was stipulated in pretrial conference that J. F. King and wife Cornelia King became the owners of a lot on Dickerson Avenue in Greenville as tenants by the entirety; that in 1930 Cornelia King filed an action in Pitt County wherein she sought alimony without divorce from J. F. King; that on 11

September 1930, a consent decree was entered in Superior Court granting alimony and requiring Mr. King to convey the real property to Mrs. King for life with remainder to the three children born of their marriage. On 18 September 1930, J. F. King executed a deed for the lot to Mrs. King, but Mrs. King did not sign the deed. Mr. King died in 1943.

In 1938 William King, son of J. F. and Cornelia King, conveyed his one-third remainder interest in the property to his sisters, the respondents, Lucy K. Hannaford and Martha K. Burroughs. Mrs. King died testate on 10 August 1965, and no mention of the real property in question was made in her will. She left the residuary estate to Martha K. Burroughs and also appointed her executrix. In filing the ninety-day inventory, inheritance tax return and final accounting, no real property assets of the estate were included.

In 1966, the respondent sisters, together with their husbands, leased the property in question to White's Stores, Inc., and since then each has received half the monthly rent paid by White's, and each has paid income tax on the rent received. Each one has also paid one-half of the ad valorem taxes on the property.

Petitioner brought this action to condemn the property in question. Martha K. Burroughs, residuary beneficiary under the will of Cornelia King, in her answer alleged that she was sole owner of the property. Lucy K. Hannaford answered alleging that she and her sister each owned an undivided one-half interest in the lot. From the judgment holding that each had a one-half undivided interest in the property, Martha K. Burroughs appeals.

Gaylord, Singleton & McNally by Phillip R. Dixon and L. W. Gaylord, Jr., for respondent appellant Martha K. Burroughs.

Frank M. Wooten, Jr., for respondent appellee, Lucy K. Hannaford.

CLARK, Judge.

The deed for the entirety property was executed by the husband subsequent to and pursuant to the consent decree entered in the Superior Court of Pitt County. A consent judgment is the contract between the parties entered upon the records

with the approval and sanction of the court. *Bland v. Bland,* 21 N.C. App. 192, 203 S.E. 2d 639 (1974); 5 Strong, N. C. Index 2d, Judgments, § 8, p. 19. It is construed as any other contract. *Mullen v. Sawyer,* 277 N.C. 623, 178 S.E. 2d 425 (1971).

Under the terms of the consent decree Mrs. King received the right to the usufruct of the entirety property, a right which enures to the husband only in tenancy by the entirety. *Strange v. Sink,* 27 N.C. App. 113, 218 S.E. 2d 196 (1975). She relinquished her right of suvivorship, agreeing that upon the termination of her life estate the remainder would vest in the three children born of her marriage with J. F. King.

Mrs. King lived for thirty-five years after the consent decree was entered and the deed for the entirety property was executed. She claimed no right of survivorship in the entirety property when her husband died in 1943, and made no disposition of the property by will upon her death in 1965. After her death her two children, the respondents Lucy K. Hannaford and Martha K. Burroughs who had acquired the remainder interest of the third child, for a period of ten years shared equally the rents and profits, which each reported as income to taxing authorities, and each paid one-half of the ad valorem taxes assessed against the property.

Lucy K. Hannaford contends that her sister Martha K. Burroughs is estopped to claim sole ownership of the property. The doctrine of estoppel by conduct, or "estoppel *in pais*—rests upon principles of equity [and] . . . is designed to aid the law in administration of justice when without its aid injustice would result, [and is based on] the theory . . . that it would be against principles of equity and good conscience to permit a party against whom estoppel is asserted to avail himself of what . . . otherwise [might] be his undisputed legal rights." *Hawkins v. M & J Finance Corp.,* 238 N.C. 174, 177, 77 S.E. 2d 669, 672 (1953). The essential elements of "equitable estoppel" as related to a party claiming estoppel are lack of knowledge and truth as to facts in question, reliance upon conduct of party sought to be estopped, and action based thereon of such character as to change his position prejudicially. *Peek v. Wachovia Bank & Trust Company,* 242 N.C. 1, 86 S.E. 2d 745 (1955).

The respondent relies on *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824 (1911) which states that "estoppel arises when any one, by his acts, representations, or admissions . . . induces an-

other to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." The case involved misrepresentation or fraud relied on by another party to his detriment.

The case before us involves a different type of estoppel, usually referred to as "quasi estoppel," which has its basis in acceptance of benefits. 31 C.J.S., Estoppel, § 107. Where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it. 31 C.J.S., *supra*, § 108. *Corbett v. Corbett*, 249 N.C. 585, 107 S.E. 2d 165 (1959); *Advertising, Inc. v. Harper*, 7 N.C. App. 501, 172 S.E. 2d 793 (1970). There is no evidence of misrepresentation, express or implied, by respondent Burroughs, which respondent Hannaford relied on to her prejudice so as to invoke the equitable estoppel doctrine in *Boddie, supra*. But the admitted facts clearly establish that Mrs. King, mother of respondents Burroughs and Hannaford, accepted the benefits of the consent decree (contract) over a period of thirty-five years. Therefore, she was estopped to deny its burdens. Since respondent Burroughs claims the sole ownership of the property through Mrs. King, she is likewise estopped.

We hold that respondents Hannaford and Burroughs were owners of the property in dispute when this proceeding was brought, and the judgment appealed from is

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. RANDALL ZANE MITCHELL AND MARK ALLEN WHITAKER

No. 7516SC708

(Filed 17 March 1976)

1. Narcotics § 4— felonious possession of marijuana — sufficiency of evidence

In a prosecution for felonious possession of marijuana, evidence was sufficient for the jury with respect to the guilt of defendant

Whitaker where the evidence tended to show that a witness observed defendant standing in front of his apartment near a small trailer, defendant was holding plastic cellophane bags in his hands, the witness observed defendant lean over the trailer with his hands inside, defendant left the trailer, the witness then went to the trailer and took therefrom two bags of vegetable material, and the material was subsequently determined to be marijuana.

2. **Criminal Law § 77; Narcotics § 3— incriminating statement made at crime scene — explanation excluded at trial — error**

In a prosecution for felonious possession of marijuana, the trial court committed prejudicial error in excluding testimony of defendant Mitchell which would have explained an incriminating declaration made by him at the crime scene.

Judge CLARK dissenting as to defendant Mitchell.

APPEAL by defendants from *Tillery, Judge.* Judgments entered 5 March 1975 in Superior Court, ROBESON County. Heard in the Court of Appeals 13 January 1976.

Defendants were tried under separate bills of indictment for felonious possession of marijuana and felonious conspiracy to possess marijuana.

The State presented evidence tending to show that on or about 3 February 1974 the defendants and Soochul Kim lived together in an apartment in Robeson County. Rickie Brooks was a teenager who lived in close proximity to the apartment complex. On the date of the alleged offense Brooks observed defendant Whitaker in front of his apartment standing near a small "U-Haul-It" trailer. Whitaker was holding plastic cellophane bags in his hand. Brooks next saw Whitaker leaning over in the trailer with his hands inside.

After Whitaker left, Brooks went to the trailer and looked inside. He saw automobile floor mats on the floor of the trailer and, when he lifted the mats, he found two cellophane bags containing "brownish-yellow vegetable material." Brooks picked up the bags, put them in his pocket and started walking to his house. As he got to the front of the apartment complex defendant Mitchell came up to him. Whitaker started walking with Mitchell towards Brooks but did not come all the way. After Mitchell walked up to Brooks he told Brooks "we have got to have the stuff back." When he made that statement he was looking at Brooks' left pocket from which the two bags of marijuana were protruding. Soochul Kim came up and said, "he's got it."

Brooks' father arrived at this point and instructed him to go home. Brooks then carried the two bags to his home. The two bags were thereafter turned over to a sheriff's deputy, who, upon further examination around the area of the apartment, found another cellophane bag containing a similar kind of vegetable material several feet away from the side of the apartment. It was later determined that the two bags taken by Brooks contained 40.7 grams of marijuana. The bag found by the deputy contained 14.1 grams of marijuana.

At the end of the State's evidence the defendants made motions for judgment as of nonsuit on both charges. The court granted the motions as to the conspiracy charges and denied the motions as to the felonious possession charges.

Defendant Whitaker testified that he was a student at Pembroke State University and shared an apartment with Kim and Mitchell. He had seen Brooks around the area of the apartments before this day in February, and on some prior occasion, the apartment had been entered and several articles had been taken from Kim's room. On 3 February 1974 he was working on his car in front of his apartment but had no cellophane bag, no marijuana and did not go to the trailer that day. The trailer belonged to his father but his brother had left it on the premises of the apartment. After having seen Brooks, the defendants left the apartment to get something to eat. They met Kim and decided to go back to the apartment and see if Brooks had taken anything.

Defendant Mitchell testified that on 3 February 1974 he was also a student at Pembroke State University. His testimony was substantially the same as Whitaker's concerning the events leading up to the defendants' confrontation with Rickie Brooks. He saw Brooks moving away from the apartment and Brooks appeared to have something in his pocket. Mitchell stopped Brooks to talk to him and told Brooks, "We have to have it back." He had seen the trailer parked outside the apartment but had never been inside of it or for that matter even looked inside of it and he had never seen anyone else using it. He denied any knowledge of the presence of marijuana in the trailer or elsewhere. Both defendants were convicted of felonious possession of marijuana and judgments imposing prison sentences were entered. Through their court appointed counsel, defendants appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

John C. B. Regan III, for defendant appellants.

VAUGHN, Judge.

These appeals are subject to dismissal for failure to docket within the time allowed. We have, nevertheless, elected to consider them on their merits.

[1] The evidence is clearly sufficient to permit the jury to find that the drugs Brooks took from the trailer had been placed there by Whitaker. His case was properly submitted to the jury. We have considered Whitaker's remaining assignments of error and find them to be without merit.

[2] In the absence of Mitchell's declaration to Brooks, "We have got to have the stuff back," while looking at the bags of marijuana in Brooks' pocket, the evidence would have been insufficient to take his case to the jury. This statement, however, when coupled with all of the other circumstances made a case for the jury. The jury could infer that Mitchell was referring to the marijuana and that if "We have got to have" the marijuana back, "we" must have had it before.

We hold that the court erred, however, in excluding testimony from Mitchell whereby he attempted to explain what he meant when he told Brooks "We have to have it back." His explanation would have been that items of personal property were missing from the apartment, he suspected Brooks as being the thief, and that it was the stolen property to which he referred and not the marijuana of which he knew nothing. His explanation raised a question of credibility which the jury should have been allowed to resolve.

On defendant Whitaker's appeal—No error.

On defendant Mitchell's appeal—New trial.

Judge MARTIN concurs.

Judge CLARK dissents.

Judge CLARK dissenting as to defendant Mitchell:

Rickie Brooks, age 16, who admitted he had been expelled from school "a bunch of times . . . because of things that hap-

pened at school and things that happened away from school," testified that when defendant Mitchell came up to him and said, "We have got to have the stuff back," he was glancing at his (Brooks') left pocket where the *tips* of the two bags were sticking out.

The majority concedes that the evidence was insufficient to take the case to the jury, but that the declaration coupled with all the other circumstances made a case for the jury. I disagree. I see no other incriminating circumstances, and the declaration is not sufficient evidence of Mitchell's possession of marijuana to submit to the jury. In my opinion the other circumstances tend to show exclusive possession by Whitaker and negate, rather than support, the State's case against Mitchell. The charge against Mitchell should be dismissed.

STATE OF NORTH CAROLINA v. JAMES HAL HENSLEY

No. 7525SC895

(Filed 17 March 1976)

Criminal Law § 53— felonious assault — injuries — expert medical testimony — proper foundation

In a prosecution for felonious assault on a nine-month-old child, the State's evidence tending to show that an assault on the child occurred and that defendant was the assailant provided a proper foundation for a neurosurgeon's testimony pertaining to injuries sustained by the child; furthermore, defendant waived his right to contest the admissibility of such testimony by failing to make a timely objection thereto.

APPEAL by defendant from *Jackson, Judge.* Judgment entered 18 June 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 19 February 1976.

Defendant was indicted for assault with a deadly weapon with intent to kill, inflicting serious injury on a child. From a plea of not guilty, the jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. From judgment sentencing him to a term of imprisonment, defendant appealed.

The State's evidence tended to show that the defendant, on 27 November 1974 at approximately 10:00 a.m., took nine

months old Angela Lee Church into the bathroom of a house trailer and severely beat the child about the head and body with his bare hands.

The child's mother, Mary Katherine Church, who had been living with defendant in the trailer, recalled that the defendant, while intoxicated, carried the then uninjured and unbruised infant into the bathroom on the day in question. Hearing loud slaps and screams coming from the bathroom for approximately five minutes, Mary Katherine went to the bathroom but could not enter, having been knocked back into the living room by the defendant. When the defendant finally emerged, Mary Katherine immediately went into the bathroom and found the child, scratched about the head and neck and " . . . lying on the floor strip naked, soaking wet, and blue around the mouth. Blood was coming out of her mouth." Defendant, shortly thereafter, took the child from the mother, carried her outside and left the child on the grass. Mary Katherine again retrieved the child and this time ran with the child to a neighbor's house. The mother also noted " . . . bruises on her thigh and all the way up on her back. She was red and had handprints on her legs."

That afternoon, Mary Katherine brought the child to Dr. Lester L. Coleman and stated that "[b]etween the time I took Angela to Dr. Coleman's office at 2 o'clock, and the time that she was there in the trailer and I heard her crying, no one was close to her, no one hit her and no one struck her in any way." Moreover, Mary Katherine contended that she herself " . . . never struck my young'un."

On cross-examination, Mary Katherine admitted that she actually never saw the defendant's alleged assault; she only heard it.

Dr. Lester L. Coleman, the initial examining physician, testified that he performed a "routine physical examination" on the child on 27 November 1974 at approximately 2:00 p.m. In addition to finding superficial scratches and a large bruise on the right thigh, the examination also indicated to Dr. Coleman injury to the brain and damaged vision.

Dr. Joe M. McWhorter, a neurosurgeon, also examined the child and elaborated at trial that the child suffered serious injury to the brain, exhibited loss of vision, and specifically sustained " . . . bi-lateral subdural hematoma, or bi-lateral . . .

blood clots on both sides of the brain." Dr. McWhorter, when asked how such an injury could have occurred, testified that " . . . the hematoma . . . could or might have been caused by a blow from a hand. . . . The hematoma could [,however,] have been caused by a fall from a chair; by some other type of instrument like a hair brush; it could have been caused if some drunk had shaken the child hard; it could have been caused by someone shaking the child in displeasure; it could have been caused if the mother had fallen while running and the child's head hit the ground. . . . [I]f the child's head was shaken vigorously enough while being carried by a person running, hematoma could have occurred."

Defendant presented no evidence, but moved for nonsuit, which motion was denied.

Other facts necessary for decision are cited below.

Attorney General Edmisten, by Associate Attorney J. Michael Carpenter, for the State.

John H. McMurray and Robert E. Hodges for defendant appellant.

MORRIS, Judge.

Defendant contends that the trial court erred in overruling his motion to strike Dr. McWhorter's testimony pertaining to the injuries sustained by Angela Lee Church because the State " . . . did not offer any evidence that defendant assaulted the said Angela Lee Church in any manner that did in fact or may have caused such injuries." This contention is without merit.

The child's mother, testifying extensively as to the events of 27 November 1974, stated that prior to the alleged assault by defendant the infant was well, unmarked and unbruised. After hearing loud slaps, crying screams coming from the bathroom where defendant alone was closeted with the child she found her child naked, bruised, scratched and bleeding from about the mouth. There is sufficient evidence that this assault in fact occurred, that defendant was the assailant, and the State therefore provided a proper foundation for the physician's testimony.

Notwithstanding our finding that a proper foundation was laid, defendant has waived his right to contest the admissibility of this evidence for failure to make a timely objection thereto.

No objection appears in the record. As our Supreme Court stated in *State v. Hunt,* 223 N.C. 173, 176, 25 S.E. 2d 598 (1943), " . . . if it be conceded that the testimony offered is incompetent, objection thereto should have been interposed to the question at the time it was asked as well as to the answer when given. An objection to testimony not taken in apt time is waived. . . . Afterward, a motion to strike out the testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal." See also: *State v. Pope,* 287 N.C. 505, 215 S.E. 2d 139 (1975); *State v. Davis* and *State v. Fish,* 284 N.C. 701, 202 S.E. 2d 770 (1974); cert. denied 419 U.S. 857. Here no such abuse of discretion appears in the record.

Defendant's remaining assignments of error are addressed to the sufficiency of evidence to withstand the motion for nonsuit and to various aspects of the charge to the jury. The evidence was plenary for submission to the jury and the charge of the court is free of prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. TYRONE JAMES REIVES

No. 7511SC854

(Filed 17 March 1976)

1. **Assault and Battery § 14— assault with deadly weapon — sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill where such evidence tended to show that defendant became involved in an altercation in a "joint," defendant pulled a pistol and pointed it at his victim's chest, defendant pulled the trigger but the gun did not fire, defendant thereafter pointed his gun at another man and shot him, and the man subsequently died.

2. **Homicide § 28— accident or misadventure — jury instructions proper**

In a prosecution for voluntary manslaughter the trial court's instructions on accident and misadventure were proper, and it was not error for the court to fail to define the word "accident."

State v. Reives

APPEAL by defendant from *Hall, Judge.* Judgment entered 18 June 1975 in Superior Court, LEE County. Heard in the Court of Appeals 13 February 1976.

Defendant was charged in separate indictments with the murder of Holden Ross, Jr., and with assaulting Clarence Fox, Jr., with a deadly weapon with intent to kill. The State proceeded on a charge of voluntary manslaughter in the murder indictment.

The State's evidence tends to show that Holden Ross, Jr., and his brothers-in-law, James Martin and Clarence Fox, Jr., went to a "joint" known as the Radar Club in Lee County after midnight on 1 March 1975. There was a confrontation between Ross and Reives; Fox went to them and pushed Ross back in an effort to stop the fight. Defendant pulled out a .38 caliber revolver, pointed it at Fox's chest and pulled the trigger, but the gun did not fire. Ross grabbed defendant who "slung" Ross to the floor, and while Ross was sitting on the floor, defendant shot him in the neck and then fled. Ross died soon thereafter.

The defendant's evidence tended to show that Reives was backed into a corner by Ross, Martin and Fox; defendant pulled out his gun; while struggling with Ross the gun fired. Defendant testified he did not intentionally pull the trigger and did not point it at Fox.

Defendant was found guilty of voluntary manslaughter in 75CR1304 and guilty of assault with a deadly weapon in 75CR1305. From judgment of imprisonment, defendant appeals.

Attorney General Edmisten by Associate Attorney Jesse Brake for the State.

J. W. Hoyle for defendant appellant.

CLARK, Judge.

[1] Defendant's motion for judgment of nonsuit on the charge of assault with a deadly weapon with intent to kill was properly overruled. There was sufficient evidence to support the verdict of guilty of assault with a deadly weapon with intent to kill. A pistol is a deadly weapon *per se. State v. Powell,* 238 N.C. 527, 78 S.E. 2d 248 (1953). An unexplained misfiring of a loaded pistol does not change its deadly character. If the pistol used is a deadly weapon and is pointed at the person of another,

then such pointing is an assault with a deadly weapon. G.S. 14-34; *State v. Currie,* 7 N.C. App. 439, 173 S.E. 2d 49 (1970). The altercation, the shooting and resulting death of Ross soon after defendant pointed the pistol at Fox's chest and pulled the trigger, and other circumstances are sufficient evidence of intent to kill. "An intent to kill 'may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.'" *State v. Cauley,* 244 N.C. 701, 708, 94 S.E. 2d 915, 921 (1956). See 1 Strong, N. C. Index 2d, Assault and Battery, § 5, p. 298.

[2] Defendant contends that his evidence discloses the defense of accidental shooting to the homicide charge, but that the court did not instruct the jury as to the legal principles of accident and misadventure. It appears from the record that the trial court instructed the jury that defendant contended that the shooting was accidental in that he did not pull the trigger and that the State must prove beyond a reasonable doubt an intentional shooting. Further, the court charged as follows: "Now, where death is the result of an accident or misadventure there is no criminal liability. Where it appears that the killing was unintentional, that the defendant acted with no wrongful purpose and that it was not the result of culpable negligence then the homicide would be excused."

We find these instructions properly apply the defense of accident, and that it is not error if the court does not define the word "accident." We find most definitions of "accident" serve only to confuse, if not mislead. See 1 C.J.S., Accident, p. 425, n. 20. The word has a commonly known meaning, and it is generally understood that an act could not be both "intentional" and "accidental." In *State v. Williams,* 235 N.C. 752, 71 S.E. 2d 138 (1952), it was held that where the court charged that the State must prove an intentional shooting, together with a statement of defendant's contentions that he did not intentionally kill, the instructions on accidental death were sufficient in the absence of a request for specific instructions. Though *Williams, supra,* has not been overruled, it is certainly desirable that the trial court, as it did in the case before us, further apply the legal principles by instructing that accident was a defense to the crime of murder or voluntary manslaughter. See *State v. Wingler,* 238 N.C. 485, 78 S.E. 2d 303 (1953), and *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969).

We have carefully examined all other assignments of error, and we find that defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

MARY HELEN NEWSOM SIMPSON AND HUSBAND, DARYL SIMPSON, PETITIONERS v. NICHOLAS CARROLL SIMPSON, JULIAN EDWARD SIMPSON, A MINOR APPEARING HEREIN BY HIS DULY APPOINTED GUARDIAN AD LITEM, BOBBY G. ABRAMS, MARY EMMA SIMPSON AND VIRGINIA ANN SIMPSON, MINORS APPEARING HEREIN BY THEIR DULY APPOINTED GUARDIAN AD LITEM, WALTER L. HINSON, THE ELON HOME FOR CHILDREN, INC., THE MISSION BOARD OF THE SOUTHERN CONVENTION OF CONGREGATIONAL CHRISTIAN CHURCHES, INC., ELON COLLEGE, AND ALL UNBORN AND UNASCERTAINED CHILDREN OR ISSUE OF MARY ELLEN NEWSOM SIMPSON, APPEARING HEREIN BY THEIR DULY APPOINTED GUARDIAN AD LITEM, JOHN E. CLARK, RESPONDENTS

No. 757SC813

(Filed 17 March 1976)

Wills § 48— devise to daughter's "children" — adopted children

Where testator devised property to his daughter for life "and then to her children if any," adopted children of the daughter are devisees under the will to the same extent as are her natural children absent an indication in the will to exclude adopted children. G.S. 48-23.

APPEAL by respondents Mary Emma Simpson and Virginia Ann Simpson, minors appearing herein by their duly appointed guardian ad litem, Walter L. Hinson from *Peele, Judge.* Judgment entered 28 April 1975 in Superior Court, WILSON County. Heard in the Court of Appeals 10 February 1976.

The present action was instituted by Mary Helen Newsom Simpson who has a vested life estate in certain timberlands to sell the timber thereon pursuant to the provisions of G.S. 41-11. The petitioner Daryl Simpson is the husband of Mary Helen Newsom Simpson. They were married 14 September 1946.

Nicholas Carroll Simpson and Julian Edward Simpson are adopted children of the petitioners. Mary Emma Simpson and

Virginia Ann Simpson are natural born children resulting from the marriage of the petitioners.

L. E. Newsom died testate 5 June 1940 and his will contained, among other provisions, the following:

> "Third, I give, devise and bequeath to my adopted daughter Mary Helen Newsom the remaining half of my real and personal estate; also all of my real and personal estate, after taking out the devises and legacies mentioned in former items, for her support and comfort during her natural life L. E. Newsom and then to her children if any, to have and to hold in fee simple.
>
> "Fourth, my will and desire is that if my adopted daughter, Mary Helen Newsom should die without issue (children) then and in that event, I give, devise and bequeath in fee simple, my remaining real and personal estate as follows: One Fourth to the endowment fund of Elon College, and the remaining one-half to the Home Mission Board of the Christian Church founded by James O. Kelley. Said half to be used to the best advantage in propagating the Gospel of Jesus Christ and establishing Christian Churches in the territory between Clayton and Selma on the West and Lucama, Wilson and Rocky Mount, N. C. on the East."

Mary Helen Newsom Simpson is one and the same person as Mary Helen Newsom referred to in the will of the late L. E. Newsom.

The guardian ad litem for Mary Emma Simpson and Virginia Ann Simpson filed a response to the petition denying that the adopted children of Mary Helen Newsom Simpson had an interest in and to the proceeds arising from the sale of said timber.

The court held inter alia that "[u]nder the Will of L. E. Newsom, Nicholas Carroll Simpson and Julian Edward Simpson, the adopted children of the petitioners, are devisees under the Will of the late L. E. Newsom and are entitled to share equally with the natural-born children of the petitioners, Mary Emma Simpson and Virginia Ann Simpson."

From the entry and signing of the judgment, the minor respondents, Mary Emma Simpson and Virginia Ann Simpson,

excepted and gave notice of appeal to this Court through their guardian ad litem.

Parker, Miles & Hinson, by Walter L. Hinson, Guardian Ad Litem for Mary Emma Simpson and Virginia Ann Simpson, repondent appellants.

Narron, Holdford, Babb and Harrison, by R. W. Harrison, Jr., Guardian Ad Litem for Julian Edward Simpson, respondent appellee.

MARTIN, Judge.

The sole question presented by this appeal is whether the court erred in concluding as a matter of law that adopted children of the petitioners, Nicholas Carroll Simpson and Julian Edward Simpson, are devisees under the will of L. E. Newsom fully and to the same extent as are the natural-born children, Mary Emma Simpson and Virginia Ann Simpson.

G.S. 48-23 provides, in pertinent part:

"The following legal effects shall result from the entry of every final order of adoption:

(1) The final order forthwith shall establish the relationship of parent and child between the petitioners and child, and from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes relating to intestate succession. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth.

* * *

(3) From and after the entry of the final order of adoption, the words 'child,' 'grandchild,' 'heir,' 'issue,' 'descendent,' or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms

thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section."

The express provisions of paragraph (3) of the statute state that in a will the word "child" shall be construed to include any adopted person unless the contrary plainly appears by the terms of the will itself. This rule of construction shall apply whether the will was executed before or after the final order of adoption and whether the will was executed before or after the enactment of the statute. *Peele v. Finch,* 284 N.C. 375, 200 S.E. 2d 635 (1973); *Stoney v. MacDougall,* 28 N.C. App. 178, 220 S.E. 2d 368 (1975).

We find nothing in the devise made by the will of L. E. Newsom to indicate an intention to exclude adopted children.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CLAYTON ALLEN MARTIN ALIAS MANUEL CLAY

No. 7519SC835

(Filed 17 March 1976)

1. **Robbery § 4; Indictment and Warrant § 17— robbery of grocery store — indictment naming employee — instructions as to another employee — no fatal variance**

In an armed robbery prosecution wherein the indictment referred only to the armed robbery of a grocery store stock clerk, defendant was not prejudiced by the court's instruction that defendant would be guilty if the jury found defendant robbed the stock clerk or a female store employee where the evidence showed that defendant robbed various employees of the grocery store of company monies and did not rob the female employee of any of her personal property, since there was but a single criminal transaction and defendant is in no danger of a subsequent prosecution for the armed robbery of the female employee.

2. **Robbery § 5— armed robbery — failure to submit common law robbery**

The trial court in an armed robbery prosecution did not err in failing to charge on the lesser included offense of common law robbery.

3. **Criminal Law § 66— in-court identification — failure to hold voir dire at time of objection — subsequent hearing**

Defendant was not prejudiced when the trial court permitted a witness to identify defendant prior to conducting a *voir dire* examination after defendant interposed an objection where the court allowed a subsequent *voir dire* examination and determined that the identification was admissible.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 29 April 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 12 February 1976.

Defendant was indicted for the 19 May 1973 armed robbery of Clyde Adams, Jr., head stock clerk of a Kannapolis Big Star Food Store. From a plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing him to a term of imprisonment, defendant appealed.

Other facts necessary to decision are cited below.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, for the State.

Robert M. Critz for defendant appellant.

MORRIS, Judge.

[1] Defendant, noting that the bill of indictment only referred to the alleged armed robbery of Clyde Adams, Jr., contends that the trial court erred in charging the jury that defendant would be accountable for the crime charged if they, inter alia, found beyond a reasonable doubt that defendant robbed "Mr. Adams or Mrs. Plott." Defendant argues that this variance " . . . is an inaccurate and misleading mandate on armed robbery." We disagree. This variance, if any, works no prejudice to the defendant and raises no constitutional claim of potential double jeopardy.

In *State v. Harris,* 8 N.C. App. 653, 657, 175 S.E. 2d 334 (1970), our Court stated that " '[t]he purpose of the rule as to variance is to avoid surprise and to protect the accused

from another prosecution for the same offense. . . . ' " (Citation omitted.) Here the evidence indicates that defendant, by the use or threatened use of a firearm, robbed various Big Star employees of company monies and did not rob Mrs. Plott of any of her personal property. Therefore, we have before us but one, single criminal transaction and the defendant is in no danger of a subsequent prosecution for the armed robbery of Mrs. Plott. This variance, therefore, worked no prejudice to defendant, and the charge did not confuse the jurors as to the charge for which defendant was being tried; namely, armed robbery of a food store's cash receipts. See: *State v. Potter,* 285 N.C. 238, 204 S.E. 2d 649 (1974); *State v. Ballard,* 280 N.C. 479, 186 S.E. 2d 372 (1972); *State v. Holland,* 20 N.C. App. 235, 201 S.E. 2d 85 (1973), cert. denied 284 N.C. 619 (1974). Cf: *State v. Johnson,* 23 N.C. App. 52, 208 S.E. 2d 206 (1974), cert. denied 286 N.C. 339 (1974).

[2] Defendant next maintains that the trial court erred in failing to charge on the lesser included offense of common law robbery. We find no merit in this contention. Here all the evidence supports the instruction on armed robbery, and there is no evidence that defendant engaged in an offense tantamount to common law robbery. "If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence *relating to the elements* of the crime charged an instruction on common law robbery is not required." *State v. Lee,* 282 N.C. 566, 569-570, 193 S.E. 2d 705 (1973); *State v. Segarra,* 26 N.C. App. 399, 216 S.E. 2d 399 (1975), cert. denied 288 N.C. 395 (1975).

[3] Defendant also contends that the trial court erred in permitting witness Mike Stevens to identify the defendant prior to conducting a voir dire examination as to the admissibility of the witness's in-court identification after defendant interposed an objection. We overrule this contention. The trial court did allow a subsequent voir dire examination and determined that the identification was admissible. Moreover, Mike Stevens's identification of defendant merely corroborated previous in-court identifications offered by several other witnesses. While it would have been better procedure for the court to have conducted a voir dire upon defendant's first objection, we nevertheless deem it to be harmless in view of the total circumstances of this case.

We have considered defendant's other contentions and find them also to be without merit.

No error.

Judges VAUGHN and CLARK concur.

JEAN G. GILL v. ROBERT T. GILL

No. 7510DC807

(Filed 17 March 1976)

Divorce and Alimony § 19— decrease in alimony — change of circumstances — insufficiency of evidence

The trial court erred in reducing the amount of alimony to be paid by the defendant to plaintiff based on a change of circumstances, since neither party presented evidence as to the circumstances of the parties on which the original alimony award was based, and it therefore could not be determined if there had been a change in those circumstances.

APPEAL by plaintiff from *Barnette, Judge.* Order entered 25 June 1975 in District Court, WAKE County. Heard in the Court of Appeals 9 February 1976.

On 25 February 1970, a judgment by confession was entered directing the defendant to pay plaintiff alimony in the sum of $225 per month on or before the first day of each month. The judgment mandated that defendant's alimony payments continue until the remarriage of the plaintiff.

On 23 May 1975, both parties moved for a change in the amount of alimony. At the hearing on the motion, plaintiff's evidence tended to show that the defendant made his alimony payments until April 1973 when he stopped payments. In August 1973 the defendant was adjudged to be in contempt of court for failing to make his alimony payments, and the court ordered him to pay the plaintiff $1,125 in back alimony.

Since the parties separated, the plaintiff sold the family home in Raleigh and moved into an apartment in Alexandria, Virginia. The plaintiff's monthly income is $825 and her "take-home" pay is $656.86 per month. Plaintiff testified that her monthly expenses were $876 per month.

Defendant testified that he had remarried and currently lives in Florida with his wife and child by his second wife, and an adopted child. Defendant purchased a four bedroom house in Florida and a small motorboat. He recently inherited an estate worth approximately $80,000 in cash and real estate, and he earns just over $19,000 per year with expenses of $1,577.43 per month.

At the conclusion of the evidence the court held that there had been a substantial change in the circumstances of the parties justifying a decrease in alimony. The court reduced the defendant's alimony payments to $135 per month.

From the order reducing plaintiff's alimony, she appealed to this court.

Tharrington, Smith and Hargrove, by J. Harold Tharrington, for plaintiff appellant.

Gulley and Green, by Jack P. Gulley, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in reducing the amount of alimony to be paid by the defendant to plaintiff based on a change of circumstances. We agree.

G.S. 50-16.9(a) provides as follows: "An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, 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."

The party moving for modification of an award of alimony has the burden of showing a change of circumstances. *McDowell v. McDowell,* 13 N.C. App. 643, 186 S.E. 2d 621 (1972). In the present case neither party presented evidence, nor is there any finding, as to the circumstances of the parties on which the original award of alimony was based, except the amount which defendant was required to pay. Defendant's evidence does not establish the original circumstances that existed; therefore it cannot be determined if there has been a change in those circumstances.

Since defendant failed to meet the burden of showing a change in circumstances the order appealed from is in error and is vacated.

Vacated.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. FREDDIE LEE SELLERS

No. 7526SC908

(Filed 17 March 1976)

Criminal Law § 126— verdict returned — doubt expressed by juror — further deliberation by jury

The trial court in a felonious assault prosecution did not err in instructing the jury to deliberate further when one juror, after the verdict was first returned and the jury was being polled, stated that at that time he had some doubt about defendant's mental capacity, and the court properly accepted the verdict after the jury had deliberated further.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 24 July 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 February 1976.

By indictment proper in form defendant was charged with an assault with a deadly weapon with intent to kill inflicting serious injury, Joan Williams being named as the victim of the assault. Defendant pled not guilty by reason of insanity.

Evidence presented by the State tended to show: Defendant and Joan Williams lived together for approximately eight years and had a child. As a result of defendant's belief that the child was not his and that Joan was trying to harm him, they separated in January of 1974. On 13 April 1974, while they were together, looking at a house that was for sale, defendant told Joan that he was going to kill her and proceeded to stab her some twenty-seven times with a screwdriver.

Defendant presented medical evidence tending to show that he was suffering from unreasonable fears that certain people, particularly Joan, were trying to harm him.

The jury returned a verdict finding defendant guilty as charged and from judgment imposing prison sentence, he appealed.

Attorney General Edmisten, by Senior Deputy Attorney General R. Bruce White, Jr., for the State.

Lindsey, Schrimsher, Erwin & Bernhardt, by Lawrence W. Hewitt, for defendant appellant.

BRITT, Judge.

Defendant argues only one assignment of error. He contends that the court erred when it instructed the jury to deliberate further when one juror, after the verdict was first returned and the jury was being polled, stated that at that time he had some doubt about defendant's mental capacity. We find no merit in the assignment.

The record reveals that after the jury received the case and deliberated for some period of time, they returned to the courtroom and the foreman announced that they had reached a verdict finding defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant's counsel then asked that the jury be polled. When polled, each juror except juror No. 1 confirmed the verdict. As to juror No. 1, he first confirmed the verdict but when asked "Is it now your verdict?" replied that "I was in doubt about his mental capacity" and stated that he still had doubt. Thereupon, without further instructions, the trial judge instructed the jury " . . . to retire and see how you find the issues and the verdict."

Following further deliberation, the jury returned to the courtroom and the foreman announced that they had agreed upon a verdict finding defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. At the request of defense counsel, the jury was polled again and all jurors answered all questions in the affirmative. The court accepted the verdict and proceeded to pass judgment.

Defendant argues that when the juror stated that he had doubt about defendant's mental capacity, that constituted a vote of not guilty by that juror and precluded the court from ordering the jury to deliberate further. We reject this argument. In our opinion the statement by the juror indicated that the jury

was not unanimous in its verdict and the trial judge properly directed the jury to return to their room and resume deliberations.

While we are unable to find any case that directly supports our holding, we think an analogous situation was presented in *State v. Yoes, et al.*, 271 N.C. 616, 157 S.E. 2d 386 (1967). In that case when the jury announced it had reached a verdict, the foreman stated that as to the defendant Davis, the jury found him guilty as charged in the bill of indictment. The indictment charged rape. Before any verdict was announced as to the other defendants, counsel for Davis asked that the jury be polled. Upon the polling, the third juror stated that such was his verdict as to Davis but he recommended mercy. Thereupon, the court sent the jury back to their room for further deliberation with instructions to go back and make up their verdict, stating "[a] verdict must be a unanimous verdict." After further deliberation the jury returned to the courtroom and rendered a verdict of guilty of rape. The Supreme Court held that the action of the trial judge in returning the jury to its room for further deliberation and the returning of a unanimous verdict was not error.

We hold that defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. MOSES WILLIAMS

No. 7514SC861

(Filed 17 March 1976)

Assault and Battery § 15— felonious assault — instructions on serious injury

The trial court in a felonious asault prosecution did not err in instructing the jury that a serious injury "is any physical injury that causes great pain and suffering."

APPEAL by defendant from *McLelland, Judge.* Judgment entered 13 May 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 February 1976.

Defendant was tried on a bill of indictment charging him with assault with a deadly weapon with intent to kill inflicting serious injury to which he pled not guilty. The evidence tended to show:

On the night in question, defendant and the alleged victim, William J. Wilson, Jr., were at a social club in Durham. A few words were exchanged between the two after which defendant pulled a large pistol, pointed it at Wilson, and fired. The bullet grazed Wilson's eyebrow, inflicting a gash which bled considerably, and the impact knocked Wilson to the floor unconscious. He was carried to a hospital emergency room where he was treated and remained for some seven hours; thereafter, he was referred to an eye clinic where metal fragments were removed from his eyeball. Wilson returned to the clinic on numerous occasions for further treatment and was out of work for two and one-half weeks.

The jury returned a verdict finding defendant guilty of assault with a deadly weapon inflicting serious injury. From judgment imposing prison sentence of not less than three, nor more than seven years, he appealed.

Attorney General Edmisten, by Associate Attorney Claudette Hardaway, for the State.

Kenneth B. Spaulding for defendant appellant.

BRITT, Judge.

Defendant's two assignments of error relate to the court's instructions to the jury. In his first assignment, he contends that the court erred in defining serious injury as follows: "A serious injury is any physical injury that causes great pain and suffering."

We note that the challenged instruction is the same as that recommended by the *N. C. Pattern Jury Instructions for Criminal Cases* and that *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626 (1964), and *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1 (1962), are cited as authority for these instructions. While our study of the opinions in *Ferguson* and *Jones* leads us to conclude that the instruction does not find explicit support in either of those cases, it finds implicit support in them.

In *Jones,* we find: " . . . The term 'inflicts serious injury' means physical or bodily injury resulting from an assault with

a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case." 258 N.C. at 91, 128 S.E. 2d at 3 (1962).

The reference to "with intent to kill" in the quoted statement must be considered in the context of the statute as written at that time. The felony now codified as G.S. 14-32(b) was created by Chapter 602 of the 1969 Session Laws and we think "serious injury" under G.S. 14-32(b) would be the same as under G.S. 14-32(a). Therefore, when the statement quoted from *Jones* is scrutinized, it says that serious injury is "physical or bodily injury," that the injury must be *serious* but fall short of death, and that "[f]urther definition seems neither wise nor desirable."

In *State v. Marshall,* 5 N.C. App. 476, 168 S.E. 2d 487 (1969), this court found no error in the following instruction on serious injury: "Fourth, inflicting serious injury. As to this, members of the jury, this means physical or bodily injury and this I feel needs no further definition. . . ."

We feel that the instruction challenged here imposes a greater degree of injury than that required by *Jones* and that approved in *Marshall;* therefore, we hold the trial court did not err in giving the instruction.

We have considered defendant's other assignment of error but find it too to be without merit.

No error.

Judges HEDRICK and MARTIN concur.

FRANKLIN DALE MANESS v. HUBERT DEE INGRAM AND BARNEY LEE BREWER

No. 7519SC845

(Filed 17 March 1976)

1. **Witnesses § 6— cross-examination — statement given to insurance adjuster**

The trial court did not err in permitting defense counsel to cross-examine a witness about a statement he had given to an insurance

adjuster after instructing the parties and attorneys not to disclose to the jury that the statement had been obtained by an insurance adjuster.

2. **Automobiles § 83— pedestrian — contributory negligence in crossing highway**

In a pedestrian's action to recover for injuries received when he was struck by defendants' car, the issue of contributory negligence was properly submitted to the jury where there was evidence that plaintiff was crossing the roadway at an unmarked crossing in the path of an oncoming car which had the right-of-way. G.S. 20-174(a).

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 1 May 1975 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 12 February 1976.

In this action plaintiff seeks to recover for personal injuries sustained when he was struck by an automobile which he alleges belonged to defendant Brewer and was being negligently operated by defendant Ingram. Defendants denied any negligence on the part of Ingram and alleged that plaintiff's injuries resulted from his own negligence.

Plaintiff offered evidence tending to show: At about 3:45 a.m. on 21 March 1971 several cars were stopped on the shoulders of U. S. Highway 220 between Biscoe and Candor in Montgomery County. Two cars, including one that had run out of gas, were on the west side of the highway and a third car was stopped on the east side of the highway. Plaintiff and Willis Lee Auman were talking with some people in the car on the east side and decided to walk across the highway. They looked for oncoming traffic and saw a car approaching from the north about 500 feet away. Auman stated that they had sufficient time to cross ahead of the oncoming car and proceeded to walk across the highway with plaintiff following about one step behind him. As Auman reached the west shoulder, the oncoming car, owned and operated by defendants and traveling at about 65 m.p.h., struck plaintiff, inflicting serious injuries.

Defendants offered no evidence and issues of negligence, contributory negligence, and damage were submitted to the jury. The jury answered the first two issues in the affirmative and from judgment dismissing the action, plaintiff appealed.

Ottway Burton and Millicent Gibson for plaintiff appellant.

Miller, Beck, O'Briant and Glass, by G. E. Miller, for defendant appellees.

BRITT, Judge.

[1] In his first assignment of error plaintiff contends the court erred in permitting defense counsel to cross-examine the witness Auman about a statement he had given to an insurance adjuster. The court instructed the parties and the attorneys not to disclose to the jury that the statement had been obtained by an insurance adjuster. Plaintiff argues that this instruction by the court placed him in an unfair position and that the court should have excluded the statement completely. We find no merit in the assignment. In certain cases it is permissible to use a writing otherwise inadmissible for impeachment purposes and we think it was permissible in this instance. *Perkins v. Clarke,* 241 N.C. 24, 84 S.E. 2d 251 (1954). *See generally* 1 Stansbury, North Carolina Evidence § 46 (1973). Furthermore, it would appear that defendants' use of the statement related primarily to the issue of negligence and since that issue was answered in plaintiff's favor, we perceive no prejudice.

[2] By his second assignment of error, plaintiff contends the court erred in submitting the issue of contributory negligence. This assignment has no merit. Submission of the issue was clearly warranted by the evidence which showed that plaintiff was crossing the roadway at an unmarked crossing in the path of an oncoming car which had the right-of-way. G.S. 20-174(a). In fact, it is hard to distinguish this case from *Price v. Miller,* 271 N.C. 690, 157 S.E. 2d 347 (1967), in which the Supreme Court affirmed an involuntary nonsuit on the ground of contributory negligence as a matter of law. *See also Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607 (1968); *Presnell v. Payne,* 272 N.C. 11, 157 S.E. 2d 601 (1967), and cases therein cited.

We have considered the other assignments of error argued by plaintiff and find them likewise to be without merit.

No error.

Judges HEDRICK and MARTIN concur.

FRED SHERMAN, JR. v. J. D. MYERS AND BETTY T. MYERS

No. 7521SC851

(Filed 17 March 1976)

Rules of Civil Procedure § 60— motion to set aside summary judgment — failure to state rule and grounds

Defendants' motion to set aside summary judgment against them was properly dismissed by the trial court where defendants stated neither the rule upon which they were proceeding nor the specific grounds upon which they sought relief.

APPEAL by defendants from *Seay, Judge.* Order entered 21 July 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 February 1976.

Plaintiff filed complaint seeking to recover on a $15,000 note given to him by defendants. Six months later, defendants answered and denied all material allegations. The answer was prepared by attorney Harrell Powell, Jr. Defendants answered plaintiff's interrogatories admitting that their signatures were on the note, that they had made only one payment, and that demand had been made upon them by plaintiff.

Plaintiff moved for summary judgment which was allowed by the court on 8 November 1974.

On 10 April 1975 defendants, represented by attorney Robert M. Bryant, moved to have the summary judgment set aside. They submitted affidavits to the effect that they had originally employed attorney G. Ray Motsinger to defend them; that Motsinger had been suspended from the practice of law and had turned the case over to attorney Powell without their consent or knowledge; that Powell had not consulted with them before filing the answer; that they had only met Powell when they signed their answers to plaintiff's interrogatories and that they had assumed that he was merely assisting attorney Motsinger; that they had not been notified of the summary judgment; and that they had no knowledge of the summary judgment until sometime in January of 1975. The affidavits also tended to show that defendants had a defense which was not pleaded: the defendants intended to sign the note as corporate officers, not as individuals. Powell's affidavit stated that he had always considered the case to be attorney Motsinger's and that Motsinger had instructed him not to assert all possible defenses against plaintiff.

A hearing was held before Judge Seay on 21 July 1975. From Judge Seay's order denying defendants' motion, defendants appealed.

Badgett, Calaway, Phillips and Davis, by Richard G. Badgett, for plaintiff appellee.

A. Carl Penney, for defendant appellants.

MARTIN, Judge.

Defendants first contend the court erred by failing to consider the merits of the defendants' motion pursuant to Rule 60 and, secondly, that the court erred in failing to make a proper or sufficient finding of fact in its order denying defendants' motion.

Rule 6 of the General Rules of Practice for the Superior Court, Supplemental to the Rules of Civil Procedure, provides in part, "All motions, written or oral, shall state the rule number, or numbers under which the movant is proceeding."

Defendants' motion makes no mention of Rule 60 of the Rules of Civil Procedure nor does it set forth any of the reasons enumerated in the Rule as grounds for relief from the summary judgment. It merely sets forth the defendants' contentions concerning the controversy and the chronology of the occurrences leading up to the entry of the summary judgment and subsequent thereto. It was therefore not procedurally permissible for Judge Seay to entertain the motion. It is apparent that the court did not understand on what theory the defendants were proceeding by the following comment which is a part of the record, to wit:

> "I just never heard of it before. It looks to me if you have a remedy at all it would be to seek certiorari to the Court of Appeals. I would be very reluctant about upsetting Judge Exum's judgment. I wasn't here, didn't hear the case argued before Judge Exum. I don't know what he considered at all."

While it is true that Judge Seay was aware that defendants were attempting to proceed pursuant to Rule 60, he was not required to hear and pass upon the motion which failed to state either the rule upon which they were proceeding or the specific

grounds upon which they sought relief. We therefore treat his denial of the motion as a dismissal and affirm the order.

Affirmed.

Judges BRITT and HEDRICK concur.

JOSEPH SNELL, MAHLON S. MOORE AND DOUGLAS DILDAY v. WASHINGTON COUNTY BOARD OF EDUCATION, T. L. HEDGEBETH, JOE PEELE, HENRY SPRUILL, SIDNEY J. HASSELL AND JAMES C. DAVENPORT

No. 752SC873

(Filed 17 March 1976)

Judgments § 6; Rules of Civil Procedure § 60— amendment of judgment after term and expiration of commission

A superior court judge had no authority after expiration of both the term of court and his commission to amend an order by reversing the order as to court costs and bond forfeiture since any error the court attempted to correct was one of judicial decision and not a clerical error, notwithstanding the amended order denominated the change as a correction of clerical error. G.S. 1A-1, Rule 60(a).

APPEAL by respondents from *Lanier, Judge*. Amended order entered 6 August 1975 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 17 February 1976.

This action was instituted on 21 April 1975, by filing of petition and issuance of temporary restraining order enjoining respondents, Washington County Board of Education and its constituent members, from voting on the hiring or rehiring of a superintendent of public instruction or any of the principals of the schools in the Washington County School System until a hearing on 28 April 1975. At the hearing before Judge Lanier on 28 April 1975, respondents moved to dismiss the petition and also filed an affidavit of Sidney J. Hassell. Judge Lanier "continued prayer for judgment" for 30 days and on 25 June 1975, signed a final order. On 6 August 1975, Judge Lanier, while holding court in Pitt County, signed the amended order without any notice to respondents or their counsel. The original order required the petitioner appellees to pay the court costs and to forfeit their bond. The amended order required a refund

of the bond and payment by respondent appellants of one-half the court costs. The respondents appealed.

Bailey and Cockrell, by Carl L. Bailey, Jr., for respondent appellants.

MARTIN, Judge.

This Court will take judicial notice of the fact that Russell J. Lanier is Resident Judge of the Fourth Judicial District; that Washington County is in the Second Judicial District; and that Judge Lanier's commission to hold court in Washington County expired on 30 June 1975. It will also take judicial notice of the fact that Judge Lanier was, on 6 August 1975, the date of the signing of the amended order, assigned to hold the courts of the Third Judicial District, and in particular the courts of Pitt County.

In *Shaver v. Shaver,* 248 N.C. 113, 102 S.E. 2d 791 (1958), the Court said:

> " . . . [T]he court has inherent power to amend judgments by correcting clerical errors or supplying defects so as to make the record speak the truth. The correction of such errors is not limited to the term of court, but may be done at any time upon motion, or the court may on its own motion make the correction when such defect appears. (Citations omitted.) But this power to correct clerical errors and supply defects or omissions must be distinguished from the power of the court to modify or vacate an existing judgment. And the power to correct clerical errors after the lapse of the term must be exercised with great caution and may not be extended to the correction of judicial errors, so as to make the judgment different from what was actually rendered. (Citations omitted.)"

No error appears on the face of the original order of 25 June 1975. Therefore, the judge had no authority to materially amend, modify or to vacate a final judgment after expiration of both the term of court and his commission.

The 6 August 1975 order, in part, is as follows:

> "Further, pursuant to NCGS 1A-1, Rule 60, it appearing to the court that a clerical mistake was made in the entry and filing of an order dated June 25, 1975, with that order

differing materially from the intent of the court, the following amended order is hereby entered: . . . "

G.S. 1A-1, Rule 60(a) does not alter the situation. The material amendment, modification or vacation of the 25 June 1975 order by the 6 August 1975 order is much more extensive than correction of clerical mistakes such as contemplated by Rule 60(a). The judgment of 25 June 1975 is regular upon its face. The 6 August 1975 amended order completely reverses the prior order as to court costs and bond. Thus, it appears that any error which the court attempted to correct was manifestly one of judicial decision and not a routine clerical error. Such error may not be corrected by denominating it as a clerical error.

Judge Lanier was without authority to materially alter or modify or to vacate the prior judgment. The 6 August 1975 order is vacated.

Reversed and remanded.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. EDWARD STEVE TURNER

No. 7529SC871

(Filed 17 March 1976)

Assault and Battery § 15— assault with deadly weapon — self-defense — burden erroneously placed on defendant

In a prosecution for assault with a deadly weapon with intent to kill, the trial court erred in placing the burden on defendant to prove self-defense.

APPEAL by defendant from *Friday, Judge.* Judgment entered 22 May 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 17 February 1976.

Defendant was tried on a bill of indictment charging him with assault with a deadly weapon with intent to kill inflicting serious injury, L. C. Phillips being the alleged victim. Defendant pled not guilty.

Evidence presented by the State tended to show: On the evening in question, Phillips and Gaither Humphries went to a

poolroom operated at the time by Joel Mode and belonging to Mode's father. Defendant, a friend of Mode's, was also present. Several of the parties engaged in a poker game after which a fight broke out. Mode and defendant inflicted multiple cuts on Phillips and Humphries with knives or other sharp instruments.

Defendant's evidence tended to show: He was in the poolroom with Mode on the evening in question when Phillips and Humphries entered. Phillips, who was drinking at the time, attempted to purchase some whiskey from Mode who told Phillips that he had no whiskey. Thereupon, Phillips removed a bottle of whiskey from his pocket, began drinking, and spilled some on the pool table. Mode asked Phillips and Humphries to leave whereupon Phillips produced a pistol. With the aid of a knife, Mode attempted to defend himself from Phillips and Humphries entered the affray. Defendant attacked Humphries to keep him from hurting Mode and during their scuffle defendant and Humphries fell through a glass window. Defendant denied hurting Phillips and insisted that everything he did was to defend himself and Mode.

The jury found defendant guilty of assault with a deadly weapon inflicting serious bodily injury. From judgment imposing prison sentence, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Donald F. Coats for defendant appellant.

BRITT, Judge.

All of defendant's assignments of error relate to the court's instructions to the jury. One of the challenged instructions reads as follows:

> Now, Members of the Jury, the burden is on the defendant to prove self-defense to the satisfaction of the Jury and to prove he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm.

The court committed error in placing the burden on defendant to prove self-defense. In *State v. Fletcher*, 268 N.C. 140, 142, 150 S.E. 2d 54, 56 (1966), the court, speaking through

Justice (later Chief Justice) Bobbitt, said: " . . . In prosecutions for felonious assault and for assault with a deadly weapon, it is not incumbent on a defendant to satisfy the jury he acted in self-defense. On the contrary, the burden of proof rests on the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim. *S. v. Warren,* 242 N.C. 581, 89 S.E. 2d 109, and cases cited; *S. v. Sandlin,* 251 N.C. 81, 110 S.E. 2d 481; *S. v. Cloer,* 266 N.C. 672, 146 S.E. 2d 815."

Since the question of self-defense was a substantial feature of this case, we are compelled to hold that the erroneous instruction was prejudicial to defendant, entitling him to a new trial.

We find is unnecessary to discuss the other assignments of error.

New trial.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. LEON B. PATE

No. 754SC830

(Filed 17 March 1976)

Automobiles § 129— driving under the influence — failure to instruct on reckless driving — no error

In a prosecution for driving under the influence of intoxicating liquor, second offense, the trial court properly omitted from his charge to the jury instructions with respect to reckless driving, since there was no evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his vehicle immediately prior to his arrest for driving under the influence. G.S. 20-140(c).

APPEAL by defendant from *Winner, Judge.* Judgment entered 24 June 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 13 February 1976.

Defendant was charged by warrant with second offense driving under the influence of intoxicating liquor. Convicted in the District Court, defendant appealed to the Superior Court

where the jury returned a verdict of guilty as charged. From judgment sentencing him to a term of imprisonment, defendant appealed.

Other facts necessary for decision are cited below.

Attorney General Edmisten, by Associate Attorney Noel Lee Allen, for the State.

Edward G. Bailey for defendant appellant.

MORRIS, Judge.

Defendant contends that the trial court erred in failing to instruct the jury that it could return a verdict of the lesser included offense of reckless driving. We disagree.

When the investigating officer, E. D. Ratliff, observed the wreck between defendant's truck and a Cadillac, he immediately investigated the accident scene and noted that he " . . . smelled an odor of alcohol coming from around the truck area . . . [and] noticed that he [i.e. the defendant] had an extreme odor of alcohol on him. As he was trying to give me his license he had to lean up against the side of the truck and he was unable to stand on his own. . . . His eyes were extremely bloodshot. He had a flushed face and his ears were reddish color and he was unsteady on his feet. . . . He couldn't talk plain, he mumbled and stuttered."

The officer further testified that on the date of the arrest he was working on the late shift and recalled seeing the defendant. "He was driving a 1967 Chevrolet van truck. The truck was heading in an easterly direction from Jacksonville towards Camp Lejeune making a left turn onto Western Boulevard. I saw a collision and I ran out there to the vehicles to see if there were any injuries. It looked like the Cadillac swerved out of control. It looked like it could have been a right bad accident so I went out there as fast as I could. It was approximately 150 feet from the restaurant to the intersection. Mr. Pate was under the wheel when I arrived at the scene of the accident. The motor was still running at the time that I got there. There was no one else in the vehicle."

G.S. 20-140(c) provides:

"Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of

intoxicating liquor as directly and visibility affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended."

The record in this case is devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence. Under the circumstances of this case, we think the trial judge correctly omitted from his charge to the jury instructions with respect to reckless driving.

No error.

Judges VAUGHN and CLARK concur.

THE NEWS AND OBSERVER PUBLISHING COMPANY, A CORPORATION, FRANK A. DANIELS, JR., CLAUDE SITTON, LINDA WILLIAMS AND NICK PETERS v. INTERIM BOARD OF EDUCATION FOR WAKE COUNTY, A BODY POLITIC AND CORPORATE, AND F. ROLAND DANIELSON, A. ROY TILLEY, J. C. KNOWLES, SUE N. BYRNE, MARY M. GENTRY, BILLY R. JOHNSON, JAMES E. ATKINS, VERNON MALONE, W. CASPER HOLROYD, JR., CLIFFORNIA WIMBERLY, MELVIN L. FINCH, JR., SAMUEL S. RANZINO, JOHN T. MASSEY, JR., AND H. GILLIAM NICHOLSON, INDIVIDUALLY AND AS MEMBERS OF THE INTERIM BOARD OF EDUCATION FOR WAKE COUNTY

No. 7610SC24

(Filed 7 April 1976)

1. **Municipal Corporations § 6; Schools § 4— open meetings law — exceptions — strict construction — burden of proof**

Exceptions to the N. C. open meetings law, Art. 33B of Ch. 143 of the General Statutes, should be strictly construed, and those seeking to come within the exceptions should have the burden of justifying their action.

2. **Schools § 4— open meetings law — board of education — selection of new member — closed session improper**

Applying a strict construction to G.S. 143-318.3(b) which provides that governing bodies specified in G.S. 143-318.1 should be allowed to hold closed sessions to consider information regarding the appointment, employment, discipline, termination or dismissal of an

employee or officer under the jurisdiction of such body, the Court holds that a member of defendant Board is not an "officer" of the Board within the contemplation of the open meetings law.

3. **Schools § 4— open meetings law — board of education — committee of the whole — closed meeting unjustified**

Though there may be instances in which a board of education would be justified in meeting as a committee of the whole and in closed session to investigate persons under consideration for appointment to the board, a board cannot evade the provisions of statutes requiring its meetings to be open to the public merely by resolving itself into a committee of the whole; the defendant Board in this instance failed to justify its closed session. G.S. 143-318.4(7).

4. **Schools § 4— board of education — filling of vacancy by secret ballot — open meetings law violated**

The trial court properly determined that the defendant Board violated the open meetings law by voting for a person to fill a vacancy by secret ballot.

5. **Schools § 4— open meetings law — board of education — required notice of meetings**

In the absence of statutory provisions for notice, defendant Board should give *reasonable* notice of its meetings, taking into consideration the urgency of the matter necessitating the meeting; though the one-hour notice given by telephone to the office of two newspapers in the instant case was insufficient, the trial court's requirement of 48 hours' notice for all meetings is unreasonably long.

APPEAL by defendants from *Bailey, Judge.* Order entered 31 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 9 March 1976.

In their complaint, filed 19 December 1975, plaintiffs allege, among other things, that on 16 December 1975 defendants, except defendants Ranzino, Massey and Nicholson, held a closed or secret meeting in violation of the provisions of Art. 33B of Chapter 143 of the General Statutes of North Carolina. Plaintiffs asked that they be granted temporary and permanent injunctive relief.

Pursuant to proper notice, the court held a hearing on plaintiffs' motion for a preliminary injunction. Following the hearing, the court entered an order finding facts summarized (except where quoted) in pertinent part as follows (numbering ours):

(1) Plaintiff publishing company is a North Carolina corporation, engaged in publishing two daily newspapers in Raleigh. The other plaintiffs are citizens and residents of Wake

County. Plaintiff Daniels is the president, and plaintiff Sitton is the vice-president and editorial director of plaintiff corporation. Plaintiffs Williams and Peters are employees of plaintiff corporation, reporters for the newspapers published by plaintiff corporation, and were assigned by their employer to attend and report the proceedings of the meeting in question.

(2) Defendant Board of Education (Board) was created pursuant to Chapter 717 of the 1975 Session Laws. The individual defendants are citizens and residents of Wake County and on 16 December 1975 constituted the members of defendant Board, defendant Danielson being the chairman of said Board.

(3) Pursuant to a call by defendant Danielson, a special meeting of the Board was held on Tuesday, 16 December 1975, commencing at 11:00 a.m., in Room 710 of the Wake County Courthouse for the purpose of selecting a person to fill a vacancy on the Board created by the resignation of John T. Kanipe. No written notice of said special meeting was provided members of the Board, nor was any notice provided the public in advance of said meeting other than a message by telephone to the office of the corporate plaintiff at approximately 10:00 a.m. on the day of said meeting.

(4) All of the individual defendants, except defendants Ranzino, Massey and Nicholson, were present and met together at said time and place for the purpose of participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction of the Board.

(5) At the beginning of the meeting, plaintiffs Williams and Peters were present. By a unanimous vote the Board accepted the resignation of Mr. Kanipe after which defendant Holroyd placed in nomination the names of eight persons to fill the vacated position. Thereupon, a motion was made and seconded that the Board hold an executive session to consider the nominations. Plaintiffs Williams and Peters informed the Board that they had been advised that an executive session was not authorized under the North Carolina Open Meetings Law. Following considerable discussion and a short recess, defendant Danielson stated that he had been advised by the attorney for the Board that an executive session, closed to the public and press, could be legally held if the Board named a committee of the Board as a "committee of the whole" to study or investigate the matter. A motion was then made by defendant Knowles

and seconded by defendant Gentry that the Board go into executive session for purpose of considering nominations for the vacancy. At that point defendant Danielson stated in substance: "You understand that I have to officially name the Board as a committee of the whole." The motion passed with defendants Knowles, Gentry, Tilley, Byrne, Johnson, Atkins and Malone voting in the affirmative and defendants Holroyd, Wimberly and Finch voting in the negative. Defendant Danielson proceeded to appoint the members of the Board as a committee of the whole to study and investigate the names recommended. At that point plaintiffs Williams and Peters left the meeting room.

(6) All of the individual defendants, except defendants Ranzino, Massey and Nicholson, remained in session pursuant to the motion for holding an executive or closed session. During that time no person was allowed to be present except said Board members and the secretary of the Board. Plaintiffs Williams and Peters, who are citizens of Wake County, were excluded from the session and the deliberations of the Board.

(7) After an interval of time, the Board concluded the closed session and continued with the meeting, during the remainder of which plaintiffs Williams and Peters were allowed to attend. Plaintiff Peters did not attend the meeting following the closed session. During the resumed meeting following the closed session, defendant Holroyd again presented to the Board the names of the eight persons previously nominated for the vacant position. Thereupon, a motion was made and adopted that the vote be by secret ballot. The individual defendants present marked ballots and handed them to the Board secretary at which time defendant Danielson remarked that he would not vote except in case of a tie. The Board secretary examined the secret ballots and announced that a majority of the votes had been cast for Mrs. Charlotte M. Martin. A motion was then made by defendant Knowles, seconded by defendant Johnson, and unanimously adopted that Mrs. Martin be elected to fill the vacancy on the Board, that her name be submitted to the City Council with the request that she be named to the Raleigh City Board of Education to fill the vacancy created by the resignation of Mr. Kanipe, and that she be officially installed as a member of defendant Board at a meeting to be held on 12 January 1976.

(8) Plaintiffs and other members of the public similarly situated were excluded from and denied access to the aforesaid executive or closed session of the Board by the individual defendants present at said meeting, and they were "denied access to the voting (following the executive session) for a person to fill a vacancy on the defendant Interim Board by reason of the voting by secret ballot."

(9) The legal rights of the individual plaintiffs to attend meetings of defendant Board as provided in Art. 33B of Chapter 143 of the General Statutes of North Carolina are insecure; a real controversy exists between plaintiffs and defendants and the legal rights of plaintiffs to attend meetings of the Board will remain uncertain unless declared by the court; unless the Board and its members are restrained and enjoined from conducting further closed meetings in violation of said Article and Chapter of the General Statutes, pending a trial or hearing of this cause on its merits, plaintiffs and others similarly situated and the public will suffer immediate, pressing and irreparable damage and injury.

The remainder of the order provides as follows:

CONCLUSIONS OF LAW

1. The defendant Interim Board of Education for Wake County is a governmental body politic of the County of Wake, State of North Carolina, with powers and authority conferred upon it by the laws of the State of North Carolina, existing solely to conduct the people's business and the defendant Interim Board has or claims authority to conduct hearings, deliberate and act as a body politic and in the public interest.

2. On the 16th day of December, 1975, the individual defendants herein (except the defendants Samuel S. Ranzino, John T. Massey, Jr., and H. Gilliam Nicholson), constituting a majority of the members of the defendant Interim Board, met, assembled and gathered together, pursuant to a call of the Chairman of the Interim Board, for the purpose of participating in deliberations and voting upon or otherwise transacting the public business within the jurisdiction, real or apparent of the defendant Interim Board, which said meeting was an official meeting of the defendant Interim Board within the meaning and intent of G.S. 143-318.2, at which the individual defendants who

were present, as members of the defendant Interim Board, participated in deliberations and voted upon and otherwise transacted public business within the jurisdiction of the defendant Interim Board.

3. The requirements of G.S. Sec. 143-318.2 that official meetings of governmental boards be open to the public necessarily includes reasonable opportunity for the public to know of the time and place when such meetings will be held and a reasonable opportunity to attend, and necessarily creates a right of the public to be given prior reasonable notice of the time and place of every such meeting; the failure of the defendants to cause a notice to be given to the public of the time and place of the said meeting of the defendant Interim Board held on December 16, 1975, prior to the meeting, was in violation of the provisions of Article 33B of Chapter 143 of the General Statutes of North Carolina.

4. The election by the defendant Interim Board of a person to fill a vacancy on the Interim Board created by the resignation of a member thereof is not the appointment of an employee or officer under the jurisdiction of the defendant Interim Board, for the reason that any such person when elected is a coequal and independent member of the Board and is not subordinate to nor under the jurisdiction of the Interim Board; therefore, the defendant Interim Board was not authorized by the provisions of G.S. Sec. 143-318.3(b) to hold a closed session from which the public was excluded while considering information regarding the appointment or election of a person to fill the vacancy on the defendant Interim Board created by the resignation of John T. Kanipe, who had been a member of the Board.

5. The defendant Interim Board and the individual defendants who were present at the meeting held on December 16, 1975, by purporting to transform the Interim Board into a "Committee of the Whole" and by holding an executive or closed session thereof, from which the public was excluded, violated the provisions of Article 33B of Chapter 143 of the General Statutes, and particularly the letter and the spirit of G.S. Sec. 143-318.1 and Sec. 143-318.2; and the defendant Interim Board by being so designated as a "Committee of the Whole" was not excluded

from the provisions of G.S. Sec. 143-318.2 under the provisions of G.S. Sec. 143-318.4(7); to permit the defendant Interim Board thereby to evade or circumvent the statutory requirements that its meetings be open to the public and that its deliberations and actions be conducted openly by declaring itself to be a "Committee of the Whole" would subvert and defeat the intent and purpose of the statute as set forth in G.S. Sec. 143-318.1 and G.S. Sec. 143-318.2.

6. The executive or closed session held by the defendant Interim Board and its members present on December 16, 1975, was not a session during which the defendants had authority to exclude the public under G.S. Sec. 143-318.3 for the reason that the excutive or closed session was held for a purpose of considering or deliberating upon a subject other than the subjects authorized by G.S. Sec. 143-318.3 to be considered during an executive or closed session; therefore, the holding of the said executive session and the exclusion of the public, including the individual plaintiffs, from such session was in violation of the provisions of Article 33B of Chapter 143 of the General Statutes of North Carolina.

7. The defendant Interim Board and the individual defendants present at the said meeting on December 16, 1975, violated the provisions of Article 33B of Chapter 143 of the General Statutes of North Carolina, by excluding the public, including the individual plaintiffs, from attending a session of the defendant Interim Board held on December 16, 1975, during which the defendant Interim Board and the said individual defendants in attendance deliberated upon and considered matters and otherwise transacted public business of the Board required to be open to the public by the provisions of G.S. Sec. 143-318.2.

8. The said defendants, by taking a vote by secret ballot for the election of a person to fill the vacancy on the Interim Board created by the resignation of John T. Kanipe, effectively deprived the public and the plaintiffs from knowledge of the votes made by the various individual members of the Interim Board, in violation of the provisions of G.S. Sec. 143-318.1 and G.S. Sec. 143-318.2, requiring actions of public boards to be conducted openly and open to the public.

9. The legal rights of the individual plaintiffs to attend meetings of the defendant Interim Board of Education for Wake County, as provided in Article 33B of Chapter 143 of the General Statutes of North Carolina, are insecure; a real controversy exists between the plaintiffs and the defendants, and the legal rights of the plaintiffs to attend meetings of the said Interim Board will remain uncertain unless declared by this Court; unless the defendant Interim Board and its members are restrained and enjoined from conducting further closed meetings in violation of Article 33B of Chapter 143 of the General Statutes of North Carolina, pending a trial or hearing of this cause on its merits, the plaintiffs and others similarly situated and the public will suffer immediate, pressing, and irreparable damage and injury.

10. The plaintiffs Linda Williams and Nick Peters, who were on December 16, 1975, and are citizens of Wake County, were, by action of the defendant Board, specifically denied access to a meeting of the defendant Interim Board required to be open to the public by Article 33B of Chapter 143 of the General Statutes of North Carolina, and, therefore, the said plaintiffs have a right to compel compliance with the provisions of the said Article by injunction or other appropriate relief, as provided by G.S. Sec. 143-318.6.

And the Court further finds and concludes that the facts of this case are not controverted and that there is no just reason for delay in an appeal from this Order, if the defendants are advised that an appeal should be taken.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT, PENDING THE FINAL DETERMINATION OF THIS CAUSE:

1. The defendant Interim Board of Education for Wake County and the individual defendants, as members of the said Board, and their successors in office, be and they are hereby restrained and enjoined from meeting, assembling or gathering together at any time or place of a majority of them for the purpose of conducting hearings, participating in deliberations, voting or otherwise transacting public business of the said Interim Board, except in conformity with the provisions of Chapter 143, Article 33B of the General Statutes.

2. The defendant Interim Board of Education shall cause a notice to be given to the public of every official meeting of the Interim Board, at least forty-eight (48) hours in advance of each such meeting, by posting on the outside of the door to the principal office of the Interim Board a written notice stating the time and place of such meeting.

3. The defendant Interim Board of Education for Wake County and the individual defendants, as members thereof, and their successors in office, be and they are hereby restrained and enjoined from voting by secret ballot on any matter required by statute to be open to the public; PROVIDED, HOWEVER, that the defendant Interim Board and its members are hereby expressly authorized to vote by written ballot on any such matter, but after every such vote, the ballots showing how each member of the Interim Board voted shall be open to inspection by any person.

4. The defendant Interim Board of Education be and it is hereby restrained and enjoined from designating itself as a Committee of the Whole under G.S. Sec. 143-318.4(7) and meeting in closed session as such to study, research and investigate nominees to fill a vacancy on said Board.

5. The defendant Interim Board of Education be and it is hereby restrained and enjoined from meeting in closed session to consider information regarding the appointment or election by the Board of a person to fill a vacancy on said Board.

IT IS FURTHER ORDERED that this preliminary injunction shall be effective upon the deposit by the plaintiffs into the Office of the Clerk of Superior Court of Wake County of the sum of $200.00 as security or such damage as the defendants may sustain by reason of this preliminary injunction if the Court decides upon final hearing that the defendants were wrongfully restrained.

Defendants appealed, assigning error.

Lassiter and Walker, by William C. Lassiter, for the plaintiff appellees.

Robert L. Farmer for defendant appellants.

Wade H. Hargrove, Amicus Curiae.

SCOPE OF REVIEW

BRITT, Judge.

The record recites that defendant appellants' sole exception "is the rendering and signing of the Order" by Judge Bailey dated 31 December 1975. That being true, appellate review is limited to the question of whether error of law appears on the face of the record. While this permits us to review the conclusions of law and to determine if the facts found or admitted support the order, it does not present for review the findings of fact or the sufficiency of the evidence to support them. 1 Strong, N. C. Index 2d, Appeal and Error § 26, and cases therein cited. Therefore, defendants' contentions that certain findings of fact are not supported by the evidence will not be considered.

PERTINENT STATUTORY PROVISIONS

This action involves an interpretation of portions of the North Carolina Open Meetings Law enacted by the 1971 General Assembly. Ch. 638, 1971 Session Laws, codified as Art. 33B of Ch. 143 of the General Statutes.

G.S. 143-318.1 provides as follows:

> "Public policy.—Whereas the commissions, committees, boards, councils and other governing and governmental bodies which administer the legislative and executive functions of this State and its political subdivisions exist solely to conduct the peoples' business, it is the public policy of this State that the hearings, deliberations and actions of said bodies be conducted openly."

G.S. 143-318.2 requires in substance that all official meetings of the governing and governmental bodies of the State and its political subdivisions, including all county, city and municipal committees and boards which have or claim authority to conduct hearings, deliberate or act as bodies politic and in the public interest, shall be open to the public.

G.S. 143-318.3 sets forth those instances in which the bodies coming within the ambit of the law may hold executive sessions and exclude the public from their deliberations. G.S. 143-318.4 specifies certain agencies or groups that are excluded from the provisions of G.S. 143-318.2.

BOARD MEMBER NOT AN "OFFICER" OF BOARD

Defendants contend first that the excutive session complained of here was authorized by G.S. 143-318.3(b) which provides in pertinent part as follows: "This Article shall not be construed to prevent any governing or governmental body specified in G.S. 143-318.1 from holding closed sessions to consider information regarding the appointment, employment, discipline, termination or dismissal of an employee or officer under the jurisdiction of such body. . . ." Defendants argue that a member of the Board is an "officer" under the jurisdiction of the Board, therefore, a closed session to consider information regarding the appointment of such officer is authorized. We reject this argument.

[1] Ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws, and those seeking to be excluded from the operation of the law must establish that the exception embraces them. 73 Am. Jur. 2d, Statutes § 313, pp. 463-64 (1974). While neither our Supreme Court nor this Court has spoken on the question of strict construction as it pertains to our open meetings law, courts of other states have held that exceptions to their open meeting statutes allowing closed meetings must be narrowly construed since they derogate the general policy of open meetings. *See Illinois News Broadcasters Ass'n v. Springfield,* 22 Ill. App. 3d 226, 317 N.E. 2d 288, 290 (1974); *Laman v. McCord,* 245 Ark. 401, 432 S.W. 2d 753 (1968); *Times Publishing Company v. Williams,* 222 So. 2d 470 (Fla. App., 1969); *Town of Palm Beach v. Gradison,* 296 So. 2d 473 (Fla., 1974). We are convinced that these principles are sound; that exceptions to our open meetings law should be strictly construed and that those seeking to come within the exceptions should have the burden of justifying their action.

[2] We think the term "under the jurisdiction of" implies one *subordinate* to the Board. For the most part, defendant Board is the aggregate of its members, who are coequal. Applying a strict construction to subsection (b), we hold that a member of defendant Board is not an "officer" of the Board within the contemplation of the open meetings law.

COMMITTEE OF THE WHOLE

[3] Defendants next contend that the trial court erred in concluding that the closed session complained of was not authorized

by G.S. 143-318.4(7) when defendants attending the meeting were constituted a committee of the whole.

G.S. 143-318.4 specifies certain agencies or groups that are excluded from the open meetings law, subsection (7) providing as follows: "All study, research and investigative commissions and committees including the Legislative Services Commission." Defendants argue that the individual defendants attending the meeting in question became an investigative committee as envisioned by Subsection (7).

Dictionaries we have consulted define "committee of the whole" in terms of a legislative body. Plaintiff submits the Century Dictionary definition as follows: "—COMMITTEE OF THE WHOLE, a committee of a legislative body consisting of all the members present, sitting in a deliberative rather than a legislative character, for formal consultation and preliminary consideration of matters awaiting legislative action." 1 Century Dictionary 1131 (1889).

We think the term is entitled to a broader reach and that utilization of the concept is warranted by groups other than legislative. By way of illustration, a brief look at the *modus operandi* of the House of Representatives of our State might be helpful.

Due to the large volume of proposed legislation, our House performs a major part of its work in a *regular* session through standing committees, finding it impossible for every member to participate in hearings and the careful scrutiny of every bill that is introduced. However, in a special or extra session, which usually considers only one or two questions, and usually lasts only a few days, the House often utilizes its rule providing for a Committee of the Whole House. *See* Journals for 1963 Extra Session dealing with Congressional redistricting; 1965 Extra Session dealing with the "Speaker Ban Law"; and 1966 Extra Session dealing with Congressional and Legislative redistricting and reapportionment. The Journals reveal that during those extra sessions practically all committee work was done by the House sitting as a committee of the whole.

The reasons for this procedure in an extra session are numerous. These include the fact that the house is dealing with a single subject, all of its members are available at the same time to meet as a committee for purpose of hearing statements from people who are not members of the House, and time is

minimized by having every member receive full information on which to base a judgment.

In like manner much of the routine work of city councils, boards of county commissioners, and boards of education, particularly in larger cities and counties, may be performed more efficiently by committees of fewer members than the entire board. However, there arise major or unusual problems or duties that require the combined and expeditious attention of the entire body and on those occasions the body could well utilize the committee of the whole procedure.

With respect to a board of education, we can envision instances in which the board would need to function as a committee of the whole in closed session in order to investigate certain matters. An example would be the theft or embezzlement of property when the board did not have proof as to the wrongdoer and means to determine the unknown culprit would have to be devised. Obviously, a discussion of the matter in a public meeting could destroy any plan to determine the wrongdoer. While an investigative committee composed of fewer than all members of the board might suffice, the gravity or complexity of the matter might justify the input and best judgment of every member. We can also envision instances in which a board of education would be justified in meeting as a committee of the whole and in closed session to investigate persons who are under consideration for appointment to the Board.

At the same time, we do not think a board can evade the provisions of statutes requiring its meetings to be open to the public merely by resolving itself into a committee of the whole. 56 Am. Jur. 2d, Municipal Corporations, Inc., § 161, p. 214 (1971); *Beacon Journal Publishing Co. v. Akron,* 3 Ohio St. 2d 191, 209 N.E. 2d 399 (1965); *Acord v. Booth,* 33 Utah 279, 93 P. 734 (1908). In our opinion, defendants failed to justify their closed session in the instant case.

As indicated above, the burden is on defendants to show that they came within one or more of the exceptions provided in the statutes. The findings of fact disclose: Prior to the closed session the names of eight persons were placed in nomination to fill the vacant position. Following the passage of a motion authorizing same, defendant Danielson proceeded to appoint the members of the Board as a committee of the whole to study and investigate the names recommended. At the resumed meet-

ing following the closed session, the names of the eight persons previously nominated were presented again.

We hold that defendants failed to show that their closed session came within the exception provided by G.S. 143-318.4(7).

VOTING BY SECRET BALLOT

[4] Defendants contend the trial court erred in concluding that they violated G.S. 143-318.1 and G.S. 143-318.2 in voting by secret ballot. This contention relates to conclusion of law (7) and finding of fact (7) set forth above. We find no merit in the contention.

G.S. 143-318.1 declares the public policy of this State that deliberations and *actions* by bodies covered by the statute shall be conducted "openly." Clearly, voting for a person to fill a vacancy is "action" and we are unable to reconcile voting by secret ballot with "openly." *See State v. LaPorte Superior Court No. 2,* 249 Ind. 152, 230 N.E. 2d 92 (1967), in which the Supreme Court of Indiana held that a secret ballot vote by a county council was in violation of the Indiana Open Meetings Statute. No doubt we would have a different situation here if it had been disclosed how the individual defendants attending the meeting voted in their secret ballots. We hold that the trial court ruled properly on this point. *People ex rel. Hopf v. Barger,* 30 Ill. App. 3d 525, 332 N.E. 2d 649 (1975).

NOTICE OF MEETINGS

[5] Defendants contend the court erred in ordering that defendant Board "cause a notice to be given to the public of every official meeting of the Interim Board" at least 48 hours in advance of each such meeting, by posting on the outside of the door to the principal office of the Board a written notice stating the time and place of such meeting. This contention has merit.

Art. 33B of G.S. Ch. 143 contains no requirement with respect to notice of meetings. We perceive no problem with respect to regular meetings where the Board publicizes that until further notice its regular meetings will be held on a specified date or dates of each month and at a specified hour and place. G.S. 115-28 authorizes a board of education to meet in special session upon the call of the chairman or of the secretary as often as the school business of the administrative unit may require, but contains no provision regarding notice of special meetings.

Neither party has cited, and our research fails to disclose, any statute that specifically provides for notice of a special meeting.

Nevertheless, it is obvious that the open meetings law would be meaningless unless the public had notice of meetings of the bodies covered by it. At the same time, we can envision emergencies that would mandate a special meeting of a board of education with considerably less notice than 48 hours.

We are aware of G.S. 153A-40 which requires 48 hours' notice of special meetings of boards of county commissioners, but that requirement does not apply to special meetings dealing with emergencies. In the absence of statutory provisions for notice, we think defendant Board should give *reasonable* notice of its meetings, taking into consideration the urgency of the matter necessitating the meeting. While we agree that the one-hour notice given by telephone to the office of two newspapers in the instant case was insufficient, we hold that 48 hours' notice for all meetings is unreasonably long.

We decline to specify the number of hours that would be "reasonable" but, considering modern means of communication, including newspapers, radio, etc., we feel that in a real emergency as little as six hours' notice to the public would be sufficient.

CONCLUSION

We affirm the order of the trial court except in the following respects:

(1) Paragraph numbered 2 of the final portion of the order (requiring at least 48 hours' notice to the public of every official meeting) is vacated.

(2) Paragraph numbered 4 of the final portion of the order (enjoining defendant Board from designating itself as a committee of the whole and meeting in closed session as such to study and investigate nominees to fill a vacancy on the Board) is vacated.

Modified and affirmed.

Judges PARKER and CLARK concur.

SOUTHERN NATIONAL BANK OF NORTH CAROLINA v. IAN I. POCOCK AND WIFE, LAURA E. POCOCK

No. 7510SC732

(Filed 7 April 1976)

1. **Uniform Commercial Code § 29; Guaranty — guaranty of note — signature in representative capacity — individual liability**

Where a guaranty of a note does not name any person represented but does show that defendants signed in a representative capacity, defendants are personally obligated on the guaranty agreement "except as otherwise established between the immediate parties." G.S. 25-3-403(2)(b).

2. **Uniform Commercial Code § 29; Guaranty — guaranty of note — signature in representative capacity — individual liability — sufficiency of evidence**

In an action to recover on a written contract of guaranty of a corporation's note, plaintiff bank's evidence was sufficient to support a jury finding that it was not "established between the immediate parties" that defendants were not to be personally obligated on the guaranty which they signed in their representative capacity where it tended to show that the bank's officials explained to defendants in detail what would be required of them in the way of a personal guaranty and that the bank would not make the loan without it.

3. **Guaranty— consideration**

A consideration moving directly to the guarantor is not essential in a guaranty contract, but the promise is enforceable if a benefit to the principal debtor or detriment or inconvenience to the promisee is shown.

4. **Uniform Commercial Code § 29; Guaranty — signature in representative capacity — evidence of intent**

In an action to recover on a written guaranty signed by defendants in a representative capacity, the trial court properly excluded defendants' testimony as to their intention at the time of signing the guaranty not to be bound in their individual capacities since, under G.S. 25-3-403(2)(b), a party's undisclosed intention not to be personally obligated, by itself, is irrelevant.

5. **Uniform Commercial Code § 29; Guaranty — signature in representative capacity — individual liability — burden of proof**

In an action to recover on a written guaranty signed by defendants in a representative capacity, the trial court did not err in giving the jury instructions placing the burden on defendants to prove that it had been established between the immediate parties that defendants were not to be personally obligated on the guaranty.

6. **Trial § 45— inconsistent answers on damages issues — refusal to resubmit all issues**

When the jury returned inconsistent answers as to the amount of damages recoverable from each of two defendants who were jointly

and severally liable on a guaranty agreement, it was within the court's discretion either to resubmit all issues or to resubmit only issues as to damages, and the court did not abuse its discretion in refusing to resubmit all issues.

APPEAL by defendants from *Brewer, Judge.* Judgment entered 27 May 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 14 January 1976.

Plaintiff Bank instituted this action to recover on a written contract of guaranty signed by defendants. Defendants filed separate answers, each denying individual liability.

Plaintiff offered evidence that during negotiations for a loan to a corporation, S&S Cleaners Inc., the stock in which was being acquired by Mr. Pocock, defendants were informed by Bank officials that the Bank would require security for the loan in the form of personal guarantees by both defendants. The Bank then held security for outstanding loans previously made to the corporation. The business plans of defendants were discussed with Bank officials, a credit check on defendants was obtained, a personal financial statement showing personal assets, liabilities, and net worth of Mr. Pocock was signed and furnished by him to the Bank, and the personal guaranty provisions were explained to defendants. Both defendants at the closing signed, in the name of and as officers of the corporation, a Security Agreement, consisting of a note chattel mortgage, in which S&S Cleaners, Inc. was named as "Borrower-Debtor(s)." The note evidenced the corporation's indebtedness to the Bank in the amount of $25,532.21, payable in monthly installments. The chattel mortgage covered certain described cleaning equipment. The face of the Security Agreement, which included the note and chattel mortgage, was signed as follows:

S&S Cleaners Inc. (Seal)
Debtor
S/Ian I. Pocock, Pres. (Seal)
Debtor
S/Laura E. Pocock, Sec.-Treas. (Seal)
Debtor

The reverse side of the Security Agreement contained a printed guaranty agreement signed by the defendants as follows:

GUARANTY OF THIRD PERSONS

Undersigned, jointly and severally, guarantee the payment, when due, to any holder hereof, of all amounts from

time to time owing thereunder, and the payment upon demand, of the entire amount owing on the foregoing Agreement, in the event of default in payment by DEBTOR(S) named therein. Undersigned waive(s) notice of acceptance of this guaranty, acknowledge themselves as fully bound by all provisions of said Agreement, and expressly agree to pay all amounts owing hereunder, upon demand, without requiring any action or proceeding against DEBTOR(S) or any foreclosure against any COLLATERAL secured in said Agreement.

_____(Seal)
Guarantor
S/Ian I. Pocock, Pres. (Seal)
(Address)
_____(Seal)
Guarantor
S/Laura E. Pocock, Sec.-Treas. (Seal)
(Address)

Plaintiff's evidence also shows that after making some of the monthly payments, the corporation defaulted on the note. The amount owing at the time of default was $19,878.45, judgment for which was obtained against the corporation. The property subject to the chattel mortgage was sold, and the net amount realized from the sale, $911.84, was credited on the judgment, leaving a balance owing thereon of $18,966.61. Plaintiff demanded said sum of defendants under their guaranty agreement, but defendants refused to pay.

Defendants testified that they were never told that they were to personally guarantee payment of the loan, that they never intended to do so, and that when they signed the guaranty agreement on the back of the Security Agreement, they signed only as representatives of the corporation.

Issues were submitted to the jury and answered as follows:

"1. Did the defendant Ian Pocock guarantee the payments of the note and security agreement as alleged in the Complaint?

ANSWER: Yes.

2. Did the defendant Laura E. Pocock guarantee the payments of the note and security agreement as alleged in the Complaint?

ANSWER: Yes.

3. What amount, if any, is the plaintiff entitled to recover of the defendant Ian Pocock?

ANSWER: $13,000.00.

4. What amount, if any, is the plaintiff entitled to recover of the defendant Laura E. Pocock?

ANSWER: $2,000.00."

The court, noting the conflict in the answers to Issues No. 3 and No. 4, refused to accept the jury's answers to those issues, and upon stipulation of the parties submitted to the jury a fifth issue, which was answered by the jury as follows:

"5. What amount, if any, is the plaintiff entitled to recover of the defendants?

ANSWER: $15,000.00."

Judgment was entered that plaintiff Bank recover of the defendants, jointly and severally, the sum of $15,000.00. Defendants appealed.

Thomas Dewey Mooring, Jr. for plaintiff appellee.

Vaughan S. Winborne for defendant appellants.

PARKER, Judge.

At issue between the parties is whether defendants are personally liable on the contract of guaranty. Insofar as pertinent to the question presented by this appeal, G.S. 25-3-403(2)(b) provides:

"G.S. 25-3-403. *Signature of authorized representative.*

* * * *

(2) An authorized representative who signs his own name to an instrument

* * * *

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity."

Here, there was evidence to show that defendant Ian I. Pocock was the duly elected President and defendant Laura E. Pocock was the duly elected Secretary-Treasurer of S&S Cleaners, Inc. As such corporate officers, each was a "representative" of the corporation as the word "representative" is used in the above statute. G.S. 25-1-201(35). No question has been here raised as to their authority to act as representatives of the corporation in connection with the loan made to it by the plaintiff Bank.

[1] Insofar as the fact of the Security Agreement, which consisted of the note and chattel mortgage, is concerned, there can be no question that the obligation thereby incurred is solely that of the corporation, since the corporation is expressly named therein as the "Borrower-Debtor(s)" and the signatures of the two defendants show that they signed in a representative capacity as corporate officers. The present case, however, is not brought to enforce any obligation contained in the Security Agreement, but is brought solely to enforce the "Guaranty of third persons" which was printed on the reverse side and which defendants also signed. The obligation created by that instrument is "separate and independent of the obligation of the principal debtor." *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E. 2d 342, 345 (1972). That instrument does not name any person represented but does show that defendants signed in a representative capacity. Thus, under G.S. 25-3-403(2)(b) defendants are personally obligated on the guaranty agreement "except as otherwise established between the immediate parties." Therefore, the determinative issue between the parties in this case is narrowed to whether it was here "otherwise established." Defendants' assignments of error should be considered in the light of the foregoing analysis as to the effect which G.S. 25-3-403(2)(b) has upon the rights of the parties under the facts of this case.

Defendants first assign error to the denial of their motion to dismiss made under Rule 12(b)(6) and to the denial of their motion for summary judgment. These motions were properly denied. Plaintiff's complaint was clearly sufficient to state a claim upon which relief can be granted, and the affidavits filed by the parties and considered by the court in connection with the motion for summary judgment clearly fall short of establishing that there was no genuine issue as to any material fact. Quite to the contrary, comparison of the affidavits filed

by the defendants with the affidavit of an official of the plaintiff Bank clearly demonstrates that there was a very lively issue between the parties as to the material facts bearing upon the determinative issue in this case.

[2] Defendants' motion for a directed verdict made at the close of the evidence was also properly denied. Plaintiff's evidence showed the making of the loan by plaintiff Bank to the principal debtor, S & S Cleaners Inc., the execution of the written "Guaranty of Third Persons" by defendant, plaintiff's extension of credit in reliance on that guaranty, default by the principal debtor, notice of default given to defendants, refusal to pay by defendants, and damage to plaintiff. Although there was a conflict in the evidence bearing upon the determinative issue in this case as to whether it was, or was not, "established between the immediate parties" that defendants were not to be personally obligated on the "Guaranty of Third Persons" which they signed, when we view the evidence in the light most favorable to plaintiff, as we must when passing upon the trial court's ruling on defendants' motion for directed verdict, *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971), we find the evidence amply sufficient to take the case to the jury. Plaintiff's evidence was to the effect that both prior to and at the time the loan was made, the Bank's officials explained to defendants in detail what would be required of them in the way of a personal guaranty, and that, far from it being established that defendants were not to be personally obligated, the Bank was relying on their personal obligation and would not have made the loan without it. Defendants' testimony to the contrary was for the jury to evaluate.

[3] We also find no merit in the contention made by the defendant, Laura E. Pocock, that directed verdict should have been allowed as to her on the grounds that the evidence shows she received no consideration, directly or indirectly, for signing the guaranty agreement. "In a guaranty contract, a consideration moving directly to the guarantor is not essential. The promise is enforceable if a benefit to the principal debtor is shown or if detriment or inconvenience to the promisee is disclosed." *Investment Properties v. Norburn, supra,* p. 196.

[4] Defendants assign error to rulings of the court excluding their testimony as to their intention at the time of signing the guaranty not to be bound in their individual capacities. Under G.S. 25-3-403(2)(b), a party's undisclosed intention not to be

personally obligated, by itself, is irrelevant. The statute makes the signing party personally obligated "except as otherwise established between the immediate parties," and it takes more than an intention of one party undisclosed to the other to establish the requisite understanding *between* the parties. We find no error in the court's rulings on the evidence.

[5] Defendants assign error to the following portion of the court's charge to the jury:

> "Our law provides that where the person is not named, or in this case a corporation, but does show that a representative signed in a representative capacity, that is where words such as President or Secretary-Treasurer are placed after names and does not show before that, or in connection with it, the name of the corporation, that a person who signs it in such a manner becomes personally obligated for the instrument or obligation for the instrument which he or she signed, unless that person shows by the evidence, it was not intended as a personal obligation but was intended as an obligation of the person from whom he held to be in a representative capacity, such as the corporation; in other words, the corporation.
>
> So the plaintiff having shown, the defendants having admitted, that they signed the purported guaranty on the instrument and placed after their names the letters abbreviating President and Secretary and Treasurer, they would be personally obligated upon such guaranty agreement, unless they show, or each of them shows, that it was intended and agreed that they signed as representatives of the corporation and not individually, in the signing of such an agreement."

Although perhaps somewhat awkwardly expressed, we find no error prejudicial to defendants in the court's instructions to the jury. Defendant's contention that the quoted portion of the charge incorrectly shifted the burden of proof to them cannot be sustained. The statute, G.S. 25-3-403(2)(b), imposes personal obligation on the party signing under the circumstances therein enumerated "except as otherwise established between the immediate parties." Therefore, unless the signing party can establish otherwise as between himself and the other immediate parties to the instrument, the law makes him personally obligated. The clear intent of the statute is that the signing party

has the burden to otherwise establish, else he incurs the personal obligation which the statute imposes.

[6] Defendants assign error to the denial of their motion to set aside the jury's verdict as to all issues. The record discloses that when the jury first returned its verdict answering the four issues originally submitted to it, the court noted that the jury had failed to follow its instructions in answering the third and fourth issues. Accordingly, the court refused to accept the jury's answers as to those issues. Defendant's counsel then moved to set aside the answers to all issues, contending "that this is a comprehensive verdict." The Court, finding that "there has been no indication that this is a compromise verdict by the jury," denied the motion. Thereafter, defendants' counsel, without waiving his objection to the denial of his motion to resubmit all issues, stipulated that a single issue, the fifth issue, be submitted, and this was done.

We find no error in the denial of defendants' motion to resubmit all issues. "Before a verdict is complete it must be accepted by the court, but it is the duty of the presiding judge, before accepting a verdict, to scrutinize its form and substance to prevent insufficient or inconsistent findings from becoming a record of the court. Therefore, where the findings are indefinite or inconsistent, the presiding judge may give additional instructions and direct the jury to retire again and bring in a proper verdict, but he may not tell them what their verdict shall be." *Edwards v. Motor Co.*, 235 N.C. 269, 272, 69 S.E. 2d 550, 552 (1952). Moreover, the trial judge "may vacate the answer to a particular issue when to do so does not affect or alter the import of the answers to the other issues," *Lee v. Rhodes*, 230 N.C. 190, 192 52 S.E. 2d 674, 675 (1949). In the present case, when the trial judge noted the inconsistency in the jury's answers to the third and fourth issues, which related only to the amount of damages, it was within the court's sound discretion either to resubmit all issues or to resubmit only on issues as to damages. There was no abuse of the Court's discretion in refusing to resubmit all issues.

We have carefully examined all of defendants' remaining assignments of error, and find no error such as would warrant granting another trial.

No error.

Judges HEDRICK and ARNOLD concur.

IN THE MATTER OF THE WILL OF E. C. EDGERTON, SR., DECEASED

No. 754SC975

(Filed 7 April 1976)

1. **Wills §§ 18, 60— renunciation by caveator of share in estate — burden of proof met by propounders**

The propounders in a caveat proceeding satisfied their burden of showing that there was no genuine issue of fact in controversy and that they were entitled to judgment as a matter of law when they submitted caveator's release and renunciation of his share of testator's estate in support of their motion for summary judgment.

2. **Wills § 60— renunciation of share in estate — adequacy of consideration**

Caveator's contention that there was a genuine issue of material fact as to whether a release by him of his expected share in decedent's estate was supported by consideration is without merit where the record indicates that two conveyances of land were made in exchange for the release; moreover, decedent had an absolute right to disinherit caveator, and it cannot be said that the consideration was inadequate because it was later determined that caveator did not receive an adequate share of decedent's estate.

3. **Wills § 60— renunciation of share in estate — obtaining by false representations or undue influence**

Caveator's contentions that genuine issues of material fact were raised as to whether a release of his share in decedent's estate executed by him was obtained by false representations relied upon by caveator, and by undue influence, are without merit, since no evidence was offered to show any fraudulent misrepresentation by the decedent, and since the averment by caveator that he always was obedient to his father and so signed the release at his father's, the decedent's, direction, did not constitute a showing of undue influence.

4. **Evidence § 11; Wills § 60— renunciation of share in estate — promises of decedent — exclusion under dead man's statute**

G.S. 8-51, the dead man's statute, operated to exclude evidence by caveator as to unfulfilled promises by decedent to convey additional lands to caveator in return for caveator's execution of a release of his share in decedent's estate.

APPEAL by caveator from *James, Judge.* Judgment entered 25 August 1975 in Superior Court, SAMPSON County. Heard in the Court of Appeals 16 March 1976.

Caveat proceeding was instituted by E. C. Edgerton, Jr., (Caveator) to have set aside what purported to be the will of E. C. Edgerton, Sr. The propounders of the purported will answered and alleged that caveator did not have standing as

required by G.S. 31-32 to file caveat. [See: *In re Will of Edgerton,* 26 N.C. App. 471, 216 S.E. 2d 476 (1975), for more detailed facts which we do not deem it necessary to repeat.]

Propounders moved for summary judgment and submitted a paper writing, dated 9 May 1973, signed by caveator in which is stated, "I . . . E. C. Edgerton, Jr., son of E. C. Edgerton, Sr., claim no right to, or interest in, the estate of my father, E. C. Edgerton, Sr., for that E. C. Edgerton, Sr., has already previously settled upon me all gifts and property rights to which I might be entitled as an heir of my said father; and this Notice is herewith given to set forth to all concerned my complete satisfaction to the settlement made upon me." Also submitted in support of the motion for summary judgment were deeds executed on 9 May 1973 from E. C. Edgerton, Sr., et ux to E. C. Edgerton, Jr.

In opposition to the motion for summary judgment, caveator submitted an affidavit in which he stated that he signed the renunciation and release at the request of his father, and he always obediently did what his father asked him to do. The affidavit further states that the decedent promised to convey additional land to caveator, and promised that caveator would receive his share of decedent's estate, caveator would sign the renunciation. Moreover, according to caveator's affidavit, the conveyances from decedent to caveator on 9 May 1973 were not gifts, and deeds of trust from caveator for the benefit of E. C. Edgerton, Sr. were submitted to establish that caveator agreed to make substantial payments to his father for the tracts of land conveyed to him.

Concluding that caveator did not have standing to caveat, the trial court granted summary judgment for propounders and dismissed the caveat. Caveator appealed to this Court.

McLeod and McLeod, by Max E. McLeod, and Johnson and Johnson, by W. A. Johnson, for caveator appellant.

Bryan, Jones, Johnson, Hunter and Greene, by Robert C. Bryan, and Haworth, Riggs, Kuhn and Haworth, by John Haworth, for propounder appellees.

ARNOLD, Judge.

The essence of this appeal is whether it was proper to grant summary judgment dismissing the caveat. Summary judgment

is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56.

Propounders maintain that caveator executed a renunciation and release to any interest in decedent's estate, and, pursuant to G.S. 31-32, caveator no longer has standing to file a caveat. It is asserted by caveator that the paper writing did not constitute a valid release and renunciation, that the same was not supported by valuable consideration; that caveator was induced to sign the instrument by false representation made by decedent and relied upon by caveator; that caveator was unduly influenced to sign the paper writing; and that caveator signed it in reliance upon unfulfilled promises and assurances by decedent to convey him additional land.

Since the propounders moved for summary judgment it was incumbent upon them to convince the trial court that no genuine issue as to any material fact existed, and that they were entitled to judgment as a matter of law. The critical question for determination by the trial court was whether the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, established a genuine issue as to any material fact. *Tuberculosis Assoc. v. Tuberculosis Assoc.*, 15 N.C. App. 492, 190 S.E. 2d 264 (1972).

The burden is on the moving party to show that there is no genuine issue of material fact regardless of who will have the burden of proof on the issue concerned at the trial. *Whitley v. Cubberley,* 24 N.C. App. 204, 210 S.E. 2d 289 (1974). Once the movant establishes that there is no genuine issue of material fact the movant must further prove that he is entitled to judgment as a matter of law. *Van Poole v. Messer,* 19 N.C. App. 70, 198 S.E. 2d 106 (1973).

[1] In the case at bar the propounders satisfied their burden of showing that there was no genuine issue of fact in controversy and that they were entitled to judgment as a matter of law when they submitted caveator's release and renunciation in support of their motion for summary judgment. *See* G.S. 31-32; *In re Ashley,* 23 N.C. App. 176, 208 S.E. 2d 398 (1974).

The moving parties having carried their burden, "the opposing party may not rest upon the mere allegations of . . .

pleading but must respond with affidavits or other evidentiary matter which sets forth specific facts showing that there is a genuine issue for trial." G.S. 1A-1, Rule 56(e); *U. S. Steel Corp. v. Lassiter*, 28 N.C. App. 406, 221 S.E. 2d 92, 94 (1976). Where a motion for summary judgment is supported by proof which would require a directed verdict in his favor at trial he is entitled to summary judgment unless the opposing party comes forward to show a triable issue of material fact. The opposing party does not have to establish that he would prevail on the issue involved, but merely that the issue exists. *Millsaps v. Contracting Co.*, 14 N.C. App. 321, 188 S.E. 2d 663 (1972).

Caveator did not rest upon his pleadings but submitted affidavits and documents in opposition to the motion for summary judgment. In order to show the existence of a genuine issue of material fact it was necessary for caveator to offer specific proof which would raise a question as to whether the paper writing of 9 May 1973 constituted a valid renunciation.

[2] With respect to caveator's assertion that there is a genuine issue of material fact as to whether the release was supported by consideration the record indicates that two conveyances of land were conveyed in exchange for the release. The release by an heir of an expectant share is binding if the release is given for a valuable consideration and the consideration given for the release is not "grossly inadequate," or procured by fraud or undue influence. *Price v. Davis*, 244 N.C. 229, 93 S.E. 2d 93 (1956).

The decedent had an absolute right to disinherit caveator, and we cannot say that the consideration was inadequate because it was later determined that caveator did not receive an adequate share of decedent's estate.

[3] Caveator's contentions that genuine issues of material fact were raised as to whether the paper writing was obtained by false representations relied upon by caveator, and by undue influence, are without merit.

If at the time a promise was made by the decedent it was made with the intention by decedent not to perform, and the caveator reasonably relied on the promise to his injury, there would be a question of whether the promise amounted to a misrepresentation of a material fact which would support an action for fraud. However, no evidence was offered to show any fraudulent misrepresentation by the decedent. The only evi-

dence presented concerned unfulfilled promises, and an unfulfilled promise will generally not support an action for fraud. *Gribble v. Gribble,* 25 N.C. App. 366, 213 S.E. 2d 376 (1975).

Assuming *arguendo* that the evidence relating to unfulfilled promises by decedent to convey additional lands to caveator did raise a question of fraudulent misrepresentation, the evidence was not admissible for reasons hereafter stated. "If the matters stated in the pleadings, affidavits and depositions are not admissible in evidence, they should be stricken and not considered by the court." *North Carolina Nat. Bank v. Gillespie,* 28 N.C. App. 237, 220 S.E. 2d 862, 866 (1976).

Moreover, we find no evidence of undue influence by decedent on caveator. The averment by caveator that he always was obedient to his father and did what his father told him to do does not constitute a showing of undue influence in the sense that it was a fraudulent influence. *See Greene v. Greene,* 217 N.C. 649, 9 S.E. 2d 413 (1940).

[4] There is merit in propounder's argument that G.S. 8-51 (the dead man's statute) makes inadmissible the caveator's averments regarding unfulfilled promises by decedent to convey additional lands to caveator in return for caveator's execution of the release. The statute, as pertinent to this issue, provides that " . . . a party shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . or a person deriving his title or interest from, through or under a deceased person . . . , concerning a personal transaction or communication between the witness and the deceased person . . . . " The caveator and propounders come within the ambit of G.S. 8-51, and we hold that the statute operates to exclude evidence by caveator concerning any personal transactions or communications between him and decedent. *See In re Will of Lomax,* 226 N.C. 498, 39 S.E. 2d 388 (1946).

It might be argued by caveator that since propounders introduced an affidavit containing testimony of Mrs. E. C. Edgerton, Sr., executrix of the will, concerning the execution of the release and the delivery of deeds in exchange for the release, that the door was opened under an exception contained within G.S. 8-51. [*See* Stansbury, N. C. Evidence, Brandis Revision, Exceptions—"Opening the door," § 75] An examination of the affidavit, however, reveals that while Mrs. Edgerton testified

concerning the execution of and identity of the renunciation and certain instruments, there was no testimony concerning promises which decedent did or did not make. We therefore hold that evidence by caveator concerning promises made by decedent is excluded.

We disagree with caveator's contention that the affidavits which he submitted present ample proof that the renunciation he signed was invalid. Caveator's competent evidence was not sufficient to show the existence of any genuine issue as to a material fact. Inasmuch as the renunciation is a "release of all rights on the part of E. C. Edgerton, Jr., to share in the estate of E. C. Edgerton, Sr.," Mr. Edgerton, Jr., does not have standing to caveat his father's purported will, and the propounders are entitled to judgment as a matter of law.

We have examined caveator's remaining assignments of error and we find no error. The judgment appealed from is

Affirmed.

Judges MORRIS and HEDRICK concur.

FIRST NATIONAL CITY BANK v. JOHN McMANUS

No. 7518SC815

(Filed 7 April 1976)

1. **Money Received § 1— money paid under mistake of fact**

Money paid to another under a mistake of fact may be recovered provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund.

2. **Money Received § 2; Pensions— overpayment of pension benefits — mistake of fact — recovery of overpayment**

Where defendant had vested benefits of $16,880.45 in his former employer's pension plan, the employer directed the pension plan trustee to pay this amount to defendant in ten annual installments, but the trustee, as the result of clerical error, paid defendant $1,688.05 per month for 13 consecutive months for a total of $21,944.65 instead of his entitlement of $3,376.10, and defendant had no actual knowledge of the amount of the vested benefits due him or the manner in which the payments were to be made, it was *held:* (1) the overpayment was made under a mistake of fact; (2) defendant has been unjustly enriched by the overpayment; (3) plaintiff trustee's negligence and defendant's ostensible good faith, standing alone, constitute an

insufficient defense to the trustee's claim for repayment; (4) defendant did not irrevocably change his position so that it would be unjust to require him to repay the amount he received over his entitlement of $3,376.10 by the fact he has incurred increased tax liability, has had to retain attorneys and accountants, and has invested the funds in a business wherein the funds have not been maintained in a separate liquid account or form; and (5) the trustee is entitled to recover from defendant the $18,568.55 overpayment.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 2 June 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 February 1976.

In its complaint and amended complaint, plaintiff, the trustee for the "Employees' Pension Plan of Lanvin-Charles of the Ritz, Inc. and Related Companies," alleged that defendant, "a qualified participant under the pension plan," should have received through February 1974 only $3,376.10 in annual installments of $1688.05, " . . . but by mistake of fact on the part of the plaintiff . . . " defendant actually received " . . . the total sum of $21,944.65. Thus, by [reason of the] mistake of fact the plaintiff has made an overpayment of $18,568.55 to the defendant, and the defendant has been unjustly enriched by receiving said amount to which he has no right or claim of entitlement."

Plaintiff further alleged that, as soon as the error was discovered, it immediately notified defendant of the error and " . . . requested that the sum be returned to the plaintiff. However, the defendant has failed and refused to repay all or any part of the overpayment to the plaintiff. . . . " , who reimbursed the pension fund " . . . in the amount of $18,568.55, the amount of the overpayment. . . . " Plaintiff sought recovery from defendant of the same amount reimbursed by it to the fund account.

Defendant's answer, denying the material allegations raised by plaintiff, asserted, inter alia, that he received the monies in "good faith" and further counterclaimed that

> " . . . as the result of the negligence of the plaintiff and the breach of standards of fiduciary duty owed by the plaintiff to the defendant in administration of the Plan, the defendant has incurred income tax liability in excess of that which he otherwise would have incurred and has paid taxes due thereby, has been compelled to employ legal

counsel and other advisors and consultants as a result of the negligence and breach of fiduciary standards by the plaintiff and the plaintiff has been damaged in the amount of at least $18,568.55."

Plaintiff's reply denied defendant's counterclaims, maintained that it failed to state a claim upon which relief can be granted and argued that if plaintiff had been negligent, the defendant is barred from recovery by reason of his own negligence.

Plaintiff and defendant each subsequently moved for summary judgment. According to plaintiff's affidavits and supporting documentation, defendant was entitled to $16,880.45 payable in ten annual installments and knew this, but that, as the result of a clerical error, defendant received $1688.05 per month for 13 consecutive months for a total of $21,944.65 instead of his actual lawful entitlement of $3,376.10.

Defendant's affidavit indicated that he had sought from a Ralph Nierenberg, of the pension plan committee, a lump sum payout and that Nierenberg assured defendant that they would try to " 'work it out the best way they can.' " Defendant contended that the 13 payments actually received seemed to be in response to his request and that as a result of the payout process he has incurred significantly increased tax liability, has had to retain, at a significant cost, attorneys and accountants and that he has "invested the proceeds in a business operation, along with other funds . . . and did not maintain . . . a separate liquid account or form."

Based on the foregoing information, the trial court entered judgment containing the following uncontroverted facts:

"1. That the parties hereto are properly before the Court and that the court has jurisdiction of the subject matter of this case.

2. That until December 31, 1972, the defendant was an employee of Lanvin-Charles of the Ritz, Inc., and was a qualified participant under its pension plan, the Employees Pension Plan of Lanvin-Charles of the Ritz, Inc., and Related Companies; that the plaintiff was a trustee of the Employees Pension Plan.

3. That the defendant, upon leaving the employ of his employer, requested of one Ralph Nierenberg, an officer of

his employer and one of the three members of the pension committee, whose function it was to determine the handling of benefits under the pension plan, that he be paid his vested benefits under the plan in a lump sum as soon as possible; that Ralph Nierenberg neither acceded to nor denied the request, but responded that the matter would be handled by the employer so that they would 'work it out the best way we can.'

4. That on or about January 22, 1973, the defendant made formal application for vested termination benefits under the plan on a form furnished by the employer or the plaintiff trustee; that said form did not provide for the applicant to request the manner of payout and no such request was made by defendant on the form.

5. That on or about February, 1973, Lanvin-Charles of the Ritz, Inc., pursuant to the pension plan, instructed the plaintiff trustee to make payment to the defendant of his vested termination benefits by paying the defendant the sum of $16,880.45, such payments to be made in the amount of $1,688.05 for nine (9) annual installments and a final annual payment of $1,688.00.

6. That a copy of the application form submitted by the defendant, including thereon instructions to the trustee concerning the manner of payout, among other matters, was mailed to the defendant on or about February 8, 1973, and defendant received the completed form shortly thereafter.

7. That the plaintiff trustee had all the facts applicable to the manner of payment and the vested termination benefits of the defendant available to it and, as the result of a clerical error on the part of the plaintiff trustee, plaintiff trustee made payments on a monthly basis of a sum of $1,688.05 per month for a period of 13 months, at which time the total payments to the defendant amounted to $21,944.65.

8. That, upon receiving the payments, the defendant had no actual knowledge of the manner in which the payments were to be made and assumed that the payments were being made in the ordinary and routine course of the distribution of his vested benefits.

9. That after the plaintiff had made 13 monthly payments for a total of $21,944.65, its error in making the

payments was discovered. The defendant, at that time if payments had been made in the manner instructed by the employer to the plaintiff trustee, would have received a total of $3,376.10. The defendant was notified of the error by letter from plaintiff dated February 25, 1974, and a demand for a refund of $18,568.55, the amount of the overpayment based upon the schedule of annual payments of $1,688.05 as directed by the employer to the trustee, was made.

10. That, upon learning of the error of the plaintiff in paying out the sum of $21,944.65, the employer Lanvin-Charles of the Ritz, Inc. made demand upon the plaintiff trustee for reimbursement to the trust fund of the Employees Pension Plan of Lanvin-Charles of the Ritz, Inc. and Related Companies in the amount of $18,568.55, as reimbursement for the payments made to defendant; that plaintiff trustee, First National City Bank, did so reimburse the trust fund of the Pension Plan for the error in payout on or about February 22, 1974.

11. That the accelerated payout of the vested benefits under the plan to the defendant resulted from the error of the plaintiff First National City Bank.

12. That the vested benefits of the defendant in the plan, based upon computations furnished to the trustee by actuaries, amounted to $16,880.45. There is no evidence that the defendant had actual knowledge of the total of the vested benefits due him under the plan.

13. That the defendant paid Federal and State income taxes on the full amounts of the distributions to him in each of the tax years 1973 and 1974, which distributions resulted in substantially increased tax liabilities over the tax liabilities which would have been incurred had the payment been made by plaintiff trustee according to the instructions from the employer.

14. That the defendant has employed advisors and attorneys and has incurred costs and fees for advice regarding the demand of the plaintiff for overpayment."

The trial court then held that defendant "has changed his position and incurred substantial liabilities . . . ", and that " . . . defendant has not been unjustly enriched by the accelerated payment to him of $16,880.45, the amount of his vested benefits

under the plan, but has been unjustly enriched by the payment of the excess amount above his vested benefits of $5,064.20." The court then determined that defendant "is entitled to retain the sum of $16,880.45 . . . [but] [t]hat the plaintiff, First National City Bank, is entitled to recover from the defendant . . . the sum of $5,064.20. . . . " Plaintiff appealed.

Smith, Moore, Smith, Schell & Hunter, by Martin N. Erwin and Benjamin F. Davis, Jr., for plaintiff appellant.

Block, Meyland & Lloyd, by Thomas J. Robinson, Jr., for defendant appellee.

MORRIS, Judge.

Plaintiff appellant, contending that the money was paid out to the defendant payee under a mistake of fact, maintains that defendant, unjustly enriched and unable to construct an adequate defense in law or equity, must accede to plaintiff's demand for repayment. We agree.

[1] The issue of who stands for the loss and disappointment when money has been disbursed under some mistaken belief of entitlement is always problematic. Our Supreme Court, structuring the problem along lines of equity, justice and transactional security, broadly holds that " . . . money paid to another under the influence of a mistake of fact . . . may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund." *Guaranty Co. v. Reagan,* 256 N.C. 1, 9, 122 S.E. 2d 774 (1961); *Dean v. Mattox,* 250 N.C. 246, 108 S.E. 2d 541 (1959); *Allgood v. Trust Co.,* 242 N.C. 506, 88 S.E. 2d 825 (1955); *Johnson v. Hooks,* 21 N.C. App. 585, 205 S.E. 2d 796 (1974); cert. denied 285 N.C. 660. Also see 66 Am. Jur. 2d, Restitution and Implied Contracts, § 135, pp. 1066-1067.

[2] There is no question but that the clerical error arising under this fact situation is sufficient to denominate the payment by plaintiff to defendant as one made under a mistake of fact. *Simms v. Vick,* 151 N.C. 78, 65 S.E. 621 (1909); *Harrington v. Lowrie,* 215 N.C. 706, 2 S.E. 2d 872 (1939); also see: *Continental Oil Co. v. Jones,* 191 So. 2d 895 (La. Ct. App. 1966). Moreover, plaintiff's negligence, if any, and defendant's ostensible good faith, standing alone, constitute an insufficient defense to plaintiff's claim for repayment. *Dean v. Mattox, supra; Allgood v. Trust Co., supra;* also see: *Salvati v. Streator Town-*

ship High School Dist. No. 40, 51 Ill. App. 2d 1, 200 N.E. 2d 122 (1964); *Westamerica Securities, Inc. v. Cornelius,* 214 Kan. 301, 520 P. 2d 1262 (1974). Also see: 70 C.J.S., Payment, § 157(d), p. 371; 66 Am. Jur. 2d, Restitution and Implied Contracts, § 131, pp. 1063-1064.

Thus, when stripped of its considerable detail, this case essentially turns on whether the overpayment of $18,568.55 to defendant " . . . caused such a change in the position of the other party [i.e. payee] that it would be unjust to require him to refund [the money]." 66 Am. Jur. 2d, Restitution and Implied Contracts, § 135, p. 1066. Stated differently, " . . . the crucial question in an action of this kind is, to which party does the money, in equity and good conscience, belong? *Allgood, supra,* at 512.

The change of position concept, usually framed in terms of equity and fair play, ultimately focuses attention on the payee's behavior and reaction to the payment and will warrant retention of the money given to the payee under a mistake of fact only when the payee's change of position resulting from the payment is obviously " . . . detrimental to the payee, material and irrevocable and [generates a condition] such that the payee cannot be placed in status quo." *Westamerica Securities, Inc., supra,* at 309. Though the issue is never simple or easily explained, we are of the opinion that "[a] change of position is not detrimental, and is not a defense, if the change can be reversed, or the status quo can be restored, without expense." 40 A.L.R. 2d, What Constitutes Change of Position by Payee so as to Preclude Recovery of Payment Made Under Mistake, § 2, p. 1001. The burden of such an irrevocable and material change of position that the payee cannot be placed in status quo is on the payee. 66 Am. Jur. 2d, Restitution and Implied Contracts, § 135.

Here, defendant payee asserts that the change of position resulted from the increased tax liability generated by the payment, the necessity and cost of defending his stake in this matter and the fact that the fund proceeds have been invested "in a business operation" wherein the funds in question have not been maintained "in a separate liquid account or form." We cannot, as a matter of law, perceive increased tax liability or defense costs as a "change of position" sufficient to bar plaintiff's recovery. Defendant can apply for tax refunds if a refund is in order, and the cost of resolving a dispute is simply part of the price all parties must bear when challenged with the pros-

pect of a lawsuit. Moreover, the fact that defendant invested in a business cannot, by itself and without other facts, raise a change of position defense. Defendant, in his affidavit, chose only to say that he had invested the money with other funds in a business venture. For reasons best known to him, he did not give any other information, except that he did not maintain a "separate liquid account or form." He has disclosed no reason that the money cannot be refunded. Where a payee uses " . . . the erroneous payment to acquire property of value . . . [there can be no] detrimental change of position." 40 A.L.R. 2d, supra, § 5, p. 1015; also see *Guaranty Co. v. Reagan, supra; Ohio Co. v. Rosemeier,* 32 Ohio App. 2d 116, 288 N.E. 2d 326 (1972); *Westamerica Securities, Inc., supra.* Defendant simply received a *benefit* to which he had no entitlement. When defendant invested the funds in a business venture, he merely transferred his interest from a cash position to some type of equity position.

Plaintiff, having agreed to pay defendant the amount due him under the pension plan in annual installments, is entitled to the use of the funds erroneously paid defendant for the period pending payment under the provisions of the plan.

We reach the conclusion that the court should have allowed plaintiff's motion for summary judgment and denied defendant's motion.

Reversed.

Judges VAUGHN and CLARK concur.

TROY ANDERSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM RUSSELL ANDERSON, DECEASED v. ADDIE EDWARDS SMITH

No. 753SC677

(Filed 7 April 1976)

1. Trial § 38— requested instructions given in substance — no error

The trial court in a wrongful death action did not err in failing to charge the jury in accordance with plaintiff's request for instructions as to the duty the law imposes upon a motorist who sees, or by the exercise of reasonable care should see, children on or near the highway, since the court's instructions were in essence those requested by plaintiff.

2. Automobiles §§ 63, 90— darting child — instruction proper

The trial court in a wrongful death action did not err in instructing the jury with respect to a child darting from a place of concealment into the path of a motorist since there was evidence in this case from which the jury could find that the child came from behind an obstruction, bushes and briers growing in a ditch, and moved onto the road in front of defendant's oncoming automobile so suddenly that defendant could not stop or otherwise avoid injuring the child.

3. Automobiles § 63— striking child — failure to sound horn — directed verdict or judgment n.o.v. improper

In an action for wrongful death of a child resulting from defendant's allegedly negligent operation of her automobile, plaintiff was not entitled to directed verdict or judgment n.o.v. on the ground that defendant's own testimony indicated that she failed to sound her horn after observing children near the highway, since such testimony merely provided the jury with an additional circumstance to be evaluated by them in determining whether defendant was guilty of any negligence which was the proximate cause of the child's death.

APPEAL by plaintiff from *James, Judge.* Judgment entered 14 March 1975 in Superior Court, PITT County. Heard in the Court of Appeals 19 November 1975.

Civil action for wrongful death of a child. Plaintiff alleged and defendant denied that the child's death was proximately caused by defendant's negligence in operating her automobile.

The parties stipulated that the child was born 15 February 1969 and that he died as a result of injuries received 22 January 1974 when he was struck by an automobile operated by defendant on Rural Paved Road No. 1529. There was evidence that at the scene of the accident the road was straight and level, ran east and west, was paved to a width of 16 feet 10 inches, and had on the north side a dirt shoulder 10 feet 8 inches wide between the edge of the pavement and a ditch. The house in which the child lived was on the south side of the road. Across the road from the house and north of the ditch was a pasture. The accident occurred shortly after 5 p.m. The weather was clear and the sun was shining.

Plaintiff's evidence showed: Shortly before the accident the child was playing with four children in the yard of his house on the south side of the road. He crossed the road and was seen in the pasture on the north side of the road. His mother stepped to the porch of the house to call him back. Before she could do so, he "started running kinda' slanting across the road." Defendant's car was approaching from the east and

"it looked like it was running some kinda' fast." The car braked and skidded but struck the child in the middle of the road, killing him instantly. The car left skid marks of 67 feet. Defendant did not blow her horn prior to striking the child.

Defendant's evidence showed: As she was driving west on the road at approximately 40 miles per hour and when she was about 200 feet from the house, she saw some children standing on the left of the road in the yard of the house. She took her foot off the accelerator and slowed down. She didn't see anybody on the right-hand side of the road until she was about 100 feet away, when she first saw the child. When she first saw him, he was part crawling and part walking out of the ditch on her right. She put on her brakes and tried to stop. The child came on across the road, and she "went to stopping" as hard as she could. She did not blow her horn; she did not have time. She had her mind all on stopping and did all she could to stop. She stopped as she hit the child.

There was also evidence that the ditch out of which the child came was about 4 to 5 feet deep, had sloping sides, and was grown up with briers and bushes. One of defendant's witnesses described the growth on the ditch banks as extending a little above the shoulder of the highway.

The jury answered the first issue "No," finding that the child's death was not caused by negligence of defendant. From judgment that plaintiff recover nothing of defendant, plaintiff appealed.

James, Hite, Cavendish & Blount by Robert D. Rouse III for plaintiff appellant.

Gaylord, Singleton & McNally by Louis W. Gaylord, Jr., and Phillip R. Dixon for defendant appellee.

PARKER, Judge.

[1] Plaintiff first assigns as error that the court failed to charge the jury in accordance with plaintiff's request for instructions as to the duty the law imposes upon a motorist who sees, or by the exercise of reasonable care should see, children on or near the highway. Although the court did not instruct the jury in the exact language requested, plaintiff concedes that the court gave similar instructions, and comparison reveals that the instructions given were in essence those requested. A litigant

is not entitled to have the trial judge instruct the jury in the exact words formulated by the litigant, *Key v. Welding Supplies, Inc.*, 5 N.C. App. 654, 169 S.E. 2d 27 (1969), "it being sufficient if the pertinent and applicable instructions requested are given substantially in the charge." 7 Strong, N. C. Index 2nd, Trial § 38, p. 348. This was done in the present case .

In the present case the court instructed the jury as follows:

> "A motorist who sees or by the exercise of reasonable care should see a child on or near the highway, must recognize that children have less discretion than do grown persons—adults—and that they may sometimes run into the road or across the path of the motorist.
>
> Therefore, under our law, due care requires the motorist to maintain a vigilant outlook to give a timely warning of his approach, and to drive at such speed and in such a manner that he or she can control the vehicle, if a child or in the event a child, in obedience to some childish impulse, should attempt to cross the road or highway in front of the vehicle."

This instruction contains the substance of the instruction requested by the plaintiff and is a correct formulation of the applicable law as long established in this State. "It has long been the rule in this State that the presence of children on or near a highway is a warning signal to a motorist, who must bear in mind that they have less capacity to shun danger than adults and are prone to act on impulse. Therefore, 'the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury.' " *Winters v. Burch*, 284 N.C. 205, 209, 200 S.E. 2d 55, 57 (1973). We find no merit in plaintiff's first assignment of error.

[2] Plaintiff's second assignment of error, based on his Exceptions 7 and 8, calls in question 2 portions of the court's charge to the jury. In the portion which is the subject of Exception No. 7, the court instructed the jury in substance that whether a motorist acted as a reasonably careful and prudent person would act is a factual question to be determined in the light of all relevant circumstances, including "whether the child came quickly into or darted out from a place of concealment or some place in which he was not easily seen." In the portion of

the charge which is the subject of Exception No. 8, the court instructed the jury as follows:

> "Accordingly, if a driver is proceeding along a highway in a lawful manner, using ordinary and reasonable caution for the safety of others, including children, that motorist will not be held liable for striking a child whose presence on the highway could not reasonably be foreseen. Under ordinary circumstances, a motorist is not required to anticipate the appearance of a child in the pathway of the motorist from behind a parked vehicle or other obstructions, so suddenly that he cannot stop or otherwise avoid injuring the child."

Plaintiff contends that although such instructions might be proper in a typical "darting child" case in which a motorist had no other warning before the child suddenly appeared in his path, the giving of such instructions in this case constituted prejudicial error. He points to the evidence in this case that other children were present in the vicinity and that defendant acknowledged she had seen these children while she was yet 200 feet distant from the point where she struck the child. Plaintiff maintains that the presence of these other children in this case placed defendant under a greater than normal duty of care and that by their presence she was already on notice to anticipate unexpected movements by some child in the area. He also points to defendant's testimony that she had seen the child's head and back as he was "crawling" from the ditch as further distinguishing this from the typical "darting child" situation.

We find no error in the court's giving the instructions which are the subject of plaintiff's Exceptions 7 and 8. The evidence shows that the other children referred to were on the south side of the road, defendant's left side as she traveled westwardly on the highway. The evidence was that these children were in the yard of the house and there was no evidence they were on the shoulder of the road or close to the pavement. There was no evidence that they were moving toward the road. On the contrary, there was evidence that they were "standing quietly." The child who was struck suddenly emerged from the partially obscured ditch on the right-hand side of the road. Defendant first saw the child coming from the ditch on her right when she was only 100 feet away, and there was no evidence she could have seen him any earlier. There was evidence that when she first saw the children on her left she was traveling 40 miles

per hour, well within the speed limit. At that speed her car was moving just over 58 feet per second. Even if, as she testified, she took her foot from the accelerator and began to slow down as soon as she saw the children in the yard, there would have been only approximately two seconds time elapse before she traveled the additional 100 feet to the point where she could first see the child emerging from the ditch. Thus there was evidence in this case from which the jury could find that the child came from behind an obstruction and moved onto the road in front of defendant's oncoming automobile so suddenly that defendant could not stop or otherwise avoid injuring the child. In our opinion the instructions given by the court to which plaintiff now excepts, when read contextually with the remainder of the charge, correctly applied the law arising on the evidence in this case. See: *Allen v. Foreman,* 18 N.C. App. 383, 197 S.E. 2d 32 (1973). Plaintiff's second assignment of error is overruled.

[3] Plaintiff's third and fourth assignments of error are directed to the court's refusal to grant his motions for a directed verdict on the first issue of negligence and for judgment notwithstanding the verdict. Plaintiff contends these rulings were error "on the basis that defendant, by her own testimony, specifically testified that she saw small children on or near the highway at a distance of 200 feet and from such time that she first observed small children, she failed to give a timely warning of her approach by sounding her horn." We do not agree. In the first place, defendant did not testify that she saw small children *on* the highway; she testified that she saw them "on the left of the road, in the yard of Mrs. Anderson's house." There was other evidence which placed these children in the yard of the house at distances from 21 to 30 feet from the highway, and there was no evidence that any child other than the child who was killed was on the highway at the time defendant's car was approaching. Defendant's testimony that she did not sound her horn merely provided the jury with an additional circumstance to be evaluated by them in determining whether defendant was guilty of any negligence which was the proximate cause of the child's death. Clearly, the evidence here was not such as to require a directed verdict in favor of the plaintiff, who carried the burden of proof. We find no error in denial of plaintiff's motions for a directed verdict or for judgment notwithstanding the verdict on the first issue.

Finally, plaintiff contends the court erred in not setting aside the verdict as being contrary to the weight of the evidence. "A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court, and its ruling thereon will not be reviewed in the absence of a showing of abuse." *Chalmers v. Womack*, 269 N.C. 433, 437, 152 S.E. 2d 505, 508 (1967). No abuse of discretion has been shown.

No error.

Judges HEDRICK and ARNOLD concur.

KEN-LU ENTERPRISES, INC. v. PAULINE NEAL

No. 7521DC745

(Filed 7 April 1976)

1. **Limitation of Actions § 4— counterclaim under Truth-In-Lending Act — statute of limitations**

In an action to recover under installment sales contracts, the 10-year limitation period of G.S. 1-47(2) for counterclaims on sealed instruments did not apply to permit defendant to file a counterclaim for damages under the Federal Truth-in-Lending Act after the one-year limitation of that Federal Act since G.S. 1-47(2) is inconsistent with the 1974 amendment to the Federal Act, 15 U.S.C. § 1640(h).

2. **Pleadings § 11— actions on evidences of debt — counterclaim under Truth-In-Lending Act**

Defendants who are sued on evidences of debt may not assert potential liability of the creditor under the Federal Truth-in-Lending Act as a counterclaim or defense in such action so far as any damages other than actual damages.

APPEAL by defendant from *Clifford, Judge.* Order entered 29 July 1975 in District Court, FORSYTH County. Heard in the Court of Appeals 14 January 1976.

On 14 May 1975, plaintiff, Ken-Lu Enterprises, Inc., filed this action against defendant Neal, alleging that defendant was in default on a series of four installment sales contracts, entered into between defendant and plaintiff on 14 December 1972, 20 March 1973, 10 October 1973, and 1 November 1973, and seeking possession of the items sold pursuant to those con-

tracts, and $433.10 plus reasonable attorney's fees, interest, and costs.

Defendant filed and served upon plaintiff an answer and counterclaim on 11 June 1975. Defendant's counterclaim sought to recover statutory damages, attorney's fees and costs from plaintiff based on violations in each of the aforesaid installment sales contracts of the Federal Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq.*, (hereinafter the "Act") and Federal Reserve Regulation Z, 12 C.F.R. Part 226 adopted by the Board of Governors of the Federal Reserve System pursuant to the Act. Defendant asserted in her counterclaim that the district court had jurisdiction of the counterclaim by virtue of 15 U.S.C. § 1640(e) and G.S. 1-47(2).

Plaintiff filed a motion seeking dismissal of defendant's counterclaim "on the ground of failure to comply with the one-year statute of limitation of the Truth-in-Lending Act, 15 U.S.C. § 1640(e)." Plaintiff further moved for judgment on the pleadings as to its claim for relief. The court entered an order granting plaintiff's motion to dismiss defendant's counterclaim and denying plaintiff's motion for judgment on the pleadings. Plaintiff's motion to dismiss defendant's counterclaim was granted on the grounds that "the defendant's counterclaim is barred by the applicable federal statute of limitations and by the October 28, 1974, amendment to the said [Truth-in-Lending] Act as contained in 15 U.S.C. § 1640(h)."

From that portion of the court's order dismissing her counterclaim, defendant appeals.

A. Carl Penney, for plaintiff appellee.

Jim D. Cooley and Gerald C. Kell, for defendant appellant.

MARTIN, Judge.

The issue for our determination is whether the one-year limitation in the Federal Truth-in-Lending Act and the October 28, 1974 amendment to the Act as contained in 15 U.S.C. § 1640(h) bar the instant counterclaim.

Defendant admits that she did not file within the Act's one-year period, but contends that G.S. 1-47(2) permits such a filing within ten years under the following circumstances:

"Upon a sealed instrument against the principal thereto. Provided, however, that if action on a sealed instrument is

filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim. . . ."

As Professor Navin noted with respect to G.S. 1-47(2) in 48 N.C. L. Rev. at 548, "[p]rior to 1969, a buyer who signed a negotiable promissory note as part of a consumer credit transaction could have found himself being sued by the holder when the statute of limitations on any claim he had against the seller had long since run. . . . An enactment by the 1969 General Assembly attempted to deal with . . . [this problem]. This legislation amended the statute of limitations section concerning sealed instruments to provide that the maker of the sealed instrument can assert any claim arising out of the transaction against . . . the plaintiff . . . even though a shorter statute of limitations would otherwise bar such a claim. . . . The Act . . . states that the purpose underlying it is 'to insure that if a suit may be maintained on a contract against one contracting party, the other contracting party will not be allowed to escape his contractual obligations by the passage of time or the transfer of contract rights.'"

In some states, though not in all, the courts will permit the consumer to counterclaim for damages if the creditor sues to collect on the transaction in which the breach occurred, even when the creditor's suit is brought several years after the transaction. This is a loophole in the one-year cutoff rule that exists in a number of states. Truth-in-Lending is a federal law which should be uniformly applied to consumers in all states. However, the courts are divided in a situation where a creditor sues a consumer to collect on a debt and the consumer wants to counterclaim for damages for breach of Truth-in-Lending, and where the loan and the truth-in-lending violation are more than one year old.

One case decided February 12, 1974, involved a home improvement contract on which the consumer defaulted after two years. The contractor sued to foreclose his mortgage and the consumer counterclaimed for damages for an alleged violation of Truth-in-Lending. However, the consumer's counterclaim was not allowed because he had requested damages more than a year after the alleged violation occurred. *Gillis v. Fisher Hardware Co.*, 289 So. 2d 451 (Fla. App. 1974).

In *Hodges v. Community Loan and Investment Corp.*, 133 Ga. App. 336 (1974), decided September 1974, the borrowers were not allowed to maintain their counterclaim for violation of the Federal Truth-in-Lending Act since the lender's action was initiated after the expiration of the Truth-in-Lending limitation period. In this Georgia case, the Court noted that the ". . . Truth-in-Lending claim is not an integral part of the action for money had and received; it is merely ancillary to that action." Further, the Court went on to say that that statute which extends the limitation period for counterclaim and cross-claims is not as broad as that in some other states. The Georgia statute of limitations states:

> "The limitations of time within which various actions may be commenced and pursued within this state to enforce the rights of the parties are extended, only insofar as the enforcement of rights which may be instituted by way of a counterclaim and cross-claim, so as to allow parties, up to and including the last day upon which the answer or other defensive pleadings should have been filed, to commence the prosecution and enforcement of rights by way of counterclaim and cross-claim *provided that the final date allowed by such limitations for the commencement of such actions shall not have expired prior to filing of the main action.*" (Emphasis supplied.)

Upon motion for rehearing, the borrowers raised the contention that their counterclaim was in the nature of recoupment, and that therefore the Truth-in-Lending statute of limitations should not be a bar thereto.

The court, in denying motion for rehearing, answered that ". . . the Truth-in-Lending counterclaim . . . did not arise out of the mutual obligations or covenants of the loan transaction upon which this suit was founded. . . ." Rather, it said that the borrowers' claim for recovery of a penalty created by federal law was an "extrinsic byproduct" of this transaction and was not dependent upon the lender's contractual obligations. Accordingly, the court said, the borrowers' counterclaim is in the nature of setoff, not recoupment. As such, it is subject to the statute of limitations stated in the federal statute creating the penalty.

In two other cases, however, the Courts have decided the identical question in favor of the consumer. In one of them, a

finance company sued the consumer for the deficiency after it repossessed and sold an automobile when the consumer defaulted on an installment. The Court permitted the consumer to counterclaim for $1,000 in damages for Truth-in-Lending violations although more than a year had passed since the sale of the car. *Wood Acceptance Co. v. King,* 309 N.E. 2d 403 (Ill. App. 1974). In accordance was *First Nat'l City Bank v. Drake,* (N.Y. Civ. Ct., September 27, 1973). The Court denied damages in this case, however, because the breach was the result of an inadvertent trivial clerical error.

In *Wood Acceptance Co. v. King, supra,* decided February 22, 1974, the defendant admitted that he did not file within the Act's one-year period but contended that section 17 of the Limitations Act (Ill. Rev. Stat. 1971, ch. 83, par. 18) permits such a filing. It provides:

> "A defendant may plead a set-off or counter claim barred by the statute of limitation, while held and owned by him, to any action, the cause of which was owned by the plaintiff or person under whom he claims, before such set-off and counter claim was so barred, and not otherwise."

The Court in the Illinois case noted that:

> "The rationale generally stated for holding that compliance with fixed limitations within the statute is indispensable to the maintenance of a right thereunder is that the statutes create rights unknown to common law, fixing a time within which the action may be commenced, which element is such an integral part of the enactments that it necessarily is a condition of the liability itself and not on the remedy alone. A statute of limitations, on the other hand, applies only to the remedy, is procedural in nature and may therefore be waived. (Citations omitted.)"

The Court further states that:

> "Although our research into the congressional hearings on the enactment of the Federal Truth in Lending Bill fails to disclose the purpose behind the one year filing period, we note that the Act is intended to safeguard the consumer in connection with the utilization of credit and the enforcement of the Act is accomplished largely through the institution of civil actions. For this reason, no provision was made for investigative or enforcement machinery at the federal

level on the assumption that the civil penalty section would secure substantial compliance with the Act. The placement of such responsibility on the often unknowledgeable consumer lends support for the conclusion that the penalty sought to be imposed on violators of this Act should not be circumvented where the debtor's obligation is not stale and is raised by way of a section 17 counterclaim arising out of the same occurrence. We conclude that the one year limitation in which to bring the federal right is not such an integral part of the Federal Truth in Lending Act as to outweigh the combined purposes of that Act and section 17 of the Limitations Act."

Effective October 28, 1974, the Act was significantly amended by Section 408(d) of Public Law No. 93-495. One of the amendments, now codified as 15 U.S.C. § 1640(h), provides:

"(h) A person may not take *any action* to offset any amount for which a creditor is *potentially* liable to such person under subsection (a)(2) [15 U.S.C. § 1640(a)(2)] of this section against any amount owing to such creditor by such person, unless the amount of the creditor's liability to such person *has been determined by judgment* of a court of competent jurisdiction in an action to which such person was a party." (Emphasis supplied.)

As Ralph C. Clontz, Jr., stated in the 1975 Cumulative Supplement to the Third Edition of his Truth-in-Lending Manual in reference to the aforesaid amendment:

"Beyond any question, this new subsection provides that unless a creditor's civil liability for disclosure errors under § 130 (a)(2) [15 U.S.C. § 1640(a)(2)] of the Act has been determined by a proper court judgment, such *potential* liability may not be used as an excuse for failure to make required payments, nor could the debtor deduct such 'potential civil penalty' from his total unpaid obligation due the creditor unless judgment has been previously entered, establishing the consumer's right to collect the Truth-in-Lending statutory penalties.

The civil penalties referred to are those provided by Section 130 (a)(2) of the Act, which specifies the 'automatic civil penalty' (twice the amount of the finance charge—minimum, $100; maximum, $1,000) in individual actions and also covers the liability of creditors in class actions

for the civil penalty of the lesser of $100,000 or one percent of the net worth of the creditor. However, we recall that Section 130(a) (1) of the Act additionally now authorizes consumers to recover any *actual* damages proximately caused by a Truth-in-Lending or Regulation Z violation, and such potential *actual damages* could be asserted as an offset against the consumer's debt to the creditor.

To the author, this new subsection also seems clearly to establish that unless a creditor's civil liability for disclosure errors under Section 130 (a) (2) [15 U.S.C. § 1640(a) (2)] of the Act has been determined by a proper court judgment such *potential* liability may *not* be asserted as a defense in any action brought by the creditor to collect the unpaid balance owed by the consumer in the consumer credit transaction in which the violation occurred. . . ."

[1] This amendment to the Act, if construed in accord with Clontz's interpretation, should produce a desirable result: a uniform application of the Act to consumers in all states. Further, G.S. 1-47(2) cannot be utilized to allow the counterclaim since it is inconsistent with the new amendment. 15 U.S.C. 1681.

[2] The design of the Act was to provide protection for consumers by affording them, through meaningful disclosure, an opportunity to compare and shop for credit. The Act should be used to protect consumers, but it should not be used to thwart the valid claims of creditors. We hold that defendants who are sued on evidences of debt may not assert potential liability of the creditor under the Truth-in-Lending Act as a counterclaim or defense in such action, so far as any damages other than actual ones.

Accordingly, the judgment of the superior court dismissing the defendant's counterclaim is affirmed.

Affirmed.

Judges VAUGHN and CLARK concur.

HEATING AND AIR CONDITIONING ASSOCIATES, INC. v. CHARLES S. MYERLY, ET AL, T/A ERNST & ERNST, A PARTNERSHIP

BRYANT HEATING AND EQUIPMENT COMPANY, A CORPORATION V. CHARLES S. MYERLY, ET AL, T/A ERNST & ERNST, A PARTNERSHIP

No. 7526SC859

(Filed 7 April 1976)

1. **Accountants; Contracts § 27— oral contract to investigate employee dishonesty — sufficiency of evidence**

Evidence was sufficient to support the trial court's finding that the plaintiff Heating did not employ the defendant to make a special audit of plaintiff's records to determine whether there had been any employee dishonesty, where such evidence consisted of testimony by the secretary-treasurer of plaintiff Heating that he conducted a telephone call with one of defendant's employees requesting that such a determination be made and the employee agreed to perform all services requested, but defendant's employee denied that such phone call ever took place, plaintiff's secretary-treasurer never mentioned the telephone call to anyone, and no notation or memorandum was made with respect to the phone call.

2. **Accountants— contract for services — accountant entitled to reasonable worth of services performed**

Evidence was sufficient to support the trial court's determination that defendant was employed by plaintiff Heating to prepare an unaudited financial statement and determine the net worth of the corporation, and that defendant was entitled to what those services were reasonably worth.

APPEAL by plaintiffs from *Ervin, Judge.* Judgment entered 24 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 February 1976.

This is a civil action wherein the plaintiffs, Heating and Air Conditioning Associates, Inc. (Heating), and Bryant Heating and Equipment Company (Bryant), in separate complaints seek to recover damages from the defendant, Charles S. Myerly, et al t/a Ernst and Ernst (Ernst), a general accounting partnership, for the defendant's alleged negligent performance of a contract to conduct an examination of the plaintiff Heating's books, records, and transactions in order to determine whether there existed any employee dishonesty. In its answer to each complaint, the defendant denied that it had entered into any

agreement with Heating to examine the books, records, and transactions of Heating to determine whether there was any employee dishonesty and denied further that it was negligent in any work or service performed for either of the plaintiffs. Defendant also filed a counterclaim against Heating seeking to recover the reasonable value for services rendered in the preparation of "a consolidating statement of the financial position (without audit) of the plaintiff [Heating] as of April 30, 1968, and a consolidating statement of income (without audit) of the plaintiff [Heating] for the fiscal year ended April 30, 1968," and for services rendered in conferences with attorneys pertaining to purchase of stock in September 1968. The cases were consolidated and after a trial without a jury, Judge Ervin made detailed findings of fact and conclusions of law and concluded that plaintiffs have and recover nothing of the defendant and that the defendant recover $4,295.00 plus interest on its counterclaim against the plaintiff Heating. From the judgment entered, both plaintiffs appealed.

Waggoner, Hasty and Kraft by William J. Waggoner and Robert D. McDonnell for plaintiff appellants.

Kennedy, Covington, Lobdell and Hickman by William T. Covington, Jr., and Stephen M. Courtland for defendant appellee.

HEDRICK, Judge.

The plaintiffs in their complaints alleged that Heating employed Ernst to conduct a special investigation of Heating's books, records and transactions to determine whether there had been any employee dishonesty; that the defendant was negligent in the performance of the contract; and that as a result of defendant's negligence the dishonesty of one of Heating's employees, Paul J. Tanner, was not discovered, which resulted in a loss to Heating in the amount of $90,472.60 and a loss to Bryant, in reliance on Ernst's work, in the amount of $102,779.81.

At trial the plaintiff's evidence tended to show the following: In 1968 and 1969 Bryant was a distributor of heating and air conditioning equipment. Heating was in the business of installing and repairing heating and air conditioning equipment. Heating was owned by officers and employees of Bryant. In April 1968 W. B. R. Mitchell, the president of Bryant and secretary-treasurer of Heating, met with Jim Faulkner, a rep-

resentative of Ernst, and asked Ernst to prepare a financial statement for Heating for the fiscal year ending 30 April 1968, and also to determine as accurately as possible the net worth of Heating so that the corporation could pay Bill Milner for the value of his stock. Milner was president of Heating and Mitchell had decided to fire him and buy up his stock. Subsequently, Mitchell had another conversation with Faulkner and asked him to make an investigation of Heating and determine whether Paul Tanner, an employee, had been embezzling corporate property, because he had received reports that Tanner had been engaging in such misconduct. On behalf of Ernst, Faulkner agreed to perform all the services requested by Mitchell. In June 1968 Mitchell was shown a pencil copy of the requested financial statement, and Faulkner advised him that Heating's net worth was negative. Mitchell requested that certain accounting adjustments be made so as to give the corporation a positive net worth of about $1,300, and this was done. With respect to the investigation of Tanner's dishonesty, Faulkner reported that he had found nothing to indicate dishonesty on Tanner's part. Mitchell asked Faulkner whether Heating should be liquidated in view of its poor financial condition, and Faulkner answered that the corporation had made good money in the past, "it was a good built-in market" for Bryant, and it should not be liquidated. After these conversations with Faulkner and other employees of Ernst, Mitchell had Milner fired and Bryant purchased his stock in Heating for $2,500. In the following months, Mitchell received in-house financial statements showing that Heating's net worth had reached a large negative figure. He employed the accounting firm of Conrad, Hoey & East to make another investigation of possible dishonesty on Tanner's part. The Conrad firm quickly found that Tanner had embezzled several thousand dollars' worth of corporate property. If Ernest had discovered Tanner's defalcations as it should have done, Mitchell would have had Heating liquidated immediately, and the losses it suffered in subsequent months would not have occurred, additionally, Bryant would not have lost money by extending additional credit to Heating.

Ernst offered evidence tending to show that it was never employed to do anything for Heating other than prepare an unaudited financial statement and determine the net worth of the corporation. Ernst was never asked to investigate the conduct of Paul Tanner; and in April or May 1968, Mitchell had not received any reports of embezzlement by Tanner. None of

the Ernst employees who performed accounting services for Heating were ever under the impression that they were supposed to carry out an audit of Heating or investigate Tanner's conduct. Charles S. Myerly, the partner in charge of Ernst's Charlotte office, was never notified that Heating had requested an investigation into the honesty of Paul Tanner; and the policy of the firm is that no such investigation may be undertaken without his approval. When an accounting firm is employed only to prepare an unaudited financial statement, reasonable care and generally accepted accounting principles do not require that it check the accuracy of the client's financial records or investigate the honesty of the client's employees. Heating has been billed for the accounting services performed by Ernst and has refused to pay for these services.

Rule 52(a)(1) provides that:

> "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

Where the judge tries a case without a jury, it is his duty to find the facts specially and state separately his conclusions of law and thereby resolve all controversies between the parties raised by the pleadings and the evidence. *Davis v. Enterprises, Davis v. Mobile Homes,* 23 N.C. App. 581, 209 S.E. 2d 824 (1974); G.S. 1-A-1, Rule 52.

While the plaintiffs contend that the court failed to make findings and conclusions determinative of all the issues raised, we are of the opinion that the only issues raised by the pleadings and the evidence were: (1) whether there was a contract between the plaintiff Heating and the defendant with respect to the defendant conducting a special investigation of Heating's books, records, and transactions to determine whether there had been any employee dishonesty, (2) whether the defendant negligently performed such a contract, and (3) what damages proximately resulted from such negligence. Obviously, if the court found and concluded there was no special contract for a fraud investigation, there would be no necessity for the court to make findings determinative of the other issues. Our inquiry therefore, with respect to plaintiffs' claims, will be limited to a consideration of plaintiffs' contention that the court erred in finding and concluding that there was no "special contract for

a special fraud investigation to be conducted by . . . [defendant] to discover whether or not Tanner or any other employee of Home Comfort [a division of Heating] was dishonest. . . ."

The trial court's findings of fact are conclusive if they are supported by competent evidence, even though there may be evidence to the contrary. *Electric Co. v. Shook*, 17 N.C. App. 81, 193 S.E. 2d 392 (1972), *affirmed*, 283 N.C. 213, 195 S.E. 2d 514 (1973); *Vaughn v. Tyson*, 14 N.C. App. 548, 188 S.E. 2d 614 (1972). With respect to whether there was a special contract between Heating and defendant, Judge Ervin made the following pertinent findings of fact:

> "The only evidence as to the formation of the special contract between Ernst & Ernst and Htg. & A/C alleged in the Complaint is the testimony of Mitchell as to a telephone conversation between him and Faulkner in late April or early May, 1968. Faulkner denied that any such telephone conversation took place and Mitchell's testimony that it did was not corroborated or supported by any evidence of any kind, either written or oral. No witness testified that Mitchell ever told him about or mentioned such a telephone conversation during the six years intervening between the time Mitchell said it occurred and the time of trial."
>
> "The evidence of record fails to persuade the Court by its greater weight that the asserted telephone conversation between Mitchell and Faulkner upon which Htg. & A/C relied to establish the formation of the special contract alleged in the Complaint and which Faulkner denied ever occurred, was substantially as related by Mitchell in his testimony given after a lapse of six years and without any notation, memorandum or corroboration and the Court is unable to find by the evidence and its greater weight what the substance of the asserted telephone conversation was, if it did occur, and the Court finds as a fact that the parties did not enter into a special contract for a special fraud investigation to be conducted by Ernst & Ernst to discover whether or not Tanner or any other employee of Home Comfort [a division of Heating] was dishonest and the Court further finds that the only contract between the parties was a contract for the preparation of financial statements without audit and the preparation of income tax returns for the fiscal year ending April 30, 1968."

[1] While the record evidence is sufficient in our opinion to raise an inference that the plaintiff Heating did employ the defendant to make a special audit of plaintiff's records to determine whether there had been any employee dishonesty, the record is complete with competent evidence that no such contract was ever made between Heating and the defendant. As the record clearly demonstrates, Judge Ervin considered all the evidence and found the facts against the plaintiffs. The evidence supports these findings which in turn support his conclusion.

[2] With respect to defendant's counterclaim against Heating, Judge Ervin made the following finding of fact:

> "At its request, Ernst & Ernst rendered accounting services to Htg. & A/C consisting of the preparation of financial statements without audit and the preparation of tax returns for its fiscal year ending April 30, 1968. Said services were reasonably worth $4,295.00 and Htg. & A/C agreed that it would pay to Ernst & Ernst what said services were reasonably worth. Htg. & A/C has not paid anything for said services, although Ernst & Ernst has demanded payment in said amount. There is justly due and owing from Htg. & A/C to Ernst & Ernst the sum of $4,295.00 with lawful interest on the sum of $3,735.00 from August 30, 1968, and on the sum of $560.00 from November 29, 1968."

Plaintiff Heating simply contends that the services rendered by the defendant were "wholly worthless" and that the court erred in entering judgment for the defendant on the counterclaim. Judge Ervin's finding and conclusion that the services rendered to the plaintiff was reasonably worth $4,295.00 is supported by the record, and is binding on appeal.

The judgment that plaintiffs have and recover nothing of the defendant on their claims, and that the defendant recover $4,295.00 plus interest on defendant's counterclaim against the plaintiff Heating is affirmed.

Affirmed.

Judges BRITT and MARTIN concur.

JACQUELINE W. GWALTNEY v. MARGARET M. KEATON, GERALD STEWART TRIPLETT AND JAMES GILBERT CANTER

No. 7522SC906

(Filed 7 April 1976)

1. **Automobiles § 45— blood alcohol test — improper foundation laid — admission of evidence harmless error**

In an action to recover damages sustained when defendant Keaton's car struck the motorcycle upon which plaintiff was a passenger, error of the trial court in admitting evidence of a blood alcohol test given the driver of the motorcycle was not prejudicial to defendant Keaton, since there was no evidence tending to establish any connection between the driver's drinking and the cause of the accident.

2. **Automobiles § 99— driver of motorcycle not owner — failure to submit negligence of owner to jury — no prejudice**

In an action to recover damages sustained when defendant Keaton's car struck the motorcycle upon which plaintiff was a passenger, defendant Keaton was not prejudiced by the trial court's failure to submit to the jury the negligence of the owner of the motorcycle, since the uncontradicted evidence showed that plaintiff and the driver of the motorcycle, who had borrowed it from its owner, were traveling to the beach on a social outing at the time of the accident. G.S. 20-71.1.

3. **Automobiles § 94— passenger on motorcycle — contributory negligence — insufficiency of evidence**

In an action to recover damages sustained when defendant Keaton's car struck the motorcycle upon which plaintiff was a passenger, the trial court did not err in failing to submit the issue of plaintiff's contributory negligence to the jury since the evidence disclosed no circumstances where plaintiff, acting with the due care of a reasonably prudent person, had reason to be apprehensive as to the manner in which the motorcycle was being operated, and there was no evidence that a person of ordinary prudence, under same or similar circumstances, would have remonstrated with the operator.

4. **Rules of Civil Procedure § 59; Trial § 52— claim of inadequate damages awarded — new trial discretionary**

Defendant's contention that the damages awarded him by the jury were inadequate and that the court should have added to the verdict or set it aside and awarded him a new trial was untenable, since the court had no power to add to the verdict, a motion for new trial on the ground of inadequate damages is addressed to the discretion of the trial judge, and defendant failed to show any abuse of discretion.

APPEAL by defendants Keaton and Triplett from *Martin (Perry), Judge.* Judgment entered 31 May 1975 in Superior

Court, ALEXANDER County. Heard in the Court of Appeals 20 February 1976.

Plaintiff instituted this action to recover damages sustained when Margaret Keaton's car struck the motorcycle upon which plaintiff was a passenger. Plaintiff alleged that the accident was caused by the negligence of Margaret Keaton and Gerald Triplett, the driver of the motorcycle. Plaintiff further alleged that Triplett was the agent of James Canter, the owner of the motorcycle, and that Canter was also liable for her damages.

Defendants Triplett and Canter answered and denied that Triplett was negligent and further denied that Triplett was Canter's agent. Triplett and Canter cross-claimed against Margaret Keaton alleging that the accident was caused solely by her negligence. Mrs. Keaton answered and denied that she was negligent, and she asserted a cross-claim against Canter and Triplett.

The evidence at trial tended to establish that Triplett borrowed Canter's motorcycle for a beach trip, and plaintiff went with Triplett as a passenger. Triplett testified that he drank about three beers earlier in the afternoon. As the plaintiff and Triplett traveled down Paul Payne Road, Triplett stated that he observed Mrs. Keaton's car coming from the opposite direction and traveling slowly. Triplett testified that he was driving fifty or fifty-five miles per hour and that Mrs. Keaton made a left turn into a driveway across his lane of travel. Triplett was unable to stop and could not avoid hitting Mrs. Keaton's car. Plaintiff and Triplett were injured as a result of the accident.

Mrs. Keaton's evidence tended to show that she was driving one of her daughter's friends home when she missed her proper turn. Mrs. Keaton stated that, because she missed her turn, she intended to pull into a driveway and turn around. She testified that she slowed down, gave a turn signal, and looked for on-coming traffic but did not see any. As she made her turn her car was hit in the side by the motorcycle. A witness to the accident testified that the motorcycle was traveling faster than fifty-five miles per hour, and the investigating officer testified that immediately after the accident he smelled the odor of alcohol on Triplett's breath.

At the conclusion of the evidence the court granted Cantor's motion for directed verdict as to Mrs. Keaton's cross-claims against him. The jury found that the plaintiff and Triplett were

injured as a result of Margaret Keaton's negligence. The jury further determined that Triplett was not contributorily negligent. Judgment was entered for the plaintiff in the amount of $11,625, for Triplett in the amount of $2,000, and for Canter in the amount of $937 for damages to his motorcycle. From the judgment defendants Keaton and Triplett appealed to this Court.

McElwee, Hall and McElwee, by John E. Hall, for plaintiff appellee.

Mitchell, Teele and Blackwell, by Hugh A. Blackwell, for defendant appellant.

Patrick, Harper and Dixon, by Stephen M. Thomas, and West, Groome and Baumberber, by Carroll D. Tuttle, for defendant appellee-cross appellant.

ARNOLD, Judge.

DEFENDANT KEATON'S APPEAL

[1] In response to a question concerning a blood alcohol test administered to defendant Triplett following the accident, Triplett testified that the results of the test were ".02." It is correctly contended by defendant Keaton that an appropriate foundation was not laid in order to properly admit this testimony into evidence. *State v. Powell,* 279 N.C. 608, 184 S.E. 2d 243 (1971); *State v. Caviness,* 7 N.C. App. 541, 173 S.E. 2d 12 (1970). However, we fail to see any prejudice to defendant Keaton by the admission of the results of the blood alcohol test since there was no evidence tending to establish any connection between Triplett's drinking and the cause of the accident.

[2] We also fail to see prejudicial error in the trial court's directed verdict as to defendant Canter. Mrs. Keaton argues that under G.S. 20-71.1, the evidence of Canter's ownership of the motorcycle was sufficient to take the case to the jury, and she contends that it was error to direct a verdict for Canter. It is true that ownership of the vehicle would be sufficient to take the case to the jury under G.S. 20-71.1, but the uncontradicted evidence proved that plaintiff and Triplett were traveling to the beach on a social outing at the time of the accident. Where the evidence clearly establishes that the defendant was operating the vehicle on a purely personal mission the defendant is entitled, without request, to a peremptory instruction on the

issue. Therefore, we hold that no prejudice has been shown, and that the error is harmless. *See Belmany v. Overton,* 270 N.C. 400, 154 S.E. 2d 538 (1967).

[3] Contributory negligence on the part of plaintiff was not submitted as an issue to the jury and defendant Keaton assigns error. She asserts that Miss Gwaltney was under a duty "to remonstrate with the driver when the circumstances are such that a man of ordinary prudence would remonstrate," and that a "guest passenger . . . is required to exercise that degree of care for his own safety which a reasonably prudent man would employ under the same or similar circumstances." 1 N. C. Index 2d, Automobiles § 94, pp. 565-566.

While a guest passenger has the duty to exercise ordinary care for his own safety "what constitutes the exercise of ordinary care on the part of a guest passenger depends on the circumstances." *Watters v. Parrish,* 252 N.C. 787, 801, 115 S.E. 2d 1 (1960).

The question of the guest passenger's contributory negligence is an issue for the jury where conflicting inferences may be drawn from the circumstances. *See Jackson v. Jackson,* 4 N.C. App. 153, 166 S.E. 2d 541 (1969). However, in the case at bar there was no evidence presented which raised conflicting inferences with respect to contributory negligence on the part of plaintiff.

Plaintiff testified that Triplett was operating the motorcycle at a lawful rate of speed and in a safe manner. The evidence indicated that she saw Triplett drink part of a beer before they left for the beach.

Although one witness indicated that he thought the motorcycle was going faster than the speed limit at the time of the accident there is no evidence that plaintiff was aware, or in the exercise of due care should have been aware, of Triplett's speeding, or that she had any opportunity to remonstrate with him. *See Norfleet v. Hall,* 204 N.C. 573, 169 S.E. 143 (1933).

There was no evidence that Triplett was under the influence of alcohol, or that he had consumed more than a small quantity of beer. The evidence discloses no circumstances where plaintiff knew, or had reason to know, that Triplett lacked the capacity to operate the motorcycle.

The evidence disclosed no circumstances where plaintiff, acting with the due care of a reasonably prudent person, had reason to be apprehensive as to the manner in which the motorcycle was being operated. [*See Watters v. Parrish, supra.*] There was no proof that a person of ordinary prudence, under the same or similar circumstances, would have remonstrated with the operator, and we hold that the trial court did not err in failing to submit the issue of contributory negligence on the part of the plaintiff to the jury.

We have examined the remainder of defendant's assignments of error, including those with respect to the judge's charge, and we find no error prejudicial to defendant Keaton.

DEFENDANT TRIPLETT'S APPEAL

[4] Defendant's only contention is that the damages awarded him by the jury were inadequate. His position that the trial court should have added to the verdict or set it aside and award him a new trial is untenable. The court has no power to add to a verdict, and a motion for new trial on the grounds of inadequate damages is addressed to the discretion of the trial judge. No abuse of discretion has been shown, and no error exists.

As to defendant Keaton's appeal we find no error.

As to defendant Triplett's appeal we find no error.

Chief Judge BROCK and Judge PARKER concur.

HERBERT A. SOPER v. JUDITH B. SOPER

No. 7521DC968

(Filed 7 April 1976)

Divorce and Alimony § 23— increase in child support provided in separation agreement

Defendant's evidence showed a substantial change in circumstances which supports the court's order increasing the amount plaintiff is to pay for child support from the $250 per month provided in a separation agreement to $700 per month where defendant testified that her expenses for the two children for the previous year amounted to $15,750 and that the major changes in her expenses for the children

since signing the separation agreement were an additional $3000 expense for child care after she went back to work and increases due to inflation.

APPEAL by plaintiff from *Leonard, Judge.* Judgment entered 21 August 1975 in District Court, FORSYTH County. Heard in the Court of Appeals 16 March 1976.

Plaintiff instituted this action on 6 February 1975, seeking an absolute divorce on the ground of one-year separation. Defendant filed answer admitting the allegations of the complaint but alleging a further answer pertaining to custody of and support for the two children born to the marriage. As a part of her pleading, defendant set forth a separation agreement entered into by the parties on 28 August 1973 providing for alimony and custody of, and support for, the children. She alleged that there had been a change in conditions and that the amount of child support provided by the agreement was grossly inadequate.

Following a trial of the cause, the court entered judgment granting plaintiff an absolute divorce. The court also entered an order with respect to child custody and support, the provisions of which are summarized in pertinent part as follows:

The court found as facts that two children, ages 12 and 6 were born to the marriage; that under the separation agreement, plaintiff agreed to pay defendant $1,300 per month alimony, said sum to be reduced in the event defendant obtained employment by an amount equal to 50 percent of defendant's gross monthly income. Regarding support of the children (who are in defendant's custody), the agreement provided that plaintiff would pay defendant $125 per child per month; in addition thereto he would make payments on the house owned by the parties jointly, or on any other residence that defendant might acquire during the separation and before her remarriage, in an amount not to exceed $250 per month. At the time of the separation, plaintiff's annual income from his medical practice was approximately $66,000. In 1975 defendant became employed and as of 1 July 1975 was earning a gross annual salary of $15,000. Under the formula established by the agreement, as of 1 August 1975, alimony payments due defendant from plaintiff would be reduced from $15,600 per year to $8,100 per year, with no increase in child support payments. (Plaintiff did not except to these findings.)

The court further found that plaintiff's income for the first six months of 1975 exceeded $50,000 and a reasonable projection of his income for 1975 would indicate an income exceeding $105,000, or almost $40,000 more than his income for 1973 when the separation agreement was signed. (Although plaintiff excepted to this finding, the exception was not brought forward in an assignment of error.)

The court made the following findings of fact to which plaintiff noted and preserved exceptions:

> "The large amount of alimony provided by the original separation agreement when compared with the small amount provided for child support makes it patently obvious, and the court finds as a fact that the disparity resulted from a desire on the part of the plaintiff husband to get maximum tax benefits from payments made to the wife for her support and the support of the children, alimony payments being fully deductible to the husband while child support payments were not.
>
> "The total amount of money that is required to directly support and maintain the two minor children of the marriage in the style and manner to which they are accustomed is well in excess of $8,400.00 per year exclusive of housing needs, private schooling and dental and medical expenses.
>
> "The testimony of the wife and costs of supporting the children introduced into evidence by the wife in written form make it clear that the sum of $250.00 per month for the support of two minor children is totally inadequate, notwithstanding that the husband is paying the house payment, the private school expenses and the dental expenses of the children and maintaining insurance coverage for medical expenses. Certainly it is inadequate when viewed in the light of the husband's income and earning capacity, both at the time the separation agreement was entered and currently.
>
> * * * *
>
> "The unusual inflationary spiral that has taken place since the separation agreement was entered is a factor which has added to the cost of supporting the children and has made even more inadequate what was already an inadequate amount for such support as set out under the original agreement."

The court also found as a fact, (plaintiff noting no exception to this finding), that defendant, by reason of her employment and under the schedule of child support and alimony provided in the agreement, has less money remaining after the payment of income taxes than she would have if she remained unemployed and continued to draw the full amount of alimony provided in the agreement.

The court made conclusions of law which include the following and to which plaintiff excepted:

> "Upon the foregoing findings of fact the Court concludes that by reason of the circumstances now existing between the parties as opposed to the circumstances which existed at the time the separation agreement was entered, and by reason of the fact that the amount for child support as provided in the original separation agreement was totally inadequate for their support, the Court is of the opinion that child support payments should be increased from the current level of $250.00 per month to a total of $700.00 per month, or $350.00 per child due to a substantial change of circumstances as well as the fact that the amount of support was inadequate from its inception.
>
> * * * *
>
> "The Court is further of the opinion that the husband is well able to continue meeting the obligations imposed upon him by the separation agreement with respect to providing private schooling, medical care through insurance, making monthly payments on the residence occupied by the wife and children under the terms of the agreement and providing dental care for the children as agreed upon between the parties."

The court ordered that effective 1 August 1975 plaintiff would pay defendant for the support of the two children the sum of $700 per month; that in all other respects the terms of the separation agreement would remain unchanged. It further ordered that defendant pay her own counsel and that the cause be retained for further orders.

Plaintiff appealed from the order relating to child support.

Nelson, Clayton & Boyles, by Laurel O. Boyles, for plaintiff appellant.

Hatfield and Allman, by James W. Armentrout and Weston P. Hatfield, for defendant appellee.

BRITT, Judge.

In his assignments of error, plaintiff contends the court erred in making the findings of fact and conclusions of law to which he preserved exceptions as indicated above, and in increasing the amount he is to pay for child support from $250 to $700 per month. We find no merit in the assignments.

In *Childers v. Childers*, 19 N.C. App. 220, 225, 198 S.E. 2d 485, 488 (1973), the legal principles controlling the instant case are stated as follows:

> "In North Carolina it is well settled that while the marital and property rights of the parties under the provisions of a valid separation agreement 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 (1966); *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235 (1962); *Rabon v. Ledbetter*, 9 N.C. App. 376, 176 S.E. 2d 372 (1970). Yet where parties to a separation agreement agree upon the amount of the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable and that upon motion for an increase in such allowance, a court is not warranted in ordering an increase in the absence of any evidence of a change of conditions. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). . . ."

While both parties recognize the validity of the quoted principles, they disagree as to their applicability here. Plaintiff argues that the evidence presented at trial was not sufficient to show that the amount for child support agreed upon by the parties was unjust or unreasonable, or that there had been a substantial change of conditions. Defendant argues that the evidence was sufficient; we agree with defendant.

The evidence discloses that, at plaintiff's insistence, defendant was not represented by counsel in negotiating the terms of the separation agreement and that it was drafted by plaintiff's attorney. While defendant does not attack the validity of the agreement, she stresses this fact to explain why the agreement was written to provide plaintiff with income tax advantages. The evidence fully supports the findings of fact on that point.

In her testimony defendant clearly showed a substantial change in conditions between the date of the separation agreement and the date of the trial. She testified that as a result of returning to work she had to employ housekeepers or babysitters to be present when the children returned from school and remain with them until she arrived at home, at a cost of approximately $3,000 per year; that, based on cancelled checks and receipts, her expenses for the children during 1974 amounted to $15,750, which sum included clothing, food, transportation, entertainment, vacations and two-thirds of the cost of upkeep of the house; and that the major changes in her expenses for the children since signing the separation agreement were the additional $3,000 expense for child care and increases due to inflation.

While it might have been better for the court in its findings to have provided more detail on the $8,400 figure, we think, under the facts in this case and the evidence presented, that the findings are sufficient and hold that they are fully supported by the evidence. We further hold that the conclusions of law are supported by the findings of fact and fully warrant the order increasing child support payments.

The order appealed from is

Affirmed.

Judges PARKER and CLARK concur.

FREDERICK M. WILSON v. J. A. TURNER, JR.

No. 7526SC919

(Filed 7 April 1976)

1. **Uniform Commercial Code § 30— successive indorsers — order of liability**

The evidence was sufficient to support the court's findings that there was no agreement between two indorsers of a note that they would be jointly and severally liable and that the indorsers were liable in the order in which they indorsed the note. G.S. 25-3-414(2).

2. **Uniform Commercial Code § 25— successive indorsers — same transaction — order of liability**

Even if it was intended that both plaintiff and defendant should indorse a note before the loan was closed, it does not follow that plaintiff and defendant indorsed the note "as part of the same transaction" within the meaning of G.S. 25-3-118(e) so as to make them jointly and severally liable since that statute did not change the rule that indorsers are presumed to be liable in the order in which their signatures appear on the instrument.

APPEAL by plaintiff from *Falls, Judge.* Judgment entered 25 June 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 March 1976.

In his complaint plaintiff alleged that on 25 October 1967 he and defendant indorsed a note for $27,900. The note was executed by Landmark Inns of Charlotte, Inc. to the Bank of Commerce, and it was a renewal of an earlier note. Plaintiff also alleged that he and defendant had agreed that they would be jointly liable for $13,500, while plaintiff would be primarily liable for the balance. In April 1968 plaintiff paid the note and this action is to collect one-half the $13,500. Defendant admitted that he indorsed the note but denied that he was liable to plaintiff for any amount.

The case was tried without a jury and plaintiff's evidence was as follows:

On 27 November 1963 Landmark Inns of Charlotte, Inc. (Landmark) executed a note to the Bank of Charlotte for $22,500, and plaintiff and defendant signed the note on the back. This note was renewed and reduced as payments were made by Landmark. In December 1965 Landmark executed a renewal note for $12,500 and both parties again signed on the back.

In February 1964 Landmark executed a $3,000 note to the Bank of Commerce which plaintiff did not indorse. This note was perodically renewed and increased as additional loans were made. Plaintiff signed some of the renewal notes. On 25 October 1967 Landmark executed a renewal note to the Bank of Commerce for $27,900, and plaintiff and defendant signed it on the back. Plaintiff signed before defendant, and his signature appears above defendant's signature.

On 4 April 1966 plaintiff and defendant signed an "Indemnification Agreement" in which they "guaranteed" the payment of a $12,500 note from Landmark to the Bank of Charlotte, and a $16,000 note from Landmark to the Bank of Charlotte. This agreement stated that the parties had orally agreed that plaintiff should be primarily liable for these debts and the parties desired to reduce their agreement to writing, and it was agreed that plaintiff would indemnify defendant for any liability defendant might incur in connection with the two notes.

On 15 March 1967 the parties signed a "Stipulation and Agreement" which provided that they had "guaranteed" payment of a $12,500 note from Landmark to the Bank of Charlotte and a $29,500 note from Landmark to the Bank of Commerce. It further provided that plaintiff had agreed to be primarily liable for the $12,500 note and $16,000 of the $29,500 note, but that a dispute had arisen as to the remaining $13,500; and that each would thereafter be free to "guarantee" renewals of the $29,500 note without waiving any claims against the other.

Plaintiff personally paid the October 1967 note to the Bank of Commerce on 2 April 1968.

Defendant offered evidence to show that he signed the 25 October 1967 note after plaintiff signed it, and that he never agreed to be jointly liable with plaintiff for any portion of Landmark's debt.

The court found that defendant had not agreed to be jointly liable and that plaintiff and defendant did not indorse the note as part of the same transaction. It concluded that the parties were liable in the order of their indorsement, and judgment was entered for defendant. Plaintiff appealed to this Court.

Fairley, Hamrick, Monteith & Cobb, by L. A. Cobb, for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by Mark R. Bernstein and Fred C. Thompson, Jr., for defendant appellee.

ARNOLD, Judge.

Since the particular note for which contribution is sought was executed following the effective date of Chapter 25 of the N. C. General Statutes, the liabilities of the parties will be determined by the Uniform Commercial Code.

[1] It is maintained by plaintiff that the judgment for defendant was in error for two reasons. First, he contends that there was an agreement by which the parties agreed to be jointly and severally liable. Under the provisions of G.S. 25-3-414(2) indorsers are liable to one another in the order in which they indorse unless they agree otherwise. The order of indorsement is presumed to be the order in which the signatures appear on the instrument.

The trial court found as a fact that there was no agreement, written or oral, by which defendant agreed to be jointly liable with plaintiff. This finding is supported by competent evidence and it is conclusive on appeal. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149 (1971); *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E. 2d 450 (1971). Plaintiff's first argument is without merit.

[2] In his second argument plaintiff contends that the court erred in finding that he and defendant did not indorse the note as part of the same transaction. Plaintiff reasons that if he and defendant signed the note "as a part of the same transaction" they would be jointly and severally liable. He relies on G.S. 25-3-118(e) which reads as follows:

> "Unless the instrument otherwise specifies two or more persons who sign as maker, acceptor, or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as 'I promise to pay.'"

According to plaintiff the loan transaction was not completed until the note was executed by the corporate maker, and indorsed by both plaintiff and defendant. It was intended from

the beginning that both parties indorse the note, and thus, plaintiff argues, there was only one transaction.

Assuming arguendo that it was intended that both parties indorse the note before the loan was closed it does not follow that plaintiff and defendant indorsed the instrument "as part of the same transaction" within the meaning of G.S. 25-3-118(e). This statute has not changed the rule in North Carolina that a prior indorser is not entitled to recover from a subsequent indorser in the absence of an agreement otherwise establishing liability. *(See Lancaster v. Stanfield,* 191 N.C. 340, 132 S.E. 21 (1926).)

The Official Comment to G.S. 25-3-118(e) declares that the statute "applies to any two or more persons who sign in the same capacity, whether as makers, drawers, acceptors, or indorsers. It applies only where such parties sign as part of the same transaction; *successive indorsers are, of course, liable severally but not jointly.*" (Emphasis added.)

Moreover, the North Carolina Comment to G.S. 25-3-118(e) provides that this section is not intended to affect the rules governing:

> "(1) Contribution between parties jointly and severally liable.
>
> (2) The order of liability of parties signing in different capacities or at different times. See North Carolina Comment to G.S. 25-3-414 (contract of indorser; order of liability)."

From the North Carolina Comment to G.S. 25-3-414(2) it is clear that the Uniform Commercial Code did not change the North Carolina rule relating to the presumption of liability between prior and subsequent indorsers:

"This continues the rule of G.S. 25-74 (N.I.L. 68) that indorsers are presumed to be liable in the order in which their signatures appear on the instrument. However, parol evidence is admissible to show the true order of indorsement." Plaintiff's second argument is also without merit.

We hold that the conclusion by the trial court that plaintiff and defendant were indorsers and liable to each other in the

order of their indorsement, according to G.S. 25-3-414, was correct. The judgment appealed from is

Affirmed.

Judges MORRIS and HEDRICK concur.

MAYHEW ELECTRIC COMPANY v. GEORGE CARRAS, D/B/A CARRAS REALTY COMPANY

No. 7526DC992

(Filed 7 April 1976)

Judgments §§ 25, 29— entry of judgment by default — setting aside on ground of excusable neglect

In an action to recover the balance due on a contract for labor and materials furnished by plaintiff where judgment by default was entered against defendant who had failed to file an answer, evidence was sufficient to support the trial court's order setting aside the judgment by default on the ground of excusable neglect, since the defendant was diligent in communicating with his attorneys and providing them with information necessary to prepare answer, the neglect of the attorneys to file answer within apt time was both excusable and was not to be imputed to defendant, and defendant had a meritorious defense to plaintiff's claim.

APPEAL by plaintiff from *Stukes, Judge.* Order entered 9 October 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 18 March 1975.

On 12 December 1974 plaintiff filed complaint seeking recovery of $3,884.03 as balance due on a contract under which plaintiff performed labor and furnished materials for installation of electrical wiring and devices in a building owned by defendant. Summons and complaint were served on defendant on 17 December 1974. No answer having been filed, on 24 January 1975 entry of default and judgment by default were entered against defendant.

On 31 January 1975 defendant filed a motion pursuant to G.S. 1A-1, Rule 60(b) to set aside the judgment by default on the grounds of excusable neglect. With this motion defendant filed answer to the complaint in which he denied material allegations in the complaint and alleged that plaintiff had con-

tracted for performance of the electrical work with a tenant in a building owned by a corporation in which defendant is a shareholder, director, and officer. In support of his motion defendant filed affidavits of two attorneys who were members of the law firm which represented defendant. In substance these affidavits state that on 18 December 1974 defendant contacted his attorneys regarding this case and immediately thereafter forwarded to them the summons and complaint with information for filing of answer; on 16 January 1975 one of defendant's attorneys saw the plaintiff's attorney in the Mecklenburg County Courthouse and asked plaintiff's attorney for two or more weeks in which to file answer; plaintiff's attorney advised he would grant an extension and defendant's attorney left the meeting under the impression defendant would be given an extension of at least two weeks; thereafter plaintiff's attorney wrote a letter to defendant's attorney in which he extended the time for filing answer for only one week, through and including 23 January 1975; the attorney who received this letter was in process of becoming disassociated from the law firm and negligently failed to communicate the letter to the remaining members of the firm in apt time for them to file answer within the seven day extension; and during all periods of time alleged the defendant was in constant contact with his attorneys concerning the matter and had several conferences in preparation for filing an answer. In opposition to defendant's motion, plaintiff filed affidavit of his attorney in which this affiant stated that defendant's attorney saw him in the courthouse approximately one day before the 30th day from the date of service on defendant and stated he needed five or seven days within which to file responsive pleadings, that plaintiff's attorney then immediately advised defendant's attorney that he had seven days within which to file responsive pleadings, and that this was confirmed by letter dated 17 January 1975 confirming the one week extension.

After a hearing on defendant's motion for relief from the judgment against him, the Court entered an order making findings of fact, which included the following:

> "13. That the defendant was diligent in communicating with his attorneys and providing his attorneys with the necessary information with which to prepare and file and (sic) answer and that any neglect on the part of the defendant was excusable.

14. That the neglect of defendant's attorneys to file an Answer within the specified time is excusable, and is not to be imputed to the defendant.

15. That this action regards a contract for work performed by the plaintiff and that under the pleadings and affidavits of record in this case the defendant has a meritorious defense against the allegations raised in the Complaint with regard to the defendant's individual capacity as defendant."

Based on its findings of fact, the Court concluded as a matter of law that "the neglect, if any, by defendant is excusable" and that "defendant has a meritorious defense to said action." From order of the Court vacating and setting aside the judgment entered against defendant on 24 January 1975, plaintiff appealed.

Whitfield, McNeely, Norwood and Badger by David R. Badger for plaintiff appellant.

Echols, Purser and Adams, P.A. by Thad Adams, III for defendant appellee.

PARKER, Judge.

In their brief, plaintiff's attorneys contend "that the defendant has produced no competent evidence to form a basis of the findings of facts and conclusions of law concerning his having a meritorious defense or his neglect being excusable." However, the question of the sufficiency of the evidence to support the court's findings is not before us on this appeal. Plaintiff has made but one assignment of error as follows:

"1. The Trial Court erred in granting defendant's Motion for Relief from Final Judgment.

Plaintiff's Exception No. 1 (Rp22)"

The only exception in the record is plaintiff's Exception No. 1 which appears at the end of the order appealed from. "This broadside exception does not bring up for review the sufficiency of the evidence to support any particular finding of fact. It presents these questions only: (1) Do the facts found support the judgment, and (2) does error of law appear on the face of the record." *City of Kings Mountain v. Cline*, 281 N.C. 269, 274, 188 S.E. 2d 284, 287 (1972). This long established rule has been brought forward in the new Rules of Appellate Pro-

cedure adopted by our Supreme Court on 13 June 1975 effective with respect to all appeals in which notice of appeal was given on and after 1 July 1975. Rule 10(b)(2) contains the following: "A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error."

The facts found do support the order appealed from. "Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant." *Jones v. Fuel Co.*, 259 N.C. 206, 209, 130 S.E. 2d 324, 327 (1963). Here, the court expressly found that defendant was diligent in communicating with his attorneys and providing them with information necessary to prepare answer. Furthermore, the court found that the neglect of the attorneys in failing to file answer within apt time was both excusable and was not to be imputed to defendant. These findings, coupled with the Court's finding that defendant has a meritorious defense, fully support the order entered. Error of law does not appear on the face of the record.

Since the order was fully supported by the facts found as noted above, we find it unnecessary to consider and do not pass upon the additional ground upon which the Court rested its order, that by virtue of the communications which had taken place between the attorneys for the parties in this case the defendant had "appeared" in this action within the meaning of G.S. 1A-1, Rule 55(b)(2) and for that reason defendant should have been served with written notice of the application for the default judgment at least three days prior to the hearing on such application.

The order appealed from is

Affirmed.

Judges BRITT and CLARK concur.

FLORINE JONES McCOY v. THOMAS McCOY, JR.

No. 7510DC921

(Filed 7 April 1976)

Rules of Civil Procedure § 4; Process § 10— service of process by publication — necessity for issuance of summons

Issuance of a summons is not essential to validity of service of process by publication made pursuant to G.S. 1A-1, Rule 4(j)(9)c upon a party to a civil action whose address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained.

APPEAL by plaintiff from *Bullock, Judge.* Judgment entered 15 October 1975 in District Court, WAKE County. Heard in the Court of Appeals 11 March 1976.

On 13 June 1975 plaintiff-wife filed her verified complaint in this action seeking an absolute divorce. She alleged that she and defendant-husband separated on 3 June 1974 with intent to remain permanently separated and since that date have continued to live separate and apart from each other. She also alleged her residence in Wake County and in North Carolina for more than six months immediately preceding institution of this action and that "defendant's address, whereabouts, dwelling house or usual place of abode is unknown by plaintiff, and with due diligence cannot be ascertained."

No summons was issued. On 29 July 1975 plaintiff filed two affidavits: (1) her own affidavit in which she stated that she last saw her husband in December 1974; that the trailer in which he lived, which was his last address known to plaintiff, was repossessed and hauled away in November or December 1974; that in an effort to locate him she twice visited his mother and sister in June 1975 and was told his whereabouts was unknown to them; and that defendant's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained; (2) affidavit of an official of the newspaper company showing publication of notice of service of process in this action in the Raleigh Times once a week for three successive weeks commencing on 16 June 1975.

On 15 October 1975 the District Court entered judgment making findings of fact on the basis of which the Court concluded as a matter of law that all provisions of G.S. 1A-1, Rule 4(j)(9)c were complied with by plaintiff in this action

with the exception that no summons was issued. The Court concluded that due diligence for service by publication required the issuance of a summons, and adjudged that plaintiff's action be dismissed for lack of jurisdiction over defendant. Plaintiff appealed.

Crisp, Bolch, Smith & Clifton by Joyce L. Davis for plaintiff appellant.

No counsel contra.

PARKER, Judge.

This case presents the question: Is issuance of a summons essential to validity of service of process by publication made pursuant to G.S. 1A-1, Rule 4(j)(9)c upon a party to a civil action whose "address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained?" We hold that it is not.

Since 1 January 1970, the effective date of our Rules of Civil Procedure, a civil action is no longer commenced by issuance of summons but by filing a complaint with the court. G.S. 1A-1, Rule 3. Even under our former practice, when in general a civil action was commenced by issuance of summons (See G.S. 1-88, repealed effective 1 January 1970), no summons was required when service was by publication. Interpreting the statutes formerly in effect, our Supreme Court held that "a civil action shall be commenced by issuing a summons, except in cases where the defendant is not within reach of the process of the court and cannot be personally served, when it shall be commenced by the filing of the affidavit to be followed by publication." *Grocery Company v. Bag Company,* 142 N.C. 174, 179, 55 S.E. 90, 92 (1906). In that case our Supreme Court expressly overruled a prior decision and held, p. 182, that "[t]he defendant's objection to the publication based on the fact that a summons had not been issued cannot be sustained." Later cases were in accord; see, e.g., *Mills v. Hansel,* 168 N.C. 651, 85 S.E. 17 (1915); *Mohn v. Cressy,* 193 N.C. 568, 137 S.E. 718 (1927); *Bethell v. Lee,* 200 N.C. 755, 158 S.E. 493 (1931); *Voehringer v. Pollock,* 224 N.C. 409, 30 S.E. 2d 374 (1944). In some of these decisions holding no summons was required where it clearly appeared to the court by affidavit that defendant could not be personally served, the opinion of our Supreme Court characterized the issuing of a summons in such cases and

having the sheriff make the return that the defendant was not to be found as being a "useless formality." The statute formerly in effect, G.S. 1-98, permitted service by publication only when the person to be served by publication could not after "due diligence" be found in the State. By the decisions in the cases above cited, our Supreme Court held that "due diligence" did not require performance of a useless formality.

Adoption of our new Rules of Civil Procedure has made no change in our practice in this regard. Rule 4(j)(9)c, which sets forth the procedure for service of process by publication, reads in pertinent part as follows:

> "c. Service by publication.—A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, *or* there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b or under paragraphs a and b of this subsection (9)." (Emphasis added.)

This subparagraph appears in Rule 4(j), which deals with the manner of service of process to exercise personal jurisdiction. It is noteworthy that every subparagraph of Rule 4(j) speaks of or clearly contemplates "delivering a copy of the summons and of the complaint," with the sole exception of subparagraph c of subsection (9) quoted above. The omission of any reference to a summons in subparagraph 9(c) is, we think, significant. Had the Legislature intended to make a change in our practice so as to require the "useless formality" of issuance of a summons and return thereon that defendant was not to be found in the county as a prerequisite to validity of a service by publication, surely some reference to a summons would have been made in subparagraph 9(c) as it was in all other subparagraphs of Rule 4(j). It should also be noted that subparagraph 9(c) is itself expressed in the disjunctive; it does not require a showing *both* that the whereabouts of the party to be served cannot with due diligence be ascertained *and* that there has been a diligent but unsuccessful attempt to serve him under one of the preceding subparagraphs of subsection (9) under which a summons would necessarily have been issued.

We see no reason why, now more than formerly, due diligence should require performance of a useless formality. Noth-

ing in the Rules of Civil Procedure indicates that the Legislature intended that it should. Logical interpretation of the language employed suggests strongly to the contrary.

The judgment dismissing plaintiff's action is reversed and this case is remanded to the District Court for further proceedings not inconsistent herewith.

Reversed and remanded.

Judges BRITT and CLARK concur.

BETTY E. SHERWOOD v. ROBERT SHERWOOD

No. 758DC868

(Filed 7 April 1976)

1. **Appeal and Error § 57— failure of court to find facts and make conclusions — presumption**

It is presumed, when the trial court is not required to find facts and make conclusions of law and does not do so, that the court on proper evidence found facts to support its judgment.

2. **Divorce and Alimony § 2; Process § 9— alimony action — nonresident defendant — service by registered mail — no personal jurisdiction**

In an action for alimony wherein plaintiff alleged that defendant abandoned her and went to Delaware, the trial court did not, under the provisions of G.S. 1-75.4(1), obtain personal jurisdiction over the defendant by virtue of plaintiff's mailing to him copies of summons and complaint by registered mail, return receipt requested, since plaintiff by admission established that defendant was not domiciled within N. C., plaintiff having admitted that defendant was not "an inhabitant of this State."

3. **Divorce and Alimony § 2; Process § 9— alimony action — abandonment alleged — injury to person occurring within N. C. — personal jurisdiction over nonresident defendant**

An action for alimony on the ground of abandonment is a claim of "injury to person or property" under G.S. 1-75.4(3), and the trial court could thus obtain personal jurisdiction of the nonresident defendant by registered mail.

4. **Constitutional Law § 24; Divorce and Alimony § 2; Process § 9— nonresident defendant — abandonment of wife in N. C. — minimum contacts sufficient for personal jurisdiction**

In an action for alimony on the ground of abandonment, subjecting the nonresident defendant to personal jurisdiction by serving summons and complaint on him by registered mail complied with the

requirements of due process in that the acts of defendant in residing with his wife in the State, abandoning his wife in the State, and fleeing the State following wilfull misconduct met the "minimum contacts" test.

APPEAL by defendant from *Nowell, Judge.* Judgment entered 12 August 1975 in District Court, WAYNE County. Heard in the Court of Appeals 17 February 1976.

Plaintiff-wife brought this action against defendant-husband under G.S. 50-16 for alimony, alleging that they were married and resided together in Wayne County for almost two years until 11 September 1973 when defendant abandoned her and went to Delaware. Copies of summons and complaint were received personally by defendant in Delaware by certified mail on 28 November 1973. An alimony pendente lite order was entered on 17 January 1974, set aside on 2 March 1974 and another order entered on 25 March 1974. On 14 May 1975 plaintiff moved to hold defendant in contempt for failure to make the required payments. This motion and an order setting a hearing on the motion were served on defendant personally by the Sheriff of Kent County, Delaware, 27 June 1975. On 14 July 1975, defendant moved to dismiss the complaint for lack of jurisdiction, insufficiency of process, and insufficiency of service of process. This motion was denied and defendant appealed.

Roland C. Braswell for plaintiff appellee.

Cecil P. Merritt for defendant appellant.

CLARK, Judge.

As grounds for his motion to dismiss, defendant alleged "for lack of jurisdiction over the person . . . for lack of jurisdiction over the subject matter . . . for insufficiency of process . . . . " The order of the trial court recited only that there was a hearing on the motion to dismiss and "the same is hereby denied." The court is required to make findings of fact and conclusions of law on this motion "only when required by statute . . . or requested by a party." G.S. 1A-1, Rule 52(a)(2). No request was made in this case. The record on appeal does not contain any evidence presented by either party at the hearing on the motion.

[1] It is presumed, when the Court is not required to find facts and make conclusions of law and does not do so, that the

court on proper evidence found facts to support its judgment. *Williams v. Bray,* 273 N.C. 198, 159 S.E. 2d 556 (1968); *Powers v. Memorial Hospital,* 242 N.C. 290, 87 S.E. 2d 510 (1955).

The plaintiff is aided by the principle of *omnia rite acta praesumuntur* as well as the prima facie presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter. *Williamson v. Spivey,* 224 N.C. 311, 30 S.E. 2d 46 (1944); 21 C.J.S., Courts, § 96(a).

Nevertheless, we must determine as a matter of law if the manner of service of process on the defendant outside the State gave the court personal jurisdiction over the defendant which would support a judgment in personam for payment of alimony. Service of process was made on the defendant in Delaware under G.S. 1A-1, Rule 4(j)(9)(b), which provides for personal service outside the State "by mailing a copy of the summons and complaint, registered mail, return receipt requested, addressed to the party to be served." But this long-arm manner of personal service may be made in a court of this State having jurisdiction of the subject matter and *grounds for personal jurisdiction as provided in G.S. 1-75.4.* G.S. 1-75.4 provides in part:

> "A court . . . has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:
>
> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> . . . .
>
> b. Is a natural person domiciled within this State; or
>
> . . . .
>
> (3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant. . . . "

[2] Under the circumstances in this case it appears that the above quoted grounds are the only applicable grounds for ob-

taining personal jurisdiction over the defendant in this case. And it appears from the record on appeal that plaintiff by admission has established that defendant was not "domiciled within this State." The allegation in the complaint that defendant "was a resident of Wayne County, North Carolina, but is now living in the State of Delaware" is not a pleading admission that defendant was domiciled in Delaware. But in mailing a copy of the summons and complaint to the defendant in Delaware the plaintiff's attorney included a "Notice," which he signed, and in which he stated, "that since you are not now an inhabitant of this State and cannot be found within this State . . . . " Though this "Notice" is not a verified pleading, and is not even required by G.S. 1A-1, Rule 4(j), it is an admission which is a part of the record in the case and plaintiff is bound by it, and is precluded from controverting this admitted fact of defendant's habitation in Delaware. See *Markham v. Johnson,* 15 N.C. App. 139, 189 S.E. 2d 588 (1972).

Both the words "domicile" and "inhabitant" mean substantially the same thing; one is an inhabitant of or domiciled in a given place if he resides there actually and permanently. 43 C.J.S., Inhabitant, p. 388; *Martin v. Martin,* 253 N.C. 704, 118 S.E. 2d 29 (1961).

"Domicile" being thus eliminated as a ground for jurisdiction over the person, we turn now to determine if the court had personal jurisdiction under G.S. 1-75.4(3), the above quoted "Local Act or Omission" statute. The plaintiff-wife alleged that the defendant-husband lived with her in Wayne County for almost two years, then abandoned her on 11 September 1973 and went to Delaware.

[3] An action under G.S. 50-16.2 for permanent alimony based on abandonment involves the withdrawal of the supporting spouse from the house and from cohabitation with the dependent spouse. 1 Lee, N. C. Family Law, § 80. The term "injury to the person or property" as used in G.S. 1-75.4(3) should be given a broad meaning consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit the actions thereunder to traditional claims for bodily injury and property damages. In *Golding v. Taylor,* 19 N.C. App. 245, 198 S.E. 2d 478 (1973), it was held that an action for alienation of affections and criminal conversation involved "injury to the person or property" within the meaning of the statute. Both the

actions, alienation of affections and the action for alimony on the grounds of abandonment, involve wrongs willfully inflicted and the deprivation of marital companionship and cohabitation. We hold that an action for alimony on the ground of abandonment is a claim of "injury to person or property" under G.S. 1-75.4(3).

Plaintiff-wife and defendant-husband resided in this State and lived together as husband and wife in this State for almost two years. The plaintiff's claim arose out of the act of abandonment within the State by the defendant. This action comes within G.S. 1-75.4(3) in all respects.

[4] There remains for our determination the question of whether under the circumstances of this case subjecting the defendant to personal jurisdiction complies with the requirements of due process. The "minimum contacts" test applied in *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95 (1945), for the assertion of personal jurisdiction over nonresident corporations has been extended to individuals by statutes, which have been held to meet constitutional requirements by the courts. If the act of operating a motor vehicle on the public highways within the State (G.S. 1-105), held constitutional in *Bigham v. Foor,* 201 N.C. 14, 158 S.E. 548 (1931), meets the "minimum contacts" test, we think that the acts of residing with a wife in the State, an abandonment of the wife in the State, and fleeing the State following willful misconduct meets the "minimum contacts" test and gives the court personal jurisdiction over the defendant. We must presume that the trial court in proper evidence found as facts the foregoing acts by the defendant within the State, and we hold that these facts support the order of the trial court denying defendant's motion to dismiss.

Though this ruling expands the concept of personal jurisdiction, the expansion is limited by the particular circumstances of this case relative to defendant's acts and contacts within the State in addition to the domicile of the plaintiff-spouse as a jurisdictional basis.

The order denying defendant's motion to dismiss is

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. DAVID EUGENE CRAWFORD

No. 7516SC847

(Filed 7 April 1976)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7; Indictment and Warrant § 17— ownership of premises and stolen property — no fatal variance**

There was no fatal variance where an indictment alleged the breaking and entering of a building and the felonious larceny of property owned by a corporation and the evidence was conflicting as to whether the owner of the building and stolen property was a corporation since conflicts in the evidence are to be resolved by the jury.

2. **Criminal Law § 84; Searches and Seizures § 2— search of defendant's apartment — consent of another occupant**

Officers lawfully searched defendant's apartment where another occupant gave them written permission for the search, and evidence disclosed by the search was properly used against defendant.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 15 May 1975 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 February 1976.

The defendant, David Eugene Crawford, was charged in a two-count bill of indictment, proper in form, with the breaking or entering of a building owned by Mobile Home Brokers, Inc., and the felonious larceny of personal property having a value of $531.00 owned by Mobile Home Brokers, Inc. The defendant pleaded not guilty, and the State offered evidence tending to show the following.

On the night of 12 February 1975, two trailers belonging to Mobile Home Brokers, Inc. (Brokers), 510 W. 2nd Street, Lumberton, North Carolina, were broken into and numerous items of personal property were stolen. The trailers were on Brokers' sales lot and had been checked and locked on the evening of 12 February 1975 by John Yow, the local manager. When Yow inspected the units on 13 February, he found that the rear doors "had been forced" open.

Detective Jimmy R. Cook of the Fayetteville Police, acting on a call he had received, went to the defendant's apartment. After getting permission to search from a co-tenant of the defendant's apartment, Detective Cook, along with Detectives W. G. Campbell and W. B. Barefoot, conducted a search of

the premises. Inside they found numerous items of stolen property, some of which Yow later identified as coming from the trailers.

The following day Crawford was arrested and gave a statement to Cook. Crawford admitted participating in the breaking and entering and larceny. He confessed that he accompanied "Nash, Al, Charles, and [his] wife" to Lumberton in a 1969 pickup truck. They broke into trailers in four different trailer parks, stealing property from each of them. They stored some of the property in Crawford's apartment in Fayetteville.

The defendant offered no evidence.

From verdicts of guilty to breaking or entering and felonious larceny and concurrent sentences of 7 to 10 years imposed for each offense, the defendant appealed.

Attorney General Edmisten by Associate Attorney Jack Cozort for the State.

John Wishart Campbell for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends that his motion for judgment as of nonsuit, his motion for a new trial, or his motion to set aside the verdict should have been granted. He argues that there was "a fatal variance between allegations of ownership" of the premises entered and of the property taken in the indictment and proof of ownership at trial. The bill of indictment charged the defendant with breaking or entering the premises and larceny of the property of "Mobile Home Brokers, Inc., a corporation." At trial, John Yow testified that he travelled to Fayetteville and identified some of the stolen property which was taken from the mobile home. He testified further that he worked for Mobile Home Brokers. When asked who owned the property, he answered: "It was owned by Mobile Home Brokers, the address that I mentioned before [510 W. 2d St., Lumberton]." The property had been purchased by "our central purchasing in Fayetteville." On cross-examination, he testified that:

> "Mobile Home Industries owned Mobile Home Brokers. It is a wholly owned subsidiary of Mobile Home Industries. As to whether there are any officers of Mobile Home Brokers, Inc., I don't think I understand the question. There

is not a President and Vice President of Mobile Home Brokers, Inc., but there are those officers of Mobile Home Industries."

Later, on cross-examination, Yow testified that: " . . . [He was] not positive that Mobile Home Brokers, as such [was] incorporated. Mobile Home Industries, Inc., is incorporated in Tallahassee, Florida. As far as [he knew], Mobile Home Brokers, Inc., [was] not a corporation."

The allegations of ownership described in a bill of indictment are essential. *State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413 (1965). If the evidence offered at trial fails to show the ownership as alleged in the indictment of the premises entered and the property taken, a motion for judgment of nonsuit should be allowed, both to the charge of breaking or entering and to the charge of felonious larceny. *State v. Eppley,* 282 N.C. 249, 259, 192 S.E. 2d 441, 448 (1972); *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967); *State v. Brown, supra.* When the evidence as summarized above is considered in the light most favorable to the State, there is at most some conflict in the testimony of witness Yow as to the corporate status of the owner of the property. Conflicts in the evidence are to be resolved by the jury. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967). In our opinion, the evidence was sufficient for the jury to find that Mobile Home Brokers, Inc., was the owner of the premises and the stolen property and to support the verdicts. *See State v. McCall, State v. Sanders, State v. Hill,* 12 N.C. App. 85, 182 S.E. 2d 617 (1971). This assignment of error is overruled.

[2] Defendant contends that the Fayetteville Police conducted an illegal search of his apartment in violation of his Fourth Amendment Rights. On voir dire Officer Jimmy R. Cook testified that he went to the defendant's apartment with Detective W. G. Campbell. The apartment was one of four in a large house at 224 Davis Street in Fayetteville. The occupant of apartment three stated that Al Broadway paid the rent on apartment four. The officers approached Mr. Broadway, who stood on the porch, and asked him if he rented apartment four. Broadway "stated that he, along with Mr. and Mrs. Crawford lived there." Broadway gave the officers written permission to search before they entered the premises. Once inside they found some of the stolen property which was later identified as belonging to Mobile Home Brokers, Inc. Following the voir

dire examination, the trial court found "that one Allen Broadway was an occupant of the premises [which was searched], and signed a written permission to search those premises" and concluded that "the officers had a lawful right to enter the premises . . . . " The findings are supported by the evidence and the conclusions are consistent with the findings. The U. S. Supreme Court in *United States v. Matlock,* 415 U.S. 164, 30 L.Ed. 2d 242, 94 S.Ct. 988 (1974), cited the rule as being:

> "That where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either."

This assignment of error is not sustained.

By defendant's next assignment of error, he contends that a statement given by him to the police was "not freely, voluntarily and understandingly made." Again, after an extensive voir dire including introduction of the statement of rights and written waiver of rights form which the defendant signed, the court concluded that the statement was "voluntarily and understandingly made." The findings and the evidence support this conclusion. This assignment of error is overruled.

We have carefully examined the defendant's additional assignment of error and find it to be without merit.

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. MILTON LEON COLLINS

No. 752SC833

(Filed 7 April 1976)

1. Criminal Law § 88— cross-examination of witnesses — limitation by court proper

In a prosecution for assault with a deadly weapon with intent to kill, defendant's contention that the trial court allowed the district attorney to impeach the defendant and show his character and reputation as a dangerous and violent man but refused to allow the defendant's counsel to impeach the prosecuting witness or show his

reputation as a dangerous and violent man is untenable, since the court did no more than properly exercise its discretion in controlling the cross-examination of witnesses.

2. **Assault and Battery § 15— assault with deadly weapon with intent to kill — instructions proper**

In a prosecution for assault with a deadly weapon with intent to kill, the trial court adequately summarized defendant's evidence and related the law to the evidence and sufficiently defined the assault charged in the bill of indictment; moreover, the court's error in inadvertently instructing that the jury should return a verdict of guilty of assault with a deadly weapon inflicting serious injury with intent to kill upon a finding of the essential elements of assault with a deadly weapon inflicting serious injury was not prejudicial to defendant since he was convicted of the lesser offense.

3. **Criminal Law § 95— instruction as to purpose for which evidence admitted — request necessary**

Failure to include instructions as to the purposes for which the evidence was received is not ground for exception unless counsel has requested such an instruction, and this is true even though the trial court did not explain the difference between substantive and corroborative evidence.

ON *certiorari* to review the trial of defendant before *Winner, Judge.* Judgment entered 6 November 1974 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 11 February 1976.

The defendant, Milton Leon Collins, was charged in a bill of indictment, proper in form, with assault on Leslie Spencer with a deadly weapon with intent to kill inflicting serious injury. After the defendant's plea of not guilty, the State offered evidence tending to show the following.

Leslie Spencer, Nathan Crandle, and the defendant were playing poker at the Do Drop Inn in Washington, North Carolina, on Sunday night, 11 August 1974, when the defendant and Spencer got into an argument over who had won one of the hands. They exchanged certain expletives before Spencer took the "pot." The defendant was preparing to deal when suddenly he put down the cards and walked out the door. He returned in a minute or two with a ".38 revolver" and demanded that Spencer give him the money from the game. Spencer argued with him while the defendant held the gun up to the side of Spencer's face. When Spencer turned his head, the defendant shot him in the mouth. Spencer tried to run and the defendant shot him in the hip. Spencer fell on the floor and the defendant fled, hiding at his sister's house overnight. Spencer was rushed to the hos-

pital where he remained for forty days undergoing two operations for the gunshot wounds.

The defendant testified that while there had been an argument over the money in the "pot" he had willingly given it to Spencer. As the defendant prepared to leave, Spencer began cursing him and followed him toward the door. When he was about four feet from the defendant, Spencer reached into his pocket and the defendant "just pulled out [his] gun and started shooting." He testified that he was aware of Spencer's reputation as a "dangerous man" and even though he did not see a weapon he decided to shoot first and ask questions later because as he said, "I know two people dead on that account."

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. From a judgment imposing a prison sentence of seven to ten years, defendant appealed. However, since he failed to perfect his appeal within the time allowed by G.S. 1-282 and the Rules of Practice in the Court of Appeals, this court allowed his petition for writ of certiorari to review the case on its merits.

Attorney General Edmisten by Associate Attorney Cynthia Jean Zeliff for the State.

Carter and Archie by Samuel G. Grimes for defendant appellant.

HEDRICK, Judge.

[1] Defendant's first assignment of error is based on four exceptions to the rulings of the court on questions objected to on cross examination. Defendant contends that the court allowed the district attorney to impeach the defendant and show his character and reputation as a dangerous and violent man but refused to allow the defendant's counsel to impeach the prosecuting witness or show his reputation as a dangerous and violent man. Defendant states the proposition much too broadly. The district attorney asked one question of the defendant, wherein he inquired as to prior convictions for breaking, entering, and larceny. The question as asked was unobjectionable and the court's overruling the defendant's objection was proper. Inquiry of a witness into prior convictions for certain crimes is relevant to impeach the witness. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970). On the other hand, the district attorney objected to three questions asked by defendant's counsel. We have exam-

ined the questions and find the ruling proper in each case. One was not even a question but a narrative statement by defendant's counsel; the second was irrelevant; and the third, directed to Captain Harry Stokes of the Washington Police, was a question as to whether the witness had "a copy of Mr. Spencer's record showing what he had been convicted of." The latter question was clearly objectionable because it assumed that Spencer had a criminal record. Contrary to the argument of the defendant, the trial court did no more than properly exercise its discretion in controlling the cross-examination of each witness. These exceptions are not sustained.

[2] Defendant's next three assignments of error are based on exceptions to the trial court's instructions to the jury. The defendant first argues that there was an inadequate summarization of defendant's evidence and that the court failed to relate the law to the evidence. Contrary to defendant's contentions, the trial court adequately summarized defendant's evidence; and while the application of the law to the evidence could have been more fully stated, it was adequate for the jury to understand the issues involved.

Defendant next contends the trial court gave a "confusing and inadequate explanation" of the elements of the offense charged and all the lesser included offenses. At one point in the charge, the court in enumerating the essential elements of assault with a deadly weapon inflicting serious injury inadvertently stated that upon a finding of those elements the jury should return a verdict of guilty of assault with a deadly weapon inflicting serious injury "with intent to kill." Since the defendant was convicted of the lesser offense, no possible prejudice could have resulted from this inadvertent mistake.

The defendant contends the court erred by not defining an assault. The court sufficiently defined the assault charged in the bill of indictment and the lesser included offenses arising on the evidence given in the case by enumerating the several elements of each offense.

[3] The defendant contends he was prejudiced by the failure of the trial court "to give the jury a cautionary instruction that certain testimony was admissible only for the purpose of corroboration if they found that it did corroborate." Failure to include instructions as to the purposes for which the evidence was received is not ground for exception unless counsel has requested such an instruction. This is true even though the trial

court did not explain the difference between substantive and corroborative evidence. *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295 (1958). The assignments of error to the trial court's instructions to the jury are overruled.

By his final assignment of error, defendant contends the court should have granted a mistrial due to the manner in which the court took the verdict. It appears from the record that there was some confusion on the part of the foreman of the jury when the clerk made inquiry of the jury as to its verdict. Under the circumstances, it was the duty of the trial court to clarify the verdict. *State v. Miller,* 268 N.C. 532, 151 S.E. 2d 47 (1966). Upon a polling of the jurors, each affirmed the verdict as taken. No prejudice resulted to the defendant.

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

CLAUDETTE W. HOLT v. RICHARD ALLEN HOLT

No. 7526DC883

(Filed 7 April 1976)

Divorce and Alimony § 23— child support — present earnings — earning capacity — attorney's fee

Court's order that defendant pay child support of $400 per month was unsupported by the findings where the court found that defendant in the past has earned between $12,000 and $14,000 annually and has an earning capacity of $12,000 to $14,000, but the court made no finding as to defendant's present earnings and made no finding that defendant is failing to exercise his capacity to earn because of a disregard of his parental obligation; furthermore, the court's order that defendant pay a fee of $300 for plaintiff's attorney was unsupported by the record where the findings do not support the court's conclusion that defendant refused to provide adequate support under the circumstances.

APPEAL by defendant from *Johnson, Judge.* Judgment entered 30 May 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 18 February 1976.

This is a civil action wherein the plaintiff, Claudette W. Holt, alleging abandonment and indignities, is seeking alimony

without divorce, attorney fees, child custody, and support from the defendant, Richard Allen Holt, her husband. Defendant denied that he had committed any marital offense and counterclaimed for a divorce from bed and board, alleging that plaintiff had offered him indignities. After a hearing on 30 May 1975, the court awarded custody of the minor children to the plaintiff and ordered that the defendant pay $400.00 per month child support and an attorney's fee of $300.00 to plaintiff's attorney. Defendant appealed.

Robertson and Brumley by Richard H. Robertson for plaintiff appellee.

Turner, Rollins and Rollins by Clyde T. Rollins for defendant appellant.

HEDRICK, Judge.

The defendant contends the court erred in ordering him to pay child support at the rate of $400.00 per month and an attorney's fee in the amount of $300.00. At the hearing on plaintiff's motion for alimony *pendente lite*, custody and support of minor children and counsel fees, evidence tended to show the following.

The parties were married on 27 January 1967 and two children, Sloane, age six, and Che, age four, were born of the marriage. Beginning in 1973 and continuing into 1974, the defendant would spend very little time with his family. He stopped coming home for dinner and would come home late at night and leave when he got up in the morning. "When he did stay around the house, he smoked marijuana and listened to music . . . . " Finally on 27 April 1974, the defendant told the plaintiff that she "made him sick" and he left the family home taking his personal belongings with him. Since then the parties "have spent five to ten nights together."

The plaintiff testified that present expenses for herself and her children were $898.20 per month. Plaintiff's net earnings from her employment as a hair stylist are from $40 to $60 per week.

The defendant was trained as a truck driver. He worked for Boren Clay Products Co. from 1968 to 1972 as a driver earning $9,000 in 1969, $16,000 in 1970, $18,000 in 1971, and $22,000 in 1972. His father who worked for Boren had obtained

this job for him, and after he died the defendant was fired. Since then he has worked for U-Haul Corporation, Interstate Contract Carrier Corporation, and Walter Griffin, Jr., as a trucker, and for East Coast Electronic Scales Company as a salesman. None of these jobs had lasted more than a few months. At the time of the hearing the defendant was employed as a truck driver for D. A. Hampton Trucking Co.; but due to the weather and the economy, he had grossed only $1200 from December, 1974, when he began working for Hampton, until the time of the hearing. Since June or July, 1973, the defendant had earned no more than $2000.

The defendant had been sending $450 per month support since separating until two months prior to the hearing when he reduced the payments to $250. The money for the support was being given to him by his mother.

While it is the legal obligation of the father to provide for the support of his minor children, G.S. 50-13.4, and while the welfare of the child is a primary consideration in matters of custody and maintenance, "yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the *ability* of the father to meet the needs." *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E. 2d 77, 79 (1967) (emphasis added); *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975). In determining the ability of the father to support the child, the court ordinarily should examine the father's *present earnings*, *Powell v. Powell*, 25 N.C. App. 695, 214 S.E. 2d 808 (1975), rather than "select the earnings for a single year in the past and use that as the basis for an award . . . . " *Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912 (1960).

> "If the husband is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which defendant is earning when the award is made. To base an award on capacity to earn rather than actual earnings, there should be a finding, based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children." *Robinson v. Robinson*, 10 N.C. App. 463, 468, 179 S.E. 2d 144, 147 (1971).

See also *Bowes v. Bowes,* 23 N.C. App. 70, 208 S.E. 2d 270 (1974), *affirmed* 287 N.C. 163, 214 S.E. 2d 40 (1975).

G.S. 50-13.6 provides that in awarding attorney fees in an action for the support of minor children the court must find "that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding . . . ."

Although Judge Johnson found as fact that the defendant was employed as "an owner-operator trucker" and "has earned between $12,000 and $14,000 annually in a similar capacity" and "has an earning capacity of between $12,000.00 and $14,000.00 annually," and that the defendant is able to provide $400 per month for the support of his children, there is no finding as to the defendant's present earnings, nor is there a finding that he is failing to exercise his capacity to earn because of a disregard of his parental obligation. *Robinson v. Robinson, supra.* Therefore, the order that the defendant pay $400 per month for the support of his children is not supported by the findings.

Likewise, the findings are not sufficient to support the court's conclusion that " . . . the defendant has refused to provide support which was adequate under the circumstances existing at the time of institution of this action." Thus the record does not support the order that the defendant pay a fee of $300 for plaintiff's attorney.

Defendant also contends the court erred in finding as a fact that defendant abandoned the plaintiff. With respect to this contention, plaintiff in her brief states "for the purposes of this appeal, the plaintiff does not controvert the defendant's contention that there is insufficient evidence to support the court's findings of fact and conclusions of law that the defendant abandoned the plaintiff." We agree. The record does not support the court's finding and conclusion that defendant abandoned the plaintiff.

For the reasons stated the order requiring the defendant to pay $400 per month for the support of his children and an attorney's fee in the amount of $300 is vacated and the cause remanded to the district court for further proceedings to determine whether the defendant is failing to exercise his capacity

to earn because of a disregard of his parental obligation to provide reasonable support for his children.

Vacated and remanded.

Judges BRITT and MARTIN concur.

RUBY T. WILLIFORD v. MATHA W. JACKSON AND PEARL W. MARLEY, CO-ADMINISTRATORS OF THE ESTATE OF MARTHA B. WILLIFORD, DECEASED

No. 754DC863

(Filed 7 April 1976)

1. **Executors and Administrators § 24— services rendered decedent — recovery under quantum meruit — sufficiency of evidence for jury**

In an action to recover a sum for services rendered by plaintiff daughter-in-law to her mother-in-law during the last three years of the mother-in-law's life, the trial court properly submitted the issue to the jury where the evidence tended to show that plaintiff and her family lived in the mother-in-law's home, plaintiff cooked, washed, ironed, changed bed linens, and completely cared for the mother-in-law who was unable to do anything for herself without help, and the mother-in-law expressed her appreciation for the daughter-in-law and said that "she wanted her looked after for it."

2. **Trial § 36— expression of opinion by trial court — new trial**

Defendants are entitled to a new trial where the trial court stated an opinion in charging the jury that one witness had corroborated the testimony of another witness.

APPEAL by defendants from *Crumpler, Judge.* Judgment entered 27 May 1975 in District Court, SAMPSON County. Heard in the Court of Appeals 17 February 1976.

In her complaint and attached "exhibit," plaintiff, daughter-in-law of the deceased Martha Williford, alleged that in view of services rendered to her mother-in-law during the last three years of the mother-in-law's life she, the plaintiff, is entitled to $3,900 plus interest and costs.

Defendant, administrators of the deceased's estate, denied all material allegations, contended that plaintiff failed to state a claim upon which relief can be granted and moved in their answer for dismissal of the plaintiff's cause of action.

At trial, plaintiff contended, through her own testimony and the testimony of others, that she provided the mother-in-law services including nursing care, preparation of meals, washing clothes and linens and generally extended to the mother-in-law the kind of personal care and attention required for a seriously ill and bedridden person. Plaintiff's evidence further indicated that no remuneration to plaintiff was ever made, but that Martha Williford, cognizant and appreciative of the daughter-in-law's efforts, wanted to have the plaintiff "looked after" because of the work she had done.

Defendant's evidence tended to show that the mother-in-law helped rear plaintiff's children and that personal care for Martha Williford was shared by other family members.

From a verdict and judgment for plaintiff, defendants appealed.

Other facts necessary for decision are cited below.

McLeod and McLeod, by Max E. McLeod, for plaintiff appellee.

John R. Parker for defendant appellants.

BROCK, Chief Judge.

[1] Defendants argue that their motions for directed verdict should have been allowed. Defendants concede that the relationship of plaintiff and decedent—daughter-in-law and mother-in-law—is not a sufficiently close relationship to raise a presumption that the services claimed to have been rendered were rendered gratuitiously. They contend, however, that the evidence disclosed a family relationship with all members of the family living in the home helping each other.

The evidence, viewed in the light most favorable to the plaintiff, tends to show the following: In the early forties, plaintiff and her husband moved into the home with the husband's parents, Jody and Martha B. Williford. Jody Williford died in 1943. From that time until approximately 1954 or 1955, all of Martha's children were living at the homeplace. There were some 10 or 11 people living there, all sharing in the labor and expense, all eating together and living as a family unit. By 1954 or 1955 all of the members of the family except Martha Williford, plaintiff, and plaintiff's husband, had moved away from the home. After the death of Jody Williford, plaintiff's

husband assumed management of the homeplace farm. The farm was rented out and the income used for the support of Martha and plaintiff and her husband and family. When plaintiff's husband worked away from the farm, that income was also used for the support of the family. Plaintiff's husband, in 1961 or 1962, installed a bathroom for the convenience of the family, including Martha Williford, whose condition made it increasingly difficult for her to get to and from the outside bathroom. Plaintiff went to work at the Erwin Mill, but in 1960 or 1961, when Martha Williford's health was such that it became necessary for someone to be there in the home to care for her, plaintiff stopped work and stayed at the home to take care of Martha Williford. Plaintiff did the cooking and washing and ironing. Plaintiff changed the bed linens on Martha's bed. For three years prior to her death, Martha was not able to do anything for herself without help. On 2 July 1971, Martha had a heart attack, and after she was discharged from the hospital, plaintiff's husband carried her to a nursing home on 6 August 1971 where she stayed until 15 December 1971. Thereafter plaintiff's husband brought his mother home and bought a hospital bed for her. She was completely confined to her bed and lost normal control of her bodily functions. Plaintiff cared for her without any help until she again had to be hospitalized on 18 March 1972. She died in the hospital on 13 April 1972. During her period of hospitalization and stay in the nursing home plaintiff and her husband frequently stayed with her in the daytime and plaintiff's husband hired a nurse's aide to stay with her at night. Martha's other children would visit occasionally at the home but did not assist plaintiff in the care of Martha. During her hospitalization and stay at the nursing home, her other children would visit her at night after they got off work and would sometimes contribute to her care, but plaintiff and her husband did most of it. Martha Williford did not receive social security or any other government benefits but "did receive Medicaid or Medicare when she was in the hospital." Plaintiff's husband testified that Martha Williford "hated for Ruby to have to wait on her like she was having to do, and all, and said she wanted her looked after for it."

We are of the opinion that the court properly submitted the issue to the jury.

[2] Defendants also contend that the trial court stated an opinion in charging the jury that one witness had corroborated the testimony of another witness. We agree.

During the course of instructing the jury, the trial court noted that plaintiff's witness, Anne Williford, had " . . . corroborated to a considerable extent the testimony of Mr. William Williford, the husband of the plaintiff in this case."

The issue of corroboration is a matter to be resolved by the jury and the trial court erred in removing this question from the jury's province. In *Lassiter v. R. R.*, 171 N.C. 283, 287-288, 88 S.E. 335 (1916), the Court said:

> "We cannot approve an instruction, 'that one witness corroborates another,' as this is a question of fact to be decided by the jury. . . . The tendency of certain testimony to corroborate a witness, and the fact of corroboration, are considered, in law, as two different things. It is for the jury and not for the judge to say how the testimony of a witness is affected by other testimony. *Swan v. Carawan*, 168 N.C., 472. The credibility of witnesses, the weight and sufficiency of testimony, are matters peculiarly within the province of the jury to consider and pass upon.
>
> We are of the opinion that the charge in the respects indicated was not an adequate one, and that the judge inadvertently expressed an opinion upon the weight of the testimony."

Because a new trial must be had, we deem it unnecessary to discuss the other errors assigned by defendants.

New trial.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. TIMOTHY L. OLDFIELD AND HOMER D. BLINCOE

No. 753SC923

(Filed 7 April 1976)

1. Searches and Seizures § 3— probable cause to issue search warrant — sufficiency of affidavit

In a prosecution for possession of marijuana, there was probable cause for issuance of a warrant to search defendants' premises where the affidavit to obtain the warrant disclosed that a purchase of

THC was made from defendants only a few minutes before issuance of the warrant, a detailed description of the premises to be searched was given, and the affidavit stated the results of three weeks of surveillance of defendants' premises.

2. **Searches and Seizures § 4— warrant to search for THC — seizure of marijuana proper**

Though the search warrant for defendants' premises was issued to search for THC, and none was found, the officers could lawfully seize six pounds of marijuana found on defendants' premises, and such contraband was admissible in evidence in a prosecution for possession of marijuana.

3. **Narcotics § 3— possession of marijuana — admissibility of search warrant**

The trial court in a prosecution for possession of marijuana did not err in admitting the search warrant into evidence on *voir dire*, though the magistrate was not present to testify that he signed it, since the affiant identified the warrant and testified that he and the magistrate signed the affidavit and that the magistrate signed the warrant.

APPEAL by defendants from *Rouse, Judge.* Judgments entered 3 June 1975 in Superior Court, CRAVEN County. Heard in the Court of Appeals 9 March 1976.

Defendants were charged in identical bills of indictment with possession of approximately six pounds of marijuana. Charges of manufacturing phencyclidine were dismissed as to each defendant at the close of the State's evidence.

The State's evidence tended to show the following: On 16 December 1974, pursuant to a search warrant, defendants' trailer was searched by Craven County and Town of Havelock officers. Approximately six pounds of marijuana were seized, along with scales, marijuana cigarette butts, syringes, a hashish pipe, a quantity of amphetamine, a quantity of hashish, and a quantity of phencyclidine hydrochloride.

Defendants offered no evidence. The jury found each defendant guilty of possession of more than one ounce of marijuana, and each defendant was sentenced to a term of not less than three nor more than five years of imprisonment.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

McCotter & Mayo, by Charles K. McCotter, Jr., for defendants.

BROCK, Chief Judge.

[1] Defendants argue that the evidence seized in the search was inadmissible because there was no showing of probable cause for the issuance of the search warrant.

The affidavit to obtain the search warrant was as follows:

"W. H. Nethercutt, Detective, Craven County Sheriff's Dept., New Bern, N. C. being duly sworn and examined under oath, says under oath that he has probable cause to believe that Tim Oldfield & Homer Blincoe has on his premises, on his person in his vehicle certain property, to wit: Tetrahydrocannabinols (THC) the possession of which is a crime, to wit: Possession of a controlled substance.

December 15, 1974, Havelock, N. C.

"The property described above is located on his premises, on his person, in his vehicle described as follows:

"This being a white and tan house trailer, located at Lot #2, Havelock Trailer Park, Havelock, N. C. You proceed West on U. S. 70, take the immediate service lane just as you cross the Slocum Creek bridge to the right. About 200 yards up this service road is a Gant Service Station. A dirt unpaved road leads straight into the trailer park. The described trailer is the second trailer on the right. To better identify the location there is a cleaning mop hanging upside down in a hedge in the front of the trailer.

"The vehicle to be searched is a 1964 Black Pontiac 4-door, bearing N. C. registration FRA 608, registered to Homer Davis Blincoe, Bks 205, Cherry Point, N. C.

"The facts which establish probable cause for the issuance of a search warrant are as follows: I, W. H. Nethercutt after making a number of drug arrests in Craven County have since the first day of Sept. 1974 held secret intelligence meetings with local and adjoining County drug agents and also agents from CID. During these meetings we attempted to determine the names of known drug dealers. Some of these persons have already been arrested. During the meetings the name of Tim Oldfield 20 yr. old white male & Homer (Butch) Blincoe, white male, were discussed as known drug dealers, based on this information, I began an undercover surveillance of these

two subjects residents. In the past 3 weeks at noon and in the evening I have observed an increasing amount of traffic; both day & night. I have also observed a white male by the name of Michael Roades who is known to me & Carteret County to be a drug dealer. This information was passed onto Carteret County officers, they have since arrested Michael Roades on possession of Marijuana. Michael Roades was interviewed by me and agreed to make a buy of THC from the two named defendants. Further investigation revealed that the two named defendants make regular trips to Atlanta, Georgia where they purchase illegal drugs and transport them to the State of North Carolina. On December 16, 1974, I gave to Michael Roades for the purpose of making a controlled buy, nine twenty dollar bills of U. S. Currency listed as follows:

Serial #'s E 39736409 B NRS
B 41621504 D NRS
E 87819019 A NRS
E 67765048 B NRS
E 93197871 B NRS
E 79640085 B NRS
E 01623010 * NRS
E 30426011 B NRS
G 37198929 C NRS

He was given this money at 11:45 a.m., this date 16 Dec 1974. He and his vehicle were searched thoroughly for any illegal drugs. He then proceeded to the mentioned address and was observed going into the trailer and returning. He was stopped on U. S. Highway 70 where he produced ~~two~~ one (HRS) small bags of a white powder and stated that it was THC. Based on this information and passed investigations of the two named defendants, I procured this search warrant.

16 December 1974

12:20 P.M.

s/ W. H. NETHERCUTT, D.S.

s/ N. R. SANDERS, Magistrate"

Irrespective of the challenged hearsay in the affidavit, the information of the purchase of tetrahydrocannabinols only a few minutes before issuance of the warrant, along with the detailed description of the location of the trailer to be searched, and the results of three weeks of surveillance of the premises constituted probable cause to issue the search warrant. This argument is without merit and is overruled.

[2] Defendants argue that the evidence seized in the search was inadmissible because the search warrant was issued to search for tetrahydrocannabinols (THC), and none was found; that the evidence seized was not specified in the search warrant; and that the evidence seized was not in plain view.

As pointed out above, the warrant to search for THC was issued upon a showing of probable cause. Although the officers found no THC, in their search for it they found the contraband seized and admitted into evidence. When officers are conducting a valid search for one type of contraband and find other types of contraband, the law is not so unreasonable as to require them to turn their heads. This argument is without merit and is overruled.

[3] Defendants argue that it was error to admit the search warrant into evidence on *voir dire* because the magistrate was not present to testify that he signed it. This argument is feckless. The affiant identified the warrant and testified that he and the magistrate signed the affidavit and that the magistrate signed the warrant.

Under assignment of error number 5, defendants contend that the court abused its discretion by repeatedly permitting the State to ask leading questions. Twenty-two exceptions are grouped under this assignment of error. Several of them do not relate to objections to questions asked, but those that do are wholly without merit. The questions were proper inquiries by the State and were not objectionable as leading questions. It would have been error to not permit the questions complained of. This assignment of error is without merit.

We have examined defendants' remaining assignments of error and conclude that they do not merit discussion. They are overruled.

The cases against these two defendants were clear and overwhelming. After investigation and surveillance, Officer

Nethercutt obtained the cooperation of a previously arrested drug dealer to purchase THC from defendants. This person purchased from defendants a substance purporting to be THC with nine twenty dollar bills supplied by the police, and delivered the substance purchased to Officer Nethercutt immediately thereafter. Officer Nethercutt promptly obtained and served a search warrant. The same nine twenty dollar bills were recovered from one of the defendants within less than an hour after the purchase was made. The evidence seized was clearly sufficient to justify the arrest and charge against the defendants. In our opinion defendants had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and MARTIN concur.

VERNON R. WHETSELL, EUGENE HOLLOMAN & R. E. HATCH, TRUSTEES OF SALEM ADVENT CHRISTIAN CHURCH (SUCCESSOR TO THE SECOND ADVENT BAPTIST CHURCH) v. GLADYS L. JERNIGAN & HUSBAND, ROLAND R. JERNIGAN

No 758SC858

(Filed 7 April 1976)

Deeds § 15— reversion clause after description — ineffectiveness

Provisions in a deed for the reverter of title to the grantor are not valid and effective where they appear only at the end of the description and are not referred to elsewhere in the deed.

APPEAL by plaintiff from *Griffin, Judge.* Judgment entered 26 September 1975 in Superior Court, WAYNE County. Heard in the Court of Appeals 13 February 1976.

Plaintiffs brought this action in order to have their church declared the sole owner of a one-acre lot which was conveyed by deed dated 17 November 1884, from D. E. Newell and his wife, Nancy Newell, and Mary Newell to the Second *Advent Baptist* Church. Plaintiffs claim that their church is the successor of the Second *Advent Baptist* Church.

Defendants claim ownership under the reverter clause in the 1884 deed which follows the description:

> " . . . thence north 70 yards to the begin., containing one acre more or less—Now the condition of this deed is

that if the said denomination of the Second Advent Baptist Church fail to build a church house, or if said denomination change their name, or if they fail to occupy said land with a church for a space of three years then said land is to return back to the parties of the first part or their legal representatives."

This reverter clause does not appear elsewhere in the deed.

Defendants answered and counterclaimed alleging that around 1969 Second Advent *Baptist* Church changed its name to Salem Advent *Christian* Church; that Salem Advent Christian Church moved and failed to occupy the land with a church for three years.

Each party filed motions for summary judgment. After a hearing and argument by counsel for both parties, defendants' motion for summary judgment was granted. The judgment concluded that the language imposing conditions on the conveyance was legally effective and entitled defendants to entry and possession of the land, title vesting in Gladys Jernigan, sole heir of the grantors.

Kornegay & Bruce, P.A. by Robert T. Rice for plaintiff appellant.

Smith, Everett & Womble by James D. Womble, Jr., and James N. Smith for defendant appellees.

CLARK, Judge.

The fundamental question presented on appeal is whether provisions in a deed for the reverter of title to the grantor are valid and effective where they appear only at the end of the description and are not referred to elsewhere in the deed. One line of cases holds that when the granting clause in a deed to real property conveys an unqualified fee and the habendum contains no limitation on the fee thus conveyed and a fee simple title is warranted in the covenants of title, any additional clause or provision repugnant thereto and not by reference made a part thereof inserted in the instrument as a part of, or following the description of the property conveyed, or elsewhere other than in the granting or habendum clause, which tends to delimit the estate thus conveyed, will be deemed mere surplusage without force or effect. *Oxendine v. Lewis,* 252 N.C. 669, 114 S.E. 2d 706 (1960); *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783 (1953).

The defendants rely on cases which hold in effect that the grantor's intent as gathered from the instrument itself controls disposition of the case; that discovery of this intention is the chief essential in the construction of conveyances; and that artificial importance should not be given to the formal parts of a deed. *Mattox v. State,* 280 N.C. 471, 186 S.E. 2d 378 (1972); *Lackey v. Board of Education,* 258 N.C. 460, 128 S.E. 2d 806 (1963); *Board of Education v. Carr,* 15 N.C. App. 690, 190 S.E. 2d 653 (1972).

In *Lackey* there was a reverter clause following both the description and the habendum clause. In *Mattox* a lengthy condition subsequent was set out in the habendum clause. In *Board of Education* there appeared after the habendum clause a condition that title should revert to the grantor if the properties should cease to be used for a nondenominational school.

But we find that in those cases where the granting, habendum and warranty clauses are regular in form and the language delimiting the fee appeared only in the body of the deed following the description, the North Carolina Supreme Court has consistently followed the rule in *Oxendine v. Lewis, supra.*

In the case before us we find that the language following is without force and effect. The judgment of the trial court is the description which tends to delimit the estate thus conveyed

Reversed.

Judges MORRIS and VAUGHN concur.

ROM L. POTTER AND WIFE, ANGIE D. POTTER, PLAINTIFF APPELLEES v. RELIANCE INSURANCE COMPANY, DEFENDANT APPELLANT

No. 7523DC877

(Filed 7 April 1976)

Insurance § 140— lightning insurance — cause of damage

Plaintiffs' evidence was sufficient to be submitted to the jury on the issue of whether their dwelling was damaged by lightning within the coverage of a lightning clause in an insurance policy, rather than by lateral earth movement as contended by defendant insurer, where the male plaintiff and a neighbor testified as to a specific flash of lightning which was followed by a loud noise, and

the male plaintiff testified that he felt a tremble in the basement where he went immediately and saw a crack in the basement wall which had not been there before the storm.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 13 August 1975, District Court, ASHE County. Heard in the Court of Appeals 18 February 1976.

Plaintiffs allege that the defendant issued to them a policy of insurance on their residence against losses caused by fire or lightning; that on 28 May 1973 their home was struck by lightning, their basement wall cracked, and defendant has refused to pay under the terms of the policy. Defendant denied loss by fire or lightning, and asserted that the crack resulted from lateral earth movement, a specific policy exclusion.

Plaintiff Rom Potter testified at the trial that on the night of 28 May, it was thundering and lightning heavily; that one particular surge of lightning was followed by a loud noise and trembling in the basement; that he went to the basement, turned on the lights and saw a crack in the wall that had not been there before the storm. A neighbor, Joe Williams, a highway patrolman, corroborated Potter's testimony about the severity of the storm and a particularly loud clap of thunder and surge of lightning.

Defendant offered no evidence and moved for a directed verdict at the close of plaintiffs' evidence, at the close of all the evidence, and for judgment notwithstanding the verdict.

The jury found that plaintiffs' residence sustained "direct loss by lightning." It was agreed that damages amounted to $2,192.72. Defendant appealed from the judgment for plaintiffs in the agreed amount.

Richard J. Bryan; Thomas S. Johnston for plaintiff appellee.

W. G. Mitchell for defendant appellant.

CLARK, Judge.

The defendant brings forward only one assignment of error: the denial of his motion for directed verdict.

Where the evidence as to the cause of the property loss or damage is doubtful or conflicting, it is a jury question whether it resulted from lightning within the coverage of a

lightning clause in an insurance policy. But where the evidence relied on to show that lightning was the cause of loss is of a speculative nature, the court will decide that, as a matter of law, the plaintiff has failed to prove that the loss was so caused. Anno., 15 A.L.R. 2d 1017.

The defendant relies on *Samet v. Insurance Co.*, 237 N.C. 758, 759, 75 S.E. 2d 913, 914 (1953), where the court reached the conclusion that the evidence "fails to show more than a possibility or to furnish more than material for conjecture as to the cause of damage to plaintiffs' building." The facts in *Samet* are summarized as follows: There was a sudden, violent storm, accompanied by lightning and thunder and a downpour of rain, lasting about twenty or thirty minutes. There were gusts of wind of unusually high velocity. The next morning it was discovered that a part of the roof of the unoccupied two-story building had collapsed. Between 50 and 75 feet of the roof at the rear, to the width of 45 feet, had fallen in. This part of the roof sloped to the rear. The roof was of felt, with asphalt and gravel, and was estimated to weigh 500 or 600 pounds per 100 square feet. The building was equipped with electric wiring under the roof, metal flashing, and metal downspout.

We find that the case before us is distinguishable from *Samet, supra.* The occupant of the dwelling and a neighbor testified as to a specific flash of lightning which was followed by a loud noise. The plaintiff occupant felt a tremble in the basement, where he went immediately and saw a crack in the basement wall which had not been there before the storm.

We find the case to be factually similar to *Grasso v. Glen Falls Insurance Co.*, 133 Neb. 221, 274 N.W. 569 (1937), where the evidence tended to show that on the day prior to the electrical and rain storm the insured building was in good condition. An employee in the building on the night of the storm heard a terrific crash; there was a flash of lightning and the building began to shake; the wall of the basement was found lying on top of the boilers; and there was a large opening in the concrete basement wall. The court held that this evidence was sufficient to make it a jury question.

We conclude that the evidence was sufficient to require submitting to the jury the issue of whether plaintiffs' dwelling

sustained a direct loss by lightning. In the judgment of the trial court, we find

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. TERRY JOHNSON

No. 7520SC950

(Filed 7 April 1976)

1. **Criminal Law § 66— out-of-court showup — independent origin of in-court identification**

The evidence on *voir dire* supported the trial court's determination that a robbery victim's in-court identification of defendant was of independent origin and was not tainted by her out-of-court identification of defendant when officers brought defendant to the store in which the victim worked some forty-five minutes after the robbery.

2. **Criminal Law § 75— incriminating statements to police dispatcher — absence of constitutional warnings**

The trial court in an armed robbery case properly allowed a person employed as a dispatcher with the police department to testify that while visiting a relative who was sharing a jail cell with defendant, defendant told her he was charged with armed robbery and answered in the affirmative when she asked him if he was guilty, notwithstanding the dispatcher did not advise defendant of his constitutional rights, where the court found that the dispatcher was not a law enforcement officer, did not make criminal investigations or interview witnesses or defendants, and was not acting as a police officer when she talked with defendant.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 18 July 1975 in Superior Court, RICHMOND County. Heard in the Court of Appeals 11 March 1976.

Defendant was tried on a bill of indictment charging him with the armed robbery of Sandra Hough. He pled not guilty and evidence presented by the State is summarized in pertinent part as follows:

Ms. Hough testified that she was working at a Kwik Pik Store near Rockingham at 10:45 p.m. on 16 May 1975 when a white male with a stocking over his head entered the store and robbed her at gunpoint. She identified defendant as the robber.

Two police officers testified that Ms. Hough's description of the man who robbed her was broadcast to patrol cars and a deputy sheriff, who had heard the broadcast, saw defendant enter a beer joint known as the Rebel Inn about 11:00 p.m. The deputy entered the Rebel Inn, arrested defendant but found no money.

Hassel Lee Patton, a friend of defendant's, testified that he was in the Rebel Inn when defendant entered; that just before defendant was arrested he called Patton into the bathroom and "stuffed both of my front pockets full of money." He told Patton not to spend the money and the next morning defendant went to the motel where Patton was staying and reclaimed the money.

Debra Teal testified that on an occasion before trial she visited a relative who was sharing a jail cell with defendant. She casually asked defendant what he was in jail for and he replied "violation of probation and armed robbery." She then asked him if he was guilty and defendant replied: "Yes, I done it, but they got to prove it."

Defendant offered no evidence.

The jury found defendant guilty as charged and from judgment imposing prison sentence of 30 years, he appealed.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Webb, Lee, Davis, Gibson & Gunter, by Joseph G. Davis, Jr., for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error defendant contends the court erred in permitting the victim of the robbery to make an in-court identification of him for the reason that the identification was influenced by an impermissibly suggestive out-of-court identification. We find no merit in the assignment.

Before Ms. Hough was allowed to testify in the presence of the jury, the court conducted a voir dire at which she and two police officers testified. She related the vivid description of her robber which she gave to police immediately after the robbery and stated that the person (defendant) which police brought to the store some forty-five minutes later was the

robber. The police corroborated her testimony with respect to the description of the robber which she provided. They also testified that they arrested defendant at the Rebel Inn "for questioning" and he agreed to go with them to the Kwik Pik Store. The court made findings of fact substantially as testified to by the witnesses and concluded that the victim's identification of defendant was based on her observation of him at the time of the robbery, that the identification was of independent origin and was in no way tainted or influenced by an impermissibly suggestive confrontation.

We hold that the court's findings were supported by competent, clear, and convincing evidence, and that the findings fully support the conclusions of law and the admission of the testimony. Our holding finds support in many cases including *Kirby v. Illinois,* 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972) ; *United States v. Cunningham,* 346 F. 2d 907 (D.C. Cir. 1970) ; and *Terry v. Peyton,* 433 F. 2d 1016 (4th Cir. 1970).

[2] In his other assignment of error defendant contends the court erred in admitting the testimony of Debra Teal for the reason that on the date she allegedly talked with him she was employed by the Rockingham Police Department and that she did not advise him of his constitutional rights. This assignment has no merit.

The court conducted a voir dire with respect to Miss Teal's testimony and found as facts that on the date in question she was employed by the City of Rockingham as a radio dispatcher with the police department; that her duties included answering the telephone, dispatching cars to wreck scenes, answering the "PIN" machine and taking calls from the fire department and rescue squad; that she was not a sworn police officer and did not have the power of arrest; that she did not make criminal investigations, did not interview witnesses or defendants and was not employed to take statements from anyone. The court concluded that at the time she talked with defendant that she was not in any way acting as a police officer, and, in fact, was not a law enforcement officer, and that even though defendant was in custody her talking with him was not a police interrogation.

The question appears to be one of first impression and while we are unable to cite any direct authority to support our holding, we conclude that the admission of Miss Teal's testi-

mony was proper in view of the findings of fact and conclusions of law made by the trial judge.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. CLEVELAND ABRAMS

No. 7510SC808

(Filed 7 April 1976)

1. **Automobiles § 134— possession of vehicle knowing it to be stolen — sufficiency of evidence**

In a prosecution for possession of a vehicle knowing it to be stolen, evidence was sufficent to be submitted to the jury where it tended to show that defendant was in possession of the car the day after it was stolen, defendant collided with another car while driving the stolen vehicle but did not stop, when he was pursued by the driver whose car he had hit and was questioned, his response was unsatisfactory, and the vehicle was subsequently found in a wooded area behind defendant's house.

2. **Automobiles § 134— possession of vehicle knowing it to be stolen — proving of felonious intent unnecessary**

In a prosecution for possession of a vehicle knowing it to be stolen, it was not error for the court to fail to instruct the jury as to defendant's felonious intent, since the statute under which defendant was charged, G.S. 20-106, did not require the doer of the act to have a felonious intent in order to be guilty of the felony of possession of a vehicle knowing it to be stolen.

APPEAL by defendant from *Lee, Judge.* Judgment entered 19 June 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 9 February 1976.

Defendant was charged under G.S. 20-106 with possession of a vehicle knowing it to be stolen. The jury returned a verdict of guilty as charged, and from a judgment imposing a prison sentence defendant appealed to this Court.

The evidence presented by the State tended to show the following: On Friday evening, 27 December 1974, a 1972 Dodge automobile (N. C. license number HDY-772) belonging to Wil-

liam D. Parker was stolen from the parking lot in front of his office. Parker admitted leaving the keys in the car. He could not identify the person who stole his car, but Parker did observe that it was a man. Parker's car was recovered by the police on the following Monday. The car had been wrecked.

On the afternoon of 28 December 1974 Helen Robinson was traveling on Highway 64 beltline when her automobile was struck by another automobile. She stopped her vehicle and assumed the other driver would stop. However, the other car proceeded down the highway and Mrs. Robinson pursued until the car stopped. Defendant was driving the car that struck her car, and she attempted to talk with defendant regarding the accident. Defendant's response was inadequate and Helen Robinson left and called the police.

When Mrs. Robinson and the police returned to where defendant was last seen, the defendant and the car were gone. Mrs. Robinson identified the license number of the vehicle that collided with her as N. C. number HDY-772. Pursuant to a conversation the police officer had with a nearby resident a warrant was obtained for the arrest of defendant.

William Parker's car was discovered in a wooded area behind defendant's house, and defendant was apprehended in a house next door to his home. The arresting officer testified that defendant was hostile, and that he had been drinking, and that he denied driving the car.

Defendant presented no evidence.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Joyner and Howison, by Edward S. Finley, Jr., for defendant appellant.

ARNOLD, Judge.

[1] There is no merit in defendant's contention that the trial court erred in failing to grant his motion for judgment as of nonsuit. Upon a motion for nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and nonsuit should be denied where there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed

and that defendant committed it. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). Defendant's possession of the vehicle, his conduct upon being approached by Mrs. Robinson after the accident, and defendant's apparent disregard for the value of the automobile are circumstances from which a jury could infer that the defendant was guilty of the offense charged.

[2] Defendant next argues that the trial court erred by failing to instruct the jury on an essential element of the crime. He asserts that the word "feloniously" in the indictment implies there was a dishonest purpose, and that the judge's charge should have included the defendant's "dishonest purposes" as an element of the crime.

It is an established principle of law that "[i]t is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime. Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design." *State v. Hales,* 256 N.C. 27, 30, 122 S.E. 2d 768 (1961); *State v. Hudson,* 11 N.C. App. 712, 182 S.E. 2d 198 (1971).

G.S. 20-106 provides in pertinent part as follows: "Any person who . . . has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony."

The purpose of G.S. 20-106 "is to discourage the possession of stolen vehicles by one who knows it to be stolen or has reason to believe it is stolen." *State v. Rock,* 26 N.C. App. 33, 35, 215 S.E. 2d 159 (1975). The State attempts to accomplish the purpose of discouraging the possession of stolen automobiles by making the act of possessing a stolen automobile punishable as a felony. Neither the construction of the statute nor the purpose for which the statute was enacted compels this Court to interpret the statute to require the doer of the act to have a felonious intent. The trial court did not commit error in its instructions.

Defendant's remaining assignments of error have been carefully reviewed and are found to be without merit.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. RANDOLPH THOMAS FAIR

No. 7527SC890

(Filed 7 April 1976)

Burglary and Unlawful Breakings § 5; Larceny § 5— possession of recently stolen goods — property not named in indictment

The fact that cuff links found in defendant's possession were not listed in the indictment charging him with breaking or entering a home and larceny of other articles of personal property therefrom did not render inapplicable the doctrine of possession of recently stolen goods where the evidence tended to show that the cuff links were stolen from the home at the same time as the property listed in the indictment, and the charge in this case, when considered contextually as a whole, fairly and adequately declared and explained the law arising on the evidence with respect to the possession of recently stolen goods.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 24 June 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 18 February 1976.

The defendant, Randolph Thomas Fair, was charged in a two-count bill of indictment, proper in form, with the felonies of breaking or entering the home of Alex and Jeannie Stuart and larceny therefrom of certain described articles of personal property. The defendant pleaded not guilty, offered no evidence, and was found guilty by the jury. From a judgment imposing a prison sentence of seven to ten years, he appealed.

Attornel General Edmisten by Associate Attorney Sandra M. King for the State.

Harris and Bumgardner by Don H. Bumgardner for defendant appellant.

HEDRICK, Judge.

Defendant's one assignment of error challenges the court's instructions to the jury with respect to the doctrine of the pos-

session of recently stolen goods. Evidence offered by the State tended to show that:

Alex W. Stewart left his home at 215 Dogwood Drive, Mount Holly, North Carolina, with his wife and three children at approximately 8:15 a.m., 25 February 1975. They returned home at approximately 6:00 p.m. that day and found that the basement door to the house had been battered down. Stuart noticed immediately that a 27 inch ten-speed bicycle and a 27 inch three-speed bicycle were missing. He went upstairs where he found that a stereo system and speakers, an AM/FM stereo clock radio, the children's piggy banks, a transistor radio, an attache tape recorder, some silver dollars and silver currency, and a psychedelic light were also missing. He noticed, too, that a pair of his son's gold-plated cuff links which he had seen in his son's room that morning were gone. The following day Alex and Jeannie Stewart went to the police station at approximately 6:00 p.m. where they identified a pair of cuff links as being the same ones taken from their house on the 25th.

Officer B. F. Harris testified that he arrested the defendant at approximately 5:00 p.m., 26 February 1975, and took him to the police station where he was searched. Harris found the cuff links which had been taken from the Stuarts in the defendant's right front pocket.

The defendant contends that since the bill of indictment did not charge that the defendant stole the gold-plated cuff links and since there was evidence that the Stuarts' home was broken into and the cuff links were stolen on some occasion other than that charged in the bill of indictment, the court erred "in failing to charge the jury that the doctrine of recent possession was applicable in this case only if the jury found beyond a reasonable doubt that cuff links found in the possession of the defendant were stolen at the same time and same place as the other items listed in the bill of indictment."

Even though property found in a defendant's possession is not listed in a bill of indictment charging that defendant with the felonies of breaking or entering and larceny, a presumption that defendant broke or entered and stole the property listed in the indictment arises if the property found in defendant's possession was recently stolen at the same time and place as the property listed in the indictment. *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969).

Thus, the fact that the gold-plated cuff links found in defendant's possession on the 26th of February were not listed in the bill of indictment charging the defendant with breaking or entering the Stuarts' home and the larceny of other articles of personal property does not render inapplicable the doctrine of possession of recently stolen goods in this case. Defendant's contention that there was evidence that the Stuarts' home was broken into and that the gold-plated cuff links were stolen at some time other than that of the 25th of February is not correct. All of the evidence tends to show that the Stuarts' home was broken into and all of the items and articles described in the bill of indictment and the gold-plated cuff links were stolen on 25 February 1975. Officer E. S. Luther's testimony on cross-examination that he took out a warrant "charging Bruce Nelson Johnson on the 26th day of February" with breaking and entering the Stuart home and larceny of the cuff links, standing alone, is not sufficient to raise an inference that the Stuarts' home was broken and entered into and the cuff links stolen at any time other than the 25th day of February 1975. The charge, when considered contextually as a whole, fairly and adequately declares and explains the law arising on the evidence with respect to the possession of recently stolen goods. The defendant's one assignment of error is overruled.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

OLNEY PAINT COMPANY, INC., A SOUTH CAROLINA CORPORATION v. ROMAN ZALEWSKI AND BONNIE HODGE, t/d/b/a CONTRACT DESIGN ASSOCIATES; COMMUNITY BUILDING CORPORATION OF ATLANTA, INC.; AND WILLIAM B. LITTLE AND STEVEN WALSH, d/b/a MANOR RIDGE

No. 7528DC837

(Filed 7 April 1976)

Evidence § 41; Laborers' and Materialmen's Liens § 3; Rules of Civil Procedure § 56— money owed subcontractor subject to lien — expression of opinion on question of law — summary judgment improper

In an action to recover for the value of wallpaper furnished by plaintiff to defendant subcontractor and to grant plaintiff all liens

and subrogation rights to which it was entitled under the statute on materialmen's liens, the trial court erred in granting summary judgment for defendant contractor on the basis of an affidavit by the contractor's vice-president that, before plaintiff filed its claim for a materialmen's lien, the contractor had paid the subcontractor all monies owed it, since such affidavit amounted to an expression of opinion on a question of law, was not admissible in evidence, and could not be considered on a motion for summary judgment.

APPEAL by plaintiff from *Styles, Judge.* Judgment entered 21 July 1975 in District Court, BUNCOMBE County. Heard in the Court of Appeals 11 February 1976.

Plaintiff, Olney Paint Company, Inc., alleged in its complaint that the defendants, William B. Little and Steven Walsh had appointed defendant, Community Building Corporation (CBC) as general contractor for the construction of an apartment complex on property they owned in Buncombe County. CBC employed defendants Zalewski and Hodge, doing business as Contract Design Associates (CDA) to install wallpaper in the apartment complex. Plaintiff supplied $3,860.15 worth of wallpaper to CDA, and CDA failed to pay for the wallpaper. Plaintiff prayed that it be awarded damages of $3,860.15 and that it be granted all liens and subrogation rights to which it was entitled under the statute on materialman's liens.

CBC admitted that it had been the general contractor for the apartment complex being built by Little and Walsh, and that it had employed CDA as a subcontractor to furnish wallpaper. It denied the other material allegations of the complaint. CDA filed no answer, and its default was entered, but default judgment was not entered.

CBC moved for summary judgment, and in support of its motion it submitted an affidavit of its vice-president, Bobby C. Jones. Jones stated that in May 1973 CBC entered into contracts with CDA for the installation of wallpaper, carpet and resilient flooring. These contracts, which were attached to the affidavit as exhibits, called for payments to be made to CDA periodically as its work progressed. CDA breached the contracts by failing to meet construction schedules and provide sufficient manpower and supervision, and CBC terminated the contracts in August and October 1973, before plaintiff filed its claim for a materialman's lien. When the contracts were terminated, "all monies to which Contract Design Associates were entitled had been paid," and there was no amount owed by CBC to CDA.

In opposition to CBC's motion, plaintiff submitted its verified complaint and in an affidavit of its credit manager, L. R. Denton. Denton stated that in September 1973 he personally informed Ed Ellis, an employee of CBC, that CDA had not paid for the wallpaper it had bought from plaintiff. In addition, he wrote two letters to Ellis advising him that plaintiff had not been paid.

The court granted CBC's motion for summary judgment and in the judgment stated that there was "no just reason for delaying entry of final judgment on said claim pending the disposition of other claims for relief involved in [the] action . . . ." Plaintiff appealed.

Robert B. Long, Jr., and Gary A. Dodd for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey and Leonard by John L. Sarratt for defendant appellee, Community Building Corporation.

No counsel for other defendants.

HEDRICK, Judge.

Plaintiff contends in its only assignment of error that the court should not have granted summary judgment for CBC. It argues that under G.S. 44A-18(2) it is entitled to a lien on any funds owed by CBC to CDA. CBC contends that plaintiff is not entitled to a lien on any funds CBC owes to CDA, because CBC does not owe any funds to CDA. This is established, CBC argues, by the affidavit of Bobby C. Jones, which states that when CBC terminated its contracts with CDA, "all monies to which Contract Design Associates were entitled had been paid." Plaintiff responds that this statement is inadmissible in evidence, because it is an expression of opinion on a question of law; and this contention seems correct.

1 Stansbury, N. C. Evidence 2d, § 130, in pertinent part states:

> "Thus a witness may state that he was in 'possession' of land or chattels, or that he 'bought' certain articles, or that a corporation 'claimed no interest' in a particular thing, or that it did not 'owe' a debt, if the words are employed in a popular sense to describe the facts rather than their legal consequences. But where the legal relations growing

out of the facts are a disputed issue in the case, and the witness's language appears to describe the relations themselves, the same words may be objectionable." (footnotes omitted)

The legal relations growing out of CBC's contract with CDA are certainly a disputed issue in this case; indeed, they are probably the crucial issue on which the case turns. If CDA had been paid all monies to which it was entitled, there is no fund on which plaintiff may obtain a lien; but if CBC did owe money to CDA, then there is such a fund and plaintiff may be entitled to a lien. Since Jones's statement was not admissible in evidence, it did not meet the requirements of NCRCP 56(e) and cannot be considered on a motion for summary judgment. CBC has therefore failed to carry its burden of proving that it is entitled to judgment in its favor, a burden which is imposed on every party moving for summary judgment, *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); and its motion for summary judgment should have been denied.

Reversed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. ROY O. ROBERSON

No. 7518SC912

(Filed 7 April 1976)

1. **Gambling § 3— possession of lottery tickets — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for possession of tickets and orders used in the operation of a numbers lottery.

2. **Criminal Law § 51; Gambling § 3— lottery tickets — expert testimony — qualification of witness**

The trial court in a prosecution for possession of lottery tickets did not err in allowing a police officer to give his opinion as to the nature and significance of papers and numbers found at defendant's house after the court had found the officer was an expert in the "investigation" of numbers lotteries but had sustained an objection to the State's tender of the officer as an expert in the "field" of numbers lotteries, since the trial judge, in overruling objections to questions asked the witness, in effect ruled that the witness was qualified to answer such questions.

State v. Roberson

3. Gambling § 3— instructions — meaning of lottery ticket

The trial court in a prosecution for possession of lottery tickets and orders sufficiently explained to the jury the meaning of the term "lottery ticket."

APPEAL by defendant from *McConnell, Judge.* Judgment entered 29 May 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 March 1976.

The defendant, Roy O. Roberson, was charged in a warrant, proper in form, with having "in his possession and under his control certificates, tickets, and orders used in the operation of a numbers lottery" in violation of G.S. 14-291.1. The defendant pleaded not guilty but was found guilty by the jury. From a judgment of imprisonment in the common jail of Guilford County for a period of eighteen months, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General James Blackburn for the State.

Taylor, Upperman, and Johnson by Herman L. Taylor and Leroy W. Upperman, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit. Evidence offered by the State tends to show the following:

Detective B. R. Dotson, accompanied by several other detectives, went to the defendant's residence at 127 N. Obermeyer Street, Greensboro, N. C., on 3 October 1974, and, pursuant to a search warrant, searched the premises. They found the defendant seated at a desk. In front of him, on the desk, they found numerous items which were identified as follows: a brown envelope containing slips of paper with numbers on them, a notebook containing columns of numbers, a white envelope containing several small slips of paper with numbers on them, scraps of cardboard paper and "travel card paper for charge cards" with columns of numbers on them, and loose pieces of paper with numbers on them. In a chest of drawers nearby they found a black book containing sheets of paper which listed the dates Monday through Friday from July 1964 to July 1974. Beside each date was a three digit number.

Detective Dotson testified that the small slips of paper with numbers on them were "numbers lottery tickets" being "similar

to the numbers lottery tickets that . . . [he had] seen in the past." Dotson also testified to the procedure of the numbers operation in general—that the winning lottery number on a given day was based on a three digit number derived from the previous day's stock exchange quotations. He then described the columns of numbers on the other papers and testified that the papers were records of bets having been placed for the day's lottery.

Finally, the State showed that the three digit numbers in the black book were the same as would be the winning number of a lottery based on the stock exchange quotations for the ten year period recorded in the book.

When the evidence is considered in its light most favorable to the State, it will permit the jury to find that the defendant had in his possession tickets and orders used in a "numbers" lottery and that he was guilty of a violation of G.S. 14-291.1. This assignment of error is overruled. *See, State v. Walker,* 25 N.C. App. 157, 212 S.E. 2d 528 (1975); *cert. denied,* 287 N.C. 264, 214 S.E. 2d 436 (1975).

[2] The defendant next argues it was error to allow Dotson to testify that the slips of paper found on the desk at the defendant's house were lottery tickets after the court had previously sustained an objection to the State's tendering of Dotson "as an expert in the field of numbers lotteries and gambling." The record discloses that at the close of an extensive voir dire examination into Dotson's experience and knowledge in investigating numbers lotteries the court found and concluded:

> " . . . that Mr. Dotson is a police officer having served in the Greensboro Police Department for ten years, several years of which have been spent in the Vice Squad, in connection with the *investigation* of numbers lottery and other gambling schemes, and is qualified to testify as an expert in connection therewith." (Emphasis added.)

Immediately following the voir dire the prosecution tendered Dotson "as an expert in the *field* of number lotteries and gambling." (Emphasis added.) There was an objection. The court responded, "Objection sustained. Let's go ahead, just let him testify." The defendant then objected on 38 different occasions to specific questions which called for an opinion by Dotson as to the nature and significance of the papers and numbers found at the defendant's house, each of which was overruled.

"A finding by the trial judge that the witness possesses the requisite skill [as an expert] will not be reversed on appeal unless there is no evidence to support it or the judge abuses his discretion." 1 Stansbury, N. C. Evidence (Brandis Rev.) § 133, p. 430 (footnotes omitted).

We have examined each of the 38 questions objected to and the answers given. In overruling each objection, the trial judge, in effect, ruled that the witness was qualified to answer the specific question as propounded. *State v. Walker, supra.* This assignment of error has no merit.

[3] Finally defendant asserts the court erred "in that it did not, at any point in its charge, define or attempt to define or explain the term 'lottery ticket' ". We do not agree. After reading the statute under which the defendant was charged, the court recapitulated some of the evidence of Detective Dotson describing the tickets, orders, books and records found in defendant's possession and his explanation and description as to how this paraphernalia was used in operating a numbers lottery. The court then in substance instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery. When the charge is considered contextually as a whole, in our opinion, it complies with the requirements of G.S. 1-180 and is free from prejudicial error.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. ANTHONY T. BOBBITT

No. 759SC943

(Filed 7 April 1976)

Robbery § 5— armed robbery — summarization of testimony proper

The trial court in a prosecution for armed robbery did not err in his summarization of the evidence when he stated that defendant

told his companion to pick up money from the counter of a store and the companion picked up the money and carried it out of the store, though the victim of the robbery whose testimony was being summarized did not specifically state that the companion picked up the money.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 11 August 1975 in Superior Court, VANCE County. Heard in the Court of Appeals 10 March 1976.

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

The State's evidence tends to show the following: Between 9:00 p.m. and 10:00 p.m. on 30 September 1974 defendant and an accomplice robbed the Currin Minute Mart in Henderson of $400.00 to $500.00. In carrying out the robbery, defendant threatened the manager of the store with a shotgun. Defendant was known to the manager and an employee and was readily identified. Defendant was seen standing outside the store shortly before the robbery by a former girl friend. Defendant left Henderson and was not arrested until his return in April 1975.

Defendant offered evidence which tended to show the following: Defendant is eighteen years of age. He dropped out of school after the tenth grade. About a week before the alleged robbery defendant went to New Jersey for a vacation. He stayed in New Jersey about seven months. He testified: "Before I left to go to New Jersey I lived everywhere. I was not working. I was not living in any special place. I do have some family and I live with them sometimes." Defendant returned to Henderson in April 1975 to straighten out a few assault warrants that had been issued against him. He was arrested on this robbery charge about two and one-half hours after he arrived in Henderson. He was in New Jersey at the time of the alleged robbery, and he did not rob the Minute Mart.

From a verdict of guilty and judgment of imprisonment for a term of thirty years, defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John M. Silverstein, for the State.

Henry W. Hight, Jr., for the defendant.

BROCK, Chief Judge.

Defendant argues that the trial judge, in his instructions to the jury, assumed certain crucial facts which were not in evidence and thereby expressed an opinion upon the evidence.

The trial judge is not required to recapitulate the testimony of a witness in the exact words used by the witness. It is sufficient for the trial judge to fairly summarize the evidence for the purpose of explaining the law applicable thereto. The two portions of the trial judge's recapitulation of the evidence of which defendant complains are as follows:

> "[T]hat Mr. Winstead removed the money from the cash register, money amounting to four or five hundred dollars in cash; that he put it on the counter, and that the defendant told the other man to pick it up; that the other man did pick up the cash in accord with the defendant's orders;
>
> . . . .
>
> "The State also offered evidence tending to show that Mr. Winstead did not give the defendant permission to take and carry away the money; that he removed from the cash register and laid on the counter and which was carried out of the store by the defendant's companion at the direction of the defendant; that the money has not been returned; that it has not been seen by Mr. Winstead from that day until this."

Defendant contends that the State did not offer evidence to establish that either defendant or his accomplice picked the money up from the counter and carried it away. Of course, the taking and carrying away is an essential element of the crime of robbery.

The State's evidence upon this element comes from the testimony of the manager of the store as follows:

> "I turned around and the Defendant, Tony Bobbitt told me it was a hold up, to give him the money. There was one other colored person with the defendant but I could not identify him. I opened the register and put roughly four hundred fifty dollars on top of the counter.
>
> "THE DISTRICT ATTORNEY: And at that time which of the two parties picked up the money, if they did?

"LAWRENCE WINSTEAD: The defendant asked, told the other party to pick up the money and let's go.

. . . .

"I did not give the two men permission to take anything from the store; especially the money.

"THE DISTRICT ATTORNEY: Would you have given up the money, had it not been for the shotgun that you testified was pointed at you?

"LAWRENCE WINSTEAD: No, sir.

"I was custodian of the money in that store.

"THE DISTRICT ATTORNEY: What did the two men do after they got the money, Mr. Winstead?

"LAWRENCE WINSTEAD: Well, when I finished putting the money on top of the counter

"THE COURT: Put it on top of the counter?

"LAWRENCE WINSTEAD: Yes, sir, the one with the gun which was Anthony Bobbitt told the other one to get the money and let's go. They turned around the side of the building and there was a blast from a shotgun, just seconds later."

The clear meaning of the foregoing testimony is that defendant's accomplice picked up the money while defendant held the shotgun and that the two men left the store with the money.

We find no prejudicial error in the instructions about which defendant complains.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. LESTER PLEMMONS

No. 7529SC973

(Filed 7 April 1976)

1. **Criminal Law § 169— exclusion of testimony — harmless error**

In a felonious assault prosecution, exclusion of testimony by defendant's wife that "somebody hollered and said come back here," if erroneous, was not prejudicial error where this information had already been placed before the jury by defendant's testimony.

2. **Criminal Law §§ 102, 128— reference to codefendant's conviction — harmless error**

The trial court in a felonious assault case did not err in failing to declare a mistrial when the district attorney referred to the fact that a codefendant had previously been convicted of the same charge for which defendant was on trial since the court's warning to the jury "not to consider that question or answer" was sufficient to render the reference to the codefendant's conviction nonprejudicial.

3. **Assault and Battery § 15— self-defense — fault in bringing on fight — failure to withdraw**

The trial court in a felonious assault case did not err in refusing to instruct on self-defense where defendant was at fault in bringing on the affray and never abandoned the fight and never withdrew.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 26 June 1975 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 17 March 1976.

Defendant was indicted for assault with a deadly weapon with the intent to kill, inflicting serious injury.

At trial, the State's evidence tended to show that defendant, accompanied by one Richard Smith, Mrs. Plemmons and others, proceeded by car to a trailer home on 4 August 1974 where defendant and Smith provoked an altercation with the victim Herman Wayne Noblitt. The dispute, originally verbal in nature, rapidly deteriorated into an exchange of gunfire. Eyewitness Harold Dean Noblitt, brother of the victim, testified that defendant and Smith

> " . . . came out the road in front of my house and I heard my sister's kids hollering that 'it's Richard Smith.' I jumped up and ran to the door and they turned around. It's a dead-end road. They came to the end of my mother's trailer which is about 10 or fifteen feet from the road and I heard Richard Smith holler to 'tell that God Damn Herman

> Noblitt I'm going to kill the Son of a Bitch.' My mother came out of the trailer, went near the car and asked for them to go on, that she did not want any trouble. About 3 or 4 minutes later, Herman came out of the house and when he did, I saw Richard Smith raise a shotgun out of the back seat. He was cursing and he shot across the yard when there was over a dozen small kids out there. Richard Smith and Lester Plemmons then pulled up about 20 feet and they backed up and Richard shot again through the yard. Then they continued going around the yard about 100 feet or so and Lester Plemmons got out of the car on the driver's side. I saw someone hand him a shotgun out of the car and he took it from an open door on the driver's side and shot across my yard and hit my brother, Herman Noblitt, in the face. Herman was bleeding real bad. He had shots on top of his head, nose, ears and chest, and he didn't have any of those injuries prior to Lester's shooting. After that, they jumped back in the car and left.
>
> My brother, Herman Noblitt, had a gun and after Richard Smith shot twice, Herman fired in the air and they took off. Then Lester Plemmons stopped and got out of the car and shot. My brother did not shoot in Lester Plemmon's direction. The shot that Lester Plemmons fired hit the end of my mother's trailer. I was in the direct line of fire and my nephew was in the house or in the door of the trailer."

Other eyewitnesses corroborated Harold's version of the assault.

Defendant's evidence tended to show that the defendant, angered by Herman Noblitt's purported overture to Mrs. Plemmons, " . . . went down to tell him [i.e. Noblitt] to stay away from her." Defendant, however, maintained that he was " . . . not up there looking for trouble." Initially unable to find Herman Noblitt, the defendant turned to leave, but then heard "somebody [holler] 'come here a minute.' " Apparently, the caller was either Harold or Herman Noblitt, and defendant claimed that he suddenly found himself facing the Noblitt brothers each of whom had a gun. Defendant testified that

> " . . . Herman Noblitt pulled a pistol up out of his pocket. He jerked it real hard and it went up in the air and went off and when it did I mashed the gas and he leveled the pistol at the car and shot twice. I saw his brother step out

of the door of his house with a shotgun. His name is Harold Noblitt. I saw him level the shotgun or some long gun at the car and when I got out of his sight, I stopped the car and jumped out and told them to hand me a gun. I was in the back and Herman Noblitt was standing behind something and he had it leveled in both hands like that. (Witness demonstrates.) I throwed the gun to my shoulder and pulled the trigger. I evidently hit him. I jumped back in the car and came straight to the sheriff's office. I don't know if Herman Noblitt shot the shotgun or not. I was busy driving. I didn't know Herman Noblitt. The first time I saw him was the day before. As to whether or not I intended to kill Herman Noblitt I don't know what my intentions were. I didn't intend to shoot a gun. When I went down there I did not take a gun with me, Richard had the shotgun. I know he had some shells for a shotgun, but I did not have a gun on my person.

As I started to leave Herman started shooting and I stopped the car and shot back. I did that because when somebody hits me I gotta hit them back, and I know for a fact I was being shot at."

From a plea of not guilty, the jury returned a verdict of guilty of assault with a deadly weapon with the intent to kill. From judgment sentencing him to a term of imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorney Norma S. Harrell, for the State.

Dameron and Burgin, by Charles E. Burgin, for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the trial court erred in excluding Mrs. Plemmons's testimony that " 'somebody hollered and said come back here.' " Defendant asserts that this testimony went to the purported issue of self-defense and " . . . should have been allowed into evidence to be considered by the jury for whatever weight the jury cared to give it." We find no merit to this contention. The record clearly indicates that this information was already before the jury, having been brought forward by defendant's own testimony, and thus the trial court's

error, if any, in excluding that portion of Mrs. Plemmons's testimony must be deemed harmless.

[2] Defendant also argues that the trial court erred in failing to declare a mistrial when the district attorney brought to the attention of the jury the fact that a codefendant, Richard Smith, had previously been convicted of the same charge for which the defendant was being tried. Defendant, moreover, assigns as error the failure of the trial court to give a detailed warning to the jury to disregard this particular question and answer. We disagree.

Here there was but one instance where this other conviction was brought to the jury's attention and when the trial court heard the district attorney's single and isolated objectionable reference to Smith's conviction, it promptly sustained the defendant's objection and immediately advised the jury " . . . not to consider that question or answer. . . . " We believe this warning, under these circumstances, sufficiently met the requirements of the law with respect to the extent of detail required when warning the jury and rendered the remark harmless and nonprejudicial. See: 48 A.L.R. 2d 1016, Prejudicial Effect of Prosecuting Attorney's Argument or Disclosure During Trial That Another Defendant Has Been Convicted or Has Pleaded Guilty." Cf: *State v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876 (1957); *State v. Atkinson,* 25 N.C. App. 575, 214 S.E. 2d 270 (1975).

[3] Finally, defendant contends that the trial court erred in failing to grant defendant's request for instructions on the law of self-defense. Again we disagree.

> " 'The right of self-defense is available only to a person who is without fault, and if a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so.' " *State v. Watkins,* 283 N.C. 504, 511, 196 S.E. 2d 750 (1973). (Citation omitted.)

Here defendant never abandoned the fight and never withdrew. He simply drove off a short distance out of sight of Noblitt and then stepped from his car and shot the victim. An instruction

on self-defense was not warranted by the evidence, and the court properly omitted it from his charge.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. EDWARD STEVE TURNER

No. 7529SC956

(Filed 7 April 1976)

Automobiles § 121— defendant behind wheel of car with engine running — sufficiency to prove he was driving

In a prosecution of defendant for driving under the influence and driving while his license was revoked, State's evidence that defendant was seated behind the steering wheel of a car which had the motor running was sufficient to prove that defendant was driving the vehicle. G.S. 20-4.01(25).

APPEAL by defendant from *Farrell, Judge.* Judgment entered 14 August 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 8 March 1976.

Defendant was charged with driving under the influence, driving while his license was revoked, and voluntary manslaughter. At the close of State's evidence, the trial court, pursuant to defendant's motion, reduced the charge of voluntary manslaughter to involuntary manslaughter. From pleas of not guilty, the jury returned verdicts of guilty as to all charges. From judgment sentencing him to various terms of imprisonment, defendant appealed.

The State's evidence tended to show that on 21 December 1974, at approximately 6:30 p.m., James Lee Blanton was observed leaving a "Super Chef" on foot. Approximately 30 minutes later, Blanton was found dead, lying on the side of the road. Strewn about the immediate vicinity of the body were pieces of broken glass from a headlight and a broken piece of a radio antenna. According to medical evidence, Blanton died from a " . . . trauma that . . . ruptured the large blood vessel that leads from the heart with secondary hemorrhage and bleeding."

Other evidence indicated that defendant, at approximately 6:45 p.m., was in a "yellow Plymouth automobile" in the Super Chef parking lot and according to witness E. M. Jolley, he " . . . saw a yellow Plymouth automobile with the motor running and steam and water running out of it, we started down to the car but about the time we reached it the motor went dead and the car started rolling backward at which time I opened the door, put my foot on the brake and stopped the car. Mr. Gould went around to the driver's side and had the person under the steering wheel to get in the back seat. (Mr. Jolley, then identified the defendant as the person under the steering wheel of the automobile.) When I first noticed the person in the automobile, he was resting his head on the steering wheel and leaning toward the door in the left side."

Roger Bell, an officer with the County Sheriff's office, testified that he, too, was at the Super Chef on the night in question and saw the defendant

> " . . . sitting in the back seat of a yellow Plymouth automobile. I went to the driver's side and hollered to him through the window; he was slumped over; I opened the door and asked him to get out. I had to help him walk because he had a strong odor of alcohol about his breath and he was staggering.
>
> He asked me what had happened; he didn't seem to know what was going on; he seemed dazed. I observed him for another ten minutes then took him to the Rutherford County jail. In my opinion, he was under the influence of some intoxicating liquor and his mental and physical faculties were impaired. I later saw the yellow Plymouth at the Rutherford County jail. The right headlight lens of the vehicle was broken out; the aerial wire of the antenna wire was broken off."

An SBI microanalyst testified that the glass and antenna found near Blanton's body came from defendant's car and that hairs found on the "antenna area of the vehicle" matched hair samples taken from the deceased.

The parties stipulated that on 21 December 1974 defendant's license already had been revoked and that defendant had received notice of revocation.

Defendant presented no evidence, but moved for judgment as of nonsuit.

Attorney General Edmisten, by Special Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

Robert W. Wolf for defendant appellant.

MORRIS, Judge.

Defendant's assignments of error are to the trial court's failure to grant his motions for nonsuit on all charges. Specifically, defendant maintains that with respect to the charges of driving under the influence and while his license was revoked the State failed to bring forward evidence showing that defendant was driving the car. Defendant further argues that with respect to the charge of involuntary manslaughter, the State failed to present sufficient evidence that defendant's culpable negligence, if any, was a proximate cause of Blanton's death. We disagree.

Under G.S. 20-4.01(25), an operator of a motor vehicle is any " . . . person in actual physical control of a vehicle which is in motion or which has the engine running." The evidence was plenary that defendant was seated behind the steering wheel of a car which had the motor running. The evidence brings defendant within the purview of the statute as to operation of the vehicle, and the evidence is plenary to support a conviction of driving under the influence. It was stipulated that defendant's license had been revoked and that defendant had had notice of the revocation.

The evidence, moreover, was sufficient to go to the jury on the involuntary manslaughter issue in view of all the direct and circumstantial evidence presented.

No error.

Judges HEDRICK and ARNOLD concur.

JOHNSON SERVICE COMPANY v. RICHARD J. CURRY AND COMPANY, INC.

No. 7514SC872

(Filed 7 April 1976)

1. **Evidence § 29— verified itemized statement of account — admissibility**

A verified itemized statement of an account was properly admitted in evidence where the affidavit of the person verifying the account shows that he has personal knowledge of the account and is familiar with the books and records pertaining to the account and the correctness thereof. G.S. 8-45.

2. **Evidence § 29— verified statement of account — availability of witness**

The use of a verified statement of an account is not limited to those situations where the person verifying the account is unavailable to testify.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 12 May 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 February 1976.

This is a civil action wherein the plaintiff, Johnson Service Company, a corporation, seeks to recover from the defendant, Richard J. Curry and Company, Inc., on an account for material and labor the total sum of $20,278.70.

In its first count in its complaint plaintiff alleged that from 5 December 1972 to 26 January 1973, at defendant's request, it provided to the defendant for the construction of environmental laboratories, certain materials and labor, and that the balance due on this account was $7,774.83. In a second count the plaintiff alleged that from 24 January 1972 to 31 August 1972, at defendant's request, it provided to the defendant for the construction of environmental laboratories material and labor, and that the balance due on this account was $12,503.87. The defendant filed answer denying that it was indebted to the plaintiff and alleged a counterclaim for breach of warranty.

At trial plaintiff offered a verified itemized statement of the account from 5 December 1972 to 26 January 1973 showing a balance due in the amount of $7,774.83. This verified account was signed by Henry Sowell, Jr., who also appeared personally and testified. At trial plaintiff offered the verified itemized statement of the account from 24 January 1972 to 31 August 1972 showing a balance due of $12,503.87. This verified account was

signed by James G. Potter who also appeared personally and testified.

The jury found that the defendant was indebted to the plaintiff on the accounts in the total sum of $20,278.70, and that the plaintiff had not expressly or impliedly warranted "that the goods and materials sold to the defendant would be fit for the particular purpose for which the defendant was to use them."

From judgment on the verdict, defendant appealed.

Clark, Tanner and Williams by David M. Clark and W. Fred Williams, Jr., for plaintiff appellee.

Powe, Porter, Alphin and Whichard by Charles R. Holton for defendant appellant.

HEDRICK, Judge.

[1] Defendant's three assignments of error present the question of whether the court erred in allowing into evidence Henry Sowell, Jr.'s and James G. Potter's verified itemized statements of plaintiff's account with the defendant.

G.S. 8-45 provides:

> *"Itemized and verified accounts.*—In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness."

Defendant contends that neither Sowell nor Potter was competent to verify plaintiff's account with the defendant. The account must be sworn to by some person who would be a competent witness to testify to the correctness of the account. *Nall v. Kelly,* 169 N.C. 717, 86 S.E. 627 (1915). It is sufficient if the affiant has personal knowledge of the account or is familiar with the books and records of the business and is in a position to testify as to the correctness of the records. *Endicott-Johnson Corp. v. Schochet,* 198 N.C. 769, 153 S.E. 403 (1930).

Sowell's affidavit in pertinent part reads as follows:

> "Pete Sowell, first being duly sworn, says that he is the service salesman for the Johnson Service Company in the

office located at 1716 New Hope Church Road, Raleigh, North Carolina, and is duly authorized by Johnson Service Company to make this affidavit on its behalf; that during 1972 and subsequent thereto, he serviced the account of Richard J. Curry and Company, Inc., and is familiar with the books and records of that account; that the attached account of Richard J. Curry and Company, Inc. supported by the itemized statement of goods sold and delivered to and services performed for Richard J. Curry and Company, Inc. as shown by the invoices attached hereto, is true and correct; * * * "

Potter's affidavit in pertinent part reads as follows:

"JAMES G. POTTER, being first duly sworn, says that he is a Sales Engineer for Johnson Service Company in the office located at 900 N. Stafford Street, Arlington, Virginia, and is duly authorized by Johnson Service Company to make this affidavit; that during 1971 and subsequent thereto, he serviced the account of Richard J. Curry & Company, Inc. and is familiar with the books and records of that account; that the attached account of Richard J. Curry & Company, Inc., supported by the itemized statements of goods sold and delivered to Richard J. Curry & Company, Inc. as shown by the quotations, purchase orders, acknowledgment of purchase order, invoices and computerized statement of account attached hereto, is true and correct; * * * "

In our opinion, these affidavits show on their face that the witnesses had personal knowledge of the account and were familiar with the books and records of plaintiff pertaining to the account and the correctness thereof. Indeed, the competency of the witnesses to give the verified itemized statement of the account was established when they testified at trial.

[2] Defendant also contends the court erred in admitting the affidavits into evidence simply because the affiants, Sowell and Potter, were available and did testify at the trial. While G.S. 8-45 serves a useful purpose in facilitating the collection of accounts where there is no bona fide dispute, and in relieving the plaintiff of the expense and delay of taking depositions, Stansbury N. C. Evidence 2d, § 157, we find nothing in the statute or our case law that limits the use of a verified statement of the account to only those situations where the witness

is unavailable to testify. These assignments of error are not sustained.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM PRESTON LESLEY

No. 7519SC878

(Filed 7 April 1976)

1. **Automobiles § 127— driving under the influence — sufficiency of evidence**

In a prosecution for driving under the influence, evidence was sufficient to be submitted to the jury where it tended to show that an officer observed a driveway leading from a public highway to an abandoned building at a time when no vehicles were there, a few minutes later the officer observed that defendant's car was in the driveway, he saw the vehicle move forward three to five feet toward the building and stop, defendant was at the wheel and appeared to be under the influence of intoxicants, and a breathalyzer test registered .23.

2. **Automobiles § 122— public vehicular area — driveway to abandoned Pepsi plant — improper jury instruction**

In a prosecution for driving under the influence, evidence was insufficient to support the trial court's instruction to the jury that a driveway from a public road to an abandoned Pepsi-Cola bottling plant was a "public vehicular area" within the meaning of G.S. 20-4.01.

APPEAL by defendant from *Albright, Judge.* Judgment entered 24 July 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 17 February 1976.

The defendant, William Preston Lesley, was charged in a warrant, proper in form, with operating "a motor vehicle on a public street or public highway and public vehicular area while under the influence of intoxicating liquor" in violation of G.S. 20-138. The defendant pleaded not guilty and was found guilty by the jury of violating G.S. 20-138(b). From a judgment imposing a ninety-day jail sentence which was suspended for three years, defendant appealed.

Attorney General Edmisten by Associate Attorney Henry H. Burgwyn for the State.

Davis, Ford and Weinhold by Robert M. Davis for defendant appellant.

HEDRICK, Judge.

[1] The defendant assigns as error the denial of his timely motion for judgment as of nonsuit. The State offered evidence tending to show the following:

M. R. Lane, "a uniformed officer" with the Salisbury Police Department, was on duty on 29 April 1975. He was patrolling "29 South," a public highway, at approximately 12:50 a.m., when he passed the old Pepsi-Cola Bottling Plant. He described the building as being unoccupied and there were "for rent" and "for sale" signs posted in the windows. The premises were not maintained and weeds were beginning to grow up in the yard. There was a concrete drive approximately thirty to thirty-five feet long which led from the highway to the building with a "rail" along the side. The drive ended at a door which opened into the building. There were no signs or obstructions barring access to the drive from Highway 29. Officer Lane testified:

> "There was not any automobile there at the time. It was approximately five minutes before I came back and saw this automobile—this station wagon. That is the Pepsi-Cola Plant up here at five points."

The car was in the driveway leading from the road to the building. He noticed it move forward three to five feet toward the building and stop. Officer Lane appproached the automobile and found the defendant slumped down in the driver's seat. The engine was running and the headlights and backup lights were on. He asked the defendant to get out of the car which he did. There was an odor of alcohol about the defendant. He could not remove his driver's license from his wallet and had difficulty maintaining his balance. When it appeared to Lane that the defendant was intoxicated he arrested him and carried him to the police station where a breathalyzer test was performed. The defendant registered "point twenty-three one hundredths of one percent blood alcohol."

In our opinion, when the foregoing evidence is considered in the light most favorable to the State it will permit the jury

to find that the defendant while under the influence of an intoxicating beverage, or having an amount of alcohol in his blood exceeding .10% by weight, drove an automobile from Highway 29, a public highway, onto the premises of the abandoned Pepsi-Cola Bottling Plant where Officer Lane found him. Such findings would permit the jury to find the defendant guilty of violating G.S. 20-138(a) or G.S. 20-138(b). This assignment of error is overruled.

[2] The defendant contends the court erred in instructing the jury "that the driveway at the Pepsi-Cola company is a public vehicular area within the State." G.S. 20-4.01 defines public vehicular area as follows:

> "*Public Vehicular Area.* — Any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public."

The evidence in the record before us is not sufficient to support the trial court's conclusion that the driveway leading from Highway 29 to the Pepsi-Cola Bottling Plant is a "public vehicular area" within the meaning of G.S. 20-4.01.

It is not necessary that we discuss defendant's additional assignments of error since they are not likely to occur at a new trial.

For error in the charge, the defendant is entitled to a new trial.

New trial.

Judges BRITT and MARTIN concur.

INGE E. RIVERS v. ALFRED RIVERS

No. 7512DC902

(Filed 7 April 1976)

Rules of Civil Procedure §§ 58, 68.1— confession of judgment — notice to defendant not required

The trial court properly determined that G.S. 1A-1, Rule 58, did not apply to confession of judgment, that defendant was not entitled to receive written notice of the entry of the confession of judgment, and that defendant therefore was not entitled to relief from the judgment by confession; moreover, a defendant is deemed to have notice of a confession of judgment, since without a written statement by defendant authorizing its entry there can be no confession of judgment. G.S. 1A-1, Rule 68.1.

APPEAL by defendant from *Herring, Judge.* Judgment entered 17 September 1975 in District Court, CUMBERLAND County. Heard in the Court of Appeals 20 February 1976.

In November 1973, a judgment by confession was entered by the Clerk of Court which provided that defendant was to pay plaintiff $300 per month permanent alimony. On 27 May 1975, pursuant to Rule 60(b), defendant moved for relief from the judgment by confession. It was established that defendant never received written notice of the entry of the judgment by confession.

After finding facts the trial court concluded that defendant had not presented grounds for relief under Rule 60(b), and "as a matter of law that Rule 58 of the North Carolina Rules of Civil Procedure relative to the Entry of Judgment has no application" to a confession of judgment authorized by Rule 68.1.

MacRae, MacRae & Perry, by Daniel T. Perry III, for plaintiff appellee.

Pope, Reid & Lewis, by Marland C. Reid, for defendant appellant.

ARNOLD, Judge.

Defendant assigns error to the court's conclusion that G.S. 1A-1, Rule 58 has no application to a confession of judgment. He contends that G.S. 1A-1, Rule 68.1, which authorizes confession of judgment, does not prescribe the manner in which

judgments by confession are to be entered, and therefore Rule 58 should govern.

Under Rule 58 there are three requirements necessary for the entry of judgments which are not rendered in open court. First, an order for the entry of judgment must be given to the clerk by the judge. Second, the judgment must be filed. Third, the clerk must mail notice to all parties, and entry of judgment is deemed to have been made at the time of the mailing of the notice. The clerk's notation on the judgment of the time of the mailing is *prima facie* evidence of the mailing and time of the mailing. *(See* N. C. Civ. Prac. & Proc., § 58-6.)

Because defendant received no written notice of the entry of the confession of judgment, and there was no notation on the judgment of the time of mailing such notice, he contends there was an improper entry of judgment. Defendant reasons that under G.S. 1A-1, Rule 60(b)(6), which allows relief for "any other reasons justifying relief from the operation of the judgment," he has grounds for relief from the judgment since he was not given proper notice of entry.

Defendant argues that the objectives of Rule 58 are to make the moment of entry of judgment easily identifiable and to give fair notice to all parties. This is a correct statement of the purposes of Rule 58 in cases where the rule is intended to apply.

G.S. 1A-1, Rule 68.1 authorizes a confession of judgment by filing with the clerk a verified statement signed by the defendant. The statement must contain the names of each of the parties, the county of residence of each party, a concise explanation as to why defendant is or may become liable to plaintiff, and an authorization for the entry of judgment for the amount stated. A statute authorizing confession of judgment is in derogation of the common law and is to be strictly construed. *Gibbs v. Weston and Co.*, 221 N.C. 7, 18 S.E. 2d 698 (1942).

Under Rule 58 the clerk may not enter a judgment not rendered in open court without first receiving "an order for the entry of judgment . . . from the judge." In contrast, there can be no entry of a confession of judgment, under Rule 68.1, without a written authorization for entry by the defendant. The defendant is therefore deemed to have notice since without a written statement by defendant authorizing its entry there can be no confession of judgment.

The trial court was correct that Rule 58 did not apply to confession of judgment, and that defendant had not shown grounds for relief under Rule 60(b). The order denying defendant's motion for relief is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

JUDITH C. HENRY v. HAROLD J. HENRY, JR.

No. 7514SC944

(Filed 7 April 1976)

Husband and Wife § 7; Courts § 21— right of wife to sue husband in tort — what law governs

The law of the state in which a wrong occurred rather than the law of the state of the parties' residence applies in determining whether a wife can sue her husband in tort; therefore, a nonresident wife may maintain in this State an action against her nonresident husband to recover for injuries received in an automobile accident in this State.

Chief Judge BROCK dissents.

APPEAL by defendant from *Preston, Judge.* Order entered 15 September 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 March 1976.

Plaintiff started this action against defendant, her husband, on 30 April 1975. She seeks damages for injuries arising out of an automobile accident allegedly caused by defendant in Granville County on 11 February 1973.

Plaintiff and defendant are residents of Pennsylvania. Under the laws of that jurisdiction plaintiff could not bring this action against her spouse. Defendant moved to dismiss the action. Under the laws of North Carolina a wife can maintain an action against her husband for the alleged tort. The trial judge ruled that the laws of this State apply and denied the motion to dismiss. We elected to pass upon the merits of defendant's appeal from that order.

DeMent, Redwine, Yeargan & Askew, by Garland L. Askew, for plaintiff appellee.

Bryant, Bryant, Drew & Crill, P.A., by Victor S. Bryant, Jr., for defendant appellant.

VAUGHN, Judge.

The accident, involving residents of Pennsylvania, occurred on an interstate highway in North Carolina. In cases involving intra-family immunity, our Supreme Court has consistently held that it would apply the law of the state where the wrong took place instead of the law of the state of the parties' residence. *Bogen v. Bogen,* 219 N.C. 51, 12 S.E. 2d 649; *Shaw v. Lee,* 258 N.C. 609, 129 S.E. 2d 288; *Petrea v. Tank Lines,* 264 N.C. 230, 141 S.E. 2d 278.

Defendant's counsel persuasively urges that the courts of this State re-examine the position previously taken and hold that the law of the domicile and not the place of the wrong should apply in determining whether a wife can sue her husband in tort. No good purpose could be served here by a review of the well reasoned cases and other writings that support the view urged by defendant. If the question had not previously been resolved by the Supreme Court, we would not hesitate to adopt the view urged by defendant to the extent that plaintiff could not maintain the present action. To so hold would not, we believe, be "to voyage into such an uncharted sea, leaving behind well established conflicts of laws rules." *Shaw v. Lee, supra.* Incapacity to sue because of marital status is a question of family law and not of tort. This State can recognize the consequences of the family status given the parties in the state of their residence without any encroachment on the right of this State to regulate the *conduct* of nonresidents while they are in this State.

Nevertheless, as it should be, the wisdom of determining whether or when the effect of a prior decision of the Supreme Court shall be modified is a matter for exclusive determination by that Court. As the Supreme Court of North Carolina recently said as it quoted with approval from an Iowa case:

> " 'If trial courts venture into the business of predicting when this court will reverse its previous holdings . . . they are engaged in a high-risk adventure which we strongly

recommend against.'" *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412.

For these reasons the order from which defendant appealed is affirmed.

Affirmed.

Judge MARTIN concurs.

Chief Judge BROCK dissents.

STATE OF NORTH CAROLINA v. DALE MILLSAPS

No. 7530SC986

(Filed 7 April 1976)

Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering motor vehicle — larceny therefrom — insufficiency of evidence

In a prosecution for breaking and entering a motor vehicle and larceny, evidence that defendant was present in the vehicle containing stolen items and with individuals who had attempted to negotiate stolen traveler's checks, without any evidence that any of the stolen items were under the actual control of defendant, was insufficient to carry the question of defendant's guilt to the jury.

APPEAL by defendant from *Small, Judge*. Judgment entered 6 September 1975 in Superior Court, GRAHAM County. Heard in the Court of Appeals 17 March 1976.

Defendant was indicted upon charges of breaking and entering a motor vehicle and of larceny. He entered a plea of not guilty.

The State presented evidence that on 7 August 1975 between the hours of 10:15 a.m. and 5:00 p.m. the camper-van of Frank Morrison was broken into at a campground in Graham County. Among items missing from the van were two cameras, two binoculars, a pellet pistol, a razor, a camplight, $800.00 in Travelers' checks, and $30.00. Defendant, along with three co-defendants traveling in a white 1962 Chevrolet station wagon, was placed under arrest for public drunkenness. He was not driving the vehicle but was a passenger sitting on the left rear side. At the time of the arrest, several of the stolen items were

found in the car. Co-defendant Phillips was carrying a $50.00 American Express Traveler's Check. Defendant had $43.27 in his possession, among which was three or four pieces of Canadian money. The State presented witnesses who testified as to the attempted negotiation or negotiation of Morrison's traveler's checks by co-defendants Carver, Phillips, and Pressley on 7 August 1975.

Defendant presented no evidence. At the close of the State's evidence, defendant moved for a dismissal, which motion was denied.

From a verdict of guilty as charged, defendant appealed.

Attorney General Edmisten by Associate Attorney Elisha H. Bunting, Jr. for the State.

McKeever, Edwards, Davis and Hays by Fred H. Moody, Jr. for defendant appellant.

PARKER, Judge.

Defendant presents one assignment of error, that the judge should have allowed his motion for nonsuit at the close of the evidence. This case is controlled by the decision in *State v. Hopson*, 266 N.C. 643, 146 S.E. 2d 642 (1966), in which the defendant was tried for breaking and entering and larceny, having been identified by police officers as a passenger in a vehicle which was seen near the site of the crime on the night of its commission and in which was found the stolen property. The court reversed the decision of the trial court, holding in a *per curiam* opinion at page 644 that "[a]ppellant was neither the owner nor the driver of the Ford in which the stolen articles were found. Evidence is lacking that he was in possession of the stolen articles. . . . [T]he evidence does no more than raise a suspicion of appellant's guilt and is insufficient in law to support a guilty verdict." See also, *State v. Ferguson*, 238 N.C. 656, 78 S.E. 2d 911 (1953); *State v. Godwin* 269 N.C. 263, 152 S.E. 2d 152 (1966). Although the State's evidence in the present case did show that the victim of the crimes was a Canadian, that various pieces of change were stolen from his camper, and that defendant had in his possession several Canadian coins when he was arrested, the State failed to show that Canadian coins were included among the pieces of change stolen from the camper and the coins found in defendant's possession were never identified as belonging to the victim. We find the State's evi-

dence that defendant was present in the vehicle containing stolen items and with individuals who had attempted to negotiate stolen traveler's checks, without any evidence that any of the stolen items were under the actual control of defendant, to be insufficient to carry the question of defendant's guilt to the jury.

The judgment appealed from is

Reversed.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. SYLVESTER GREEN

No. 755SC926

(Filed 7 April 1976)

Criminal Law § 169— admission of evidence over objection — no objection to like testimony — harmless error

Defendant was not prejudiced by testimony over objection that an accomplice who was tried separately from defendant had "confessed" where an officer thereafter testified without objection that the accomplice's confession was in the form of agreeing with incriminating statements made in his presence by another accomplice.

APPEAL by defendant from *Cowper, Judge.* Judgments entered 13 June 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 March 1976.

By indictments proper in form, defendant was charged with (1) larceny of a 1973 Chevy truck, (2) safecracking, (3) breaking or entering a building occupied by B. F. Goodrich Company, and (4) larceny of personal property of the value of $4,019.90 pursuant to the breaking or entering. He pled not guilty to all charges.

Evidence presented by the State, in pertinent part, tended to show: On Saturday night, 30 November 1974, defendant, together with Gonzales Jones and Kenneth Aaron, broke into a Goodrich Store in Wilmington, cracked a safe and took money from it, loaded a quantity of merchandise on a truck and drove it away. When that truck developed mechanical difficulty, they returned to the store and got another truck. Defendant drove

the second truck while Jones and Aaron followed in Aaron's Dodge automobile. Police stopped the car and arrested Jones and Aaron. On the following day, Jones confessed, implicating defendant and Aaron. At the trial in which defendant took the stand, Jones testified as a witness for the State. The jury returned verdicts finding defendant guilty of the four charges stated above. From judgments imposing prison sentences, he appealed.

Attorney General Edmisten, by Associate Attorney Norma S. Harrell, for the State.

Lionel L. Yow for defendant appellant.

BRITT, Judge.

By the sole assignment of error argued in his brief, defendant contends the trial court erred in allowing Police Officer Henderson, over objection, to state that he obtained a confession from Kenneth Aaron.

It will be noted that defendant was tried separately from Jones and Aaron. On direct examination Officer Henderson, without objection, related statements made to him by Jones which implicated defendant in all four cases. On redirect examination, Henderson, over defendant's objection, stated that he obtained a confession from Aaron but did not relate at that time what Aaron had told him. When the State did not present Aaron as a witness, defendant called him and at that time he denied making any confession. As a rebuttal witness for the State, Henderson, without objection, testified to the effect that Aaron's confession was in the form of agreeing with incriminating statements made in his presence by Jones. The police did not get a signed statement from Aaron.

There are many reasons why the assignment has no merit but we will discuss only one. It is well settled that ordinarily the admission of testimony over objection is harmless when testimony of the same import is theretofore or thereafter admitted without objection. 3 Strong, N. C. Index 2d, Criminal Law § 169 and cases therein cited. When he was called as a rebuttal witness, Officer Henderson testified, without objection, that while Jones was making his statements with respect to the offenses, police would periodically stop Jones, ask Aaron if the statement was correct, and Aaron would answer in the affirmative. In view of this testimony, we can perceive no possible way

that defendant was prejudiced by the bare statements of Officer Henderson that Aaron "confessed."

We hold that defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. PHILLIP EDWARD BROWN

No. 7519SC961

(Filed 7 April 1976)

Criminal Law § 149— directed verdict — no appeal by State

The State may not appeal from an order of the superior court directing a verdict for defendant in a criminal case. G.S. 15-179.

APPEAL by the State from *Kivett, Judge.* Judgment entered 15 August 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 16 March 1976.

Defendant was tried in district court on a warrant charging him with operating a motor vehicle on a public highway while under the influence of intoxicating liquor. He was found guilty of the lesser offense of operating a motor vehicle on a public highway while having a blood alcohol content of .10 percent, a violation of G.S. 20-138(b). From judgment imposed, he appealed to superior court.

In superior court defendant was placed on trial for violating G.S. 20-138(b), pled not guilty, and was found guilty of that charge. Before any judgment was rendered, defendant, in separate written motions, moved (1) to set the verdict aside for the reason that the State failed to qualify a witness as provided by G.S. 20-139.1(b), and (2) to arrest the judgment for the reason that defendant was not tried on a warrant charging a violation of G.S. 20-138(b).

The court allowed both motions. As to (1), upon finding that the State failed to qualify the breathalyzer operator as required by G.S. 20-139.1, and that defendant had "properly" moved for a directed verdict of not guilty at the close of the

State's evidence, the court ordered the verdict returned by the jury set aside and a verdict of not guilty entered. The State appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

John D. Ingle for defendant appellee.

BRITT, Judge.

G.S. 15-179 provides as follows:

"WHEN STATE MAY APPEAL.—Except as provided in G.S. 15A-979(c), an appeal to the appellate division or superior court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—

(1) Upon a special verdict.

(2) Upon a demurrer.

(3) Upon a motion to quash.

(4) Upon arrest of judgment.

(5) Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.

(6) Upon declaring a statute unconstitutional.

(7) Upon a motion to bar prosecution based on the prohibition against double jeopardy."

We hold that an appeal by the State is not authorized in this case. On oral argument in this court the State contended that the appeal is permitted by subsection (4), "upon arrest of judgment." We reject that contention because no judgment was arrested. The action of the court in allowing defendant's motion in arrest of judgment had no effect and we treat it as mere surplusage.

While we think the trial court erred in directing a verdict for defendant, we are not authorized to correct that error. The record discloses that during the presentation of evidence defendant did not challenge the qualifications of the breathalyzer operator and did not object to any of his testimony. Defendant's

first complaint with respect to the testimony came after the jury returned its verdict; that was too late. 3 Strong, N. C. Index 2d, Criminal Law § 162; *State v. Harrell,* 16 N.C. App. 620, 192 S.E. 2d 645 (1972); *State v. Davis,* 8 N.C. App. 589, 174 S.E. 2d 865 (1970).

Appeal dismissed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA EX. REL., COMMISSIONER OF INSURANCE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, THE TRAVELERS INDEMNITY COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, LUMBERMEN'S MUTUAL CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, MARYLAND CASUALTY COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 7510INS974

(Filed 7 April 1976)

Insurance § 79.1— automobile liability rate filing — disapproval without hearing

The Commissioner of Insurance had no authority to disapprove an automobile liability insurance rate filing without first conducting a public hearing. G.S. 58-27.2.

APPEAL by North Carolina Automobile Rate Administrative Office and certain member companies from an order of the Commissioner of Insurance dated 25 September 1975. Heard in the Court of Appeals 16 March 1976.

On 1 July 1975 defendant, Rate Office, filed with the Commissioner of Insurance a proposal for a 15.9% increase in premium rates for automobile liability insurance. The filing was accompanied by supporting statistical exhibits. On 25 September 1975 the Commissioner issued an order providing that the filing was "disapproved" and that a public hearing on the filing would be held on 30 October 1975. Defendants appealed from the Commissioner's order.

Attorney General Edmisten by Assistant Attorney Isham B. Hudson, Jr., and Hunter and Wharton by V. Lane Wharton, Jr., and John V. Hunter III, for plaintiff appellee.

Allen, Steed and Pullen by Arch T. Allen and Thomas W. Steed, Jr.; Broughton, Broughton, McConnell and Boxley by J. Melville Broughton, Jr.; Manning, Fulton and Skinner by Howard E. Manning; and Young, Moore and Henderson by Charles H. Young, Jr., for defendant appellants.

HEDRICK, Judge.

G.S. 58-27.2 provides in pertinent part:

"Whenever any statuory or licensed insurance rating bureau . . . making its own rate filings makes any proposal to revise an existing rating schedule, the effect of which is to increase or decrease the charge for insurance . . . and such rating schedules are subject to the approval of the Commissioner, such bureau . . . shall file its proposed change and supporting data with the Commissioner who shall thereafter, before acting upon any such proposal, order a public hearing thereon . . . . "

The record before us demonstrates that the Commissioner of Insurance did not "order a public hearing" before taking action disapproving the "filing" of 1 July 1975. The Commissioner had no authority to disapprove the proposed rates without conducting a public hearing. The order appealed from is vacated and the cause is remanded to the Commissioner for further proceedings as by law required.

Vacated and remanded.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. CURTIS McDONALD HUGHES

No. 7521SC935

(Filed 7 April 1976)

APPEAL by defendant from *Walker, Judge.* Judgment entered 11 June 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 March 1976.

State v. Hughes

The defendant, Curtis McDonald Hughes, was charged in a bill of indictment, proper in form, with the armed robbery of Ruby True in the amount of $63.65. The State's evidence tended to show that on the night of 19 December 1974 the defendant and another man entered a store attended by Ruby True and robbed her at gunpoint of cash and cigarettes and that one of the men while leaving shot at Ruby True. Defendant's evidence tended to establish an alibi for the time of the robbery.

From a verdict of guilty as charged and the imposition of a prison sentence of 15 to 18 years, defendant appealed.

Attorney General Edmisten by Associate Attorney Alan S. Hirsch for the State.

R. Lewis Ray for defendant appellant.

HEDRICK, Judge.

Defendant's counsel concedes that he has been unable to find any error "of significance or consequence." Nevertheless, we have carefully reviewed the record and find that the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 APRIL 1976

Supplemental Opinion. Original Opinion: 27 N.C. App. 282

STATE v. STEPHENS No. 7526SC393	Mecklenburg (74CR20766) (74CR20767) (74CR20768) (74CR20769) (74CR20771)	No Error

FILED 7 APRIL 1976

GRIFFIS v. GRIFFIS No. 7521DC821	Forsyth (74CVD186)	Affirmed
HEATH v. BD. OF COMRS. No. 7518SC764	Guilford (74CVS7307)	No Error
HILL v. HILL No. 7518DC904	Guilford (75CVD242)	Affirmed
HOUSE v. HOUSE No. 752DC941	Martin (71CVD390)	Affirmed
IN RE BENFIELD No. 7525DC874	Burke (75SP53NR)	Affirmed
NASCO v. MASON, ET AL No. 7527SC850	Gaston (74CVS5041)	Appeal Dismissed
RIVERS v. RIVERS No. 7512DC1069	Cumberland (73CVD4999)	Vacated
STATE v. BARBER No. 752SC938	Washington (75CR985)	No Error
STATE v. BAUGUESS No. 7523SC894	Wilkes (75CR3693)	No Error
STATE v. CHAPMAN No. 7527SC870	Gaston (74CR13028)	No Error
STATE v. CRAIG No. 7520SC962	Richmond (75CR1937) (75CR1940)	No Error
STATE v. DAVIS No. 7526SC993	Mecklenburg (75CR9563)	No Error
STATE v. GIBBS No. 752SC964	Beaufort (75CR2055)	No Error
STATE v. HAMRICK No. 7527SC954	Gaston (75CR3804)	No Error
STATE v. HARRIS No. 7520SC864	Stanly (75CR1424)	No Error

STATE v. KORNEGAY No. 758SC911	Wayne (75CR4663)	New Trial
STATE v. LITTLE No. 7526SC881	Mecklenburg (74CR16969)	No Error
STATE v. LOCKLEAR No. 7516SC991	Robeson (74CR13954)	No Error
STATE v. MATTHEWS & EVANS No. 7510SC998	Wake (75CR13427) (75CR13428)	No Error
STATE v. PAIVA No. 754SC884	Onslow (74CR18024) (74CR18025)	No Error
STATE v. ROBINSON No. 7526SC990	Mecklenburg (75CR24195)	No Error
STATE v. RUSS No. 7511SC907	Harnett (75CR377)	No Error
STATE v. SAWYER & SAWYER No. 7520SC969	Union (75CR3556) (75CR3611)	No Error
STATE v. WHITMAN No. 7510SC1003	Wake (73CR31329) (73CR31330) (73CR31331)	Affirmed
SWAIM v. VESTAL No. 7523DC777	Yadkin (72CVD401)	No Error
TUMBLIN v. HOPPER No. 7526SC1001	Mecklenburg (75CVS3941)	Affirmed

ALVIN PALMER, LOUISE ROSS, ELSIE HYATT AND VIRGINIA HONEYCUTT v. MARY KETNER, INDIVIDUALLY, CLARENCE W. FOWLER, DOUGLAS WORSHAM, JOHN M. SEASE, TRUSTEES OF THE ESTATE OF E. K. PARTON

No. 7530SC799

(Filed 21 April 1976)

1. **Wills § 59— subscribing witness — right to question validity of provisions**

The subscribing witness to a will is not required to read it, and the witness's signature is only an affirmation that a statutory requirement was complied with and does not constitute an acceptance or endorsement of the will's provisions; therefore, in this declaratory judgment proceeding to interpret testator's will and to determine various rights in testator's estate, defendant Ketner who was a subscribing witness to the will, was not thereby estopped to question the validity of remainder provisions of the will.

2. **Wills § 16— failure to file caveat — no standing to file caveat — subsequent attack on validity of provisions — no estoppel**

Failure of defendant Ketner to file a caveat to testator's will did not constitute an estoppel of defendant to question later the validity of remainder provisions of the will, since defendant was not an heir-at-law of testator at the time of his death and had no standing to file a caveat.

3. **Declaratory Judgment Act § 1— declaratory judgment proceeding — right of litigant to contest part of will**

Though the N. C. Supreme Court has held that a plaintiff may not bring an action for a declaratory judgment holding a will, contract or other instrument valid, it has not held that every document involved in a declaratory judgment action must be deemed valid and enforceable; therefore, plaintiffs' contention that a litigant may not contest any part of a will in a declaratory judgment action is untenable.

4. **Wills § 41— creation of trust — rule against perpetuities violated — law of intestate succession applicable**

Provisions of testator's will setting up trust for the benefit of his mother and sister for the duration of their lives, and providing that the trust would continue for a period of 25 years after the death of the sister, or beyond the 25 years until all children of testator's youngest sister reached the age of 21 violated the rule against perpetuities, since at the death of the testator the possibility existed that the trust would not terminate and the remainder interest would not vest until more than 21 years, plus the period of gestation, after some life or lives in being at the time of testator's death; therefore, by intestate succession the property involved must pass to the heirs at law and next-of-kin of the testator, and by will the interest of one of testator's sisters passed to defendant Ketner.

Palmer v. Ketner

APPEAL by defendant, Mary Ketner, from *Lewis, Judge.* Judgment entered 30 June 1975, Superior Court, HAYWOOD County. Heard in the Court of Appeals 22 January 1976.

This action was brought under the Declaratory Judgment Act to interpret the testator's will and determine various rights in testator's estate. Defendant Mary Ketner answered and contested the proposed interpretation of the will. The facts are stipulated. Testator died 25 November 1931, and his will was probated on 12 December 1931. Defendant Mary Ketner was a subscribing witness to the will; no caveat to the will was filed. The will provides in pertinent part as follows:

> "Item I; I, E. K. Parton, do hereby will, bequeath and convey all property both real estate and personal property, with which I die seized, to J. J. Carpenter, Mrs. Frank Henry, and Mrs. Chauncey Palmer, Trustees; to be used in the following manner and to be disposed of in the following ways at the end of said trust.
>
> * * * *
>
> Item III, section one; That after all debts and funeral expenses have been paid that the whole of my property, both personal and real estate, be held in trust for the benefits of my mother, and my sister, Vesie, so long as either or both of them may live.
>
> Section; two: Provided further, that the said appointed trustees so use, conducts and maintains this property as to secure the greatest amount of revenue from it, and after taxes and maintaining expenses have been deducted to turn over to my mother and sister Vesie all rents and profits (~~proceeds~~) from (~~to~~) said property; less the trustees' fees.
>
> Item IV, section, one; Provided further that after the death of both my mother and sister Vesie that the whole of the property may be conducted as follows:
>
> * * * *
>
> [Provisions for funeral and gravestone expenses.]
>
> Item; V; section one: That after all expenses about mentioned and any other necessary expenses arising from the burial of my mother, sister Vesie, and the placing of the grave markers, have been paid; then it is my will that the trustees as named in the first part of this will con-

tinue the estate in trust and divided equally the revenues between them or their assigns for a period of twenty-five years or if at the end of this time there is any heir of my youngest sister that is not twenty-one years of age, then this trust be continued until such an heir shall have reached his or her majority.

* * * *

Item VII; section one: Provided that should a vacancy occur in the board of trustees that the two remaining trustees immediately appoint another to take that place.

Section two: That this trustee be appointed out of my own relatives, if any competent one survive, if not that he or she be appointed from any good, upright citizen.

Item VIII, section one: Provided that after all the heirs of my youngest sister have reached their majority, and after this trust has run at least twenty-five year (It is to stay in force more than twenty-five years if all the heirs of my youngest sister have not reached their majority) then the trustees who are acting at such a time shall liquidate the trust and pay to (~~look~~) the heirs (~~by blood kin of~~) my sisters Louisa Carpenter, Rena Henry and Leah Palmer per sterpes equal shares share and share alike and not per sterpes . . . . "

Testator's mother, Laura Parton, died on 22 May 1938 and testator's sister, Vesie Parton, died on 23 November 1971. Testator's other sisters included Louisa Carpenter, who died 31 January 1971, leaving no children; Rena Henry, who died 28 May 1958 leaving one child, plaintiff Virginia Honeycutt; and Leah Palmer who died on 30 November 1974, leaving three children, plaintiffs Alvin Palmer, Louise Ross and Elsie Hyatt. Testator had two other sisters, Frances Shelton and Nettie Teague, who were not beneficiaries of his will. All of testator's nieces and nephews were over 21 when his sister Vesie died in 1971.

Louisa Carpenter, having no children, devised and bequeathed her interest in testator's estate to defendant Mary Ketner, daughter of Frances Shelton. As vacancies arose among the trustees, new trustees were not appointed as directed by the will. After the original trustees had died, Clarence W. Fowler, Douglas Worsham and John M. Sease were appointed successor

trustees in a special proceeding; they took no position on the questions raised.

The trial court adjudged that plaintiffs were entitled to receive the corpus of the trust and that Mary Ketner had no interest in testator's estate. From this declaratory judgment defendant Ketner appeals.

Brown, Ward & Haynes, P.A., by Woodrow H. Griffin for plaintiff appellees.

Millar, Alley & Killian by Leon M. Killian III for defendant appellant, Mary Ketner.

CLARK, Judge.

[1, 2] The trial court ruled "That there having been no caveat to the will of E. K. Parton and particularly in view of the fact that Mary Ketner was a subscribing witness, the said Mary Ketner is estopped to deny that the trust corpus should be distributed to the heirs of Rena Henry and Leah Palmer." We find that the court erred in this conclusion. The subscribing witness to a will is not required to read it, and the witness's signature is only an affirmation that a statutory requirement was complied with and does not constitute an acceptance or endorsement of the will's provisions. Nor does the failure of defendant Ketner to file a caveat constitute an estoppel. She was not an heir-at-law of testator at the time of his death and had no standing to file a caveat.

[3] Plaintiffs rely on *Farthing v. Farthing,* 235 N.C. 634, 70 S.E. 2d 664 (1952), for the proposition that a litigant may not contest any part of a will in a declaratory judgment action. In *Farthing* it was held that a plaintiff may not bring an action for a declaratory judgment holding a will, contract or other instrument invalid; it does not hold that every document involved in a declaratory judgment action must be deemed valid and enforceable. The defendant Ketner is not estopped to question the validity of the remainder provisions of the will.

[4] The trial court concluded that upon the death of Vesie Parton on 23 November 1971, only Leah Palmer survived from the three original trustees, and that she would have been entitled to the "revenues" of the trust for a period of twenty-five years provided she lived that long, but upon her death on 30 November 1974, by acceleration of their remainders the trust

property vested in plaintiffs, the heirs of testator's sisters, Louisa Carpenter, Rena Henry and Leah Palmer.

Defendant assigns error in this conclusion, contending that testator intended that the substitute trustees, after the original trustees named in the will had died, would continue receiving the income from the trust for a period of twenty-five years after the death of Vesie Parton, and the remainder would not vest until the termination of the trust. If the will is so interpreted it would violate the rule against perpetuities. Under this rule, "[n]o devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void." *Clarke v. Clarke,* 253 N.C. 156, 161, 116 S.E. 2d 449, 452-53 (1960). The remaining provisions of the will would be void; the estate would pass to the heirs of the testator, which included his sister, Louisa Carpenter, and the devise of her interest in the estate of the defendant Mary Ketner would effectively transfer such interest.

Nothing else appearing, terms used in a will must be construed so as to accomplish the intent of the testator, which is determined from the will itself and the surrounding circumstances known to the testator. As to the property devised or bequeathed, the will is construed as if executed immediately prior to the testator's death. G.S. 31-41. As to the identity of the devisee or legatee, however, it is to be construed, nothing else appearing, in the light of circumstances known to the testator at the time of its actual execution. *Peele v. Finch,* 284 N.C. 375, 200 S.E. 2d 635 (1973). There is a long presumption against disinheritance. An heir should not be disinherited except by express devise or by one arising from necessary implication, by which the property is given to another. *Gold v. Price,* 24 N.C. App. 660, 211 S.E. 2d 803 (1975).

The ultimate beneficiaries of the corpus of the trust were the heirs of testator's three sisters named in the will. These heirs received no benefits under the trust until the trust terminated. Only then do they have a beneficial interest. The heirs of the named sisters are not ascertainable at the death of the testator and cannot be ascertained until the termination of the trust, which marks the time of vesting. *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899 (1960); *Carter v. Kempton,* 233 N.C.

1, 62 S.E. 2d 713 (1950). In the recent case of *Roberts v. Bank*, 271 N.C. 292, 156 S.E. 2d 229 (1967), where the testator established a trust for his daughter for life, with the corpus to go at her death, *per stirpes*, to his other children, it was held that the remainder interest vested as of the time of the testator's death. While we have some difficulty in distinguishing the rule in *Roberts* from the rule in *Parker* and *Carter*, apparently those cases are not overruled by *Roberts*. *Sub judice*, it appears clear from the language in the will, particularly the use of the term *per stirpes* and the substantial lapse of time between the death of testator and the termination of the trust, that the remainder interests could not be ascertained and did not vest until the termination of the trust.

At the death of the testator the possibility existed that the trust would not terminate and the remainder interest would not vest until more than twenty-one years, plus the period of gestation, after some life or lives in being at the time of testator's death. The trust was to continue at least twenty-five years after the death of testator's mother and sister Vesie and after their burial expenses and cost of grave markers had been paid. The mother and sister Vesie and the named trustees might die more than twenty-one years and ten lunar months prior to the termination of the trust. Therefore, the trust provisions of the will violate the rule against perpetuities and are void. By intestate succession the property involved must pass to the heirs at law and next-of-kin of the testator, E. K. Parton; and the sister Louisa Carpenter owned an interest in the estate at the time of her death on 31 January 1971 which she devised to her niece, the defendant Mary Ketner.

Plaintiffs contend that the trust terminated upon the deaths of testator's mother and sister Vesie because the duties of the trustees ceased to exist, the trust became passive, and the legal and equitable titles merged. We reject this contention since Item III imposed the duty on the trustees to use, conduct and maintain the property so as to secure the greatest amount of revenue from it, and this responsibility continued after the death of the mother and sister Vesie.

Nor do we agree with plaintiff's contention that upon the death of Vesie Parton, Leah Palmer was the sole remaining trustee and sole beneficiary of the trust income, which would merge the estate and terminate the trust. The testator provided for three trustees and for successor trustees if a vacancy oc-

curred, and that they would receive the trust income for at least twenty-five years after the deaths of his mother and sister Vesie. The record on appeal consisted of the pleadings, the will, and stipulations, none of which gave us the surrounding circumstances existing at the time the will was made. For interpretation of the will we are confined to the will itself. We have no knowledge of the kind, amount, or value of the estate property or the income therefrom. We must be guided by the intent of the testator as expressed in the will, and as so expressed the trustees, whether original or successor trustees, were to "conduct and maintain the property and receive the income therefrom for at least twenty-five years until it vested in the ultimate beneficiaries, the heirs of testator's named sisters." We do not find any intent to limit the income to the original trustees so as to terminate the trust and accelerate the remainder.

We find that the trust provisions of the will violate the rule against perpetuities and are void, and that the property involved passed by intestate succession to the heirs-at-law and next-of-kin of E. K. Parton, and that by will the interest of Louisa Carpenter passed to the defendant Mary Ketner.

The judgment is reversed and this cause is remanded for entry of judgment in accordance with this opinion.

Reversed and remanded.

Judges MORRIS and VAUGHN concur.

GEORGE J. HODGES v. LUTHER JAMES NORTON, SR., ALICE NORTON

No. 7510SC900

(Filed 21 April 1976)

1. Uniform Commercial Code § 79— public sale of collateral — presumption of commercial reasonableness

If a secured creditor elects to dispose of the collateral by public sale, G.S. 25-9-601 *et seq.* creates a conclusive presumption of commercial reasonableness if the secured party substantially complies with the "Public Sale Procedures" provisions of the Uniform Commercial Code.

2. **Uniform Commercial Code § 79— public sale of collateral — failure to give debtor notice by mail — commercially reasonable disposition**

A tractor which was collateral for a purchase money security agreement was not disposed of by the secured creditor in a commercially reasonable manner where (1) notice of the same was posted at the courthouse door but the debtors were not given notice by registered or certified mail as required by G.S. 25-9-603(2), and (2) there was no evidence that the collateral was sold in any recognized market for used tractors, that it was sold at the price current in any such market, or that it was sold in conformity with reasonable commercial practices among tractor dealers. G.S. 25-9-507(2).

3. **Uniform Commercial Code § 79; Chattel Mortgages and Conditional Sales § 19— public sale of collateral — manner not commercially reasonable — deficiency judgment — presumption of value**

Where a secured creditor disposes of collateral without giving the debtor proper notice and in a manner that is not commercially reasonable, the debt is to be credited with the amount which reasonably should have been obtained through a sale conducted in a reasonably commercial manner according to the Uniform Commercial Code, and it will be presumed that the collateral was worth at least the amount of the debt, thereby placing on the creditor the burden of overcoming such presumption by proving the market value of the collateral by evidence other than the resale price; furthermore, if the debtor asserts damages or penalty against the creditor under G.S. 25-9-507(1), the recovery by deficiency is subject to credit or offset by such damages or penalty.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 22 July 1975, WAKE County, Superior Court. Heard in the Court of Appeals 19 February 1976.

In his verified complaint plaintiff alleged that on 1 September 1970 defendants executed for $12,500.00 a purchase money security agreement on "a 1962 Kenworth Tractor 76626"; that defendants paid $370.00 on the note; that defendants defaulted; that the tractor was sold on 18 January 1971 for $2,500.00; and that defendants are indebted to plaintiff in the sum of $9,945.00.

Defendants in their answer admitted execution of the note and security agreement, the payment of only $370.00, and alleged that the default sale was not according to law.

Plaintiff filed motion for summary judgment, supported by two affidavits: (1) by that of plaintiff in which he alleged that the default sale was advertised for a period of two weeks as by law provided; and (2) by W. T. Shaw in which he alleged that he posted a notice of sale at the courthouse door on 4 January 1971; that he sold the Kenworth tractor at public auction on 18 January 1971 as provided by law.

Defendants filed affidavits in opposition of (1) a tractor dealer stating that the tractor was worth $7,500.00 at the time of default sale, and (2) defendant Luther James Norton, Sr., stating that he used the tractor one month and returned it to plaintiff in good condition, at which time it had a fair market value of $12,500.00, and that neither he nor his wife had received any notice of sale.

The motion for summary judgment was denied.

Jury trial was waived, and the only witness was W. T. Shaw, who testified that he posted a notice of sale only at the courthouse door; that he did not notify defendants of the sale; and that the purchaser at the sale was Edna Hollis, who worked for Square Deal Transfer, a corporation owned by plaintiff. By stipulation the court received in evidence the promissory note and security agreement and the notice of sale.

The trial court found facts, concluded that plaintiff did not comply with the notice provisions of the Uniform Commercial Code, did not dispose of the Kenworth tractor in a commercially reasonable manner, and was not entitled to a deficiency judgment. From judgment dismissing the action, plaintiff appealed.

Johnson and Johnson by W. Glenn Johnson; Boyce, Mitchell, Burns & Smith by Thomas G. Farris for plaintiff appellant.

Tharrington, Smith & Hargrove by Wade M. Smith for defendant appellees.

CLARK, Judge.

The evidence for plaintiff tends to show that on 4 January 1971, W. T. Shaw, attorney for plaintiff, posted at the courthouse door the following notice:

"NOTICE OF SALE OF PERSONAL PROPERTY.

Under, by virtue of and in accordance with G.S. 45-21.13, G.S. 45-21.16 and G.S. 45-21.18 and that Title Retaining Contract dated September 1, 1970, executed by Luther James Norton, Sr., and his wife, Alice Norton, default having been made in the indebtedness secured thereby, the undersigned holder of said indebtedness and said Title Retaining Contract, will offer for sale and sell to the highest bidder for cash at public auction at the Wake County

Courthouse (East Door) in the City of Raleigh, County of Wake, State of North Carolina, at 12 O'Clock Noon on Monday, January 18, 1971, certain personal property, to-wit: a 1962 Kenworth Tractor 76626.

This 4th. day of January, 1971.

George Judson Hodges
P. O. Box # 155
Raleigh, N. C. 27554"

The trial court found as a fact that no effort was made to notify the defendants of the default sale. The testimony of W. T. Shaw, the only witness at trial, supports this finding.

G.S. 25-9-504(3) reads in part:

"Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. . . . "

[1] If the secured creditor elects to dispose of the collateral by public sale, G.S. 25-9-601, et seq., creates a conclusive presumption of commercial reasonableness if the secured party substantially complies with the "Public Sale Procedures" provisions of the Uniform Commercial Code procedures. These procedures are not a part of the "Official Text of the U.C.C." but are in effect in North Carolina and appear to be peculiar to this State. *Graham v. Bank,* 16 N.C. App. 287, 192 S.E. 2d 109 (1972). These procedures provide for the contents of notice of sale (G.S. 25-9-602), the posting and mailing notice of sale (G.S. 25-9-603), and other provisions which are not relevant to the questions involved in this appeal.

Plaintiff assigns as error the finding of the trial court that the tractor was not sold in a commercially reasonable manner, contending that he posted notice at the courthouse more than five days preceding the sale as provided by G.S. 25-9-603; that though he did not "at least five days before the date of sale, mail by registered or certified mail a copy of the notice of sale to each debtor," as provided by the statute, compliance with the "Public Sale Procedures" (G.S. 25-9-601, et seq.) is not mandatory; and that a public sale may be commercially reason-

able even though it does not fully comply with the statute. While the contention is correct, the assignment has no merit. The "Procedures" statutes providing for notice have the purpose of enabling the debtor to protect his interest in the collateral by paying the debt, finding a buyer, or being present at the sale to bid, so that the collateral is not sacrificed by a sale at less than its true value.

[2] In the case at bar the defendant-debtors had no notice other than the posting of the notice of sale at the courthouse. To hold that the posting of a notice of sale at the courthouse for at least five days prior to the date of sale constitutes a disposition of the collateral in a commercially reasonable manner would completely ignore the facts of commercial life and contravene the purpose and policy of the Uniform Commercial Code. See G.S. 25-1-102. That the posting of a notice at the courthouse is no longer an effective means of getting notice to the debtor is recognized by Public Sale Procedures statute G.S. 25-9-603(2), which provides that *in addition* to the posting of a notice of sale at the courthouse door "the secured party . . . shall at least five days before the date of sale, mail by registered or certified mail a copy of the notice of sale to each debtor obligated under the security agreement." This statute must be read and construed in conjunction with G.S. 25-9-504(3) which provides: "Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale . . . shall be sent by the secured party to the debtor . . . . " It also states " . . . but every aspect of the disposition including the method, manner, time, place and terms *must be commercially reasonable.*" (Emphasis added.)

The term "commercially reasonable" is not specifically defined in the Uniform Commercial Code, as are many other words and terms, but G.S. 25-9-507(2) gives us some guiding rules. Certain manners of disposition are stated therein to be legally deemed to be *commercially reasonable:* (1) if sold "in the usual manner in any recognized market" for the collateral; (2) if sold "at the price current in such market at the time of . . . sale"; and (3) if otherwise "sold in conformity with reasonable commercial practices among dealers in the type of property sold."

Sub judice, applying these criteria to the public sale, there is no evidence that the collateral was sold in any recognized

market for used tractors, that it was sold at the price current in any such market, or that it was sold in conformity with reasonable commercial practices among tractor dealers.

We concur with the ruling that the tractor was not sold in a commercially reasonable manner. The trial court further ruled that because of the failure of the creditor to so comply, the creditor could not recover a deficiency judgment against the debtor in any amount. G.S. 25-9-507(1) in part provides for restraint by court order of a creditor who proposes to dispose of the collateral in an unreasonable manner, and for a recovery for damages where the unreasonable disposition has been concluded. However, the statute makes no provision for barring recovery of a deficiency judgment. This problem has been treated in various ways by other courts. It is generally held that a creditor's failure to give the notice required under U.C.C. § 9-504(3) and dispose of the collateral in a commercially reasonable manner precludes or limits his right to recover a deficiency judgment. See Anno., 59 A.L.R. 3d 401 (1974).

Many, perhaps a majority, of the courts hold that the creditor's failure to give the required notice constitutes an absolute bar to the recovery of a deficiency judgment. Anno., 59 A.L.R. 3d, at 409. This view often rests upon the rationale that since the creditor's noncompliance with the notice requirements deprived the debtor of his right of redemption under which he could have required possession of the collateral by payment of the amount owed and could thereby have eliminated any deficiency, the creditor should not be allowed to recover a deficiency judgment under such circumstances.

It is our view that absolutely precluding recovery of a deficiency judgment would in some cases (i.e., where the collateral has been so used by the debtor before the creditor could take possession its market value was substantially below the debt) result in injustice and contravene the U.C.C. spirit of commercial reasonableness. Further, in our view the provision of U.C.C. § 9-507(1) that a debtor has a right to recover from the creditor any loss caused by failure to comply with the Code contemplates the right to deficiency judgment by the creditor who fails to comply with the U.C.C. provisions in disposing of the collateral.

[3] We hold that the debt is to be credited with the amount that reasonably should have been obtained through a sale con-

ducted in a reasonably commercial manner according to the U.C.C., and that the creditor's failure to dispose of the collateral as required by the Code raises a presumption that the collateral was worth at least the amount of the debt, which places upon the creditor the burden of overcoming such presumption by proving the market value of the collateral by evidence other than the resale price. *Barker v. Horn,* 245 Ark. 315, 432 S.W. 2d 21 (1968); *T. & W. Ice Cream, Inc. v. Carriage Barn, Inc.,* 107 N.J. Super. 328, 258 A. 2d 162 (1969); *Tauber v. Johnson,* 8 Ill. App. 3d 789, 291 N.E. 2d 180 (1972).

And if the debtor asserts damages or penalty against the creditor under G.S. 25-9-507(1) the recovery by deficiency is subject to credit or offset by such damages or penalty. *Tauber v. Johnson, supra.*

That part of the judgment concluding that the plaintiff did not dispose of the Kenworth tractor in a commercially reasonable manner as required by the U.C.C. is affirmed, and that part of the judgment denying plaintiff a deficiency judgment is reversed, and this cause is remanded for determination of what sum, if any, the plaintiff is entitled to recover of the defendants in accord with this opinion.

Affirmed in part and reversed in part.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. MICHAEL L. SHARRATT AND RONALD RICHARDSON

No. 7512SC957

(Filed 21 April 1976)

1. Criminal Law § 66— in-court identification — failure to hold voir dire — harmless error

In this prosecution for rape and crime against nature, the admission of testimony by the victim tending to identify defendants as the persons who committed the crimes without a *voir dire* hearing to determine its admissibility after defendants objected generally thereto did not constitute prejudicial error where it is clear that the in-court identification was based on the victim's observation of defendants prior to and at the time of the crimes, and where defendants admitted they were with the victim at the time and places in question but denied that they engaged in the conduct described by her.

2. Criminal Law § 66— hospital showup identification — admissibility

There was no substantial risk of misidentification when a crime against nature and rape victim identified defendants at a hospital showup, and evidence of the showup identification was properly admitted in defendants' trial, where the time between the offenses and the hospital showup was only 30 to 40 minutes; the victim had generous opportunity to observe defendants during the offenses; she paid particular attention to defendants because of the conduct in which they engaged; she gave the police an accurate description of each defendant; she demonstrated a high level of certainty of identification at the showup; and she became hysterical at the sight of defendants; furthermore, the showup procedure was appropriate under the circumstances since the police had no way of knowing how long the victim would be confined in the hospital and thus could not reasonably arrange a lineup, and the police needed confirmation of defendants' identities to avoid incarceration of innocent persons.

3. Criminal Law § 86— impeachment of defendant — dismissed criminal charges

The trial court properly refused to permit defense counsel to impeach the prosecutrix by cross-examination relating to a controlled substances charge against her which had been dismissed.

4. Criminal Law § 99— remark by court — absence of prejudice

In a prosecution for rape and crime against nature, defendant was not prejudiced when the trial court, in sustaining the State's objection to repetitious questions asked the prosecutrix concerning her admission that she had engaged in prostitution, remarked that "It's distasteful enough, Mr. Little, to go through it once."

5. Searches and Seizures § 2— consent to search — warrant not necessary

No warrant was necessary for the search of a truck at the police station where the defendant who owned the truck consented to the search.

APPEAL by defendants from *Bailey, Judge.* Judgments entered 18 June 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 March 1976.

Each defendant was charged in a separate two-count bill of indictment, in substantially identical language, with the felonies of (1) kidnapping [G.S. 14-39] and (2) crime against nature [G.S. 14-177]. Each defendant was also charged in a separate bill of indictment, in substantially identical language, with the felony of rape [G.S. 14-21]. The jury found defendants not guilty of kidnapping; therefore, this appeal is concerned only with defendants' convictions of the offenses of (1) crime against nature and (2) second degree rape.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

James D. Little, Public Defender, for the defendants.

BROCK, Chief Judge.

We decline to encumber these pages with the prosecuting witness's recitation and description of the depraved, bestial and sadistic treatment she received from defendants. Defendants, advisedly, do not argue insufficiency of the State's evidence to support their conviction of either the offense of crime against nature or the offense of second degree rape. Our references to evidence will be confined to that necessary for a discussion of the assignments of error.

[1] The series of events which culminated in the acts complained of first began at about 5:30 p.m. on 15 February 1975 on Hay Street in the City of Fayetteville. Judy Ann Voorhees (Voorhees) walked down to Hay Street with a friend. Upon arriving there, defendant Richardson talked with her, and she was subsequently pushed into a truck driven by defendant Sharratt. When Voorhees was asked with whom she talked, Richardson objected. When Voorhees was asked who was driving the truck, Sharratt objected. Defendants assign as error the court's admission of testimony identifying them without first conducting a *voir dire*. At the time of these general objections, there was no suggestion of an in-custody confrontation, and neither defendant requested a *voir dire* or otherwise stated grounds for his objection.

When the State offers a witness whose testimony tends to identify a defendant as the person who committed the crime charged, the better procedure dictates that the trial judge, even upon a general objection only, conduct a *voir dire* in the absence of the jury, find facts, and thereupon determine the admissibility of the in-court identification testimony. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). "Failure to conduct the voir dire, however, does not necessarily render such evidence incompetent." *State v. Stepney, id.* In the case presently before us, the witness (Voorhees) was in the company of defendants for about one and one-half hours. She saw both of them clearly at the meeting on Hay Street. She saw both of them while riding between them in the truck through the streets of Fayetteville and to a wooded area behind the Highland Nursing Home.

She observed each defendant as he engaged in abusive and sordid conduct upon her. She gave a detailed and accurate description of defendants and the truck to the police before defendants were arrested. In fact, the defendants admitted being with Voorhees on the day and at the places in question. The crux of their defense was that they did not engage in the conduct as described by Voorhees. It is clear from the evidence that the in-court identification originated with and was based upon Voorhees' observation of defendants prior to and at the time of the crime against nature and the rape. Therefore, the failure of the trial court to conduct a *voir dire* and make findings of fact must be deemed harmless error beyond a reasonable doubt. This assignment of error is overruled.

[2] By defendants' next assignment of error they argue that evidence of the out-of-court identification of defendants should have been excluded because the procedure employed by the police was impermissibly suggestive.

After Voorhees was able to evade the defendants, she ran to the nearby Highland Nursing Home where she was wrapped in a sheet and the police were called. When an officer arrived, Voorhees related to him what defendants had done and gave the officer a description of defendants. The officer relayed the description to the police radio dispatcher. Voorhees was then transported to Cape Fear Valley Hospital for examination and treatment of her injuries. Within thirty to forty minutes after Voorhees eluded them, the two defendants were arrested and brought to the hospital for identification. When defendants were brought into the hospital, Voorhees identified them as her assailants, and defendants were then immediately transported to jail.

The State was permitted to offer in evidence before the jury testimony relating to the identification by Voorhees of defendants at the showup at the hospital. Defendants argue that even though Voorhees' in-court identification of defendants may stem from her observation of them before and during the offenses and therefore is of origin independent of the showup at the hospital, the hospital showup was so impermissibly suggestive as to require exclusion of evidence of that showup.

In this case Voorhees had generous opportunity to observe defendants during the offenses; she paid particular attention

to them because of the conduct in which they engaged; she gave the police an accurate description of each defendant; she demonstrated a high level of certainty of identification at the hospital showup, and she became hysterical at the sight of them; and the time between the offenses and the hospital showup was only thirty to forty minutes. It clearly appears that Voorhees' identification was reliable, and in view of all of the circumstances, there was no substantial risk of misidentification, and there was no denial of due process. *See State v. Shore,* 285 N.C. 328, 204 S.E. 2d 682 (1974). Further, it appears that the showup procedure was appropriate under the circumstances. Voorhees was in the hospital for examination and treatment of injuries. The police had no way of knowing how long she would be confined. Therefore, they could not reasonably arrange a lineup. The defendants had been arrested in reliance upon the description broadcast on the police radio, and the police needed reasonably immediate confirmation of defendants' identities to avoid incarceration of innocent persons. This assignment of error is overruled.

[3] Defendants argue that they should have been permitted to impeach the State's witness Voorhees by cross-examination relating to a controlled substances act violation charge against her, which was later dismissed. For purposes of impeachment North Carolina bars cross-examination regarding an indictment or other accusation of crime, as distinguished from a conviction. For purposes of impeachment a witness, including the defendant in a criminal case, may be cross-examined concerning prior convictions or specific instances of criminal and degrading conduct, but he may not be cross-examined as to whether he has been indicted or is under indictment, or has been accused either informally or by affidavit on which a warrant is issued, or has been arrested, for a criminal offense other than that for which he is then on trial. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). This assignment of error is overruled.

[4] Defendant Sharratt argues that the trial judge made a statement that was prejudicial to him. During the course of her testimony, the State's witness Voorhees stated that on two occasions in October 1974 she engaged in sexual intercourse for money. She stated that she was thereafter married in October 1974 and did not engage in prostitution during the months of November 1974 through February 1975. Counsel for Sharratt pursued the questioning concerning prostitution in the month of February 1975 and then asked about the month of January

1975. The State's objection to further questions about January 1975 was sustained by the trial judge as repetitious. The judge then stated: "It's distasteful enough, Mr. Little, to go through it once." Defendant Sharratt argues that this remark was prejudicial to him. Although the judge may have been well advised to rule on the State's objection and omit the gratuitous remark to defense counsel, we fail to see prejudice to defendant Sharratt. It seems that the remark amplified the admission of the State's witness that she had at one time engaged in prostitution. Rather than prejudicial to defendant Sharratt, it seems that the remark was prejudicial to the State. This assignment of error is overruled.

[5] Defendants argue that the evidence obtained by a search of defendants' truck should have been suppressed. They argue that no search warrant was obtained and that the search was therefore unconstitutional. The police took possession of the truck at the time of defendants' arrests and thereafter retained custody of the truck. Defendants argue that because there was no immediate search and no need for immediate search, a warrant was required. This argument ignores the clear evidence of consent to the search after the truck was taken into custody. From plenary, competent evidence on *voir dire* the trial judge found that the owner of the truck (Sharratt) freely consented to the very search that was conducted. This consent rendered competent the evidence thereby obtained. This assignment of error is overruled.

Defendants' assignments of error to the opinion testimony of the physician who examined State's witness Voorhees, to the opinion testimony of the agent of the State Bureau of Investigation, and to the charge of the court to the jury have been carefully reviewed and found to be without merit.

No error.

Judges VAUGHN and MARTIN concur.

CHARLES B. MARKHAM v. JAMES B. SWAILS, CHAIRMAN, AND HORACE E. STACY, JR., EMERSON P. DAMERON, ROBERT C. HOWISON, JR., W. H. McELWEE, GEORGE H. McNEILL, FRANCIS I. PARKER, WALTER R. McGUIRE, ERIC C. MICHAUX, ALL MEMBERS OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, AND THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA

No. 7510SC811

(Filed 21 April 1976)

1. **Administrative Law § 5; Rules of Civil Procedure § 52— judicial review of administrative decision — necessity for finding of fact**

When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to G.S. 143-314 and 315 (now G.S. 150A-50 and 51), the judge is not required to make findings of fact and enter a judgment thereon in the same sense as a *trial judge* pursuant to G.S. 1A-1, Rule 52(a) and (b).

2. **Administrative Law § 5; Rules of Civil Procedure § 52— judicial review of administrative decision — motion to amend findings — no duty to entertain motion**

In a proceeding for judicial review of the administrative decision of the Board of Law Examiners denying petitioner's application for the issuance of a license to practice law in this State, the superior court judge was not required to entertain a motion made pursuant to G.S. 1A-1, Rule 52 "to have the court amend its findings, make additional findings or amend its Decision and Order."

3. **Appeal and Error § 14— appeal not taken within 10 days — no jurisdiction in Court of Appeals**

The Court of Appeals did not obtain jurisdiction to hear petitioner's appeal from the trial court's order affirming the decision of the Board of Law Examiners, since the order was entered on 20 March 1975 but petitioner did not give notice of appeal until 24 June 1975. G.S. 1-279.

APPEAL by petitioner from *McKinnon, Judge.* Orders entered 20 March and 27 June 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 10 February 1976.

On 23 August 1972, Charles B. Markham (petitioner) made application to the Board of Law Examiners of the State of North Carolina (respondents) for the issuance of a license to practice law in this State pursuant to Rule VII of the rules governing admission by comity to the practice of law in North Carolina. On 7 March 1973, after a hearing, the Board denied the application. On 2 April 1973, petitioner filed a petition in the Superior Court for a writ of certiorari for judicial review

of the administrative decision of the Board denying the application. On 20 March 1975, after reviewing the record of the proceedings before the Board and having considered briefs and oral arguments of counsel, Judge McKinnon entered an order affirming the decision of the Board. On 1 April 1975, petitioner, purportedly pursuant to G.S. 1A-1, Rule 52(b), filed a motion in the Superior Court "to have the court amend its findings, make additional findings or amend its Decision and Order . . . ." This motion was denied by Judge McKinnon at a hearing on 16 June 1975, and an order denying the motion was signed 27 June 1975. On 24 June 1975, petitioner appealed to this court from the March order and the June order.

Jordan, Morris and Hoke by John R. Jordan, Jr., for petitioner appellant.

Young, Moore and Henderson by Charles H. Young and R. Michael Strickland for respondent appellees.

HEDRICK, Judge.

Petitioner assigns as error the order dated 27 June 1975 denying his "motion to have the court amend its findings, make additional findings or amend its decision and order." G.S. 143-307 and 143-309 (now G.S. 150A-43 and 150A-45, effective 1 February 1976) provide that an aggrieved party may obtain judicial review of a final decision of an administrative board by petitioning for a writ of certiorari to the Superior Court of Wake County.

G.S. 143-314 (now G.S. 150A-50, effective 1 February 1976) provides:

> *Review by court without jury on the record.*—The review of administrative decisions under this Chapter shall be conducted by the court without a jury. The court shall hear oral arguments and receive written briefs, but shall take no evidence not offered at the hearing; except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken by the court; and except that where no record was made of the administrative proceeding or the record is inadequate, the judge in his discretion may hear the matter de novo.

G.S. 143-315 (now G.S. 150A-51, effective 1 February 1976) provides:

> *Scope of review; power of court in disposing of case.*—The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.
>
> If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

G.S. 1A-1, Rule 52(a)(1) provides:

> *Rule 52. Findings by the court.*
>
> (a) *Findings.*—
>
> (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.

Petitioner's motion to amend the judgment specifies that it was made pursuant to Rule 52(b) which provides:

> (b) *Amendment.*—Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

[1, 2] When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to G.S. 143-314 and 315, the judge is not required to make findings of fact and enter a judgment thereon in the same sense as a *trial judge* pursuant to Rule 52(a) and (b). Indeed, pursuant to G.S. 143-315, the authority of the judge is limited to affirming, modifying, reversing or remanding the decision of the administrative agency. In our opinion, Rule 52(b) has no application in this proceeding, and Judge McKinnon was not required to entertain a motion made pursuant thereto. However, we treat the order of 27 June 1975 denying the motion as an order of dismissal and affirm it.

[3] Petitioner assigns as error the order dated 20 March 1975 affirming the decision of the Board of Law Examiners. G.S. 143-316 (now G.S. 150A-52, effective 1 February 1976) in pertinent part provides:

> Any party to the review proceedings, including the agency, may appeal to the appellate division from the final judgment of the superior court under rules of procedure applicable in other civil cases.

G.S. 1-279, applicable to this appeal, provides:

> *When appeal taken.*—The appeal must be taken from a judgment rendered out of session within 10 days after notice thereof, and from a judgment rendered in session within 10 days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required; provided, however, that if any motion permitted by G.S. 1A-1, Rule 59, is timely made or an amendment to or alteration of a judgment is effected by the methods prescribed in that same rule, the appeal need not be taken within the time limits stated above, but the appeal must be taken within 10 days from the signing of the order ruling on such motions or amending or altering the original judgment.

The provisions of this statute are jurisdictional. When the requirements of the statute are not complied with, the appellate court obtains no jurisdiction of an appeal and must dismiss it. *Oliver v. Williams,* 266 N.C. 601, 146 S.E. 2d 648 (1966). In the present proceeding, petitioner did not give notice of appeal from the order entered 20 March 1975 until 24 June 1975. There-

fore this court did not obtain jurisdiction to hear the appeal from the order affirming the decision of the Board.

The result is: The appeal from the 20 March 1975 order affirming the decision of the Board is dismissed; the appeal from the 27 June 1975 order denying the motion filed pursuant to Rule 52(b) is affirmed.

Dismissed in part; Affirmed in part.

Judges BRITT and MARTIN concur.

LILLIE FULTON BRIDGES v. FRANK WILLARD BRIDGES

No. 7526DC977

(Filed 21 April 1976)

1. **Appeal and Error § 6— interlocutory order — appeal subject to dismissal**

In an action for alimony *pendente lite*, permanent alimony and attorney fees, defendant's appeal from an order allowing plaintiff to enter the family home to remove bedroom furniture, personal clothing and effects, and jewelry and instructing both parties to refrain from disposing of any personal property pending disposition of the action is subject to dismissal since the order is clearly interlocutory, and even if valid, does not deny defendant a substantial right. G.S. 1-277; G.S. 7A-27.

2. **Contempt of Court § 3; Divorce and Alimony § 18— invalid order for alimony pendente lite — refusal to obey — no basis for contempt proceeding**

In an action for alimony *pendente lite*, permanent alimony and attorney fees, the trial court's order requiring the transfer of certain personal property from the family home to plaintiff amounted to an attempt by the trial court to award the plaintiff alimony *pendente lite* and was therefore void, since the court had specifically concluded that plaintiff was not entitled to alimony *pendente lite;* therefore, it was error for the trial court to hold defendant in contempt for violating its invalid order, since an invalid judgment or order may not be the basis of a proceeding in contempt.

APPEAL by defendant from *Hicks* and *Robinson, Judges.* Orders entered 24 July 1975 and 9 September 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 17 March 1976.

This is a civil action by plaintiff wife against her husband for alimony pendente lite, permanent alimony, and attorney fees. On 24 June 1975, after a hearing on plaintiff's motion for alimony pendente lite, Judge Robinson entered an order in pertinent part as follows:

" . . . THE COURT CONCLUDES AS A MATTER OF LAW:

1. That the Plaintiff has sufficient funds on which to subsist until a final hearing of this matter and with which to employ counsel.

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

1. That plaintiff's request for alimony pendente lite and counsel fees are hereby denied.

2. That she is allowed to have her personal clothing out of house and 1 bedroom suit.

3. Neither party is to dispose of any personal property now in their possession, except money, during pendency of this action."

On 24 July 1975, a dispute having arisen between the parties as to which bedroom suit the plaintiff was empowered by the order to remove from the premises where the defendant resided, Judge Hicks entered another order in pertinent part as follows:

"[T]he Court makes the following findings of fact:

1. That by the terms of the Order of this Court dated June 24, 1975, the Plaintiff was entitled to remove certain property from the homeplace.

2. That this removal has not been accomplished.

IT IS NOW, THEREFORE, ORDERED, AJUDGED AND DECREED AS FOLLOWS:

1. That on Saturday, July 26, 1975, at 11:00 A.M., the Defendant shall make available to the Plaintiff the homeplace previously occupied by Plaintiff and Defendant so that the Plaintiff may remove the following items of personal property from that residence:

(a) The non-king size bedroom suit.

(b) All of the Plaintiff's personal clothing and personal effects.

(c) All of the Plaintiff's jewelry.

2. That the Court specifically reserves Judgment of ownership as to said personal property, and further orders that neither party may in any fashion dispose or destroy any property of the marriage."

The defendant gave notice of appeal from the 24 July 1975 order.

On 9 September 1975, after a hearing on plaintiff's second motion to have the defendant attached as for contempt for failing to comply with the July order, Judge Robinson found that the defendant willfully and without legal justification had failed to comply with the prior orders of the court and entered an order that defendant be imprisoned for 30 days. Defendant also appealed from this order.

On 21 October 1975, Judge Hicks and Judge Robinson entered an order consolidating the two cases on appeal.

W. J. Chandler for plaintiff appellee.

James J. Caldwell for defendant appellant.

HEDRICK, Judge.

[1] The appeal from the order dated 24 July 1975 is subject to dismissal since the order is clearly interlocutory, and even if invalid, does not deny defendant a substantial right. G.S. 1-277; G.S. 7A-27; *Funderburk v. Justice,* 25 N.C. App. 655, 214 S.E. 2d 310 (1975).

Even though the appeal from the order of 24 July must be dismissed, we must determine the validity of that order along with the order of 24 June 1975 to resolve the questions raised by the appeal from the order of 9 September 1975 holding the defendant in contempt.

G.S. 50-16.3(a) provides:

"Grounds for alimony pendente lite.—(a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without

divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

G.S. 50-16.7(a) in pertinent part provides:

"How alimony and alimony pendente lite paid; . . .—

(a) Alimony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order. * * * "

The order dated 9 September holding the defendant in contempt was based on the finding that the defendant was "in violation of the prior Orders of the court." Obviously this finding refers to the orders of 24 June and 24 July 1975.

[2] Since the action was for alimony and the motion wherein the orders entered was for alimony pendente lite, we assume that the order transferring possession of the specific items and articles of personal property was an attempt by the judge to award the plaintiff alimony pendente lite by giving her possession of the personal property. However, the orders specifically concluded that plaintiff was not entitled to alimony pendente lite, and the facts found by the judge support that conclusion. Having determined as a matter of law that the plaintiff was not entitled to alimony pendente lite, the District Court in this proceeding and on this record had no authority to order a transfer of the possession of the personal property described in the orders to the plaintiff. The orders of 24 June and 24 July 1975 are invalid on the face of this record.

An invalid judgment or order may not be the basis of a proceeding in contempt. *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581 (1962); *Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658 (1949); *In re Longley,* 205 N.C. 488, 171 S.E. 788

(1933). Thus, since the orders dated 24 June and 24 July 1975, which the court found the defendant had failed to comply with, were not lawfully issued and are invalid as a matter of law, the judgment finding and holding the defendant in contempt and ordering him to be imprisoned for 30 days is likewise invalid and must be vacated.

The result is: The appeal from the order dated 24 July 1975 is dismissed; the order dated 9 September is vacated.

Dismissed in part; Vacated in part.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. WESLEY CLARK

No. 7527SC965

(Filed 21 April 1976)

Criminal Law § 143— violation of probation conditions — sufficiency of evidence

Evidence was sufficient to support trial court's findings that defendant willfully violated the terms and conditions of his probation where such evidence tended to show that defendant did not work regularly when work was in fact available to him, defendant failed to pay into court sums required of him for court costs and attorney's fee, and defendant moved from his place of residence without securing written permission from his probation officer.

APPEAL by defendant from *Friday, Judge.* Judgment entered 12 September 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 16 March 1976.

The defendant, Wesley Clark, is appealing from an order revoking his probation and activating a prison sentence of four years imposed in a judgment entered by *Snepp, Judge,* on 31 October 1973. At the probation hearing, the State offered evidence tending to show the following:

The defendant was placed on five years probation by Judge Snepp with certain conditions—those pertinent to the revocation hearing being that the defendant pay $289.00 court costs and $250.00 attorney's fee into the court at the rate of $15.00 per month beginning November 1973; that he not change

his residence without written permission from his probation officer; and that he work faithfully at suitable, gainful employment as far as possible. John Laughridge, the defendant's probation officer, testified that the defendant had paid only $90.00 into the court and was $165.00 in arrears. The defendant had not been working regularly. Laughridge described various jobs which the defendant had held, none of which the defendant kept for much more than a month, and testified " . . . that the defendant [had] not maintained employment when, in fact, work was available to him. . . . " The defendant was fired from one job for excessive absenteeism and walked off another job after working only one day. Finally, around 15 March 1975, the defendant moved from his place of residence without securing written permission from his probation officer. His whereabouts remained unknown until May 1975 when he was arrested on the warrant charging violations of his probation. Laughridge also testified that the defendant had a "drinking problem," and that he was aware of the defendant being epileptic and having "sugar," but that no employer had mentioned these facts when discussing defendant's work history.

The defendant in his testimony did not deny that he was behind in his payments, that he had not worked regularly, or that he had moved without permission. He testified, though, that as a result of his epilepsy, when he felt a seizure coming on, he would leave work to hide that fact from his employers because they would not hire people with epilepsy. In addition he was a diabetic and was often without sufficient funds to buy medication for either sickness. As a result of his illnesses and poor health, he was hospitalized twice, could not work regularly, and could not earn enough money to make his payments into the court. He had changed his residence without permission because the landlord had thrown his family out when they could not pay the rent.

At the close of the hearing, the court made the following findings:

> "2. The Court finds as a fact that the defendant has wilfully and without lawful excuse violated the conditions of the Probation Judgment as hereinafter set out.
>
> (A) That the defendant has refused to pay Court costs and attorney's fees as ordered, having paid only $90.00 to date, last payment being made on June 7, 1974; he

is $165.00 in arrears, in violation of the Condition of Probation 'That he shall pay the sum of $289.00 for costs of this action. That he shall pay the sum of $250.00 to reimburse the State for his attorney's fees. The above monies are to be paid into the Office of the Clerk of Superior Court of Gaston County at the rate of $15.00 per month beginning on or before Friday, November 30, 1973, and a like amount on or before the last Friday of each and every month thereafter until all monies are paid in full.'

(B) That on or about March 15, 1975, the probationer did abscond from his residence at Traveler's Court, Route 5, Gastonia, North Carolina without securing written permission from the Probation Officer; that his whereabouts are unknown at the present time, in violation of the Condition of Probation that he shall 'Remain within a specified area and shall not change place of residence without written consent of the Probation Officer, and shall not leave the State of North Carolina without prior written consent of the Probation Officer.'

(C) That the defendant has not maintained employment, when, in fact, work was available to him, in that he was hired at Pharr Yarns, McAdenville, North Carolina on November 5, 1973 and terminated November 29, 1973; he was rehired at Pharr Yarns on December 17, 1973 and terminated on January 17, 1974; he was rehired at Pharr Yarns on May 17, 1974 and terminated on July 9, 1974; on September 10, 1974, he was hired at Rex Mills #3, Ranlo, North Carolina and terminated on October 14, 1974; he was hired at Groves Mill, Gastonia, North Carolina on April 9, 1974 and terminated on April 10, 1974 after walking off the job; he was hired at J. P. Stevens Company (Ragan Plant), Bessemer City, North Carolina on April 23, 1974 and discharged for excessive absenteeism on May 10, 1974, in violation of the Condition of Probation that he shall 'Work faithfully at suitable, gainful employment as far as possible.' "

From the order revoking defendant's probation and activating the prison sentence imposed of four years, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis.

Harris & Bumgardner by Don H. Bumgardner for defendant appellant.

HEDRICK, Judge.

By his one assignment of error, defendant contends the evidence adduced at the hearing does not support the findings and conclusion that defendant willfully violated the terms and conditions of probation.

Whether the defendant had willfully violated the conditions of his probation is a question of fact to be determined by the judge. *State v. Barrett,* 243 N.C. 686, 91 S.E. 2d 917 (1956). Findings of fact based on evidence which reasonably satisfies the judge, in the exercise of his sound discretion, that the defendant has violated a valid condition of probation will not be disturbed on appeal. *State v. Seagraves,* 266 N.C. 112, 145 S.E. 2d 327 (1965).

We find and hold that the evidence is ample to support the material findings that the defendant willfully violated the terms and conditions of his probation. The judgment appealed from is affirmed.

Affirmed.

Judges MORRIS and ARNOLD concur.

WILLIE L. HARDIN, EMPLOYEE v. A. D. SWANN TRUCKING CO., INC., EMPLOYER, LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 7517IC936

(Filed 21 April 1976)

Master and Servant §§ 66, 96— findings of Industrial Commission — review on appeal

Evidence was sufficient to support the Industrial Commission's finding of fact that plaintiff's injury by accident during the course of his employment did not materially aggravate or accelerate a pre-existing disease or infirmity and did not proximately contribute to the loss of plaintiff's foot; and findings of fact of the Industrial Com-

mission are binding on appeal when supported by any competent evidence, even though there be evidence which would have supported a contrary finding.

APPEAL by plaintiff from an order of the North Carolina Industrial Commission entered 23 July 1975. Heard in the Court of Appeals 11 March 1976.

This is a proceeding under the Workman's Compensation Act, General Statutes Chapter 97, for temporary total disability, permanent partial disability and medical expenses for injury allegedly arising out of an accident on 3 January 1972. At a hearing held on 24 October 1974 and 22 January 1975, evidence was introduced which in pertinent part is summarized as follows:

Plaintiff was employed by defendant Trucking Co. as a truck driver. On 3 January 1972 as he was driving down Blue Ridge Mountain on Route 52 between Hillsville and the State line, the brakes on his truck gave way. The plaintiff jumped from the truck onto the pavement. He landed on his feet but the force of the jump threw him "into the road." The plaintiff testified that he "was stiff and sore and excited from shock" and that his right foot was swollen and in pain. Plaintiff was also bruised along his right side and a cut on his elbow required four stitches. Fulton Chandler, a fellow employee, testified that he saw plaintiff on 4 January 1972 and the plaintiff "complained about his feet or legs hurting him."

On 7 January 1972, plaintiff visited Dr. Forbes in Reidsville, North Carolina. Plaintiff testified that Forbes examined his foot which was swollen and sore but did not take an x-ray. He also testified that Dr. Forbes told him that he should see Dr. Register. Dr. Forbes's records, including his report on the Industrial Commission forms, which were introduced into evidence, showed only that plaintiff complained of a "bruise on left shoulder and side." No treatment was performed and the plaintiff continued to work. An affidavit by Dr. Forbes was introduced into evidence which showed that the plaintiff has had arteriosclerotic cardiovascular disease since 1969.

Dr. Register, an orthopedic surgeon from Greensboro, testified that he first treated plaintiff on 17 February 1972 on referral from Dr. Forbes. The plaintiff complained to him of pain in his right foot. The foot was sore and swollen. Dr. Register made a tentative diagnosis of cellulitis and gave the plaintiff

an ointment and an antibiotic for treatment and directed him to return in one week. On 24 February 1972, he saw the plaintiff again. The foot looked better although the plaintiff complained that "his foot felt numb and couldn't feel anything." Dr. Register directed the plaintiff to return again in one week but he did not see plaintiff again until 19 April 1972 "when he came in complaining of pain in his right foot." The plaintiff was admitted into Cone Hospital on 21 April 1972 and the foot was amputated on 4 May 1972 after it became gangrenous.

In response to a hypothetical question as to whether the accident described by the plaintiff on 3 January 1972 "could have or may have caused the problem which eventually necessitated the amputation of his foot," Dr. Register answered "it could have." On cross examination, he testified, "[I]t could have been an aggravation of a preexisting condition. I am not able to say to a reasonable medical certainty whether or not the problem which caused the amputation was an aggravation of a preexisting condition." The following then occurred:

"Q. Would you go so far as to say it was a reasonable medical probability?

A. Yes, sir, it could have been.

Q. By, 'could have been,' it was probable or possible?

A. It's possible.

Q. And possible is the strongest word?

A. That is all I can tell you.

Q. You couldn't say probable?

A. I couldn't say.

* * *

When he came to the office on February 17, 1972 we made a note stating: that Mr. Hardin was complaining of pain in right foot for several months; no known injury; has had some treatment by Dr. Forbes and medication. This record says no known injury. The secretary wrote this down. I never got any history from any injury. That is all I can tell you. The note says he had trouble several months prior to February 17th."

From an order denying compensation, plaintiff appealed.

Clark M. Holt by Robert L. Watt III, and Griffin, Post, Deaton & Horsley by W. Edward Deaton for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter by Martin M. Erwin and J. Donald Cowan, Jr., for defendant appellees.

HEDRICK, Judge.

The one question presented on this appeal is whether the Commission erred in making the following finding:

> "Plaintiff's injury by accident on January 3, 1972 did not materially aggravate or accelerate a preexisting disease or infirmity and did not proximately contribute to the loss of plaintiff's foot."

Causation between the accident and the subsequent disability is an issue of fact to be determined by the Commission from competent evidence. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). *See also, Manuel v. Cone Mills Corp.*, 242 N.C. 309, 87 S.E. 2d 558 (1955); *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). Findings of fact of the Industrial Commission are binding on appeal when supported by any competent evidence, even though there be evidence which would have supported a contrary finding. *Petree v. Duke Power Co.*, 268 N.C. 419, 150 S.E. 2d 749 (1966); *Benfield v. Troutman*, 17 N.C. App. 572, 195 S.E. 2d 75 (1973), *cert. denied* 283 N.C. 392, 196 S.E. 2d 274 (1973).

Assuming that there is evidence in the record which would support a finding by the Commission that the injuries suffered by plaintiff on 3 January 1972 contributed to the ultimate loss of his foot, the Commission found otherwise; and there is competent evidence in the record to support the Commission's findings.

The order appealed from is affirmed.

Affirmed.

Judges MORRIS and ARNOLD concur.

EDGAR LUTHER BARRETT, JR., ADMINISTRATOR OF THE ESTATE OF EDGAR LUTHER BARRETT III v. R. "BUD" PHILLIPS, ROBERT ALLIGOOD AND JOHNNY LEE SMITH

No. 753SC885

(Filed 21 April 1976)

Schools § 11; Negligence § 8— death of football player — use of ineligible player — proximate cause

There was no causal connection between the death of a high school football player allegedly caused in a collision with an ineligible player on the opposing team and defendants' negligence in the preparation and filing of the 1970 Master Eligibility List and in allowing the player who was ineligible because of age to participate in the game.

APPEAL by plaintiff from *James, Judge.* Judgment entered 19 May 1975 in Superior Court, PITT County. Heard in the Court of Appeals 18 February 1976.

The plaintiff, Administrator of the estate of Edgar Luther Barrett III, commenced this action on 16 August 1972, in Superior Court of New Hanover County. The complaint alleges that the defendants were jointly and severally liable for the wrongful death of plaintiff's intestate, Edgar Luther Barrett III. The injuries he received on October 9, 1970, allegedly resulted from a collision with the defendant, Johnny Lee Smith, while participating in a football game between J. H. Rose High School of Greenville, North Carolina, and New Hanover High School of Wilmington, North Carolina. The alleged acts and omissions complained of concerned negligent or wilful disregard for the rules, regulations, and requirements of the North Carolina High School Athletic Association and the North Carolina State Department of Public Instruction, in that the J. H. Rose High School football team used a player, Johnny Lee Smith, who was ineligible for competition under the aforesaid rules, regulations, and requirements. These rules stated that players twenty years of age or older were not eligible for competition and that players were not eligible for competition beyond the eighth consecutive semester after entry into the ninth grade.

The present action was removed from New Hanover County to Pitt County Superior Court upon defendants' motion. Thereafter, defendants filed a motion for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure. A hear-

ing was had upon defendants' motion on 3 March 1975. Judgment was rendered out of term on 19 May 1975. The plaintiff excepted to the judgment and his appeal entries were filed on 21 May 1975.

Mattox and Reid, P.A., by David E. Reid, Jr., and Gary B. Davis, for plaintiff appellant.

Hogue, Hill, Jones, Nash & Lynch, by William L. Hill II, and Speight, Watson and Brewer, by William C. Brewer, Jr., for defendant appellees.

MARTIN, Judge.

Plaintiff contends the trial judge erred in granting defendants' motion for summary judgment.

> "The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue . . . The standard for summary judgment is fixed by Rule 56(c). 'The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law' . . . Rule 56 is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved. . . 'The determination of what constitutes a "genuine issue as to any material fact" is often difficult. . . It has been said that a genuine issue is one which can be maintained by substantial evidence. Where the pleadings or proof of either party disclose that no cause of action or defense exists, a summary judgment may be granted. . . . ' " *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Procedurally, the question in the instant case is reduced to whether or not the pleadings, together with the answers to Rule 33 Interrogatories, show any genuine issue as to any material fact, and whether any party is entitled to a judgment as a matter of law. Applying this test to the case at bar, it appears that the judgment of the trial court should be affirmed.

A careful review of the record reveals that the parties were in agreement as to the material factual particulars concerning the death of Edgar Luther Barrett III. There was no "genuine issue as to any material fact." The effect of the undisputed facts was a question of law for the court to determine. See *Kessing v. Mortgage Corp., supra.* The question of law decided by the trial court was whether the defendants' violation of the rules, regulations, and requirements of the North Carolina State Department of Public Instruction and the North Carolina High School Athletic Association through the incorrect preparing and filing of the 1970 Master Eligibility List and their allowing Johnny Lee Smith to participate in the football game constituted actionable negligence.

Plaintiff contends that the defendants' negligence in the preparation and filing of the 1970 Master Eligibility List and in allowing Smith to participate in the football game was the proximate cause of Barrett's death. While defendants may have violated the aforesaid rules, regulations, and requirements, we fail to perceive a causal relation between the violation and the injury resulting in the boy's death.

> "[T]he principle prevails in this State that what is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does or does not exist. 'This rule extends and applies not only to the question of negligent breach of duty, but also the feature of proximate cause. . . . ' (Citations omitted)." *Hudson v. Transit Co.,* 250 N.C. 435, 108 S.E. 2d 900 (1959); See *McNair v. Boyette,* 15 N.C. App. 69, 189 S.E. 2d 590 (1972).

For the reasons stated above, we hold that the trial court was correct in entering summary judgment in favor of the defendants.

Affirmed.

Judges BRITT and HEDRICK concur.

HERSEL GRADY STROTHER v. HOWARD ODELL STROTHER

No. 7510DC913

(Filed 21 April 1976)

1. **Divorce and Alimony § 19— alimony pendente lite — increase in wife's income — letter from wife to judge — competency**

In ruling on plaintiff's motion for an increase in alimony *pendente lite* and child support, it was not error for the trial court to consider a letter from plaintiff to the judge concerning additions to the plaintiff's income in the form of payments to be received from a sale of land.

2. **Divorce and Alimony § 19— increase in wife's income — reduction in alimony pendente lite proper**

In ruling upon defendant's motion to reduce and plaintiff's motion to increase alimony *pendente lite,* it was not error for the trial court to find that plaintiff's circumstances had changed with respect to her income due to payments being made to her from the sale of land and for the court to reduce the amount of alimony.

ON *certiorari* to review an order by *Barnett, Judge.* Order entered 30 May 1975 in District Court, WAKE County. Heard in the Court of Appeals 9 March 1976.

On 25 July 1973 the plaintiff, Mrs. Hersel Grady Strother, instituted an action against her husband for divorce from bed and board, alimony, custody of the parties' minor child, and child support payments. In her complaint the plaintiff requested alimony *pendente lite.* On 21 March 1974 an order granting the plaintiff custody and child support payments of $460.00 per month was entered, and by order dated 23 July 1974 the plaintiff was granted alimony *pendente lite* in the amount of $430.00 per month and attorney's fees. On 8 January 1975 the defendant husband filed a motion to reduce alimony due to a substantial decrease in his income. In response, the plaintiff moved for an increase in alimony and child support. Finally, upon the motion and affidavit of the plaintiff, the court ordered the defendant to appear on 8 April 1975 and show cause why he should not be held in contempt for failure to comply with the previous order to provide alimony *pendente lite* and child support. At the hearing the wife offered evidence of additional expenses for the child and herself. The husband presented evidence of financial setbacks during the previous year. In the course of the hearing it was disclosed that the wife recently began receiving payments for land that she and her husband had

sold to a third party prior to the divorce proceedings. According to her testimony:

> "I filed a suit against my husband for half of the 1974 and 1975 payment on some land we sold to Mr. York some years ago and last week we settled the case. After I paid my attorney, I got about $8,000.00. I do not remember the exact figure. I had never recovered any of the money that had been paid, and we tried to settle without going to Court, but he would not. My lawyer got a third of what I recovered, and we gave Mr. Strother a break by letting him have $2,000.00 of the payment for the year before. Before attorney's fees, I got $14,000.00."

Apparently the judge requested further information about these payments, and a letter dated 10 April 1975 relating the annual payments on the note from J. W. York & Company to Mr. and Mrs. Strother for the period of 1976 through 1986 was prepared by the wife's attorney and presented to the judge a few days after the hearing.

By order dated 29 May 1975 the judge found no substantial change in the husband's income for 1975, but did find that the wife's needs had substantially increased. However, the judge concluded that the payments from the York note would more than adequately meet the wife's additional financial needs and that "therefore, defendant [husband] is entitled to a reduction in alimony pendente lite in that plaintiff's net monthly needs are substantially less, at least for the next eleven years [the term of the York note]."

E. Ray Briggs, for the plaintiff.

Cockman, Akins & Aldridge, by David R. Cockman, for the defendant.

BROCK, Chief Judge.

On appeal the wife raises two assignments of error.

[1] The first assignment of error arises out of the following finding of fact in the 29 May 1975 order:

> " . . . There has been a substantial change concerning plaintiff's income in the form of an addition which will more than make up for her increased needs; . . . "

The wife argues that this finding is not based on competent evidence. In particular she questions whether it was proper for

the judge to use the 10 April 1975 letter describing the payments due from the York note as evidence on which to base the finding of fact described above. The wife's reference to the York note payments in her testimony at the hearing prompted the judge to inquire further about the significance of this addition to her income. The letter served to clarify her testimony at trial, and the judge, as the trier of fact in this action, was entitled to request this additional information. If plaintiff's counsel had not agreed to furnish the additional information, it would have been within the province of the judge to examine plaintiff under oath to obtain the information. Ordinarily the use of a letter received by the judge would be inappropriate, but here it is the party who furnished the letter who is complaining. Under such circumstances we see no error prejudicial to plaintiff.

[2] Next the wife argues that it was error to find a change of circumstances in her situation because of the York note payments. It is noteworthy that the effect of the York note on the wife's status as a dependent spouse is not in issue. The only question is whether it was proper to find that the income derived from the York note warranted a reduction in the amount of alimony *pendente lite* for the wife. The specific amount of alimony *pendente lite* to be paid a dependent spouse is within the discretion of the trial judge to determine and will not be disturbed on appeal in the absence of an abuse of discretion. *Holcomb v. Holcomb,* 7 N.C. App. 329, 172 S.E. 2d 212 (1970); *Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589 (1965). In view of the temporary nature of alimony *pendente lite* and the specificity of the findings of fact upon which the order is based, we find no abuse of discretion by the judge in this case. We are sympathetic with the wife's argument that the payments from the York note should not be considered income for purposes of determining the amount of alimony *pendente lite* she is entitled to:

> "Alimony pendente lite is measured, among other things, by the needs of the dependent spouse and the ability of the supporting spouse. The mere fact that the wife has property or means of her own does not prohibit an award of alimony pendente lite. (citations omitted)" *Cannon v. Cannon,* 14 N.C. App. 716, 189 S.E. 2d 538 (1972).

However, whether the York note payments justify a reduction in alimony *pendente lite* properly lies within the discretion of the trial judge.

The judgment in this case is

Affirmed.

Judges VAUGHN and MARTIN concur.

MELVIN W. GRIFFIN AND WIFE, MARY E. GRIFFIN; AND MILL END CARPET OUTLET, INC. v. ERNEST R. CANADA

No. 7518DC958

(Filed 21 April 1976)

Fraud § 12— false affidavit — absence of reliance and injury

Evidence that defendant builder falsely represented in an affidavit to obtain the release of home construction loan funds that all bills for labor and materials had been paid when in fact a bill for carpet had not been paid was insufficient for the jury in an action for fraud brought by the homeowners and the carpet supplier since there was no evidence of reliance on the affidavit by the carpet supplier and there was no evidence that either the carpet supplier or the homeowners were injured by the false affidavit.

APPEAL by plaintiffs from *Clark, Judge.* Judgment entered 19 June 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 15 March 1976.

This appeal stems from an action brought by plaintiffs against the defendant for fraud. The plaintiffs, Mr. and Mrs. Griffin, entered into a contract with the defendant for the construction of a new home on Selkirk Drive in Greensboro, North Carolina, and the plaintiff, Mill End Carpet Outlet, Inc., installed carpet in the new house.

The evidence tends to show that the Griffins agreed to pay the defendant $45,000.00 for the construction of a new house, and the defendant promised to build the house, perform necessary repairs and corrections, and install carpet in place of the oak floors specified in the original plan. In May 1974 the defendant asked Mill End Carpet Outlet to install carpet which the Griffins had selected for their new house. An invoice for $1,625.24 was mailed to the defendant for the carpet on or about 13 May 1974, and another invoice for additional padding and carpeting was mailed to the defendant on or about 19 July 1974. These invoices have never been paid.

On 11 June 1974 plaintiffs paid the defendant a total of $18,017.98 as part of the contract price for the house. A portion of this sum ($9,617.98) was the balance of a $33,000.00 construction loan obtained by the Griffins from Gate City Savings and Loan Association. Before releasing the $9,617.98 to the Griffins to pay the defendant, Gate City Savings and Loan Association required the defendant to execute a notarized affidavit to the effect that "he [defendant] is familiar with the property described in this application for loan from the Gate City Savings and Loan Association; that he has had charge of the purchase of materials and contracting for labor for building recently constructed or repaired on said premises; that all bills for labor and materials used in constructing or repairing any building or buildings on said premises within the last six months have been paid except the following. . . . " No bills for labor or materials were described in the space provided. In addition it states that "[t]his affidavit is made to save said Association harmless from any claims for labor and material and as an inducement to said Association to pay to me the balance of money due on said loan." At trial the defendant testified as follows: "I was aware on June 11, 1974 when I signed the affidavit that the carpet had not been paid for and that Mill End Carpet Outlet was owed $1,625.24. I have still not paid Mill End Carpet Outlet and they are owed about $1,664.19 for the carpet. I did tell Mr. Griffin that I would pay Mill End Carpet Outlet but I still don't have the money to pay them."

After the presentation of evidence, the court made findings of fact and entered the following "conclusions of law":

CONCLUSIONS OF LAW

"1. The plaintiff, Mill End Carpet Outlet, Inc., is entitled to recover damages from the defendant, Ernest R. Canada, in the sum of $1,664.19 plus interest from July 19, 1974.

"2. The crossaction and counterclaim of the defendant, Canada, against the plaintiffs, Melvin W. Griffin and wife Mary E. Griffin, ought to be dismissed as the defendant, Canada, has received all money that he is entitled to under the contract with the plaintiffs, Griffin."

Adams, Kleemeier, Hagan, Hannah & Fouts, by M. Jay DeVaney, for the plaintiffs.

High, Washington & Bowden, by Barbara Gore Washington, for the defendant.

BROCK, Chief Judge.

The plaintiffs assign error to the judge's dismissal of their claim for fraud against the defendant. It is well established in this jurisdiction that in an action for fraud arising from an express representation, the plaintiff must establish six essential elements: (1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with the intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation, and acted upon it; and (6) that plaintiff thereby suffered injury. *Austin v. Tire Treads, Inc.*, 21 N.C. App. 737, 205 S.E. 2d 615 (1974).

Although it is clear that the defendant signed the affidavit knowing it to be false, the record is devoid of any evidence of reliance by Mill End Carpet Outlet; the affidavit had no bearing on the sale of carpet to the defendant. Moreover, there is no evidence that either of the plaintiffs was injured by the false affidavit. Mill End Carpet Outlet was not injured by the alleged fraud of the defendant; rather, it was injured by the defendant's failure to pay the invoice when submitted to defendant. Whether the Griffins could have been injured by the false affidavit poses a more difficult question. Had Mill End Carpet Outlet filed and perfected a lien for the carpet sold to defendant, and subsequently foreclosed in the event defendant failed to pay for the carpet, it may be that the Griffins would have been sufficiently injured to establish fraud. However, there is no evidence that such a lien was filed or that the Griffins are now confronted with this potential harm. Therefore, based on the record before us, we hold that the plaintiffs failed to produce sufficient evidence of reliance and injury to sustain a finding of fraud by the defendant.

Affirmed.

Judges VAUGHN and MARTIN concur.

LOWE'S OF GREENSBORO, INC. v. CARL D. CURRY

No. 7518DC754

(Filed 21 April 1976)

Guaranty; Rules of Civil Procedure § 50— directed verdict for plaintiff — facts not admitted

In this action on a guaranty of credit extended to a corporation, the trial court erred in directing a verdict for plaintiff where plaintiff's evidence that the corporation was indebted to it and of the amount of the debt was uncontradicted but defendant did not admit the debt or the amount thereof, since a verdict may not be directed in favor of the party with the burden of proof unless only a question of law is presented on admitted facts.

APPEAL by defendant from *Clark (Walter E.), Judge.* Judgment signed 6 June 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 19 January 1976.

Plaintiff seeks to recover $4,952.39 on a guaranty agreement executed by defendant.

Plaintiff's local credit manager testified in substance as follows:

Defendant, a vice-president of International Second Homes Corporation, applied for credit on behalf of that corporation and signed a credit application form supplied by plaintiff. The credit application contained the following:

> "In consideration of credit being extended by Lowe's to me/us/it, I and/or we certify the truthfulness and veracity of the statement above, and I and/or we guarantee and bind ourselves to the faithful payment of all amounts purchased or now owing, by us or either of us, or any other person, firm or corporation for our benefit. If credit is extended to a corporation in which we, or either of us, or I am an officer, or in which an interest exists I and/or we will personally faithfully guarantee the payment of all credit extended to said corporation."

Plaintiff signed the application above a line under which there was printed the word "APPLICANT" and also signed over a line under which the words "GUARANTOR AND PLEDGEE" were printed. At the bottom of the application followed the printed words "Credit Limit" the figure "2,000" is written. Plaintiff's witness testified that this figure was written in after defendant

left the office and represented his unilateral decision as to the amount of credit he would extend. After talking with one of the credit references given by defendant, he increased the amount to $5,000.

The agreement was executed on 23 January 1973. Credit was extended until 6 October 1973. Payments were made on the account from time to time and, on 4 October 1973, the account was fully paid according to the ledger card introduced into evidence. Nothing has been paid since that date and the amount now owed is for credit purchases on 6 October 1973. The credit manager called defendant and was told by defendant that "a check would be forthcoming." International Second Homes Corporation is insolvent and plaintiff received nothing as a result of the claim it filed in the bankruptcy proceedings.

Defendant's testimony as it is material to the appeal is substantially as follows. He went to plaintiff's office to open a credit account for the corporation. At that time he was Sales Manager and Assistant Vice-President of the corporation. He gave plaintiff the information requested on the credit application and signed the application above the words "Guarantor and Pledgee" and above the word "Applicant." Thereafter, he ordered materials from plaintiff on a number of occasions but did not place the order for the goods bought in October, 1973. The corporation went bankrupt after less than one year's operation and part of his salary has not been paid. His mother was one of the stockholders.

In defendant's answer he alleged that, at the time of the execution of the credit application, plaintiff had indicated that the credit limit of the corporation would be $2,000. At trial, he testified "I can't say for sure whether the $2,000 figure of the credit limit being [sic] placed on the application at the time." In his answer he first generally denied the material allegation of the complaint but in other parts of the answer he effectively admitted the execution of the document in question. Neither in his pleading nor at trial, however, did he admit that the corporation was indebted to plaintiff in any amount.

At the close of all the evidence the court took the case from the jury and entered judgment directing a verdict for plaintiff in the amount sued for.

J. Patrick Adams, for plaintiff appellee.

Gerald C. Parker, for defendant appellant.

VAUGHN, Judge.

At the close of the evidence in this case it would have been proper for the judge to have instructed the jury that if it should find the facts to be as all of the evidence tended to show, it should return a verdict in favor of the plaintiff as prayed for in the complaint. This is so because there are no material conflicts in the evidence and no conflicting inferences arise therefrom.

Nevertheless, upon the authority of *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297, we hold that it was error to direct a verdict for plaintiff in any amount, since plaintiff was the party with the burden of proof. Plaintiff's evidence that there was no limit on the amount of defendant's guarantee was uncontradicted by defendant. Nevertheless it was not *admitted* by defendant. Plaintiff's evidence that the corporation was indebted to it and its evidence as to the amount of the debt was not contradicted by defendant. Nevertheless, neither by pleading nor evidence did defendant *admit* the company debt or the amount thereof. *Cutts v. Casey, supra,* holds that verdict may never be directed in favor of the party with the burden of proof unless only a question of law is presented based on *admitted* facts. The verdict may not be directed merely because the material facts are uncontradicted. The uncontradicted evidence must be submitted to the jury with instructions as to how to answer the issues *if* they believe the evidence.

The judgment is reversed and the case is remanded.

Reversed and remanded.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. PHYLLIS ANN CHRISTOPHER

No. 7525SC775

(Filed 21 April 1976)

Homicide § 30— second degree murder prosecution — failure to submit manslaughter

In this prosecution for second degree murder of defendant's husband, the trial court erred in failing to submit manslaughter as a possible verdict where the State's evidence tended to show that defend-

ant had been a patient in a hospital because of a nervous condition, she was taken to a home prior to being taken to a more convenient hospital, she did not want to reenter a hospital, defendant and her husband were in a bedroom when two shots were fired, defendant ran from the bedroom and threw a pistol on the floor, deceased was found lying across a bed, and deceased died from two wounds received from a weapon he had had for about three weeks.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 30 April 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 21 January 1976.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders and Associate Attorney Wilton E. Ragland, Jr., for the State.

Byrd, Byrd, Ervin & Blanton, P.A., by Robert B. Byrd, for defendant appellant.

VAUGHN, Judge.

Defendant was indicted for the murder of her husband. The homicide occurred on 14 February 1974.

On 22 April 1974, defendant was committed to Dorothea Dix Hospital for mental observation. She remained in that hospital for about a month. Thereafter, she was admitted to Broughton Hospital as an emergency patient and remained there for about ten days. On 11 November 1974, the court again committed her to Dorothea Dix Hospital for mental and physical evaluation.

When the case came on for trial on 28 April 1975, the court found that defendant was competent to stand trial.

She was placed on trial for murder in the second degree. Under the charge of the court the only permissible verdicts were guilty of murder in the second degree, not guilty or not guilty by reason of insanity.

For about two weeks prior to the homicide, defendant had been a patient in a hospital in Lincolnton apparently because of a nervous condition that had existed for several months. Her husband wanted to remove her from the hospital in Lincolnton and place her in a hospital in Hickory because it would be more convenient to take care of her. The husband, defendant's sister and another brought her from the hospital to the Stillwell home on 12 February 1974. Defendant did not want to enter the hos-

pital in Hickory. Defendant, her husband and a number of others remained at the Stillwell home for about two days. During this time defendant appeared to be very weak and pale. She bit her nails all the time and just sat around and stared out of the window. She did not speak or talk to anyone and did not appear to eat or sleep.

The 16-year-old son of defendant and deceased testified that he, his parents and others had been together in the Stillwell home for most of the day on 14 February 1974. So as far as he knew, there had been no argument between his parents. During the afternoon his parents went into a bedroom alone and closed the door. The son remained in the living room. After the couple had been in the bedroom for some time the son heard two shots, saw his mother run out of the bedroom and throw a pistol on the floor. Prior to the time he heard the shots the son had heard no noises from the bedroom. Immediately after the shooting, defendant ran to a house about one quarter of a mile away from the Stillwell residence and telephoned the Sheriff's Department.

The deceased was found lying across a bed with his clothes on. He died as the result of two gunshot wounds. One bullet had entered the side of his head just behind his right ear and the other on the right side of his neck. No powder burns were observed about the wounds.

The death weapon was a .22 caliber pistol that deceased had owned for about three weeks. Six live shells and two spent shells were found in the pistol.

The defendant did not testify and no further evidence was introduced concerning the circumstances of the killing.

Defendant offered evidence designed to show that she was insane at the time of the killing. This evidence included the testimony of Dr. William Taylor, a psychiatrist employed at Dorothea Dix Hospital who testified that he did "not believe that she had the capacity to know the wrongfulness of her acts."

The verdict was guilty of murder in the second degree and judgment imposing a prison sentence of not less than fifteen nor more than eighteen years was entered.

We have considered all of defendant's assignments of error and conclude that, except for No. 10, none of them disclose error so prejudicial as to require a new trial.

In assignment of error No. 10 defendant contends that it was error for the judge to refuse to allow the jury to consider manslaughter as one of its possible verdicts. We agree and order a new trial.

Murder in the second degree is the unlawful killing of a human with malice but without premeditation and deliberation. The *intentional* use of a deadly weapon as a weapon when death proximately results from such use gives rise to the presumptions that the killing was unlawful and done with malice. Manslaughter is the unlawful killing of a human without malice and without premeditation and deliberation. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393. The circumstantial evidence relied on by the State is just as consistent with a lesser degree of homicide as it is with murder in the second degree.

New trial.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. JESSIE GRAHAM, RONALD L. ROBERTS

No. 763SC28

(Filed 21 April 1976)

Criminal Law § 26; Robbery § 5— armed robbery — assault with deadly weapon — one act — double jeopardy

A defendant, having been convicted of armed robbery, cannot be convicted of the lesser offense of assault with a deadly weapon where both offenses arise out of the same act.

APPEAL by defendants from *Lanier, Judge.* Judgments entered 28 August 1975 in Superior Court, CRAVEN County. Heard in the Court of Appeals 16 April 1976.

Attorney General Edmisten, by Associate Attorney Noel Lee Allen, for the State.

Lee, Hancock & Lasitter, by Moses Dow Lasitter, for defendant appellant, Jessie Graham.

Robert G. Bowers, for defendant appellant, Ronald L. Roberts.

VAUGHN, Judge.

We have considered all of the assignments of error brought forward and, except as hereinafter stated, find them to be without merit.

Each defendant was convicted of armed robbery and assault with a deadly weapon. All offenses arose out of the same occurrence. A defendant, having been convicted of armed robbery, cannot be convicted of the lesser offense of assault with a deadly weapon where both offenses arise out of the same act. We must, therefore, arrest judgment in the assault with a deadly weapon cases.

As to each defendant, the judge consolidated the cases for judgment and ordered the imposition of a single sentence. It is necessary, therefore, to remand the cases for entry of a proper judgment against each defendant on the armed robbery conviction.

Nos. 75CR4999 and 75CR4960 (the armed robbery cases) are remanded for resentencing.

In Nos. 75CR4998 and 75CR4959 (the assault with a deadly weapon cases) the judgments are arrested.

Judges BRITT and ARNOLD concur.

WEYERHAEUSER COMPANY v. GODWIN BUILDING SUPPLY CO., INC.

No. 7511SC767

(Filed 21 April 1976)

1. **Trial § 42— verdict not inconsistent**

Jury's verdict was not inconsistent in finding that defendant was indebted to plaintiff for goods and services and that defendant was entitled to recover damages for plaintiff's breach of a marketing agreement.

2. **Contracts § 29— breach of contract — loss of future profits**

The trial court erred in allowing the jury to consider loss of future profits in determining the amount of damages for breach of a marketing contract since there was no evidence to support a finding of loss of future profits.

APPEAL by plaintiff from *Hall, Judge.* Judgment entered 8 April 1975 in Superior Court, HARNETT County. Heard in the Court of Appeals 21 January 1976.

Plaintiff started this action to recover for goods sold and services rendered by plaintiff to defendant. Defendant then counterclaimed and alleged that plaintiff had breached a marketing contract into which the parties had entered. Defendant sought to recover a substantial sum it alleged as damages resulting from plaintiff's breach of that contract.

In the issues submitted, the jury found that defendant was indebted to plaintiff for the goods and services, that plaintiff had breached its contract with defendant and that defendant was entitled to recover $100,000 as damages.

Edgar R. Bain; Hutchins, Romanet & Thompson, by Bob Hutchins, attorneys for plaintiff appellant.

Johnson and Johnson, by W. A. Johnson, for defendant appellant.

VAUGHN, Judge.

Plaintiff's first three arguments question the sufficiency of the evidence to go to the jury on defendant's counterclaim. When the evidence is considered in the light most favorable to defendant we find it sufficient to take the case to the jury.

[1] Plaintiff's fourth argument, that the verdict should be set aside because it is inconsistent, is without merit. It was not inconsistent for the jury to find that defendant was indebted to plaintiff for the goods and services and also find that plaintiff had breached the marketing agreement.

Plaintiff's sixth argument, directed to the court's charge, does not appear to be supported by a proper exception.

[2] All of plaintiff's remaining assignments of error go to the question of damages. There were errors in the judge's charge on that issue. Among other things, it was improper to allow the jury to consider loss of future profits because there was no evidence to support a finding of loss of future profits.

We find no error in the trial other than on the question of what damages, if any, defendant sustained by reason of plaintiff's breach of the contract. On that issue there must be a new trial.

The case is remanded for a new trial on the issue of damages.

Remanded.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA FIRE INSURANCE RATING BUREAU

No. 7510INS581

(Filed 5 May 1976)

1. **Insurance § 116— fire insurance rates — necessity for public hearing**

G.S. 58-27.2(a) and the rules and regulations adopted by the N. C. Insurance Advisory Board pursuant to the statutory authority granted it by G.S. 58-27.1(c) required the Commissioner of Insurance, before acting upon a proposal for a 19% reduction in extended coverage and windstorm insurance premium rates filed with him by the Fire Insurance Rating Bureau, to hold a public hearing on such proposal, after the publishing of notice thereof to the public, and in accordance with such rules and regulations.

2. **Insurance § 116— fire insurance rates — "deemer" provisions — necessity for public hearing**

Insofar as the G.S. 58-27.2(a) requirement for a public hearing on a proposal to revise fire insurance rates may be repugnant to the "deemer provisions" of G.S. 58-131.1, the statutory provisions mandating a public hearing must prevail since those provisions were last enacted.

3. **Insurance § 116— fire insurance rate filing — withdrawal by Rating Bureau**

The N. C. Fire Insurance Rating Bureau may, in its discretion, withdraw a rate filing at any time prior to the setting of a public hearing thereon when, because of delay in setting the hearing, the data upon which a filing was made has become obsolete.

4. **Insurance § 116— fire insurance rates — authority to investigate absent rate filing — necessity for notice and hearing**

Any rate order made by the Insurance Commissioner pursuant to the authority of G.S. 58-131.2 "to investigate at any time the necessity for a reduction or increase in rates" may be made only after giving the Rating Bureau and insurers who may be affected thereby reasonable notice and hearing if hearing is requested. G.S. 58-131.5.

Judge MARTIN dissents.

APPEAL by respondent, The North Carolina Fire Insurance Rating Bureau, from orders issued by the Commissioner of Insurance on 11 April 1975, 28 April 1975, and 30 April 1975. Heard in the Court of Appeals 21 October 1975.

This rate-making proceeding was instituted on 6 January 1975 by a filing with the Commissioner of Insurance by the North Carolina Fire Insurance Rating Bureau seeking a 19% reduction in extended coverage and windstorm insurance premium rates.

The questions presented by this appeal, however, are placed in clearer perspective when viewed against the background of certain related prior proceedings.

By letter dated 8 January 1973 the Rating Bureau made a filing with the Commissioner of Insurance seeking revisions in extended coverage and windstorm rates indicating an overall reduction of 23.3%, coupled with a uniform $100.00 deductible applicable to all extended coverage perils. This filing was based on review of experience for the years 1964-1970 inclusive. By letter dated 7 March 1973 addressed to the Manager of the Rating Bureau, the Commissioner replied as follows:

> "This has reference to your filing dated January 8, 1973.
>
> It is not possible to schedule a public hearing at this time due to my very busy schedule. Therefore, I am requesting that you waive the deemer provisions of General Statute 58-131.1.
>
> A public hearing will be set as soon as my schedule permits.
>
> Yours very truly,
> s/ JOHN RANDOLPH INGRAM
> Commissioner of Insurance"

(The statutory provision referred to in Commissioner Ingram's letter as the "deemer provisions" is contained in the last sentence of G.S. 58-131.1, which is as follows:

> "Every rating method, schedule, classification, underwriting rule, bylaw or regulation submitted to the Commissioner for approval shall be deemed approved, if not disapproved by him in writing within 60 days after submission.")

By letter dated 9 March 1973 the Manager of the Rating Bureau responded as follows:

"Dear Commissioner Ingram:

Review of Experience-Extended Coverage
1964-1970 Inclusive

In accordance with your request of March 7, 1973, this Bureau waives the deemer provisions of General Statute 58-131.1.

We request, however, that the public hearing will be set as soon as practicable."

No public hearing was set. On 22 June 1973 the Governing Board of the Rating Bureau withdrew the filing made 8 January 1973 and notified the Commissioner that upon completion of review of more recent experience data which had become available, a new filing would be made.

On 21 September 1973 a new filing was made based on review of experience for the years 1965-1971 inclusive and indicating an overall reduction of 22.6%. By letter dated 20 November 1973 the Commissioner requested waiver of the provisions of G.S. 58-131.1 with respect to the 21 September 1973 filing, again stating that due to his very busy schedule it was not possible to schedule a public hearing at that time and stating that a public hearing would be set as soon as his schedule permitted. In accordance with the Commissioner's request, the Rating Bureau by letter dated 27 November 1973 waived the provisions of G.S. 58-131.1 with respect to the 21 September 1973 filing and requested that the public hearing be set as soon as practicable. No public hearing was set. On 31 May 1974 the Governing Board of the Rating Bureau withdrew the filing made 21 September 1973 and notified the Commissioner that a new filing would be made upon completion of review of more recent experience data.

On 6 January 1975 the Rating Bureau made the filing which led to the events giving rise to the present appeal. This filing was based on experience for the six years 1968-1973 inclusive and indicated a 19% reduction in rates without provision for any additional deductible. By letter dated 5 March

1975, addressed to the Manager of the Rating Bureau, the Commissioner replied as follows:

"This has reference to your filing dated January 6, 1975 proposing revised rates for Extended Coverage.

It is not possible to schedule a public hearing on this filing at this time and you are requested to waive the deemer provisions of General Statute 58-131.1.

Yours very truly,
JOHN RANDOLPH INGRAM
Commissioner of Insurance
s/R. E. Holcombe
Fire & Casualty Actuary"

This letter from the Commissioner dated 5 March 1975 was received by the Rating Bureau on 7 March 1975 and crossed in the mail the following letter, dated 6 March 1975, from the Manager of the Rating Bureau to the Commissioner:

"Dear Commissioner Ingram

Review of Experience — Extended Coverage
1968-1973 Inclusive

Pursuant to action of the Governing Board of this Bureau, the captioned filing is hereby withdrawn.

This action was taken on the advise of the General Counsel of the Bureau for the primary purpose of avoiding possible controversy at this time about the effect of the operation of the deemer provision of the Statute (G.S. 58-131.1) or about the effect of a waiver by the Bureau.

Yours very truly,
s/ C. B. AYCOCK
Manager"

When the Commissioner's letter of 5 March 1975, which requested the Rating Bureau to waive the "deemer provisions" of G.S. 58-131.1 with respect to the filing dated 6 January 1975, was received in the office of the Rating Bureau on 7 March 1975, the Manager of the Bureau responded to the Commissioner by letter dated 7 March 1975 which referred the Commissioner to the Manager's previous letter, dated 6 March 1975, withdrawing the filing. No further filing was made by

the Rating Bureau relating to premium rates for extended coverage and windstorm insurance.

By letter dated 11 April 1975 the Commissioner of Insurance wrote to the Manager of the Rating Bureau as follows:

> "This has reference to your submission of January 6, 1975 with attached statistical exhibits.
>
> Pursuant to authority conferred under General Statute 58-131.2 the reduction of 19% set forth in your filing is hereby approved. An additional decrease of 3.4% as determined by the attached rate development exhibit is also hereby approved.
>
> You are directed to implement these reductions effective May 1, 1975.
>
> Yours very truly,
> s/JOHN RANDOLPH INGRAM
> Commissioner of Insurance"

Attached to this letter was a table labeled "Development of Indicated Rate Level Change."

On 22 April 1975 the North Carolina Fire Insurance Rating Bureau filed a motion with the Commissioner of Insurance to set aside his order as contained in his letter dated 11 April 1975, stating as grounds for the motion that:

> (1) The filing to which the 11 April 1975 order referred was not then before the Commissioner for consideration, having been withdrawn by the Bureau by its letter to the Commissioner dated 6 March 1975.
>
> (2) The 11 April 1975 order was entered without prior notice to the Bureau and without opportunity afforded the Bureau or any other persons to be heard with respect thereto.
>
> (3) No findings of fact or conclusions of law were made to support the 11 April 1975 order.
>
> (4) No public hearing had been held in North Carolina on the subject of fair rates for extended coverage insurance for more than two years, and the public interest would best be served by a full public hearing based on a revised and updated filing on extended coverage rates which the

Rating Bureau was preparing and which it expected to file within thirty days.

On 28 April 1975 a hearing was held before the Commissioner on the Rating Bureau's motion to set aside his 11 April 1975 order. At the conclusion of the hearing on 28 April 1975 the Commissioner orally announced that insofar as the 19% reduction was concerned, it was his order that the reduction go into effect with an effective date of 1 May 1975, and he set 12 May 1975 as the date to hear the Rating Bureau on the further reduction of 3.4%.

On 30 April 1975 the Commissioner signed a written "Supplemental Order to Letter Order of April 11, 1975." In this he "affirmed" that portion of his letter order dated 11 April 1975 which ordered a reduction of 19% in extended coverage insurance rates, and stayed the portion of his letter order of 11 April 1975 which ordered an additional reduction of 3.4%, pending a hearing on the additional reduction to be held on 12 May 1975.

On 30 April 1975 the North Carolina Fire Insurance Rating Bureau filed exceptions and notice of appeal from the Commissioner's letter order dated 11 April 1975 and from his oral order entered at the conclusion of the 28 April 1975 hearing which denied the motion to set aside the 11 April 1975 order. Also on 30 April 1975, after the Rating Bureau received a copy of the Commissioner's written "Supplemental Order" of that date, the Rating Bureau filed a supplemental notice of appeal and exceptions.

Attorney General Edmisten by Assistant Attorney General Isham B. Hudson, Jr. for John Randolph Ingram, Commissioner of Insurance.

William T. Joyner and J. E. Tucker for North Carolina Fire Insurance Rating Bureau, Appellant.

PARKER, Judge.

Chapter 1079 of the 1949 Session Laws, which was ratified and became effective on 21 April 1949, was entitled "An Act to amend Chapter 58 of the General Statutes of North Carolina to provide for the holding of public hearings on rate filings." Section 1, subsection (2) of that act enacted into law a new section

of the General Statutes, G.S. 58-27.2, subsection (a) of which provides as follows:

> "G.S. 58-27.2(a)—Whenever any statutory or licensed insurance rating bureau or any insurance company making its own rate filings makes any proposal to revise an existing rating schedule, the effect of which is to increase or decrease the charge for insurance, or to set up a new rating schedule, and such rating schedules are subject to the approval of the Commissioner, such bureau or company shall file its proposed change and supporting data with the Commissioner who shall thereafter, before acting upon any such proposal, order a public hearing thereon, if such hearing is required by the rules and regulations adopted by the insurance advisory board and in accordance therewith, and fix a time and place for such hearing not earlier than 20 days thereafter. The bureau or the company making such proposal shall, not more than 10 days prior to the time of such public hearing cause to be published in a daily newspaper or newspapers published in North Carolina, and in accordance with the rules and regulations of the insurance advisory board, a notice, in the form and content approved by the Commissioner, setting forth the nature and effect of such proposal and the time and place of the public hearing to be held."

Subsection (b) of G.S. 58-27.2 expressly makes the provisions of that statute "applicable to all rating bureaus operating in North Carolina."

Ch. 1079 of the 1949 Session Laws also amended G.S. 58-27.1 by adding thereto subsection (c), which provides as follows:

> "G.S. 58-27.1(c) The insurance advisory board shall, within three months of the ratification of this subsection promulgate rules and regulations to provide for the holding of public hearings before the Commissioner of Insurance, or any person employed by the Insurance Department authorized by the Commissioner to act in his stead, on such proposals, to revise an existing rating schedule the effect of which is to increase or decrease the charge for insurance or to set up a new rating schedule, as are subject to the approval of the Commissioner and as, in the judgment of the board, are of such nature and importance as to justify and require

a public hearing. The board shall have authority to determine by such rules and regulations the circumstances under which such public hearings shall be held and the Commissioner of Insurance shall hold public hearings in accordance with such rules and regulations. From time to time the board may revise and change its promulgated rules and regulations in such manner as, in its judgment, the public interest may require."

Acting pursuant to the authority granted to it by G.S. 58-27.1(c), the North Carolina Insurance Advisory Board adopted, and on 1 March 1950 filed with the Secretary of State, rules and regulations providing for the holding of public hearings before the Commissioner of Insurance on proposals to revise insurance rates. Insofar as pertinent to the questions raised on this appeal, these rules and regulations provide as follows:

"Pursuant to the provisions of the aforementioned act and to afford all citizens and interested persons as full an opportunity as possible to be heard in all cases where substantial rights of the public are involved in such matters, and without undue delay on minor rate adjustments or classification changes, the following rules are adopted:

1. Any rate adjustment or proposal involving a general revision of an existing rating schedule which the Commissioner or the Advisory Board finds upon investigation involves a material change in the rate level, or the setting up of a new rating schedule of a material nature for a kind of insurance or for a separately rated major subdivision thereof, shall be subject to a public hearing prior to action thereon by the Insurance Commissioner. Any proposal involving only a change or changes in specific items of an existing rating schedule shall not be subject to a public hearing unless the Insurance Commissioner, upon review, decides that a public hearing is justified and required by the nature and importance of the proposed change or changes and is in the public interest.

* * *

3. Public hearings herein provided for shall be conducted by the Commissioner of Insurance or, in his discretion, by any reasonable person employed and duly authorized to act in his stead.

4. The time and place of any public hearing shall be determined by the Commissioner, who shall give due regard to the convenience of all interested parties. In no event shall a public hearing be scheduled prior to twenty days after submission of a rate filing.

5. Publication of notice of any public hearing shall be made by the bureau or company which is the proponent of the rate filing. The notice shall set forth the nature and effect of the proposal and the time and place of the public hearing to be held. The notice shall be published in one or more daily newspapers published in this State not more than ten days prior to the time set for the hearing. The Commissioner shall approve the form and content of such notice. Notice regarding hearings where there is no bureau or company proponent shall be given by the Insurance Commissioner.

* * *

8. The hearing shall be open to the public and any interested person or persons may appear and be heard, either in person or by a representative, and produce oral or written evidence relevant and material to the subject matter.

* * *

10. At all such hearings the proponent of the rate adjustment shall be accorded the opportunity to offer evidence in rebuttal.

* * *

13. Subsequent to a public hearing on a filing made with the Insurance Department, immediate consideration shall be given to all the information available. Announcement of the Commissioner's decision shall be made public as soon after the hearing as is feasible but in no event before any approved bulletins, rate schedules or amendments to schedules or manuals shall be placed in the mail to agents and companies affected, in order that the Commissioner's decision shall be put into effect. The effective date shall be the date specified in the bulletins, rate schedules or amendments to schedules or manuals, mailed to the agents and companies."

[1, 2] Thus, G.S. 58-27.2(a) and the rules and regulations adopted by the North Carolina Insurance Advisory Board pur-

suant to the statutory authority granted it by G.S. 58-27.1(c) clearly and explicitly required the Commissioner of Insurance, *before* acting upon the proposal for a 19% reduction in extended coverage and windstorm insurance premium rates filed with him by the Fire Insurance Rating Bureau on 6 January 1975, to hold a public hearing on such proposal, after the publishing of notice thereof to the public, and in accordance with such rules and regulations. Insofar as this statutory requirement for a public hearing may be repugnant to what the parties have in their correspondence sometimes referred to as the "deemer provisions" of G.S. 58-131.1, the provisions of G.S. 58-27.2(a) mandating the public hearing must prevail. When two statutes are in conflict and cannot reasonably be reconciled, the statute last enacted repeals the earlier statute to the extent of the repugnancy, even absent a specific repealing clause. *Commissioners v. Commissioners,* 186 N.C. 202, 119 S.E. 206 (1923). As above noted, G.S. 58-27.2(a) was enacted in 1949, while G.S. 58-131.1 was enacted in 1945. Therefore, whatever the legal effect of a "waiver" by the Fire Insurance Rating Bureau of the "deemer" provisions of G.S. 58-131.1 may be, it is clear that neither the Rating Bureau nor the Insurance Commissioner may lawfully dispense with the public hearing in cases in which a public hearing is mandated by G.S. 58-27.2(a). Moreover, the busy schedule of the Commissioner does not justify failure to comply with the statute's mandate. We note that G.S. 58-27.1(c) and the rules adopted by the Insurance Advisory Board pursuant thereto permit the public hearing to be held either before the Commissioner or before "any person employed by the Insurance Department authorized by the Commissioner to act in his stead."

In the present case no hearing has been held on the rate filing made by the Rating Bureau on 6 January 1975. The only hearing of any nature held in connection with that filing was the hearing before the Insurance Commissioner held on 28 April 1975, and that hearing was held solely to consider the Rating Bureau's motion to set aside the Commissioner's ex parte letter ruling of 11 April 1975. At no time was any notice of hearing published as is required by G.S. 58-27.2(a) and by paragraph Number 5 of the above cited rules of the Insurance Advisory Board. By entering the orders here appealed from without first conducting the public hearing mandated by the statute the Insurance Commissioner exceeded his authority. *Comr. of Insurance v. Automobile Rate Office,* 29 N.C. App. 182, 223 S.E. 2d

512 (filed 7 April 1976) ; *Comr. of Insurance v. Rating Bureau,* 28 N.C. App. 409, 221 S.E. 2d 96 (1976).

[3] For an additional reason the orders appealed from must be reversed. When those orders were entered, the rate filing on which they purportedly were based had already been withdrawn by the Rating Bureau which filed them. We find nothing in Article 13 of Chapter 58 of the General Statutes, under which the North Carolina Fire Insurance Rating Bureau was created, which deals with the right of the Rating Bureau to withdraw a filing once made. We see no sound reason, however, why this may not be done, at least if done prior to the time a public hearing on the filing has been set. Certainly it is desirable that any rate filing be based upon the most current data available. As noted by our Supreme Court, "[w]hile the statute requires that a hearing by the Commissioner upon a filing by the Bureau be held promptly, it is well within the bounds of possibility that, between the filing and the hearing, experience may be had which would be most relevant to the determination of the direction of a projection of the present 'loss trend' into the future." *In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 37, 165 S.E. 2d 207, 222 (1969). That case held that evidence of such more recent experience is admissible at the hearing. Even so, when because of delay in setting the hearing the data upon which a filing was made becomes obsolete, orderly procedure may call for the withdrawal of the old filing and the making of a new one based upon more recently available information. Accordingly, we hold that in such cases the Rating Bureau may, in its discretion, withdraw a filing if this is done prior to the setting of a public hearing thereon.

[4] It should be noted that this holding recognizing the right of the Rating Bureau to withdraw a filing in no way limits the authority of the Insurance Commissioner to carry out his statutory duty to achieve insurance premium rates "as will produce a fair and reasonable profit only." G.S. 58-131.2 gives the Commissioner power, even without any filing by the Rating Bureau, "to investigate at any time the necessity for a reduction or increase in rates." Any order made by the Commissioner pursuant to that authority, however, may be made only after giving the Rating Bureau and insurers who may be affected thereby reasonable notice and hearing if hearing is requested. G.S. 58-131.5.

We find it unnecessary to pass upon appellant's contention that in entering the orders appealed from the Commissioner

violated appellant's constitutional rights. The statutes above cited make adequate provision for protecting appellant's due process rights to notice and hearing. It is only necessary that the Commissioner comply with the mandates of the statutes.

For the reasons noted, the orders appealed from are

Vacated.

Judge MORRIS concurs.

Judge MARTIN dissents.

MITCHELL FURST, TRUSTEE, AND DANIEL BOONE COMPLEX, INC. v. DALTON H. LOFTIN, TRUSTEE; JAMES J. FREELAND AND WIFE, MAXINE H. FREELAND, AND CENTRAL CAROLINA BANK AND TRUST COMPANY, ASSIGNEE

No. 7515SC1011

(Filed 5 May 1976)

1. **Rules of Civil Procedure § 56— summary judgment — no findings of fact by trial court**

In passing upon a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, the court does not decide facts but makes a determination whether an issue exists which is germane to the cause of action; if findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper.

2. **Rules of Civil Procedure § 56— summary judgment — burden of proof**

The party moving for summary judgment has the burden of clearly establishing, by the record properly before the court, the lack of a triable issue of fact and the movant's papers are carefully scrutinized while those of the opposing party are indulgently regarded.

3. **Mortgages and Deeds of Trust § 19— assignment of note by holder — insurance required by deed of trust — right of holder to require insurance on subject property**

In an action to have foreclosure sales set aside and for monetary damages, the trial court erred in determining that because defendants Freeland assigned a note, deed of trust, and chattel mortgage to defendant CCB as collateral for a loan made to them by CCB in an amount less than that of the note, they had no right to require insurance coverage on the improvements on the subject property pursuant to the provisions of the deed of trust, declare the indebtedness in default, or direct that the deed of trust and chattel mortgage be foreclosed, since it is the general rule that in the absence of a statutory

provision to the contrary, where the owner of a mortgage has pledged it as collateral security for a debt less than the face of the mortgage, he has an interest in it which entitles him to take proper steps to foreclose the mortgage.

4. **Mortgages and Deeds of Trust § 25— insurance coverage required in deed of trust — failure to specify dollar amount — declaration of default**

In an action to have foreclosure sales set aside and for monetary damages, the trial court erred in concluding that defendants Freeland could not declare the note in question in default for failure of plaintiffs to maintain insurance on the subject property for the reason that no particular amount of insurance was ever specified by the Freelands or by CCB, the assignee of the note, since the deed of trust securing the note provided that the amount of insurance would be an amount satisfactory to the holder of the note, not to exceed the unpaid balance thereon, and defendants Freeland were sufficient "holders of the note" to exercise requirements regarding insurance coverage. Moreover, evidence was sufficient to raise an issue whether defendants Freeland agreed to a particular amount of insurance coverage.

5. **Mortgages and Deeds of Trust § 26— foreclosure under deed of trust provisions — sufficiency of notice**

In an action to have foreclosure sales set aside and for monetary damages, the trial court erred in determining that the deed of trust foreclosure proceeding conducted by defendant Loftin at the direction of defendants Freeland was a civil proceeding subject to the Rules of Civil Procedure and that the mailing of notice of default, addressed to plaintiff at Hillsborough, N. C., by defendant Loftin on 2 July 1974 followed by commencement of foreclosure proceedings on 24 July 1974 did not meet the requirements of notice provided for by the contract and rule of law, since the record discloses that defendants Freeland and Loftin complied with the provisions of the deed of trust before instituting foreclosure proceedings.

6. **Mortgages and Deeds of Trust § 40— setting aside foreclosure — summary judgment improper**

Summary judgment was improper in this action to have foreclosure sales set aside since material issues of fact existed with respect to plaintiffs' provision of insurance coverage on the subject property as required by the deed of trust.

7. **Mortgages and Deeds of Trust § 13— determination that default occurred — duty of trustee**

In an action to have foreclosure sales set aside and for monetary damages, defendant Loftin was not entitled to summary judgment since there was an issue of fact as to whether Loftin, even though his powers as trustee were mandatory, acted in good faith and exercised the judgment of a reasonable and prudent person in determining that there had been a default under the deed of trust.

Judge CLARK dissenting.

APPEAL by defendants from *Smith, Judge.* Judgments entered 9 July 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 5 April 1976.

Plaintiffs instituted this action to have defendants restrained and enjoined from selling certain real estate and personal property under a deed of trust and chattel mortgage. The complaint was later amended in order for plaintiffs to seek the setting aside of foreclosure sales and recovering monetary damages.

The allegations of the original complaint, filed 21 August 1974, are summarized in pertinent part as follows:

Plaintiff trustee is the owner of certain real estate located in Hillsborough, N. C., known as the Daniel Boone Complex, Inc. (DBC). Defendant Loftin is the trustee and defendants Freeland are the cestuis que trust named in a deed of trust executed by DBC on 1 March 1974. Defendant bank (CCB) is the assignee and holder of said deed of trust and note secured by same. On 24 July 1974 defendant Loftin caused real estate to be advertised for foreclosure sale pursuant to said deed of trust, the sale being scheduled for 23 August 1974. Defendant Loftin also caused certain personal property belonging to plaintiffs to be advertised for foreclosure sale pursuant to said chattel mortgage, the sale being scheduled for 30 August 1974. Plaintiffs are informed and believe that defendant Loftin claims default in said deed of trust and chattel mortgage on the ground that plaintiffs have not provided continuous insurance coverage as required by the deed of trust; plaintiffs insist that there has been continuous insurance coverage, hence no default. Plaintiffs asked that defendant Loftin be restrained and enjoined from conducting the foreclosure sales.

The court entered a temporary restraining order on 22 August 1974 and rescheduled the real estate sale for 30 August 1974 pending a hearing on the temporary order. On 28 August 1974 the court entered an order dissolving the restraining order. Plaintiffs gave notice of appeal and the court ordered that operation of the 28 August order be suspended pending appeal, provided plaintiffs posted a $50,000 bond by 9:00 a.m., 30 August 1974. Plaintiffs failed to post the bond and did not perfect the appeal.

On 4 October 1974 plaintiffs filed an amended complaint alleging a wrongful sale of their land and personal property on

30 August 1974 by defendant Loftin, purporting to act as trustee, to defendants Freeland. Plaintiffs asked that the sales be declared null and void and that they recover damages from defendants.

Defendants Freeland and Loftin filed answers admitting the sale of the land and personal property but alleging that the deed of trust and chattel mortgage were in default for failure of plaintiffs to provide continuous insurance coverage. Defendant CCB filed answer alleging that its only interest in the matter was that of assignee of the note and deed of trust as security for a loan made by it to defendants Freeland.

All parties moved for summary judgment. In support of the summary judgment motions, the parties presented depositions, exhibits, and other materials tending to show the following:

In March 1974 plaintiff DBC executed a note to defendants Freeland for $1,085,000, representing the balance of the purchase price of the real estate in question; to secure said note DBC executed a deed of trust on the real estate to defendant Loftin as trustee and a chattel mortgage to defendants Freeland on certain personal property located on the real estate. The deed of trust provided that DBC would obtain insurance on the property "in an amount satisfactory to the holder of the Note." The deed of trust was recorded on 15 March 1974 and on the same day defendants Freeland assigned the note and deed of trust to defendant CCB as collateral for a $250,000 loan made by CCB to the Freelands. On 14 March 1974 plaintiff DBC executed a deed to plaintiff trustee conveying the lands in question subject to the deed of trust aforesaid to defendant Loftin.

After 15 March 1974 defendant Loftin, on behalf of defendants Freeland, repeatedly made inquiries to plaintiffs or their attorneys as to whether plaintiffs had obtained insurance as required by the deed of trust. On 23 April 1974 plaintiffs' attorney sent defendant Loftin binders for two insurance policies on the subject property, one of which was to expire on 2 May 1974 and the other on 1 June 1974. Defendant Loftin requested that the actual policies be sent to him, but this was not done, even after the binders expired. On 19 June 1974, defendant J. J. Freeland purchased insurance on the property, paid a premium of approximately $27,000 therefor, and on 2 July 1974, at defendant J. J. Freeland's direction, defendant Loftin mailed

notice of default to plaintiff DBC. On 3 July 1974 defendant Loftin received two insurance policies covering the property from plaintiffs' attorney, the effective date of the policies being 2 April 1974 and the expiration date being 2 April 1975.

On 10 July 1974 defendant Loftin contacted the insurance agency which sold the policies to plaintiff DBC and was advised that the policies had been cancelled for nonpayment of premium.

On 24 July 1974, pursuant to defendant J. J. Freeland's instructions, defendant Loftin began advertisement of foreclosure sales of the subject property. On 20 August 1974, defendant Loftin received signed statements from officers of the companies which issued the insurance policies to plaintiff DBC, as well as the agency which sold plaintiff DBC the policies, indicating that the policies had never been cancelled and were still in effect. At the foreclosure sales defendants Freeland purchased the real estate for $500,000 and the personal property for $137,914.50.

Following a hearing on the motions, the court granted defendant CCB's motion for summary judgment and denied the motions of defendants Freeland and Loftin. It granted partial summary judgment for plaintiffs, holding that the deed of trust and chattel mortgage had been wrongfully foreclosed, and reserving for later determination the question of what relief should be granted to plaintiffs.

Defendants Loftin and Freeland appealed.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by Josiah S. Murray III, for plaintiff appellees.

Dalton H. Loftin in propria persona.

Manning, Fulton & Skinner, by M. Marshall Happer III, for defendant appellants Freeland.

BRITT, Judge.

APPEAL OF DEFENDANTS FREELAND

Did the trial court err in entering summary judgment against defendants Freeland? We hold that it did.

[1] At the outset we note that the trial court made extensive "findings of fact." We repeat again that in passing upon a

motion for summary judgment pursuant to G.S. 1A-1, Rule 56, the court does not decide facts but makes a determination whether an issue exists which is germane to the cause of action. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E. 2d 113 (1971). If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975).

[2] We also restate the rule that the party moving for summary judgment has the burden of clearly establishing, by the record properly before the court, the lack of a triable issue of fact and the movant's papers are carefully scrutinized while those of the opposing party are indulgently regarded. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Koontz v. Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972), *rehearing denied*, 281 N.C. 516 (1972).

[3] First, it appears that the trial court concluded that because defendants Freeland had assigned the note, deed of trust, and chattel mortgage to CCB, they had no right to require insurance coverage on the improvements on the subject property, declare the indebtedness in default, or direct that the deed of trust and chattel mortgage be foreclosed. We think the court erred in this conclusion.

It is true that the instruments securing plaintiffs' indebtedness of $1,085,000 were assigned by defendants Freeland to CCB; but, the assignment was only as collateral for a loan of $250,000.00. The assignment specifically states that it is for collateral purposes and that upon the payment of the loan, the $1,085,000 note and deed of trust would be reassigned to defendants Freeland. The three instruments were reassigned to said defendants on 10 September 1974.

It appears to be the general rule that in the absence of a statutory provision to the contrary, where the owner of a mortgage has pledged it as collateral security for a debt less than the face of the mortgage, he has an interest in it which entitles him to take proper steps to foreclose the mortgage. 55 Am. Jur. 2d, Mortgages, § 1369, p. 1086. It further appears that this rule has been followed in this jurisdiction. *Ball-Thrash & Co. v. McCormick*, 162 N.C. 471, 78 S.E. 303 (1913); *see e.g., Sineath*

v. Katzis, 219 N.C. 434, 14 S.E. 2d 418 (1941). We have found no statute affecting the rule in North Carolina.

We hold that defendants Freeland had the right to demand compliance with the insurance coverage provisions of the deed of trust, to declare the note in default upon failure of plaintiffs to comply with said provisions, and in the event of default to require the trustee to foreclose the deed of trust.

[4] The trial court concluded that defendants Freeland could not declare the $1,085,000 note in default for failure of plaintiffs to maintain insurance for the reason that no particular amount of insurance was ever specified by the Freelands or by CCB. We think the court erred in this conclusion.

The pertinent provision of the deed of trust is as follows: "That the said party of the first part (DBC) will insure and keep insured the buildings and contents in the premises herein conveyed against loss by fire and windstorm during the existence of this indebtedness in an amount satisfactory to the holder of the note but not to exceed the unpaid balance thereon and will assign said insurance to the holder of the note . . .; and, should the party of the first part fail to cause such insurance to be issued and assigned as aforesaid or fail to pay any premium therefore (sic), then the said holder of the Note is authorized to effect such insurance or to make such premium payments as may be due if he so elects, and such sums so paid shall be a lien against the said premises and immediately due and payable to the holder of the Note. . . ."

It will be noted that the amount of insurance would be an amount satisfactory to the holder of the note, not to exceed the unpaid balance thereon. As stated above, we think defendants Freeland were sufficient "holder(s) of the note" to exercise requirements regarding insurance coverage.

The record discloses that on 23 April 1974 defendant Loftin received a letter from plaintiffs' counsel enclosing two insurance binders purportedly covering buildings on the subject property and contents; that defendant Loftin discussed the binders with defendant J. J. Freeland and he was satisfied with the amounts shown on the binders; and that defendant Loftin wrote plaintiffs' counsel, Mr. Redmon, informing him that Mr. Freeland did not object to the amount of coverage shown on the binders but that he was disgusted with the fact that he had not received the policies and receipts. (R. p. 32.)

We hold that the evidence was sufficient to raise an issue whether defendants Freeland agreed to a particular amount of insurance coverage.

[5] The trial court concluded that the deed of trust foreclosure proceeding conducted by defendant Loftin at the direction of defendants Freeland was a "proceeding of a civil nature," subject to Rule 1 of the North Carolina Rules of Civil Procedure; and that the mailing of notice of default, addressed to Daniel Boone Complex, Inc., Hillsborough, N. C., by defendant Loftin on 2 July 1974, followed by the commencement of foreclosure proceedings on 24 July 1974, did not meet the requirements of notice provided for by the contract and rule of law. We think the court erred in this conclusion.

The deed of trust specifically provides that if DBC should fail to perform any of the covenants and conditions required of it "after mailing notice of default addressed to Daniel Boone Complex, Inc., Hillsborough, N. C., certified mail, return receipt requested, and such default shall continue for 20 days," then defendants Freeland had the option of declaring the entire indebtedness due and payable immediately. The record discloses that defendants Freeland and Loftin complied with these provisions before instituting foreclosure proceedings.

We reject plaintiffs' contention and the trial court's conclusion that the foreclosure of the deed of trust under the power of sale contained therein is an action or proceeding subject to the Rules of Civil Procedure. (It will be noted that the foreclosure in this case antedated the 1975 amendments to Article 2A of G.S. Chapter 45.)

[6] Defendants Freeland assign as error the failure of the court to grant their motion for summary judgment. We find no merit in this assignment.

It appears that the primary question involved in this case is whether plaintiffs failed to provide insurance coverage as required by the deed of trust. While evidence submitted by plaintiffs tends to show that they did, evidence presented by defendants tends to show that they did not. We think material issues of fact exist and that neither plaintiffs nor defendants Freeland are entitled to summary judgment.

Therefore, the summary judgment against defendants Freeland is reversed and this cause is remanded to the superior court for further proceedings not inconsistent with this opinion.

APPEAL OF DEFENDANT LOFTIN

[7] For the reasons set forth above, we hold that the trial court erred in granting summary judgment against defendant Loftin. The remaining question is whether the court erred in denying defendant Loftin's motion for summary judgment. We hold that it did not.

"The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act." *Woodard v. Mordecai,* 234 N.C. 463, 471, 67 S.E. 2d 639, 644 (1951). The deed of trust in question provides that in the event of default, and on application of the cestui que trust or the then holder of the note, "it shall be lawful for and the duty of" the trustee to institute foreclosure proceedings. Thus it appears clear that the powers vested in defendant Loftin were mandatory.

Even so, the trustee in a deed of trust owes a duty to the debtor as well as to the creditor. In *Mills v. Building and Loan Ass'n.,* 216 N.C. 664, 669, 6 S.E. 2d 549, 552 (1940), it is said:

> "The trustee for sale is bound by his office to bring the estate to a sale under every possible advantage to the debtor as well as to the creditor, (Citation.) and he is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and the creditor alike, apprising both of the intention of selling, that each may take the means to procure an advantageous sale. (Citation.) He is charged with the duty of fidelity as well as impartiality, of good faith and every requisite degree of diligence, of making due advertisement and giving due notice. (Citations.) Upon default his duties are rendered responsible, critical and active and he is required to act discreetly, as well as judiciously, in making the best use of the security for the protection of the beneficiaries. (Citations.)"

Applying the rule stated in *Mills,* the question then arises, did defendant Loftin act in good faith and did he exercise the judgment of a reasonable and prudent person in determining that there had been default under the deed of trust? This creates an issue of fact and on his motion for summary judgment, defendant Loftin, as movant, had the "laboring oar." *Singleton v. Stewart, supra.*

At the trial of this cause, assuming that evidence will be presented substantially as indicated in the present record, defendant Loftin will be entitled to an issue as to whether he acted in good faith and as a reasonable and prudent man in concluding that there had been default by plaintiffs. At that time, the burden of proof will be on plaintiffs and should they fail to make out a prima facie case on the issue, defendant Loftin will be entitled to a directed verdict.

Therefore, the summary judgment against defendant Loftin is reversed and this cause as to him is remanded to the superior court for further proceedings not inconsistent with this opinion.

* * * * *

Judgment reversed and cause remanded.

Judge PARKER concurs.

Judge CLARK dissents.

Judge CLARK dissenting:

In making the foreclosure sale under the power of sale in a deed of trust it is the duty of the trustee to exercise due diligence and to act in good faith for the best interests of the parties, both grantees and beneficiaries. But in this case we are concerned with the duty of the trustee in determining default, which is controlled by the terms of the deed of trust, a contract between the parties. Under these terms the trustee could act only when authorized by the creditors. The creditors had the option of declaring the entire indebtedness due and payable; they did so and directed the trustee to foreclose. The trustee then had the duty to foreclose.

The grantors attempted to enjoin the foreclosure, obtained a temporary restraining order, but in the hearing before Judge Brewer to continue the restraining order on 28 August 1974, the court found ". . . there is no competent evidence . . . which would support an order continuing the restraining order." The trustee sold the property two days later on 30 August 1974. Two days before sale the grantors were unable to offer to the court competent evidence that there was no default. I find nothing in the record to indicate that any competent evidence was submitted to the creditors or the trustee at any time which would justify cancellation of the foreclosure sale.

In my opinion the plaintiffs were required (1) to provide insurance as required by the deed of trust, and (2) to submit satisfactory proof to the creditors that they had effected this insurance. All of the proof establishes that the insurance coverage was cancelled, and there was no competent evidence that prior to foreclosure sale on 30 August 1974 the plaintiffs had in effect the required insurance coverage and offered satisfactory proof of such to the creditors. I would grant all of defendants' motions for summary judgment. See *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION ET AL v. RUFUS L. EDMISTEN, ATTORNEY GENERAL AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC. INTERVENORS

No. 7510UC374

(Filed 5 May 1976)

Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — validity

A fossil fuel adjustment clause which permits an electric utility to adjust its monthly bills for services by means of a formula which takes into consideration fluctuations in the cost of fossil fuels with reference to a base cost, which does not increase the utility's rate of return but is so designed that it automatically passes on to the customers both any increase or decrease in the cost of fossil fuels the utility is forced to incur after following reasonably prudent procurement practices, and which automatically passes on to customers any savings from improvements in generation efficiency, is a valid part of a rate or rate schedule within the meaning of G.S. Chapter 62; moreover, in allowing such clause to be placed into effect on an interim basis and in giving it final approval in this case, the Utilities Commission acted within its statutory powers and in accordance with statutory procedures.

Judge MARTIN dissenting.

APPEAL by the Attorney General from order of the North Carolina Utilities Commission entered 19 December 1974 in Docket #E-2, Sub 234. Heard in the Court of Appeals 12 November 1975.

On 25 January 1974 Carolina Power & Light Company (CP&L) filed with the North Carolina Utilities Commission its verified application for authority to adjust its metered retail

electric rates and charges by the addition of a fossil fuel cost adjustment clause. In this application, which was supported by affidavits and exhibits, CP&L alleged that the cost of fossil fuel accounted for 57% of its total operating and maintenance expenses in 1973, that the fossil fuel market was extremely unstable and the price of coal and oil had increased and was continuing to increase at an unprecedented rate, and that unless the proposed fossil fuel clause was allowed, CP&L's financial condition was not sufficient to enable it to absorb the rapid large increases in fossil fuel costs without severe impairment of its ability to provide adequate electric service. The requested fossil fuel adjustment clause would apply to the monthly bill for service a charge or credit for each kwh sold based on the cost of fossil fuel above or below the base cost established in the clause, which was computed from the heat rate for fossil generation and the actual cost of fossil fuel burned by CP&L during the twelve months ending on 30 June 1973. The Commission assigned this application its Docket #E-2, Sub 234.

On 5 February 1974 the Commission entered its order making findings of fact and conclusions and permitting the clause to go into effect on an interim basis effective on service rendered on and after 6 February 1974. As part of this order the Commission directed that Docket E-2, Sub 234 be consolidated with pending Docket E-2, Sub 229 and that all evidence presented in this matter be subject to cross-examination and further review before final disposition. (The pending Docket E-2, Sub 229 was a general rate case which had been commenced 29 October 1973 when CP&L filed application with the Commission for authority to increase its electric rates and charges for its retail customers in varying percentages which amounted to approximately a 21% overall increase.)

On 13 March 1974 the Commission amended its order of 5 February 1974 to approve CP&L's undertaking, which was filed with its application on 25 January 1974, by which it agreed to refund with interest to the persons entitled thereto the amounts, if any by which payments made to it for electric service exceed the amounts which would have been paid under rates as finally determined to be just and reasonable.

Public hearings were held on the matters embraced in the consolidated Dockets E-2, Sub 234 and E-2, Sub 229 during July, August, and September 1974. On 27 November 1974 the Commission entered an order directing that Docket E-2, Sub

234 be separated for decision and further hearings from Docket E-2, Sub 229, and directing that further hearings on CP&L's fossil fuel adjustment clause be set for 30 January 1975 at the same time and place set for investigations on fuel clauses of Duke Power Company and Virginia Electric and Power Company.

On 19 December 1974 the Commission issued its order making findings of fact which included the following: The largest single item of expense for CP&L in 1973 was fossil fuel used for electric generation. The average price of coal (the major fossil fuel consumed) increased from 46.79 cents per million BTU in January 1973 to 92.5 cents per million BTU in June 1974, an increase of approximately 100 percent. Oil increased from 49.16 cents per million BTU in January 1973 to 176.84 cents per million BTU in March 1974, an increase of over 350 percent. Gas increased from 50.52 cents per million BTU in January 1973 to 58.15 cents per million BTU in March 1974. Total burned fossil fuel cost increased from 47.80 cents per million BTU in January 1973 to 78.25 cents per million BTU in March 1974. These sudden and drastic increases have resulted in large increases in the cost of producing electric power. Such increases cannot be recovered in CP&L's rate design unless an automatic adjustment for fluctuating fuel costs is allowed. Without such an automatic adjustment, the utility will experience a further deterioration of earnings before a general rate case can be filed and heard. CP&L has been unable to earn the return on its common stock equity found to be fair and reasonable by the Commission. This shortfall in earnings has been caused, in part, by the sharp rise in the cost of fossil fuel. A continuing shortfall in earnings could result in higher rates to the customer and possibly jeopardize service. A "KWH" type of fuel clause adjusts for improvements in generation efficiency and appropriately passes any savings to the rate payer. In view of the circumstances of the fossil fuel market, the fossil fuel adjustment clause is a reasonable method by which CP&L can recover a part of its reasonable operating expenses.

Based on its findings of fact made in this case, and based on voluminous evidence heard by the Commission in other recent dockets involving CP&L and other electric utilities operating in North Carolina concerning the supply and price of coal and procurement practices of particular utilities, the Commission concluded that the market forces controlling the price of fossil

fuels are beyond the ability of either the Commission or CP&L acting alone to control. The Commission concluded that refusal to allow CP&L to recoup the great increase in fossil fuel cost in a just, reasonably expeditious, and orderly manner would imperil CP&L's ability to operate and to provide service. The Commission held that the cost of fossil fuel incurred by CP&L is a reasonable operating expense to the extent that CP&L exercises sound management practices in negotiating with suppliers, and found that the Commission's system of monitoring the operation of the fossil fuel clause will insure that CP&L acts in accordance with sound management practices in its negotiations and will protect the rate payers, by preventing CP&L from recovering more through the fossil fuel clause than its reasonable operating expenses as such expenses relate to cost increases of fossil fuel above the base cost as established in the fossil fuel clause.

Based upon its findings of fact and conclusions, the Commission approved the fossil fuel adjustment clause set forth in CP&L's application filed 25 January 1974, approved all revenues collected thereunder from bills rendered through 30 September 1974, and discharged and cancelled CP&L's undertaking for refund with respect to all such revenues on bills rendered through 30 September 1974. The Commission's order further directed that it would proceed with the hearings scheduled for 30 January 1975 and would continue its investigation into the fossil fuel purchasing procedures and policies of CP&L to the extent that they affect the fossil fuel adjustment factors applied to bills rendered after 30 September 1974, and directed CP&L to continue to file with the Commission monthly reports on the amount of the fuel cost adjustment factor and the factors and computations used in its derivation.

The Attorney General, acting on behalf of the using and consuming public, in apt time as provided in G.S. 62-90(a), filed notice of appeal and exceptions to the Commission's interim order of 5 February 1974, entered in Commission Docket #E-3, Sub 234, which order permitted CP&L's fossil fuel cost adjustment clause to go into effect on an interim basis, and to the Commission's final order entered in that case on 19 December 1974, which gave final approval to CP&L's fossil fuel cost adjustment clause.

Attorney General Edmisten by Deputy Attorney General I. Beverly Lake, Jr., and Assistant Attorney General Robert P. Gruber for appellant.

Joyner & Howison by Robert C. Howison, Jr., and William E. Graham, Jr., for Carolina Power & Light Company, appellee.

Edward B. Hipp, General Counsel, and Assistant Commission Attorney Wilson B. Partin, Jr., and Associate Commission Attorney Jane S. Atkins for the North Carolina Utilities Commission.

PARKER, Judge.

By order of this Court dated 12 June 1975 the appeal in this case was consolidated, for the purpose of briefs and oral arguments, with the pending appeal from the Commission's final order entered in CP&L's general rate case, Commission Docket #E-2, Sub 229. Certain parties who are appellants in that case, to wit: The North Carolina Textile Manufacturers Association, Inc., Ball Corporation, and Executive Agencies of United States of America, in their briefs and oral arguments presented in the consolidated hearing of the appeals in the two cases which resulted from our order of 12 June 1975, have presented arguments and contentions attacking the Commission's orders of 5 February 1974 and 19 December 1974 entered in this case. These parties, however, did not file timely notice of appeal as required by G.S. 62-90(a) from the Commission's orders filed in this case. Accordingly, CP&L's motion to dismiss the purported appeals of these parties in this case is allowed, and our consideration of the appeal in this case will be limited to the questions raised by the appeal of the Attorney General.

On this appeal the Attorney General contends that the Commission, by issuance of its orders of 5 February 1974 and 19 December 1974 in Docket No. E-2, Sub 234, acted in excess of its statutory authority, upon and through unlawful proceedings, in violation of the due process requirements of the State and Federal Constitutions, and that it acted arbitrarily and capriciously. These contentions have already been considered and rejected by this Court. In *Utilities Comm. v. Edmisten, Attorney General,* 26 N.C. App. 662, 217 S.E. 2d 201 (1975), this Court was called upon to consider the validity of the Commission's orders which approved the fossil fuel adjustment clause of Duke Power Company. A majority of the panel of this

Court hearing the appeal in that case affirmed the Commission's orders. The decision in that case held that a fossil fuel cost adjustment clause, such as the one in the case now before us, which permits the electric utility to adjust its monthly bills for service by means of a formula which takes into consideration fluctuations in the cost of fossil fuels with reference to a base cost, which does not increase the utility's rate of return but which is so designed that it automatically passes on to the customers both any increase or decrease in the cost of fossil fuels which the utility is forced to incur after following reasonably prudent procurement practices, and which also automatically passes on to customers any savings from improvements in generation efficiency, is a valid part of a rate or rate schedule within the meaning of G.S. Chapter 62. In that case this Court held that the Commission, in allowing such a clause to be placed into effect on an interim basis and in giving it final approval, acted within its statutory powers and in accordance with statutory procedures. On authority of that decision, we hold that the Commission, by issuance of its orders which are challenged on this appeal, also acted within its statutory powers and in accordance with statutory procedures.

Examination of the record in this case also reveals that the Commission's essential findings of fact were supported by competent evidence, and we hold that in entering the orders appealed from the Commission did not act arbitrarily or capriciously.

Accordingly, the orders appealed from are

Affirmed.

Judge CLARK concurs.

Judge MARTIN dissenting.

For the reasons stated in my dissenting opinion filed in *Utilities Comm. v. Edmisten, Attorney General,* 26 N.C. App. 662, 217 S.E. 2d 201 (1975), I vote to reverse.

ROBERT C. GUNTHER AND WIFE, SARAH GUNTHER v. WILLIAM E. PARKER AND WIFE, LOIS R. PARKER

No. 7528DC937

(Filed 5 May 1976)

1. Fraud § 1— elements of actionable misrepresentation

The complaint for actionable misrepresentation consists of (1) a representation of a material fact, (2) which was false, (3) which was either known to be so by the defendant when it was made or which was made recklessly without any knowledge of its truth, (4) which was intended to induce reliance, and (5) which did induce reasonable reliance, (6) reliance which resulted in injury to plaintiff.

2. Fraud § 12— sale of house — misrepresentation of basement as "dry" — sufficiency of evidence

In an action to recover damages sustained by plaintiffs when they bought defendants' home in reliance upon representations made by defendants that the basement of the home was "dry," evidence was sufficient to be submitted to the jury where it tended to show that plaintiffs received an affirmative response to their inquiry as to whether the basement was "dry," defendants had employed plumbers to make temporary repairs to a hopelessly defective sewer line system which had created a serious backflow into the basement, the plumbers' initial trench dug to probe for the sewer line was described to plaintiffs by defendants as merely an area suffering from soil erosion, and a list given plaintiffs by defendants recommending repairmen omitted the name of the very plumbing company which had responded to defendants' initial sewer problem several months prior to sale of the house to plaintiffs.

APPEAL by plaintiffs from *Styles, Judge.* Judgment entered 29 September 1975 in District Court, BUNCOMBE County. Heard in the Court of Appeals 11 March 1976.

In their complaint, filed 26 April 1973, plaintiffs alleged that "on the 22nd day of January 1973, the plaintiffs purchased from the defendants a house and lot . . . in the City of Asheville . . . for the sum of Fifty-seven Thousand Five Hundred and no/100 ($57,500.00) Dollars, which moneys were paid in full . . ." and maintained that defendants, prior to the purchase, ". . . represented to the plaintiffs and to the real estate broker . . . that the basement of said house was 'dry' and that no water had accumulated in the basement of said house during the defendants' ownership of same." The plaintiffs alleged, however, that, contrary to defendants' representation, the basement actually sustained considerable sewage and water backflow and that ". . . prior to their purchase . . . the sewer line,

or a portion thereof, had collapsed on October 7, 1972 causing water to back up into said basement and that the defendants were advised at that time by Moser, Inc., a local plumbing contractor, that the entire sewer line was badly deteriorated and needed to be replaced." Plaintiffs asserted that the defendants failed to heed the plumber's advice and instead ". . . effected temporary repairs . . . [and] did not replace or repair the deteriorated sewer line, nor did the defendants disclose to the plaintiffs the condition of said sewer line which was not visible to inspection and these plaintiffs . . . believe that such failure on the part of the defendants constituted a concealment of a material fact, the existence of which was peculiarly within the knowledge of said defendants in that said condition could not be discovered by a reasonable inspection."

Plaintiffs further allege that "surface waters had, prior to the date of their purchase . . ., also trespassed and accumulated in the basement . . . on numerous occasions, which fact was well known to the defendants at the time the aforesaid representations were made by the defendants to the plaintiffs."

Thus, plaintiffs charged that ". . . the defendants' representation that the basement . . . was 'dry' and that no water had accumulated in said basement of said house during the defendants' ownership was not true but was false and constituted a material misrepresentation wilfully made by the defendants to induce the plaintiffs to purchase said house and lot; that said defendants made said misrepresentation knowing same to be false with the intention of deceiving these plaintiffs and said plaintiffs reasonably relied upon said representations to their damage and injury."

More specifically, plaintiffs averred that after the purchase and

> ". . . during March of 1973 the sewer line leading from said house to the main sewer line collapsed and the basement of said house flooded with sewer water and sewer contents and these plaintiffs were required to completely replace said sewer line; that certain properties owned by the plaintiffs which were located in said basement were destroyed and had to be discarded; that in addition thereto considerable amounts of surface water from time to time . . . entered the plaintiffs' basement and these plaintiffs were therefore caused to make other repairs to prevent

such condition from re-occurring; that these plaintiffs, by virtue of the foregoing misrepresentations, have been damaged in the sum of One Thousand Eight Hundred ($1,800.00) Dollars."

Defendants, after unsuccessfully moving to dismiss the cause of action, answered, denying all of plaintiffs' substantive allegations.

At trial, plaintiff Dr. Robert Gunther testified that during pre-purchase inspection of the house his ". . . wife asked Mr. Parker if there had ever been any water in the basement, water problem in the basement. And Mr. Parker said 'yes, on one occasion there was because there are two downspouts at the end of the house that had either been plugged up or somehow not continuous from the roof into the ground, and under the ground. On that one occasion water had come in but that was corrected. And other than that, it was a dry basement.' "

Dr. Gunther further pointed out that during an inspection of the lot he noted ". . . an area on the bank, oh, maybe four or five feet down the bank, that was new fresh dirt. I asked Mr. Parker what it was. He replied to me that it was an area of erosion. This fresh dirt was located over the line of the sewer, from the house to the main line. No, during my inspection of the house and front portion of the house the sewer line was not visible to my eye. At that time I didn't know it was there. No, Mr. Parker did not make any statement or inform me or offer any information concerning the condition of that sewer line. The sewer line was never discussed. Yes, after I saw this fresh dirt and he made the statement in answer to my wife's question about no water accumulating in the basement, my wife and I decided to purchase the house."

Within five weeks of moving into the newly purchased house, the Gunthers purportedly experienced "difficulty with the sewer line." Dr. Gunther recalled that he ". . . went downstairs to the basement, I don't know what for, but when I got down there I found that there was sewerage coming out of that floor trap or drain. And at that point it was an area, maybe eight or ten feet wide, slowly extending across the basement. I recognized this as sewerage . . ."

Unable to reach the plumber listed on a recommendation list furnished and compiled for plaintiffs by the defendant sellers, the plaintiffs, after thumbing through the phone book,

called Moser Plumbing Comany, who immediately sent employee Sam Bass out to the house. Mr. Bass earlier had done plumbing work at the house for defendants and had been able then to clear the line temporarily. In March, Moser Plumbing returned to the site and replaced the entire sewer line for plaintiffs.

On cross-examination, plaintiff Dr. Gunther admitted that he ". . . never at any time asked Mr. Parker anything as to whether there had been any problem with the sewer line . . . [and he] did not hear . . . [his wife] ask him anything with respect to that."

Sam Bass, testifying for plaintiffs, stated that he, in fact, worked on the house on 8 October 1972 for the defendants, who, of course, then owned the home. Mr. Bass stated that during that October work session he advised the defendants that in his ". . . opinion the line was either broken or collapsed. . . ." Mr. Bass and a Company team returned to the site on 10 October 1972 and dug a small trench in the front of the house as an initial, unsuccessful attempt at locating the sewer line. Mr. Bass stated that his team, after locating the pipe, found it to be flattened, distorted, broken and composed of an inferior product and unsuccessfully recommended replacement with a better and more durable system.

Ostensibly, this initial probe trench was the fresh dirt patch noted by Dr. Gunther during his pre-purchase inspection. Mr. Bass stated that his crew never filled "that hole back up" after their October 1972 visit, but found during his March 1973 visit that the initial probe trench "had been covered up." On cross-examination, Mr. Bass explained that in October defendant William F. Parker told him ". . . he and someone would fill it back in."

Finally, plaintiff Sarah Gunther testified that she recalled

> ". . . asking Mr. Parker some questions as to the condition of the basement. I asked him the question on December 8. As to what question I asked him, I asked him if he'd ever had any water in his basement. His reply was no, then he explained about the downspouts. Yes, I was there when my husband was having a conversation as to a stain on the basement floor in the area of the drain in the basement. Well, just that he asked what the stain was from and Mr. Parker explained about cleaning the air filter. No, during the time that I was in the basement I did not see any evi-

dence of water accumulation or sewer backup on the basement floor. Yes, I went out and saw this area that Mr. Parker said was erosion on the bank, in the front of the house. To the best of my knowledge that was the same area that Mr. Bass was working in, I can't say for sure. Prior to the time that my husband and I agreed to purchase this house from Mr. and Mrs. Parker, neither of those two individuals made any statement as to the sewer line or any defects in the sewer line. No, I did not have any knowledge or reason to believe that the sewer line was defective in any way. Yes, I relied upon the statements the Parkers made in reaching a decision as to whether I wanted to buy the house."

At the close of plaintiffs' evidence defendants moved for a directed verdict. From order allowing the motion, plaintiffs appealed.

Other facts necessary for decision are set out in the opinion.

Morris, Golding, Blue and Phillips, by J. N. Golding, for plaintiff appellants.

Dennis J. Winner for defendant appellees.

MORRIS, Judge.

Plaintiff appellants contend that the trial court erred in granting defendants' motion for a directed verdict. We agree.

Judge Arnold, speaking for our Court in *Freeman v. Development Co.*, 25 N.C. App. 56, 59, 212 S.E. 2d 190 (1975), noted the general rule that "[i]n considering a motion for directed verdict, the court must view the evidence in the light most favorable to the non-moving party, giving to it the benefit of all reasonable inferences and resolving all inconsistencies in its favor. . . . The motion should be granted only if, as a matter of law, the evidence is insufficient to support a verdict for the non-movant." Stated differently, "[i]n determining whether a judgment directing verdict for the defendant may be sustained . . . [a]ll 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." *May v. Mitchell*, 9 N.C. App. 298, 300, 176 S.E. 2d 3 (1970).

Plaintiffs' case touches on various theories of fraud, deceit, concealment and misrepresentation, but ostensibly, mainly rests on the alleged misrepresentation of the basement's ability to withstand water inflows and the alleged concealment of circumstances which would have indicated that a serious problem existed.

[1] The complaint for "[a]ctionable misrepresentation consists of (1) a representation of a material fact, (2) which was false, (3) which was either known to be so by the defendant when it was made or which was made recklessly without any knowledge of its truth, (4) which was intended to induce reliance, and (5) which did induce reasonable reliance, (6) reliance which resulted in injury to plaintiff." *Austin v. Tire Treads, Inc.*, 21 N.C. App. 737, 739, 205 S.E. 2d 615 (1974). The plaintiffs' duty to prove falsity, furthermore, must be ". . . evaluated at the time . . . [the alleged] representation . . . [was] made or when it . . . [was] acted upon by the plaintiff." Id. at 740.

[2] Here plaintiffs' proof tended to meet the aforesaid requirements and indicated that defendants advised plaintiffs, upon inquiry, that the basement was "dry" but for one instance when water entered the homesite from broken or defective water downspouts. Plaintiffs' evidence, however, contradicted defendants' alleged representations, showing that defendants had engaged plumbers to render temporary repairs to a hopelessly defective sewer line system which had created a serious backflow into the basement. Plaintiffs also presented evidence tending to show that the plumbers' initial probe trench for the sewer line was described to plaintiffs as merely an area suffering from soil erosion. Finally, plaintiffs presented uncontradicted evidence that defendants' list of recommended repairmen omitted the name of the very plumbing company which had responded to defendants' initial sewer problem several months prior to the sale.

Taken in the light most favorable to plaintiffs, this evidence warranted a denial of defendants' motion for directed verdict. See: *Jenkins v. Hawthorne*, 269 N.C. 672, 153 S.E. 2d 339 (1967).

We are aware of this Court's opinion in *Goff v. Realty and Insurance Co.*, 21 N.C. App. 25, 203 S.E. 2d 65 (1974), cert. denied 285 N.C. 373 (1974), wherein the plaintiff buyer of a

home sued the seller for fraud when sewage from other homes standing on higher ground flowed into plaintiffs' property. Here, unlike *Goff*, the defendants, by failing to disclose upon inquiry the true nature of the dirt patch in the front of the house and in stating that the basement basically was "dry," created a situation such that a jury could find that they had "resorted to . . . artifice which was calculated to induce plaintiffs to forego investigation." Id. at 30.

The defendants' alleged actions, representations, omissions and concealments raise important questions of fact and infer strongly that defendants purposely misled plaintiffs. Every seller wants to present his property in the best possible light, but that must not be confused with the kind of behavior alleged by plaintiffs and inferred by their evidence. This is not technically a lawsuit for concealment or misrepresentation of a defective sewer system; it is an action for misrepresentation of a basement's condition and the related propriety of defendant's purported behavior. As to this problem, plaintiffs have presented sufficient evidence, in our opinion, to have the question submitted to the jury.

Reversed.

Judges HEDRICK and ARNOLD concur.

DAWSON INDUSTRIES, INC. v. GODLEY CONSTRUCTION CO., INC.

No. 7526SC920

(Filed 5 May 1976)

1. Contracts § 27— roof construction — no breach of contract

In this action to recover the cost of replacing a defective roof installed by defendant contractor on a building it constructed for defendant, the evidence supported the court's findings that the roof defects would not have occurred if the base sheet of the roofing material had been nailed to the roof deck rather than being laminated thereto, that leaks in the roof were caused by normal expansion of the building which caused a pulling apart of the roofing material from the roof deck, and that construction of the building was done in accordance with the plans and specifications as required by the contract between the parties, and the court's findings supported its conclusion that defendant constructed the building in accordance with the contract between the parties and has not breached said contract.

2. **Appeal and Error § 57— unsupported findings — unchallenged findings sufficient to support conclusions**

When findings which are unchallenged or are supported by competent evidence are sufficient to support the judgment, the judgment will not be disturbed because another finding which does not affect the conclusion is not supported by the evidence.

3. **Sales § 6— implied warranty of livability — inapplicability to commercial structure**

There is no implied warranty of livability applicable to a commercial structure.

APPEAL by plaintiff from *Falls, Judge.* Judgment entered 25 June 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 March 1976.

In this action, instituted 5 February 1971, plaintiff seeks to recover $48,000 which it alleges defendant should pay to replace a defective roof defendant installed on plaintiff's building.

The complaint alleges that in September 1967 plaintiff, as owner, and defendant, as general contractor, entered into a contract whereby defendant agreed to erect a building on plaintiff's land in Dawson, Georgia; that defendant failed to construct the roof in conformity with plans and specifications for the building; and that as a result of the defective construction the ". . . roof leaks excessively whenever it rains."

Defendant filed answer in which it admitted entering into a contract for the construction of the building but denied any breach of the contract. In an amendment to the answer, filed 24 January 1974, defendant alleges that on 5 February 1971 plaintiff agreed that if defendant would make certain repairs to the roof that "the dispute . . . would be ended"; that pursuant thereto defendant caused the specified repairs to be made; and that the performance of said work constituted an accord and satisfaction of all disputes between the parties.

Jury trial was waived and, following a trial at which both parties presented evidence, the court entered judgment providing in pertinent part as follows:

FINDINGS OF FACT

1. That the plaintiff and defendant entered into a contract on or about September 22, 1967, in which the defendant agreed to construct a building in Dawson, Georgia, for

the plaintiff according to plans and specifications approved by the plaintiff's architect.

2. That the defendant proceeded to construct the building according to said plans and specifications and delivery of the completed building was tendered to the plaintiff in April 1968 at which time the plaintiff took possession of said building. That during the construction of said building by the defendant, the plaintiff's architect was on the job site from time to time to check on the work in progress.

3. That installation of the roof on the building in question was done by the method of laminating the base sheet of the roof to the roof deck rather than by nailing the base sheet, a method of application which was recommended by the manufacturer of the roofing material.

4. That Section 48 of Division 1 of the General Conditions made a part of the specifications for the construction of said building provides that, "All manufactured articles, materials and equipment shall be applied, installed, connected, erected, used, cleaned and conditioned as directed by the manufacturer, unless herein specified to the contrary."

5. That the defendant questioned the method of application of laminating the base sheet of the roof to the roof deck and was told to proceed with that method by the plaintiff's architect after he had inspected the roof and considered such method of application.

6. That leaks in the roof in question were caused by normal expansion of the building which in turn caused a pulling apart of the roofing material from the roof deck, which would not have occurred had the base sheet of the roofing material been nailed to the roof deck rather than laminated. The warranties in the contract between the parties hereto provided that the defendant warranted only that the workmanship and materials would be free from fault and defects.

7. That there is no evidence in the record in this matter tending to show that any workmanship or materials supplied by the defendant were faulty or defective.

EXCEPTION NO. 2

8. That the construction of the building in question by the defendant for the plaintiff was done in accordance with the contract between the parties hereto and in accordance with the plans and specifications as required by said contract.

EXCEPTION NO. 3

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW:

1. That the defendant constructed the building in question in strict accordance with the contract between the parties hereto and in strict accordance with the plans and specifications and has not breached its contract with the plaintiff.

EXCEPTION NO. 4

WHEREBY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover nothing of the defendant and that the plaintiff's claim be dismissed, and that the cost of this action be taxed by the Clerk against the Plaintiff.

Plaintiff appealed.

Fairley, Hamrick, Monteith & Cobb, by Laurence A. Cobb, for plaintiff appellant.

Ervin, Kornfeld & MacNeill, by Winfred R. Ervin and John C. MacNeill, Jr., for defendant appellee.

BRITT, Judge.

Plaintiff states its assignment of error as follows:

"The Court's finding that the roof defects would not have occurred if the base sheet of the roofing material had been nailed to the roof, that there is no evidence to show any faulty or defective workmanship of materials, and that the construction of the building was done in accordance with the Contract and its conclusion that the building was constructed in strict accordance with the Contract and the Plans and Specifications and that the Defendant has not breached its contract with the Plaintiff.

"Exception No. 1 (R p 87); Exception No. 2 (R p 87); Exception No. 3 (R p 87); Exception No. 4 (R p 87)."

Our review in this case is confined to a consideration of the findings of fact and conclusion of law set out in plaintiff's assignment of error. N.C.R. App. P. 10. That being true, we will not consider questions raised by plaintiff unrelated to the assignment.

Three of plaintiff's exceptions relate to findings of fact 6, 7 and 8 or portions thereof. It is well settled that findings of fact by the trial court are conclusive when supported by competent evidence. Strong's N. C. Index 3d, Appeal and Error, § 57.2. We proceed then to determine if the challenged findings are supported by competent evidence.

[1] First, plaintiff contends the court erred in that part of finding of fact 6 finding that the roof defects would not have occurred if the base sheet of the roofing material had been nailed to the roof. Plaintiff presented as its witness Thomas M. Driggers, a consulting engineer from Albany, Georgia, whom the court found to be an expert in construction and design. Mr. Driggers testified that in his opinion the root cause of the leaking roof was expansion of the structural steel, the building having been erected in the winter when the steel was at its most contracted position. He further testified that the expansion could have been avoided through the use of expansion joints but they were not required by the plans or specifications. Later on he testified (R. p. 32):

> "The roofing material in this case was mopped on. It could have been nailed. Nailing would have retarded movement of the roofing. When the building moved, it would have been able to move somewhat without breaking. . . .
>
> "In my opinion, nailing the roof materials would have minimized the problem. I would say that the base sheet would be able to move somewhat with the desk (sic [deck]) as it moved when it is nailed, rather than being glued directly to it, as the crack occurs and it pulls apart."

We hold that the evidence supports the finding that the leaks would not have occurred had the base sheet of the roofing material been nailed to the roof deck rather than laminated.

Plaintiff's next contention relates to finding of fact 7, "[t]hat there is no evidence in the record in this matter tending to show that any workmanship or materials supplied by the defendant were faulty or defective."

[2] A careful review of the record discloses that while there might be some evidence tending to show faulty workmanship by defendant, this is of no avail to plaintiff. One of the crucial findings by the court is that part of finding 6 "[t]hat leaks in the roof in question were caused by normal expansion of the building which in turn caused a pulling apart of the roofing material from the roof deck . . ."; plaintiff has not challenged that finding in its assignment of error. When findings that are unchallenged, or are supported by competent evidence, are sufficient to support the judgment, the judgment will not be disturbed because another finding, which does not affect the conclusion, is not supported by evidence. 1 Strong's N. C. Index 3d, Appeal and Error, § 57.2.

We hold that while finding of fact 7 might be deficient, the error does not entitle plaintiff to a new trial since other findings, which are supported by the evidence or are not challenged, are sufficient to support the judgment.

Plaintiff contends the court erred in its finding of fact No. 8 "[t]hat the construction of the building in question by the defendant for the plaintiff was done in accordance with the contract between the parties hereto and in accordance with the plans and specifications as required by said contract."

The plans and specifications constitute the heart of the contract between the parties. Plaintiff's witness Driggers testified (R. p. 30):

> "Based upon my examination of these (contract) documents and my inspection of the building my opinion is that it was built very similar to the way the drawings are drawn up. The details are not maybe as clear as would normally be done, but in general, I would say yes it was constructed fully in accordance with the Plans and Specifications."

Plaintiff's witness J. K. Bost testified (R. p. 64): "In my opinion the building was constructed according to the Plans and Specifications."

We hold that finding 8 is fully supported by the evidence.

Finally, plaintiff contends the court erred in concluding that "defendant constructed the building in question in strict accordance with the contract between the parties hereto and in strict accordance with the plans and specifications and has not breached its contract with the plaintiff."

[3] Plaintiff argues that the court in concluding that defendant did not breach its contract with plaintiff did not take into consideration the question of implied warranty. Assuming, *arguendo,* that the question is properly presented to this court, we do not think that any implied warranty of livability is applicable to work on a commercial structure.

The court found, and plaintiff did not preserve an exception to the finding, that the contract between the parties provided that "the defendant warranted only that the workmanship and materials would be free from fault and defects." While recognizing that the doctrine of *caveat emptor* has long been the rule in North Carolina, plaintiff insists that our Supreme Court relaxed the rule in *Hartley v. Ballou,* 286 N.C. 51, 209 S.E. 2d 776 (1974), as applied to purchasers of new buildings. Even if North Carolina law were applicable to the instant case, and it is not, *Hartley* is readily distinguishable as the rule declared in that case applies only to contracts for the sale of a new dwelling when the vendor is in the business of building dwellings.

The contract between the parties here specifically provides that "the law of the place where the Project is located" shall govern, therefore, Georgia law must be applied to the contract. Plaintiff has not cited, and our research has failed to reveal, any Georgia case that has extended the rule of implied warranties even as far as *Hartley v. Ballou, supra.*

In *Cannon v. Hunt,* 116 Ga. 452, 42 S.E. 734 (1902), the plaintiff owner instituted an action against the defendant builder based on breach of a construction contract because the roof of the building in question was leaking; the court held that the leaks were due to an improper method of applying the roofing material but that the method of application was within the contract specifications and did not constitute a breach of contract since the builder was not to be held accountable for unsatisfactory results.

In *Batson-Cook Co. v. Pearce Roofing Co.,* 124 Ga. App. 835, 186 S.E. 2d 358 (1971), the court found no implied warranty on behalf of the builder that a roof would be waterproof when the builder had fully complied with the specifications recommended by the manufacturer of the roofing materials specified in the contract.

We hold that the conclusion of law challenged by plaintiff is fully supported by valid findings of fact.

For the reasons stated, we conclude that plaintiff has failed to show prejudicial error, therefore, the judgment appealed from is

Affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. HORACE PADGETT

No. 755SC892

(Filed 5 May 1976)

1. Criminal Law § 15— motion for change of venue — pre-trial publicity

The trial court did not err in the denial of defendant's motion for a change of venue of his armed robbery trial because of pre-trial publicity where affidavits presented by defendant do not indicate that the pre-trial publicity was inflammatory or suggested defendant's guilt, and the newspaper articles were ordinary factual reports of the robbery and defendant's arrest for the crime.

2. Criminal Law § 7— entrapment

Entrapment is a defense and the prosecution is barred only when it is established that the criminal intent started in the mind of the officer or agent of the State and by him was implanted in the innocent mind of the accused, luring him into commission of an offense which he would not otherwise have committed.

3. Criminal Law § 121— entrapment — insufficiency of evidence

The evidence in an armed robbery case was insufficient to require submission of the defense of entrapment to the jury where it tended to show that a confidential informant told a police officer that a Winn-Dixie store would be robbed that day, the officer told the informant that if he participated in the robbery he would be charged with the robbery, the informant and several Winn-Dixie stores were placed under surveillance, officers saw defendant enter and rob a Winn-Dixie store while the informant waited in the getaway car, and officers thereafter arrested both defendant and the informant.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 19 June 1975. Heard in the Court of Appeals 19 February 1976.

Defendant was charged in a bill of indictment with the felony of armed robbery of the Long Leaf Mall Winn-Dixie Store in Wilmington on 9 February 1975. One Jack Bentley was charged in a separate bill of indictment with the same offense. Upon motion of defendant Padgett, Padgett was tried separately from his co-defendant Bentley.

The State's evidence tends to show the following: On 9 February 1975 police officers of the City of Wilmington received information from Jack Bentley, a confidential informer for one of the officers of the Inter-Agency Bureau of Narcotics, that a Winn-Dixie Store would be robbed that day. As a result of this information, the several Winn-Dixie Stores in Wilmington were placed under police surveillance. At the time the information was received, the informer, Jack Bentley, was advised that if he participated in the robbery, he would be arrested and charged with robbery.

Jack Bentley was also placed under surveillance. Bentley drove to Horace Padgett's residence where Padgett joined him in Bentley's automobile. The police followed the car as Bentley drove through the Long Leaf Mall parking lot and paused several times in front of the Winn-Dixie Store. Bentley then drove out of town where he stopped on successive occasions at two convenience stores. He then drove back into town to the Long Leaf Mall parking lot. Finally Bentley stopped the car directly in front of the exit door of the Winn-Dixie Store. Horace Padgett went into the store with a sawed-off shotgun. Padgett held the shotgun to the head of one of the employees, Robert Finley, as he ordered the manager to take the money from the cash registers and place it in a paper bag. The manager knew and recognized Horace Padgett. At about this time Bentley blew the horn of his automobile, and Padgett fled through the store's exit door and to the car. Police called for Padgett to halt, but Padgett dropped the shotgun and jumped into Bentley's car with the bag of money. As Bentley drove away, the police fired shotguns and pistols. Bentley was hit by shotgun pellets and drove the car into a ditch a short distance from the parking lot. Bentley was apprehended in the car. Padgett ran from the car with the bag of money but was found in a short time hiding nearby in heavy bushes.

Defendant's evidence tends to show the following: Defendant started drinking on Saturday, 8 February 1975, and drank steadily until the afternoon of Sunday, 9 February 1975. On

Sunday afternoon Bentley came to Padgett's residence at approximately 2:20 p.m. Padgett obtained a sawed-off shotgun from his garage and put it in Bentley's car. A few minutes later Bentley and Padgett left in Bentley's automobile. Padgett was so drunk that he did not know what he was doing. When Bentley stopped in front of the Winn-Dixie Store, Padgett put a stocking over his head and walked into the store with the shotgun, but he didn't know what he was doing. Padgett saw the manager of the store whom he had known all his life, and he was handed a brown paper bag. He ran from the store, and when he heard a shotgun fire, he dropped the gun he was carrying and dove into the car. He did not realize what was going on. When the car ran into the ditch, Padgett was thrown out of the door, and he ran. He thought the police were trying to kill him. He hid in the bushes and surrendered shortly thereafter.

From a verdict of guilty as charged and judgment of imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, Jr., for the State.

Calder & Stanley, by Richard L. Stanley, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that denial of his motion for a change of venue because of pre-trial publicity was error for which he is entitled to a new trial.

A motion for removal to an adjacent county or for the selection of a jury from an adjacent county on the grounds of unfavorable pre-trial publicity is addressed to the sound discretion of the trial court. The burden of proof on this motion is on the defendant. *State v. Brown* and *State v. Maddox* and *State v. Phillips,* 13 N.C. App. 261, 185 S.E. 2d 471 (1971), cert. denied and app. dism'd 280 N.C. 723, 724 (1972). Defendant offered the affidavits of nine residents of New Hanover County, each of whom opined that it would be difficult to select jurors from New Hanover County who had not heard the case discussed and formulated an opinion about the case. Defendant also offered copies of newspaper articles in support of his motion. The judge reviewed these affidavits and newspaper articles and denied defendant's motion.

None of the affidavits indicates that the pre-trial publicity was inflammatory towards defendant or suggested defendant's guilt. From a review of the newspaper articles, it appears that they were ordinary factual reports of a robbery, a confrontation with police, the arrest of defendant and Bentley, the charges against them, and their release on bond. Later articles reported additional arrests of defendant and Bentley and additional charges against them. But these articles were normal news reporting which contained no statements of evidence to be used against defendant and were not inflammatory. The record in this case fails to show that any juror objectionable to defendant was permitted to sit on the trial panel or that defendant exhausted his peremptory challenges. Defendant has failed to show an abuse of discretion by the trial judge. This assignment of error is overruled.

Defendant's assignments of error 3, 4, 5, 6, 9, and 11 are addressed to the rulings of the trial judge upon defendant's objections to evidence offered by the State. We have reviewed each of these and find them to be wholly without merit. A seriatim discussion would serve no useful purpose. Each of these assignments of error is overruled.

Defendant's assignments of error 15 and 16 are addressed to the denial by the trial judge of defendant's motions to strike "unresponsive" answers by two State's witnesses on cross-examination. It seems clear to us that the nature of the cross-examination called for the answers given. But, if defendant were correct in labeling the answers unresponsive, they were not prejudicial to defendant. These assignments of error are overruled.

Defendant's assignments of error 17, 19, and 20 are addressed to rulings of the trial judge upon defendant's objections to evidence offered by the State. We have reviewed each of these and find them to be wholly without merit. These assignments of error are overruled.

Most of the defendant's remaining assignments of error are related to what he perceived to be efforts to show a defense of entrapment.

[2] "It is, of course, elementary that the State has no business fostering crime and that it is no part of the duty of law enforcement officers to incite crime for the sole purpose of punishing it. But a 'clear distinction is to be drawn between

inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception.' *State v. Burnette,* 242 N.C. 164, 169, 87 S.E. 2d 191, 194 (1955). The determinant is the point of origin of the criminal intent. Entrapment is a defense and prosecution is barred only when it is established that the criminal intent started in the mind of the officer or agent of the State and by him was implanted in the innocent mind of the accused, luring him into commission of an offense which he would not otherwise have committed. In this State the burden is on the defendant to establish the defense of entrapment to the satisfaction of the jury. (Citations omitted.)" *State v. Salame,* 24 N.C. App. 1, 210 S.E. 2d 77 (1974). The fact that officers or agents of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution, nor will the mere fact of deceit defeat a prosecution, "for there are circumstances when the use of deceit is the only practicable law enforcement technique available." *United States v. Russell,* 411 U.S. 423, 36 L.Ed. 2d 366, 93 S.Ct. 1637 (1973); *Hampton v. U. S.,* 44 U.S.L.W. 4542 (Apr. 27, 1976).

During the cross-examination of the Bureau of Narcotics officer for whom Jack Bentley had acted as an informer, defendant posed the following questions:

> "Did you make a statement to any of the personnel of the court and particularly Judge Cowper that the Police Department was holding an innocent man in Jack Bentley?"

The State's objection was sustained.

> "Immediately after this armed robbery out there what was the disposition of Jack Bentley's case?"

The State's objection was sustained. Thereafter the witness was permitted to answer the questions out of the hearing of the jury. The answer to the first question was: "No." The answer to the second question was: "The armed robbery warrant against Jack Bentley was dismissed."

Obviously defendant was not prejudiced by the trial court's ruling on the first question. The answer could not have been helpful to defendant's defense.

With respect to the second question, the defendant, the district attorney, the witness, and the judge already knew Jack Bentley was under indictment for the armed robbery. In fact, the State proposed to try defendant and Bentley jointly, but defendant successfully moved for a severance of Bentley's trial. The question propounded and the answer given were irrelevant because Bentley was actually under indictment at the time. It is clear from the evidence that Bentley was told by the officers prior to the robbery that if he (Bentley) participated in the robbery, he would be arrested, charged, and tried. One of the officers testified that Bentley was acting as an informer for him at the time of the robbery because of a narcotics violation for which the officer had arrested Bentley. If he had been permitted to do so, this officer would have testified that after the robbery the narcotics violation warrant was *nol prossed*. However, this testimony would have been irrelevant and collateral evidence. The officer had already testified that Bentley was told he would not be granted immunity if he participated in the armed robbery. There was also testimony that no police officer had instructed Bentley to participate in the armed robbery or had advised Bentley upon how to conduct the robbery if he did participate. Indeed, there was simply no showing of entrapment by the State's evidence either on direct or cross-examination.

When the defendant testified, he was not permitted to say what Bentley said to him or what Bentley thought. This restriction was, of course, proper. Bentley was not a party. His trial had been severed at defendant's request. Bentley was not a witness for the State nor for the defendant, albeit one of the grounds asserted by defendant in his motion for severance was that defendant wanted to call Bentley as a defense witness.

[3] It seems that if defendant had been in fact entrapped, Bentley's testimony would have been crucial. Defendant no doubt is aware of what Bentley's testimony would have disclosed. If it would have disclosed entrapment, no doubt defendant would have used his subpoena power to obtain Bentley's testimony. Defendant cannot make out a case of entrapment on mere supposition. In our opinion there was no showing of entrapment as a matter of law, nor was there a showing of entrapment sufficient to require submission of that defense to the jury. As pointed out in the summary of evidence, the defendant's main defense was intoxication, and this defense was submitted to the jury.

We have reviewed all of defendant's assignments of error, and they are overruled. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

IN THE MATTER OF STEVEN RANDALL STOKES

No. 7510DC924

(Filed 5 May 1976)

1. **Infants § 10— delinquent child — age of child sufficiently shown**

In a hearing upon a petition alleging that respondent was a delinquent child in that he murdered a named person, evidence was sufficient to show that respondent was a child less than sixteen years of age where such evidence consisted of a prior order of the juvenile court, dated 18 months prior to the present hearing, which stated that defendant was at that time twelve years of age.

2. **Infants § 10— delinquent child — murder — possession of intent to commit**

Even if the presumption that a person between the ages of seven and fourteen is rebuttably presumed incapable of committing a criminal offense is relevant to proceedings in the juvenile court, there was ample evidence in this proceeding from which the trier of facts could find that respondent possessed the required intent to commit the murder alleged.

3. **Infants § 10— delinquent child — murder in perpetration of robbery — sufficiency of evidence**

In a hearing upon a petition alleging that respondent was a delinquent child in that he murdered a named person, evidence was sufficient to show respondent's participation in the murder where such evidence tended to show that the victim was killed during the course of a robbery in which respondent was an active participant.

4. **Criminal Law § 75— juvenile respondent — statements to officers — admissibility**

Written and oral statements made by respondent to police officers were admissible where they were made understandingly, freely, voluntarily, and without coercion or intimidation, and where respondent's parents were present throughout the questioning.

APPEAL by juvenile respondent from *Bason, Judge.* Order entered 15 September 1975 in District Court, WAKE County. Heard in the Court of Appeals 9 March 1976.

On 6 August 1975, a juvenile petition was filed alleging that respondent "is a delinquent child as defined by G.S. 7A-278(2) in that at and in the county named above and on or about the 5th day of August 1975, the child did unlawfully, wilfully and feloniously and of his malice aforethought kill and murder Euphie D. Adams. In violation of G.S. 14-17."

After the hearing on the petition, the court entered an order wherein it found facts and concluded that respondent had committed the act alleged in the petition and was a delinquent child. The court also entered an order placing respondent in the custody of the Department of Human Resources, Division of Youth Services for an indefinite period of time not to extend beyond his 18th birthday. Respondent, through court appointed counsel, gave notice of appeal.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Tharrington, Smith & Hargrove, by Roger W. Smith, for respondent appellant.

VAUGHN, Judge.

Counsel for respondent appellant has appropriately grouped his four assignments of error into two arguments.

The first argument goes to the sufficiency of the evidence to support the court's finding that respondent is a delinquent child.

The State offered evidence tending to show the following:

On 6 August 1975, at about 10:00 a.m., the body of Mrs. Euphie Adams was found in the yard of her home on Six Forks Road. The Medical Examiner was called to the scene and determined that Mrs. Adams had been dead about ten or twelve hours. At the time of her death, Mrs. Adams was 80 years old and weighed 118 pounds. She had been badly beaten about the head, neck and chest. Her injuries included fractures of the left mandible, the left hyoid bone and thirteen ribs. There had been considerable bleeding from wounds on her head.

The investigating officers found a six cell flashlight near a storm drain. Some ashes and a piece of burned wood were found in the storm drain. The flashlight was bent. There was blood

on the flashlight. Blood taken from the body of Mrs. Adams and that taken from the flashlight were of blood group "O."

During the afternoon of the day of the killing, investigating officers went to the home where respondent, a 13-year-old boy, lived. Respondent's parents and several of his brothers and sisters were present. Respondent, his brothers and sisters were informed that they were going to be charged with murder in connection with Mrs. Adams' death.

In the light most favorable to the State, respondent gave the officers the following account of the events surrounding the killing.

He, his sisters Linda and Kathy and his brother Tim decided to go to Mrs. Adams' home on the pretext of asking her for flowers but for the real purpose of robbing her. Respondent carried a sheet and flashlight. When they arrived, respondent asked Mrs. Adams for some flowers. He and his sister, Linda, got Mrs. Adams to the side of her house and respondent's brother, Tim, threw the sheet over Mrs. Adams. After the robbery they burned the sheet. Several of the children returned home. Later, respondent's sister, Kathy, told them that she had killed Mrs. Adams. Respondent told the officers that he and the others took a rifle, some money and a check from the Adams' home. A ten dollar bill was recovered from under a couch cushion in respondent's home. A United States Government check was also discovered in the home.

[1] Respondent first argues that there is no evidence that respondent is a "child" less than sixteen years of age. During that part of the hearing devoted to the admissibility of certain statements made by respondent, a prior order of the juvenile court adjudging that respondent was a delinquent was introduced by respondent. That order, dated 13 March 1974, determined that respondent, on that date, was 12 years of age. Moreover, the juvenile court can take judicial notice of its own records to determine whether it has jurisdiction over the alleged delinquent.

[2] Respondent next argues that, if there was evidence that respondent was 13 years of age, there was no evidence that respondent was capable of forming the mental intent to commit the criminal offense alleged. Citing *State v. Yeargan,* 117 N.C. 706, 23 S.E. 153 and other cases involving criminal prosecutions, he argues that a person between the ages of seven and

fourteen years of age is rebuttably presumed incapable of committing a criminal offense. Even if we assume that the statements found in those cases, involving the prosecution of children in the criminal courts, are relevant to proceedings in the juvenile court, there is ample evidence in the case before us from which the trier of the facts could find the required intent.

[3] Respondent's final point in his first argument goes to the alleged insufficiency of the evidence to show his participation in the murder.

We have already set out our summary of the evidence adduced at the juvenile hearing. That evidence is sufficient to support the inferences that Mrs. Adams was killed in the course of a robbery, in which respondent was an active participant, and supports the finding of the trial judge.

[4] Respondent's remaining assignments of error are grouped in his argument concerning the admissibility of written and oral statements made by him.

The "totality" of the circumstances under which the statements were made are disclosed by the judge's recital of his findings:

> "On the morning of August 6, 1975, between 9:00 a.m. and 10:00 a.m., Raleigh Police Detectives Brinson and Pratt went to the residence of Mrs. Euphie D. Adams, Six Forks Road, Raleigh, where they found the body of Mrs. Adams lying on the ground approximately ten feet from her house. The house was approximately one hundred feet from the road.
>
> Subsequently that day Detective Brinson was at the home of the respondent, Steven Randall Stokes, on two occasions. On the first occasion, between 1:00 p.m. and 3:00 p.m., the detective saw the respondent's mother and father and some brothers and sisters. The detective had no conversation with the respondent at that time.
>
> Several hours later, Detective Brinson was at the Stokes' residence again where the detective saw the respondent along with his mother, two older brothers, and an older sister. Raleigh Police Detective Keeter and Sergeant R. D. Williams were also there.

At this time Detective Brinson learned the identity of the respondent, his brother Timothy, and sister Linda and informed them in the presence of their mother that they were going to be charged with murder in connection with the death of Mrs. Adams.

Detective Brinson then took the respondent with his brother Timothy and his sister Linda to the Raleigh Police Department.

The respondent and his brother Timothy were taken upstairs to the Juvenile Division while the sister Linda was taken downstairs to the area for adults.

On *voir dire* relating to the admissibility of statements made by the respondent, the Court finds the following facts:

At the Juvenile Division of the Raleigh Police Department, the respondent was placed in a small room alone, behind a closed door, and was asked no questions until his parents arrived. On the arrival of the respondent's parents, approximately forty-five minutes or one hour later, they joined the respondent in the small room for questioning along with Detectives Brinson and Keeter.

Meanwhile, respondent's older brother Timothy was in another small room, separated from the respondent's room by a central room having two-way mirrors permitting both boys to be viewed from the central room.

At the time of this questioning of the respondent, both of his parents were present. The respondent had not been previously questioned.

Before this questioning began, Detective Brinson advised the respondent and his parents that he would have to advise them of their rights and that they must understand these rights.

The detective gave the respondent and his parents a written copy of the statement of rights that included a waiver of rights and asked them to listen carefully and to read along with him while he read from the written statement. The detective placed the respondent in a position where he could read along with the detective.

The detective read the complete page which was as follows:

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent and not make any statement.

Anything you say can and will be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him or anyone else with you during questioning.

If you cannot afford a lawyer, one will be appointed for you by the Court before questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me by anyone. I have read or had read to me this statement of my rights and the above Waiver of Rights, and I understand what my rights are.

The entire period that the detective spent in explaining the rights and reading the rights was approximately five minutes.

Detective Brinson talked with the parents at that time; they appeared normal, although they were slightly upset.

At the time of the reading of the rights, Detective Brinson did not specifically tell the respondent what a lawyer was. There was no conversation as to whether the respondent had the money to hire a lawyer.

Neither a representative of the Wake County Department of Social Services nor a representative from the District Court was present.

Following the reading of the rights, the detective asked the respondent if he understood his rights and if he would talk to the detective without a lawyer present. The respondent said that he would, giving an affirmative answer, as did his father. That reply was the respondent's only comment. No questions were asked by either the respondent or his parents.

Following the reading of the rights and the reading of the waiver form and following the affirmative answer of the respondent that he would talk to the detective without a lawyer present, respondent and his parents signed the Waiver of Rights. The date and time was August 6, 1975, 5:37 p.m. The signatures were witnessed by Detective Brinson and Keeter.

At the time of the respondent's affirmative answer as to talking without a lawyer, he had been told again of the case that the detective was investigating and that the detective wanted the respondent to talk to him about that case.

All of the foregoing *voir dire* findings were made from the examination of the witness, Brinson. The respondent did not testify or offer evidence on *voir dire* except to place into evidence a portion of the respondent's Juvenile Court file consisting of an Adjudicatory Order and a Dispositional Order dated March 13, 1974, wherein respondent was found to be delinquent and placed in the custody of the Wake County Department of Social Services. The Adjudicatory Order included a finding by the Court that as of March 13, 1974, the respondent was twelve years of age. It is from that 1974 finding of the Court that the Court now finds the respondent to be thirteen years of age at the time of his interrogation on August 6, 1975, and within the jurisdiction of the court at this juvenile hearing. There was no testimony as to the respondent's age in the evidence of the petitioner.

At the conclusion of the questions and argument on *voir dire,* the Court determined that the respondent freely, understandingly, voluntarily, and intelligently answered

questions for Detective Brinson beginning at 5:37 p.m. on August 6, 1975, without undue influence, coercion or duress, and without any promise, threat, reward, or hope of reward; that the respondent had been fully advised of his constitutional rights and understood his rights; that after being advised of his rights, he knowingly and intelligently waived his rights to counsel at the time of interrogation, making a statement to Detective Brinson.

It was therefore adjudged that the respondent's answer and statement to Detective Brinson are competent and can be admitted into evidence."

The judge made similar findings in connection with a written statement by respondent on the same day.

We have set the judge's findings out in detail. On their face, we hold that they refute respondent's contention that the juvenile's statements were inadmissible because:

"They were not made voluntarily and with understanding because (A) Respondent was not of sufficient age to understand the import of his statements, (B) he was being illegally detained, (C) his legal guardian was not present, (D) he was in circumstances fraught with intimidation, (E) he was not of sufficient intelligence to understand the import of his statements, and (F) he spoke reluctantly."

It is hard to imagine that officers, charged with the duty of identifying the perpetrators of a horrible crime could have done more to insure that any statement made by respondent was made voluntarily and with full understanding of all of his legal rights.

We have carefully reviewed the proceeding in the juvenile court. There, and on this appeal, the juvenile was diligently represented by able counsel. We find no error in the proceedings in the juvenile court. The order of that court is affirmed.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES ASBURY

No. 7527SC819

(Filed 5 May 1976)

1. **Criminal Law § 126— polling of jury — reluctant assent to verdict — subsequent free assent — verdict not defective**

Where a juror, during the polling of the jury, indicates that his consent to the verdict was given reluctantly, such verdict is not defective if it appears that the juror ultimately freely assents to the verdict.

2. **Criminal Law § 126— polling the jury — idle questions of juror — response of judge not prejudicial**

Where one juror, during the polling of the jury, asked why there were three questions and asked what the differences in the questions were, the trial court's response to the juror's inquiry that all three questions would call for the same response was not prejudicial to defendant, since it appeared that the juror's questions stemmed from idle curiosity, and the juror subsequently unequivocally indicated his assent to the verdict.

Judge CLARK dissenting.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 14 May 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 10 February 1976.

Defendant was indicted for the crime of armed robbery. Upon the call of the case and on motion of the State, the defendant's case was consolidated for trial with that of another defendant allegedly involved in the same robbery.

In the light most favorable to the State, the evidence tended to show that at about 4:15 p.m. on 14 January 1975, defendant and Edward Conner (the defendant in the companion case) went to the Fairview Grocery and Service in Gastonia. The two men entered the store. Defendant went to the candy counter and Conner went to the ice cream box. Defendant asked the proprietor, Raymond Robinson, for a certain named candy bar which was located underneath the counter. Robinson reached down to get the merchandise and as he stood up he saw the defendant pointing a small gun, thought to be a .22 caliber pistol, directly at him. Defendant announced that this was a holdup and, following his demand for money, Robinson directed him to the cash register. The defendant instructed Robinson to open the cash register and called for his companion to come and

search the man. Robinson was relieved of his pocketbook and some $25.00 in cash from the register while being held at gunpoint. Robinson was then directed to the other side of the store, told to face the wall and the two men ran to an automobile they had parked outside the store near the gas pumps. Robinson wrote down the license plate number as the men drove off.

Both defendants were identified in court by Robinson as the same two individuals who had robbed him on 14 January 1975. The court, following a *voir dire* examination found as a matter of law that "the in-court identification of the defendant Willie James Asbury, is based upon the witness's recollection of the defendant at the time of the robbery on the 14th of January 1975; and that said identification has not been unduly or improperly suggested by the conduct of the investigating officers when investigating the suspected getaway car some four to six weeks after the robbery on the 14th day of January 1975."

Thereafter, the State called Gloria Glenn, who testified that she was a resident of Gastonia, North Carolina, and knew Conner by the nickname "Tanker." She further testified that in January of 1975, she owned a 1964 Chevrolet and that the license plate number on that automobile was identical to the one on the car used by the holdup men and taken by the proprietor at the time of the robbery. Conner had agreed to put another motor in this vehicle and had taken the car sometime in November of 1974 and did not return it until late January, 1975. In November, 1974, the car was not running and the tag referred to above was in the trunk of the car during that period of time.

The defendant's evidence, including the testimony of Conner, tended to show that on 14 January 1975 Asbury and Conner were together at the home of Conner's sister between the hours of 2:30 p.m. and 5:00 p.m. Thereafter, they went directly to the home of Conner's cousin some half block away and remained there between the hours of 5:00 p.m. and 2:00 a.m., 15 January 1975. The defendants did not leave this residence at any time during this nine hour period. Conner's cousin also testified that defendant Conner had been at her house between the hours of 10:00 a.m. and 1:30 p.m. on 14 January 1975 and left to pick up defendant Asbury from his job.

The city's personnel director testified that defendant Asbury was a city employee in the sanitation department and that

his records indicated that defendant Asbury had reported for work on the morning of 14 January 1975 although these records apparently did not indicate the time of his arrival or the time of his departure. He said that usually the men would come to work at approximately 7:00 a.m., complete the designated work and leave when such work was completed. Generally the work could be finished by 1:00 p.m. or 2:00 p.m.

On cross-examination, Conner stated that he had possession of the car belonging to the witness Glenn sometime in November until January for the purpose of repairs, but he had no particular knowledge or interest in the license plate. He was earning a living doing mechanic work and did not loan the tag to anyone nor did he give anyone permission to use the tag.

Defendant Asbury did not testify and upon the jury's return of guilty verdicts in both cases, the defendants moved for a poll of the jury.

From the imposition of an active sentence, this defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Robert P. Gruber and Associate Attorney Jesse C. Brake, for the State.

Roberts and Caldwell, P.A., by Geoffrey A. Planner, for defendant appellant.

VAUGHN, Judge.

The defendant brings forward only one assignment of error. It concerns things that occurred during the jury poll.

Specifically, the defendant refers to the three questions asked each juror by the clerk during the polling of the jury when the verdict was returned against Conner, one juror's apparent confusion, and the trial court's reaction thereto. The three questions were: "Was this your verdict? Is this now your verdict? Do you still agree and assent thereto?" When one juror asked what was the difference in the three questions and why were there three questions, the court responded, "They would really call for the same response, I would say."

The exchange that occurred between the court, the clerk and the juror appears in the record as follows:

"CLERK: David M. Houck. (Stands.) Your foreman has reported to the Court a verdict of guilty of robbery with a firearm as to Edward Conner, Jr. Was this your verdict?

DAVID M. HOUCK: (No response.)

CLERK: Was this your verdict?

DAVID M. HOUCK: Can I ask—uh. I hate to be—can I ask what the difference in the three questions is?

THE COURT: I'm sorry. Will you phrase your question again?

DAVID M. HOUCK: What are the differences in the three questions that she asked?

THE COURT: I'll let her ask the questions again.

CLERK: The three questions are: 'Was this your verdict? Is this now your verdict? Do you still agree and assent thereto?'

DAVID M. HOUCK: What I'm asking is, why are there three questions?

THE COURT: They would really call for the same response, I would say. I just don't know how better to explain. Ask the first question.

* * *

CLERK: Was this your verdict?

DAVID M. HOUCK: Yes, it was.

CLERK: Is it now your verdict?

DAVID M. HOUCK: (Long pause.) Yes.

CLERK: Do you still agree and assent thereto?

DAVID M. HOUCK: What would happen if I said no?

MR. FUNDERBURK: (Attorney for defendant Conner.) Your Honor, I think that he should be instructed that he has a right to say no, and that he should do so, if he so feels.

THE COURT: Well, sir. You will just have to answer the questions, and the Court will take such steps as must be taken, but you must answer the question. Ask the question again.

CLERK: Do you still agree and assent thereto?

DAVID M. HOUCK: Yes, sir."

After the clerk had polled the last juror, both defendants moved for a mistrial based on Mr. Houck's request for instructions and the court's refusal to so instruct.

Arguments were heard by the court in support of the motion for mistrial. Thereafter, the following exchange took place.

"THE COURT: Mr. Houck, stand up. (Mr. Houck stands.) Poll Mr. Houck again. Mr. Houck, listen to the questions. As I indicated to you, I think the questions are self-explanatory. Ask the juror the first question—

MR. FUNDERBURK: Your Honor, if I might, I think the problem is Mr. Houck doesn't understand—

THE COURT: All I want is Mr. Houck's verdict. That's all. With reference to what happens, that's of no concern to him. All I want to know is what his verdict is. So, ask the questions again.

CLERK: Mr. Houck, your foreman has reported to the Court a verdict of robbery with a firearm as to Edward Conner, Jr. Was this your verdict?

MR. HOUCK: Yes, ma'am.

CLERK: Is this now your verdict?

MR. HOUCK: Yes, ma'am.

CLERK: Do you still agree and assent thereto?

MR. HOUCK: Yes, ma'am.

THE COURT: Now, as to Mr. Asbury.

CLERK: Your foreman has reported to the Court a verdict of guilty of robbery with a firearm as to Willie James Asbury. Was this your verdict?

MR. HOUCK: Yes, ma'am.

CLERK: Is this now your verdict?

MR. HOUCK: Yes, ma'am.

CLERK: Do you still agree and assent thereto?

MR. HOUCK: Yes, ma'am.

THE COURT: Now, Mr. Houck, is there any misunderstanding on your part about the time frame and the essence of those questions?

MR. HOUCK: No, sir.

THE COURT: MOTIONS FOR A MISTRIAL IS DENIED."

It is of significant note that the jury was polled individually as to each defendant and that the alleged error complained of herein by defendant Asbury occurred when juror Houck was being questioned with respect to his verdict against defendant Conner. When the same juror was questioned as to his verdict against Asbury, he showed no reluctance or hesitation whatsoever.

[1] Generally, a defendant has the right to have the jury polled in order to determine whether the verdict is unanimous. *State v. Cephus*, 241 N.C. 562, 86 S.E. 2d 70. There is, however, a conflict of authority as to whether a verdict of guilty should be accepted after a juror, during the poll, has indicated that his consent to the verdict was given reluctantly. Some courts have held that a reluctantly assented to verdict is a defective verdict. We hold to the view that such verdicts are not defective if it appears that the juror ultimately freely assented to the verdict. Subsequent answers and responses made by a juror may cure the effect of prior inconsistent, ambiguous, equivocal or evasive answers. *See* Annot., 25 A.L.R. 3d 1149.

[2] Here, the juror unequivocally indicated his assent to the verdict. Moreover, juror Houck's responses do not indicate any reluctance to assent to the verdict. Instead, his questions seem to stem from idle curiosity as to why there were three questions instead of one. The judge's initial response to the juror's questions was not as clear as it could have been. Nevertheless, it could not have been taken as a suggestion as to what the juror's response to the poll should be. The questions directed to him were clear and simple. They called for yes or no answers. There is nothing in the record to suggest that his answers were prompted by anything other than the evidence in the case. In

the light of the overwhelming evidence of defendant's guilt, any error in the judge's response was harmless beyond a reasonable doubt.

No error.

Judge MORRIS concurs.

Judge CLARK dissents.

Judge CLARK dissenting:

The court's instruction to juror Houck that the three questions would call for the same response was error since the juror had the right to disagree at that time even though he had agreed to the verdict when reached in the jury room. Though given during the poll of the jurors relative to the verdict rendered in the case against the defendant Conner, the instruction was never corrected. Under these circumstances juror Houck could have understood that he was required to then assent to the verdict if he theretofore agreed. In my opinion the error was not harmless beyond a reasonable doubt.

DIZE AWNING AND TENT COMPANY v. CITY OF WINSTON-SALEM

No. 7521SC987

(Filed 5 May 1976)

1. **Appeal and Error § 68— prior Supreme Court opinion — amendment of complaint — law of the case**

In this action to recover for flood damage allegedly caused by defendant city's negligence, a prior Supreme Court opinion did not constitute the law of the case as to the sufficiency of plaintiff's evidence to go to the jury where plaintiff changed its position as to defendant's acts of negligence in an amendment to its complaint after the Supreme Court opinion was filed and presented evidence at the second trial in conformity with its amendment.

2. **Waters and Watercourses § 1— servience of lower lands**

Each of the lower parcels of land along natural drainways is servient to those on the higher level in that each is required to receive and allow the unimpeded passage of surface water from the higher level.

3. **Waters and Watercourses § 1— diversion of water — acceleration of water**

While a property owner may not divert water or cause it to flow onto the land of another in a manner different from its natural course so as to injure the other owner's land, he may accelerate and increase the flow of such water from his lands provided the course remains unchanged.

4. **Municipal Corporations § 20; Waters and Watercourses § 1— change of culvert size — flooding — absence of negligence**

In this action against a city to recover for flood damage to plaintiff's property, plaintiff's evidence was insufficient for the jury where it tended to show only that defendant city replaced a culvert with a larger culvert, and that large debris which could not have passed through the smaller culvert did pass through the replacement culvert and blocked plaintiff's smaller culverts, causing water to pond and flood plaintiff's property, since defendant only increased or accelerated the flow of water under its street.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 27 August 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 March 1976.

In this action, instituted on 14 August 1964, plaintiff seeks to recover $75,000 as compensation for flood damage allegedly caused by the negligence of defendant.

The case first came on for trial at the 17 April 1967 session of the court. After considering the pleadings and stipulations entered into between the parties, the trial judge concluded that, as a matter of law, plaintiff was not entitled to recover and entered judgment dismissing the action. Plaintiff appealed and in an opinion, filed 8 November 1967, reported in 271 N.C. 715, 157 S.E. 2d 577, the Supreme Court reversed the judgment of the trial court, holding that if plaintiff was able to substantiate its allegations, it was entitled to have a jury pass upon its claim.

The allegations of the pleadings at the time of the former appeal are summarized in the Supreme Court opinion cited above and no useful purpose would be served in summarizing them here.

On 5 July 1968 and 1 November 1968, plaintiff filed amendments to its complaint. The substance of the amendments are hereinafter set forth in this opinion.

When the cause came on for trial at the 25 August 1975 session of the court, plaintiff presented evidence which is summarized in pertinent part as follows:

In about 1925 plaintiff purchased a vacant lot approximately 150 feet northwest of South Main Street in Winston-Salem. A small creek or branch ran through plaintiff's property and on through a culvert under South Main Street, plaintiff's property being downstream from the street. At that time defendant maintained a 30-inch culvert or pipe under the street, this being the same culvert that was under the street when defendant annexed the area in 1919.

In 1925 plaintiff laid a 24-inch pipe in the branch running through its property and built over it, the open branch continuing north and south of plaintiff's building. Around 1930 plaintiff extended its building to the west and installed a 36-inch pipe under the new section. In 1946 plaintiff installed two pipes, 24 inches and 30 inches in size, and extended its building to the south. In about 1951 plaintiff purchased the 150 feet of property between its original lot and the Main Street culvert; a manhole was built at the west end of the culvert and a 36-inch pipe was installed between the manhole and the two pipes beginning at the south side of plaintiff's building. In 1954 plaintiff sold this property and the purchaser built an A & P food store and parking lot on it.

In 1960 defendant replaced the old 30-inch pipe or culvert under Main Street with a new 42-inch culvert. Until 1960 plaintiff had never had any flooding problems but in April of 1961 its property was flooded and on 28 May 1963 there was another flooding incident that was considerably worse. The flooding caused water to run into plaintiff's building, inflicting extensive damage to its machinery, merchandise and other property.

After the 1963 flooding, employees of plaintiff and defendant examined the junction box where plaintiff's 30 and 24-inch pipes connected with the 36-inch pipe at the A & P store property line. They found that the passage of water into plaintiff's pipes had been blocked by automobile tires, logs, a tree stump, and other large items of debris. Prior to 1960 these items of debris could not have passed through the Main Street culvert.

Defendant's employees regularly inspect the Main Street culvert and also the pipes continuing downstream from the

culvert. They crawl through the pipes from time to time and clean out debris. They crawled through the pipe under the A & P property on 24 May 1963, four days before the flooding of plaintiff's property. While defendant does not make repairs and maintenance on drainage pipes located on private property, it cleans them out.

At the conclusion of plaintiff's evidence, defendant's motion for directed verdict pursuant to Rule 50(a) was allowed and from judgment dismissing the action, plaintiff appeals.

Deal, Hutchins and Minor, by William Kearns Davis, for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by William F. Womble and Roddy M. Ligon, Jr., for defendant appellee.

BRITT, Judge.

Did the trial court err in allowing defendant's motion for directed verdict and dismissing the action? We hold that it did not.

[1] First, we respond to plaintiff's argument that the Supreme Court opinion established the law of this case, that plaintiff presented evidence substantially as alleged in its pleadings, therefore, it was entitled to have the jury pass upon its cause. We reject this argument.

The Supreme Court opinion, page 720, contains the following paragraph:

> "And now, turning to the plaintiff's position, construed most favorably to it, the plaintiff alleges that by the City's action in removing a 36-inch pipe or culvert, *which was guarded by the use of covers, grilles, and other protective devices,* and replacing it with a larger one, *without grilles or other devices to prevent tires and other large debris from entering it,* it created a condition that would flood plaintiff's property when they could not be accommodated by plaintiff's smaller culverts. In blocking the plaintiff's culverts they would naturally cause water to pond and flood plaintiff's property, which plaintiff alleged resulted in $75,000 damage." (Emphasis added.)

We think the decision in the former appeal turned on plaintiff's allegations at that time that before the culvert was re-

placed it was guarded at the east end by grilles and other protective devices, but after the culvert was replaced, defendant failed to reinstall grilles or other protective devices. In its amendment to the complaint, filed on 1 November 1968, subsequent to the Supreme Court decision, plaintiff, among other things, alleged the following: "The plaintiff, in paragraph 9 above, does not intend to allege that any covers or grilles were located at the eastern end of the old culvert under South Main Street. . . . "

In view of the quoted amendment, and plaintiff's evidence in conformity therewith, we think our present position in applying the law to the instant case is different from the position confronting the Supreme Court on the former appeal.

[2] The law appears well settled in this jurisdiction: each of the lower parcels of land along natural drainways is servient to those on the higher level in that each is required to receive and allow the unimpeded passage of surface water from the higher level. *Midgett v. Hwy. Comm'n,* 260 N.C. 241, 132 S.E. 2d 599 (1963); J. Webster, Real Estate Law in North Carolina § 320 (1971). This is the civil law rule long prevailing in this State. *Davis v. Cahoon,* 5 N.C. App. 46, 168 S.E. 2d 70 (1969); *cert. denied,* 279 N.C. 348, 182 S.E. 2d 580 (1971). *See, cf.,* 1A G. Thompson, Commentaries on Modern Law of Real Rroperty, § 266 (1964) (common law rule). Less emphasis is placed on the existence of well defined surface channels than on a treatment of surface water as a resource. It is designed to maximize the beneficial usage of such waters. As stated by our Supreme Court in an early decision:

> " . . . The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions, and the privilege or easement of the upper tenant to carry off the surface water in its natural course, under reasonable limitations, and the subserviency of the lower tenants to this easement are the natural incidents to the ownership of the soil. The lower surface is doomed by nature to bear this servitude to the superior and must receive the water that falls on and flows from the latter." *Mizell v. McGowan,* 120 N.C. 134, 137, 26 S.E. 783, 784 (1896).

[3] A second rule is that one property owner may not divert water or cause it to flow onto the land of another in a manner

different from the natural course in which it would normally flow, so as to injure the other owner's land. Should a lower landowner divert, dam or impound the natural flow of surface waters so as to cast them back upon and damage the upper landowner, then he may be subject to liability in an action for damages. *Braswell v. Hwy. Comm's,* 250 N.C. 508, 108 S.E. 2d 912 (1959).

This is subject to corollary, that while the land owner may not *divert* surface waters from their natural course, he may *accelerate* and increase the flow of such water from his lands, provided the course remains unchanged. Thus surface waters may be drained into a natural drainway without liability to lower property owners for damage caused to lands along the lower drainway as a result of increased flow of a natural stream. *Barcliff v. R. R.,* 168 N.C. 268, 84 S.E. 290 (1915).

[4] We feel that these principles, applied to plaintiff's evidence thoroughly substantiate the trial judge's decision to grant defendant's motion for directed verdict. *Dickinson v. Pake,* 284 N.C. 576, 201 S.E. 2d 897 (1974). *See generally,* W. Shuford, North Carolina Practice and Procedure § 50-10 (1975). At no point during plaintiff's sixty odd years of occupation and ownership did the city ever maintain more than a mere culvert. This was a valid exercise of the municipal police power, authorized under present G.S. 160A-297 and G.S. 160A-311 et seq. *See e.g.,* former G.S. 160-222 (1964), repealed N. C. Session Laws, c. 698, s. 2 (1971). During this same period plaintiff sought to encase or reroute the course and flow of South Creek. Defendant acted only to increase or accelerate the volume and flow of water under its street, obviously in order to alleviate flooding endangering property owners east of South Main Street. At no point did defendant ever divert the course of South Creek to the detriment of lower property owners including plaintiff.

That defendant selected a design choice for construction of a replacement culvert, which exposed the inadequacy of plaintiff's private drain system for coping with increased flow from the South Creek watershed is no basis upon which to impose liability on defendant. Given a number of alternatives from which to choose, and without more than plaintiff's evidence of negligence, the judiciary will not question or second guess the wisdom of local municipal officials in selecting or not selecting a particular design rather than one of those posited by plaintiff's expert at trial. *State v. Stowe,* 190 N.C. 79, 128

S.E. 481 (1925); *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5 (1966); *State v. Camp,* 286 N.C. 148, 209 S.E. 2d 754 (1974). *See generally,* 6 E. McQuillin, Municipal Corporations §§ 24.02, 24.30 (3d rev. ed. 1969). Plaintiff has failed to come forward with any evidence from which to infer either abuse of discretion or an invalid exercise of municipal police power. So long as defendant's conduct remained within bounds of its right to accelerate or increase rate of flow under the easement of servitude, there is no basis for negligence liability.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. AL BOBBY RAINES, SAMUEL EARL WHITAKER, LARRY LESTER LANE, WILLIE GUY, JR.

No. 7510SC979

(Filed 5 May 1976)

1. **Burglary and Unlawful Breakings § 4; Criminal Law § 42— breaking and entering — items in defendants' vehicle — admissibility**

In a prosecution for breaking and entering, larceny, and possession of burglary tools, the trial court did not err in admitting into evidence a crowbar, TV owners' manual, warranty, antenna and plastic bag found in the automobile in which defendants were riding when they were arrested, since there was evidence presented that a store had been broken into and valuable articles were stolen therefrom, and defendants were observed at the scene of the crime during the time when the crime was probably committed, and since the articles in the car had a logical tendency to connect defendants with the perpetration of the crime.

2. **Burglary and Unlawful Breakings § 4— breaking and entering — analysis of paint on door and crowbar — testimony admissible**

The trial court in a prosecution for breaking and entering, larceny, and possession of burglary tools did not err in allowing into evidence testimony of SBI agents which showed that, through analysis of paint on the door of the store broken into and paint on the crowbar found in defendants' vehicle, and through analysis of the markings on the door, the crowbar found in the car in which the defendants were riding when they were arrested was the instrument used to break into the store.

3. Burglary and Unlawful Breakings § 6— breaking and entering — definition of breaking not prejudicial

Defendant was not prejudiced in a prosecution for breaking and entering by the trial court's jury instruction that breaking "simply means the opening or removal of anything blocking entry."

APPEAL by defendants from *McKinnon, Judge.* Judgments entered 27 June 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 17 March 1976.

Defendants were indicted on charges of breaking and entering, larceny, receiving, and possession of burglary tools. The receiving charges were not prosecuted, and they were tried on the remaining charges.

The State presented evidence at trial tending to establish that Donald Duty, manager of the Raleigh Firestone Store, returned to the store in the early morning hours of 2 May 1975 in response to a call from the police department and discovered that the back door of the warehouse had been forced open. Duty testified that three television sets were missing from the warehouse.

Detective D. C. Williams testified that he "had received information as to planned criminal activities by these four defendants on May 1st." Williams stated that he received information that the defendants planned to steal television sets. Williams' information was provided by an informant who had, on prior occasions, given information leading to the arrest and conviction of other persons. Williams said that he began surveillance on the four defendants at approximately 6:00 p.m. on 1 May 1975. Williams observed defendant Willie Guy driving a Monte Carlo at the corner of Martin and Hargett Streets. Williams followed Guy to the 400 block of South Bloodworth Street where Al Bobby Raines got into the car. Williams stated that he lost track of the vehicle for a short time, but, upon regaining visual contact, he observed that Larry Lane was also in the car. At approximately midnight all four of the defendants were seen together in the vehicle.

Williams testified that he directed his surveillance to the Firestone Store when he saw the defendants' car parked on Commerce Street, and the Firestone Store was the only store in the area stocking television sets.

Williams stated that he heard a loud banging outside the Firestone Store and saw Al Bobby Raines, Larry Lane, and

Sammy Whitaker by the door of the building. Willie Guy, driving the Monte Carlo, picked up the other three men. Williams made a visual check of the Firestone Store's door but did not detect any evidence of breaking and entering. He then pursued the defendants.

Police Sergeant Lockey made a thorough search of the Firestone Store and discovered that the building had been broken into. Williams stopped the vehicle in which the defendants were traveling and searched the vehicle. Pursuant to the search, Williams found a sawed-off shotgun, a 357 magnum pistol, and a crowbar. Williams seized the guns but left the crowbar in the car. After obtaining a search warrant, the crowbar, a TV owner's manual, and other items found in the car were impounded.

SBI chemist, R. D. Cone, testified that the paint on the crowbar originated from the door broken into at the Firestone Store. SBI agent Frederick Hurst, Jr. was qualified as an expert in the field of toolmark identification. Agent Hurst testified that the crowbar made the marks on the door which was broken open at the Firestone Store.

Defendants Raines and Whitaker presented evidence of alibi. Defendants Lane and Guy presented no evidence. The jury returned a verdict of guilty as to each of the defendants for breaking and entering, and possession of burglary tools. Each defendant was acquitted on the charge of larceny. From a judgment imposing prison sentences, the defendants appealed to this Court.

Attorney General Edmisten, by Special Deputy Attorney General John M. Silverstein, for the State.

Thomas S. Erwin for defendant appellant Willie Guy, Jr.

Manning, Fulton and Skinner, by James E. Davis, Jr., for defendant appellant Bobby Raines.

William A. Smith, Jr., for defendant appellant Lester Lane.

James A. Everett for defendant appellant Earl Whitaker.

ARNOLD, Judge.

[1] Defendants contend that the trial court erred by admitting into evidence the crowbar, owner's manual, warranty, antenna

and plastic bag found in the automobile in which defendants were riding when they were arrested. Defendants argue that the relevancy of evidence was "remote and conjectural" and that admission of the objects into evidence invited prejudice. This contention is unfounded.

There was sufficient competent evidence presented at trial to prove that in the early hours of 2 May 1975 the Firestone Store in Raleigh was broken into and that valuable articles were stolen from the store. There was further evidence establishing that the defendants were observed at the scene of the crime during the time when the crime was probably committed. The evidence was properly admitted in that it had a logical tendency to connect the defendants with the perpetration of the crime. *State v. Fogleman,* 204 N.C. 401, 168 S.E. 536 (1933).

"Tangible traces of various sorts may indicate the presence of a person or the happening of an event of a certain character at a particular place, and evidence of them is therefore admissible if the inference sought to be drawn is a reasonable one. Thus, . . . the finding of weapons, . . . burglar tools, or other paraphernalia used in the commission of the crime, or other clues tending to place the accused at the scene, may be received as tending more or less strongly to connect the accused with the crime." Stansbury's N. C. Evidence, Footprints and Other Tangible Clues. § 85, pp. 263-265.

Defendants contend that the trial judge erred in denying their motion for a jury view. Absent a showing that the trial court abused its discretion in refusing to allow the jury to view the area surrounding the Firestone Store, we cannot say that the trial judge erred in denying the defendants' motion. *State v. Payne,* 280 N.C. 150, 185 S.E. 2d 116 (1971) ; *State v. Ingram,* 23 N.C. App. 186, 208 S.E. 2d 519 (1974).

[2] Defendants Raines and Guy assign error to the trial court's rulings admitting testimony of SBI agents R. D. Cone and Fred Hurst, Jr. The SBI agents' testimony effectually determined, through an analysis of the paint on the door and the crowbar, and the markings on the door, that the crowbar found in the car in which the defendants were riding when they were arrested was the instrument used to break into the Firestone Store. Defendants argue that tests used in determining whether the crowbar was the instrument used in the break-in are not scientifically reliable. We disagree.

"It seems abundantly clear that, despite occasional technical roadblocks erected by the 'rule' against invading the jury's province and by notions about the jury's sublime capacity to draw its own inferences, there can be expert testimony upon practically any facet of human knowledge and experience." Stansbury's N. C. Evidence, Subject Matter of Expert Testimony, § 134, p. 438.

The record establishes that SBI agent Cone is a forensic chemist with a B.S. degree from North Carolina State University, and a M.S. degree from Michigan State University. Mr. Cone had teaching experiences in his field of chemistry at the secondary education and college levels. He has had his works published by the Southern Association of Forensic Scientists and by the Academy of Forensic Scientists.

Agent Hurst is assigned to the firearm and toolmark division of the technical section of the criminal laboratory of the State Bureau of Investigation. He studied firearm and toolmark identification under the chief examiner for the SBI, and at the Chicago Police Crime Laboratories. He has conducted numerous comparisons of tools and toolmarks for the SBI since 1971.

The trial court's findings that Agents Cone and Hurst were properly qualified as experts is supported by the evidence, and the trial judge did not err in admitting the witnesses' testimony tending to establish the crowbar as the instrument used in the break-in of the Firestone Store. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

[3] Defendant Raines assigns error to the trial judge's definition of breaking in his instruction to the jury. The trial judge stated that breaking "simply means the opening or removal of anything blocking entry." Defendant Raines notes that the North Carolina Supreme Court disapproved of a similar definition of breaking in *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). However, Justice Branch, writing for the majority, states that [a]lthough we do not approve of the language used by the trial judge in this portion of the charge, we do not believe that the jury was misled by this single statement." *State v. Henderson, supra,* at 22.

The evidence at trial established that the building was broken into through the use of a crowbar on the door. We do

not believe that defendant Raines was prejudiced by the trial court's definition of breaking, and we find no error.

We have reviewed the remaining assignments of error and do not find any error prejudicial to defendants.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DON BARRY NEAGLE

No. 7626SC2

(Filed 5 May 1976)

1. **Criminal Law § 66— in-court identification of defendant — no pretrial confrontation — failure to hold voir dire not error**

The trial court did not err in allowing a witness to give testimony which identified defendant as the perpetrator of the crime charged without first conducting a voir dire, since there was no evidence of any pretrial lineup or confrontation between the witness and defendant.

2. **Criminal Law § 49— attempt to procure false testimony — evidence admissible**

The trial court in a second degree murder prosecution did not err in allowing evidence which tended to show that defendant threatened his girl friend who was with him on the night the crime was committed if she did not give testimony that was favorable to him.

3. **Homicide § 28— intoxicated defendant — no evidence of self-defense — failure to instruct not error**

The trial court in a second degree murder prosecution did not err in failing to charge the jury on self-defense where the two eyewitnesses to the crime other than defendant gave no testimony that tended to show self-defense, and defendant's testimony was that he was intoxicated and remembered nothing about the occurrence.

APPEAL by defendant from *Baley, Judge.* Judgment entered 5 September 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 April 1976.

By indictment proper in form, defendant was charged with the murder of L. V. Mason on 9 March 1974. He was placed on trial for murder in the first degree and pled not guilty.

Evidence presented by the State is summarized in pertinent part as follows:

On 9 March 1974 defendant and Mason spent most of the day and evening together drinking beer and whiskey. They were accompanied by defendant's girl friend, Debra Burns Tarlton (Debra), who did not drink on that day and drove defendant's car for him.

Around 10:00 p.m. defendant, Mason, Debra and one or two others were on the parking lot at Smitty's Place where beer was sold. Defendant and Debra were sitting in the front seat of defendant's two-door LTD while Mason was in the backseat. Mason insisted that he wanted to fight defendant and got out of the car. Defendant obtained a small hatchet from under the car seat and got out. As he approached Mason he raised the hatchet in the air but did not strike Mason. They shook hands, reentered the car and rode off to get something to eat. Some ten minutes later they returned to the parking lot at Smitty's with Mason riding in the front passenger seat and defendant in the rear seat. There had been no argument between the two men after they shook hands.

When they returned to Smitty's the door on the right side of the car was opened, defendant put one foot on the ground, grabbed Mason by his hair, pulled his head out of the car and struck Mason in his face with the hatchet. Defendant then pulled Mason from the car onto the ground, got back into the car and Debra drove away, leaving Mason lying face up on the ground.

An autopsy revealed Mason died from a head injury with a subarachnoid hemorrhage of the brain. The pathologist gave his opinion that it was possible for the homorrhage to have been caused by a blow to Mason's head.

At the close of the State's evidence, the court allowed defendant's motion to dismiss the first-degree murder count.

Defendant testified as a witness for himself and his testimony is summarized in pertinent part as follows: Defendant had been drinking heavily for six weeks prior to the alleged murder. He remembered drinking with Mason on 9 March 1974 but did not remember fighting with him or hitting him with a hatchet. Debra told him the next day that he hit Mason with a hatchet because Mason was going to swing a bottle at him. He did not threaten Debra or tell her what to say. He could not

remember how many times he had been convicted of public drunkenness; that he had been convicted of assault following a "public drunk" but could not remember when or how many times; that he did not remember how many times he had assaulted an officer after he had been arrested; that he believed he had been convicted twice of driving under the influence.

Other pertinent evidence is hereinafter summarized in the opinion.

The court instructed the jury that they might return a verdict of second-degree murder, voluntary manslaughter, or not guilty. They returned a verdict of second-degree murder and from judgment imposing prison sentence of not less than 15 nor more than 20 years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Ann Reed, for the State.

Childers and Fowler, by Max L. Childers, and Roberts, Caldwell & Planter, P.A., by Joseph B. Roberts III, for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the admission of certain testimony by the witness Eddie Dean Smith on the ground that the testimony constituted an in-court identification of defendant without a voir dire determination of its admissibility. The assignment has no merit.

Smith testified that on the night in question, at about 10:00 p.m., he went to Smitty's Place where he observed a Ford LTD in the parking lot; that the lot was well lighted and he saw two people, one of whom was the defendant. He then proceeded to testify with respect to defendant raising the hatchet in the air, the two men shaking hands, going off in the car together, returning some ten minutes later, and defendant striking Mason in the face with the hatchet, dragging him out of the car and leaving him face up on the ground.

While many cases can be cited to support our holding on this assignment, *State v. Cox*, 281 N.C. 275, 188 S.E. 2d 356 (1972), appears to be directly on point. In *Cox*, the Supreme Court held that the trial court did not err in denying defendant's motion for a voir dire examination to determine the admissibility of a police officer's in-court identification where no evi-

dence indicated that the officer had previously identified the defendant in a pretrial lineup or confrontation. In the case at bar there was no evidence of any pretrial lineup or confrontation between the witness Smith and defendant.

[2] Defendant assigns as error the admission of evidence tending to show that he threatened Debra Tarlton if she did not give testimony that was favorable to him. We find no merit in this assignment. In *State v. Minton,* 234 N.C. 716, 723, 68 S.E. 2d 844, 849 (1952), cited by defendant, the court, speaking through Justice Ervin, said: " . . . An attempt by an accused to induce a witness to testify falsely in his favor may be shown against him. Such conduct indicates a consciousness on his part that his cause cannot rest on its merits, and is in the nature of an admission that he is wrong in his contention before the court. (Citations.)"

[3] The assignment of error which defendant seems to stress most is that the trial court erred in not charging the jury on self-defense. We find this assignment without merit.

Admittedly, G.S. 1-180 requires the trial court to "declare and explain the law arising on the evidence given in the case." Failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error, even in the absence of a request for special instructions. *State v. Hornbuckle,* 265 N.C. 312, 144 S.E. 2d 12 (1965). While recognizing these principles, we do not think there was sufficient evidence of self-defense in the instant case to require jury instructions on that question.

The record discloses only three eyewitnesses to the killing—Eddie Dean Smith, Debra Tarlton, and defendant. Smith and Tarlton gave no testimony that tended to show self-defense and defendant's testimony was that he was intoxicated and remembered nothing about the occurrence. It is true that Debra admitted she told investigating officers that Mason was swinging at defendant with a bottle, and that defendant acted in self-defense, but she completely repudiated that statement at trial, asserting that it resulted from defendant's intimidation.

In *State v. Absher,* 226 N.C. 656, 40 S.E. 2d 26 (1946), the court held that where defendant testified that he became so intoxicated that he had no recollection of anything that happened for some time prior and subsequent to the homicide, the trial judge was not required to submit to the jury the question

of self-defense, notwithstanding testimony on the part of the State's witnesses that defendant knew what he was doing, since even the evidence that defendant knew what he was doing, standing alone, failed to lay the necessary predicate that defendant reasonably apprehended he was in danger of death or great bodily harm. *Absher* appears to present a stronger case for instructions on self-defense than the case *sub judice*.

We have carefully considered the other assignments of error brought forward and argued in defendant's brief but find them also to be without merit.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

EVELYN BARRIER PENNINGER v. C. LIPE BARRIER AND WIFE EVELYN BLACKWELDER BARRIER, HELEN BARRIER STUDDERT AND HUSBAND RICHARD STUDDERT, EDITH BARRIER McGLAMERY AND HUSBAND NEAL V. McGLAMERY, AND DANIEL GILLON BARRIER

No. 7519SC1065

(Filed 5 May 1976)

1. Deeds § 9— deeds of gift — sufficiency of evidence

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of whether deeds were deeds of gift and therefore void because not recorded within two years after their execution where plaintiff testified that neither of the grantees paid anything for the land conveyed by the deeds and never saw the deeds prior to the grantor's death, and there was no evidence that services furnished by the grantees to the grantor before and after execution of the deeds were furnished as consideration for the deeds.

2. Deeds § 7— delivery of deed — possession by grantor's attorney

Plaintiff's evidence would support a jury finding that there was no valid delivery of deeds where an attorney testified that he prepared the deeds for the grantor, now deceased, who told him to keep the deeds until the grantor's death and then deliver them to the grantees, and that he would have followed any instructions of the grantor concerning the deeds.

3. Deeds § 11— construction of deeds — exclusion of other deeds not executed contemporaneously therewith

In an action to set aside three deeds from decedent to defendants, the trial court did not err in excluding four other deeds from decedent which were offered to show decedent's intent to dispose of his real property after death by delivering to his attorney deeds for all the property he owned where the four deeds were not made contemporaneously with the three deeds from decedent to defendants and the seven deeds did not amount to a simultaneous transaction.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 9 September 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 16 April 1976.

This is an action to have certain deeds executed by C. R. Barrier declared null and void, ab initio. Plantiff alleges in her complaint that on 9 June 1971 C. R. Barrier executed a deed dated 23 April 1971 to Daniel Gillon Barrier for certain real property located in Cabarrus County. Plaintiff further states that C. R. Barrier executed on 13 July 1971 two deeds, one to Helen B. Studdert and the other to C. Lipe Barrier, Helen B. Studdert and Edith B. McGlamery, for certain real property located in Cabarrus County. The deeds were filed for registration on 21 August 1974.

Plaintiff alleges that the deeds were gifts and that the deeds are void as a matter of law because they "were not proven in due form and filed for registration within two (2) years after the making there as required by law." Plaintiff further alleges that C. R. Barrier died 17 August 1974, and that she is one of the heirs at law and next of kin. She alleges also that she is the owner of a 1/5 undivided interest in each of the land tracts deeded to the defendants.

An amendment to plaintiff's complaint alleges that C. R. Barrier "never at any time prior to his death released control over either of said deeds . . . and said deeds were never, in contemplation of law, delivered to the grantees or to anyone else for the use and benefit of the grantees with the intention at said time that title should pass as the instruments become effective as a conveyance."

In their answer defendants deny that the deeds are deeds of gift and deny that the deeds are void. Defendants assert that the deeds are "warranty deeds for which good and valuable consideration . . . [were] given by the grantees to the grantor."

At the close of plaintiff's evidence the trial judge granted the defendants' motion for a directed verdict and dismissed plaintiff's action. Plaintiff appealed to this Court.

William L. Mills, Jr., for plaintiff appellant.

Webster S. Medlin for defendant appellees.

ARNOLD, Judge.

Plaintiff contends in this appeal that the court erred in directing a verdict for defendants. She maintains that there was evidence from which the jury could have found that the deeds were deeds of gift. Moreover, she asserts that there was evidence that the deeds were not validly delivered because decedent never released power and control over the deeds. Plaintiff's arguments have merit.

In a jury trial a motion for directed verdict by defendant presents the question of whether the evidence, considered in the light most favorable to plaintiff, will justify a verdict for plaintiff. *Rayfield v. Clark*, 283 N.C. 362, 196 S.E. 2d 197 (1973); *McCoy v. Dowdy*, 16 N.C. App. 242, 192 S.E. 2d 81 (1972).

[1] When the plaintiff's evidence is considered in the light most favorable to her it tends to show the following:

Plaintiff testified that prior to decedent's death none of the grantees [defendants] ever saw the deeds in question. The deeds recited that they were supported by consideration, but neither of the grantees paid anything for the land purportedly conveyed by the deeds. Plaintiff did testify that defendants furnished personal services to decedent before and after execution of the deeds, but there was no evidence that such services were furnished as consideration for the deeds.

W. S. Bogle, attorney for decedent, testified that he prepared the deeds for decedent who told him to keep the deeds until decedent's death and then deliver them to the grantees. Bogle also stated that if the decedent had ever requested him to change the deeds, "I imagine I would have but I don't know." Bogle also testified that "I did whatever he instructed me to do" and that "I would have done what he wanted with these deeds to comply with his wishes."

Pursuant to G.S. 47-26 all deeds of gift have to be recorded within two years or they become void. The three deeds in ques-

tion were executed on 9 June 1971 and on 13 July 1971, and they were not recorded until 21 August 1974, more than two years later, and four days following decedent's death. The evidence was sufficient for the jury to consider whether the deeds were deeds of gift.

[2] With respect to whether there is a valid delivery of a deed there are three requirements: (1) an intention by the grantor to give the instrument legal effect according to its purport and tenor; *(2) evidence of that intention by some word or act which discloses that the grantor put the instrument beyond his legal control;* and (3) acquiescence by the grantees in such intention. *Jones v. Saunders,* 254 N.C. 644, 650, 119 S.E. 2d 789 (1961) [Emphasis added].

Testimony by W. S. Bogle, grantor's attorney, would certainly justify a reasonable inference that the grantor retained ultimate control over the deeds until his death. "So long as a deed is within the control and subject to the authority of the grantor there is no delivery, without which there can be no deed." *Fortune v. Hunt,* 149 N.C. 358, 361, 63 S.E. 82 (1908).

[3] In addition to introducing into evidence the three deeds from decedent to the defendants, plaintiff attempted to introduce four other deeds from decedent. She contends that the deeds were admissible to show decedent's intent to dispose of his real property after his death by delivering to Bogle deeds for all the property he owned, thereby allowing the deeds to substitute as a will.

"In construing a deed and determining the intention of the parties, ordinarily the intention must be gathered from the language of the deed itself when its terms are unambiguous. However, there are instances in which consideration should be given to the instruments made contemporaneously therewith, the circumstances attending the execution of the deed, and to the situation of the parties at the time." *Smith v. Smith,* 249 N.C. 669, 675, 107 S.E. 2d 530 (1959). All deeds constituting a "simultaneous transaction" may be construed together in determining the intent and effect of one of the deeds. *Combs v. Combs,* 273 N.C. 462, 160 S.E. 2d 308 (1968).

The three deeds to defendants which were admitted into evidence were executed on 9 June 1971, and 13 July 1971, while the four deeds not admitted into evidence were executed 13 July

1971; 6 October 1972; and 8 March 1973. Since we do not find that the seven deeds amounted to a "simultaneous transaction" or that the last four deeds were made "contemporaneously" with all three of the deeds from decedent to defendants we find no error in the exclusion of the last four deeds.

Plaintiff's evidence presented a case for the jury. The judgment directing verdict for defendants is

Reversed.

Judges BRITT and VAUGHN concur.

PRATHER, THOMAS, CAMPBELL, PRIDGEON, INC. v. FLORILINA PROPERTIES, INC.

No. 7529SC927

(Filed 5 May 1976)

Judgments § 51— action to enforce judgment of S. C. court — jurisdiction of S. C. court in question — summary judgment improper

In an action to enforce a judgment entered by a South Carolina court, the trial court erred in entering summary judgment in favor of plaintiff where there was a genuine issue of material fact—whether the South Carolina court had *in personam* jurisdiction over the defendant, a Florida corporation, in an action brought by plaintiff, a South Carolina corporation, to recover for services rendered pursuant to a contract, which was allegedly executed in Florida, for the preparation of plans for three dams to be constructed by defendant in North Carolina.

APPEAL by defendant from *Grist, Judge.* Judgment entered 11 September 1975, in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 11 March 1976.

Plaintiff brought an action against defendant 7 January 1975 in South Carolina. Plaintiff alleged that it was a South Carolina corporation and that defendant was a Florida corporation and that defendant also had a registered service agent in North Carolina. Pursuant to a contract, plaintiff was to prepare construction drawings and specifications for three dams being built by defendant in North Carolina. Defendant had failed to pay plaintiff in full for its services and was indebted to plaintiff for $2,000.00.

After defendant failed to file an answer in the South Carolina action, a default judgment was entered against it for $2,025.00. The court stated in its order that "evidence was presented which . . . clearly establishes the jurisdiction of this Court under South Carolina Code Section 10.2-803(g), in that the contract between the plaintiff and defendants was performed in whole or in part in the State of South Carolina."

Plaintiff brought this action to enforce the South Carolina judgment. In an unverified answer, defendant admitted that a judgment had been entered against it, denied that the South Carolina court had jurisdiction to enter such a judgment, by counterclaim alleged that plaintiff was employed to prepare a master plan for its Rutherford County property and to lay out a road on the property, but that the master plan was defective in that the road was across unsuitable terrain; and defendant prayed for damages in the sum of $6,000.00.

Plaintiff moved for summary judgment which the court granted. The court also granted summary judgment for plaintiff on defendant's counterclaim.

Hamrick, Bowen & Nanney by Louis W. Nanney, Jr., for plaintiff appellee.

A. Clyde Tomblin for defendant appellant.

CLARK, Judge.

Defendant's first assignment of error is that the trial court improvidently granted plaintiff's motion for summary judgment in the action by the plaintiff to enforce the South Carolina judgment.

In support of its motion the plaintiff offered its complaint which incorporated by reference a copy of the proceedings, including the default judgment, in South Carolina, but no affidavits or other materials were submitted in support of the motion. The defendant, in resisting the motion for summary judgment offered only its unverified answer and counterclaim.

If the South Carolina court did not have jurisdiction, then its judgment is void, and this State is not required to give "full faith and credit" to the judgment under Art. IV, § 1 of the Federal Constitution. The full faith and credit clause does not prevent inquiry into the jurisdiction of the South Carolina

court, and the record of the judgment may be contradicted as to the facts necessary to give the court jurisdiction. *State v. Williams*, 224 N.C. 183, 29 S.E. 2d 744 (1944); *Marketing Systems v. Realty Co.*, 277 N.C. 230, 176 S.E. 2d 775 (1970); 2 Strong, N. C. Index 2d, Constitutional Law § 26, p. 244.

Though the South Carolina judgment recited that it had jurisdiction over the defendant corporation, a mere recital in the judgment that the court rendering it had jurisdiction is not conclusive and, notwithstanding such recital, the court of another state, in which the judgment is asserted as the cause of action, or as a defense, may, within limits, make its own independent inquiry into the jurisdiction of the court which rendered the judgment. But if jurisdiction is, itself, an issue which has been fully litigated in, and determined by, the foreign court which rendered the judgment, the judgment is entitled to full faith and credit. *Hosiery Mills v. Burlington Industries*, 285 N.C. 344, 204 S.E. 2d 834 (1974).

In the present case it appears that the plaintiff is a South Carolina corporation; that defendant is a Florida corporation; that they entered into a contract whereby defendant was to prepare plans for the construction of a dam by defendant in North Carolina; and that plaintiff was to be paid a fixed sum. In its answer to the complaint in this case, the defendant alleges that the contract was executed in Florida; that the dam construction was in North Carolina; that it did no business in South Carolina and had no agent there; and that the South Carolina judgment was void in that the court did not have *in personam* jurisdiction over the defendant.

Clearly, the defendant's answer raised the issue of the jurisdiction of the South Carolina court which rendered the judgment. Defendant had the right to raise this issue in this case in North Carolina because the issue had not been fully litigated in, and determined by, the South Carolina court, because the defendant did not appear in the South Carolina action, and because there is nothing in the record to indicate that it consented to the jurisdiction of that court.

On the motion for summary judgment the test is whether the pleadings and materials offered in support of the same show that there is no genuine issue as to any material fact. If there is no such issue, then the sole question for the court's determination is whether the party is entitled to the judgment as a

matter of law. *Weaver v. Insurance Co.*, 20 N.C. App. 135, 201 S.E. 2d 63 (1973). The burden is on the movant to establish the lack of genuine issue of material fact, one where the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

We find that the plaintiff's complaint and the copy of the proceedings in the South Carolina court which were offered in support of its motion for summary judgment were not sufficient to establish the lack of the genuine issue of material fact, to-wit the *in personam* jurisdiction of the South Carolina court over the defendant.

The trial court also granted the plaintiff's motion for summary judgment on the defendant's counterclaim. Whether the defendant is entitled to pursue his counterclaim against the plaintiff is dependent upon the determination of the issue of jurisdiction by the South Carolina court. If the South Carolina court did have *in personam* jurisdiction over the defendant, it is possible that the defendant, having failed to prosecute his counterclaim in South Carolina, would be precluded from prosecuting the same in this action. We, therefore, find that the plaintiff's motion for summary judgment on the defendant's counterclaim was improvidently granted.

The summary judgment for the plaintiff on its action to enforce the South Carolina judgment, and for the plaintiff on the defendant's counterclaim, is

Reversed and Remanded.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. STEPHEN J. WILLIAMS

No. 7612SC27

(Filed 5 May 1976)

1. Criminal Law § 66— pretrial lineup — in-court identification based on observation at crime scene

In a prosecution for rape, crime against nature and kidnapping, the trial court's finding that the victim's in-court identification of

defendant was based on her observation of him at the crime scene and not on a pretrial lineup conducted three days after the alleged offense was supported by the evidence where such evidence tended to show that the victim was in defendant's presence at the time of the crime for thirty minutes and that she had ample opportunity to observe him, the victim immediately picked defendant out of the lineup with no suggestion that he was her assailant, and defendant was represented by counsel at the lineup which was properly conducted.

2. **Criminal Law § 80— vehicle registration card — inspection by defendant of original — introduction of copy not error**

The trial court did not err in allowing the State to introduce into evidence a copy of defendant's automobile registration card duly certified by authorized officials of the DMV rather than the actual card *found in defendant's* vehicle, though the assistant district attorney, in a voluntary disclosure statement, had notified defense counsel that the original card would be introduced in evidence, since there is no requirement that the State offer writings into evidence in the precise form that they were in when inspected by defense counsel.

APPEAL by defendant from *Hall, Judge.* Judgment entered 5 September 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 April 1976.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with (1) rape, (2) crime against nature, and (3) kidnapping. The offenses allegedly occurred on 10 June 1975 and Mrs. Chon Pok LeBron was the victim named in each indictment. The cases were consolidated for trial.

The State offered evidence tending to show: Shortly after 2:15 a.m. on 10 June 1975, Mrs. LeBron was driving home from her place of employment in Fayetteville. Defendant began following her in his car and finally collided with her so that both cars had to stop. Defendant then walked over to Mrs. LeBron's vehicle, grabbed her, and carried her to his car. He carried her to a dark secluded area near a school building several miles from the scene of the collision. At that place he stopped his car and forced her to perform fellatio; he then forced her to have intercourse with him but only for a very brief period of time. Thereafter he drove Mrs. LeBron a short distance away from the school, ordered her to get out of his car, and drove off.

Defendant presented no evidence.

A jury found defendant guilty of crime against nature and kidnapping, and found him not guilty of rape. From judgment imposing prison sentence of not less than 40 nor more than 45

years, to be credited with 84 days pretrial confinement, defendant appealed.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Smith, Geimer & Glusman, P.A., by Kenneth Glusman, for defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the court erred in finding as a fact that Mrs. LeBron's identification of defendant was of origin independent of the lineup she viewed at the sheriff's office, and in refusing to suppress her identification of defendant. We find no merit in the contention.

Before Mrs. LeBron was permitted to identify defendant at trial, the court conducted a voir dire in the absence of the jury at which the victim and Deputy Sheriff James Parrish testified. Following the voir dire, the court found as facts that at the time the alleged offenses were committed Mrs. LeBron was in defendant's presence for some thirty minutes and had ample opportunity to observe him; that some three days later she viewed several photographs which included a picture of defendant made some 74 days earlier and she was unable to pick out defendant's picture; that a few minutes later, on the same date, a lineup was conducted and Mrs. LeBron immediately picked out the defendant; that defendant was represented by counsel at the lineup which was properly conducted; Mrs. LeBron selected the defendant from the lineup without any suggestion as to which one in the lineup was the defendant; that the cars involved had interior lights that came on when the car doors were open and she was in defendant's presence for approximately thirty minutes. The court found and concluded that the testimony of Mrs. LeBron with respect to the in-court identification of defendant was based solely on her observation of him at the scene of the crimes and was not influenced in any way by anything else.

Our Supreme Court has held many times that when the trial court's findings of fact on a voir dire are fully supported by evidence, the findings are conclusive on appeal. *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. McVay*, 277 N.C. 410, 177 S.E. 2d 874 (1970). We hold that Judge Hall's findings

in the instant case are fully supported by the evidence, and the findings support the conclusion of law that the testimony of Mrs. LeBron regarding the identity of defendant was admissible.

[2] Next, defendant contends the court erred in permitting the State to introduce into evidence certain items which were not disclosed to defense counsel during pretrial discovery. This contention has no merit.

Prior to the trial of this action the new Rules of Criminal Procedure, particularly Art. 48 of Chapter 15A of the General Statutes, became effective. In a voluntary disclosure statement, filed 28 August 1975, the assistant district attorney notified defense counsel of certain exhibits which the State proposed to introduce. The list included "the driver's license and registration card of Stephen J. Williams which were FOUND IN THE VEHICLE . . . . " (Emphasis added.) At trial, instead of offering the registration card found in the car, the State offered a copy of the card duly certified by authorized officials of the Department of Motor Vehicles. Over defendant's objection the copy was admitted into evidence.

Defendant argues that he was prepared to defend against the original document on the ground that it was obtained from the car pursuant to an illegal search and seizure, and that he was "surprised" by the introduction of the certified copy. We find the argument unpersuasive.

The common law recognized no right to discovery in criminal cases. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972). Statutes in derogation of the common law must be strictly construed. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925 (1955); *McKinney v. Deneen,* 231 N.C. 540, 58 S.E. 2d 107 (1950). While G.S. 15A, Art. 48, requires the State, upon proper motion, to divulge certain writings or documents, we find nothing therein that requires the State to offer the writings into evidence in the precise form that they were in when inspected by defense counsel.

We note also that the State's voluntary disclosure statement provided that a copy of the title to the automobile, as certified by the Department of Motor Vehicles, would be offered in evidence and defendant did not object to its introduction. That document disclosed registration in the name of William Easley Paine, Jr. However, on the back were three assignments of the title and the third, dated 10 July 1974, was to defendant.

Assuming, *arguendo*, that the court erred in admitting the certified copy of the registration card, it would appear that the error was rendered harmless by introduction of the copy of the certificate of title showing a final assignment to defendant.

Finally, defendant contends the court erred in admitting into evidence a photograph of the automobile which he allegedly drove and admitting evidence pertaining to paint samples allegedly taken from the automobile. Suffice it to say that we have carefully considered these contentions and find them also to be without merit.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

DONALD P. BROCK; J. K. WARREN, JR.; W. B. HARGETT; H. C. BELL; MARY ELIZABETH BROCK McDANIEL; P. NELSON BANKS; HAROLD H. BATE; R. C. TYNDALL, JR.; G. B. FOY; C. C. JONES, JR.; W. W. BRAFFORD; ROBERT R. RIGGS; ERNEST B. RIGGS; HAROLD RIGGS; FRED D. RIGGS; RUSSELL J. RIGGS; DALTON EUBANKS; RALPH NOBLES; JERRY T. RIGGS; J. C. ARTHUR; E. N. RIGGS; W. H. RIGGS; ALTON ARTHUR; C. B. ARTHUR; BEN DILLAHUNT; THOMAS ARTHUR; C. FELIX HARVEY; JULIAN G. HOFMANN; CARLTON A. POLLACK; MRS. ORA D. POLLOCK; SYLVANUS D. MALLARD; EDNA T. MALLARD; WILLIAM V. GRIFFIN; MRS. V. C. GRIFFIN; D. E. TAYLOR; HUGH B. OLIVER; W. DENFORD EUBANK; LINDY HARTSELL; CHRIS R. EUBANKS; HUBERT L. JENKINS; FELTON EUBANKS; CORENA ANDREWS; W. ARCHIE EUBANKS; MR. M. R. WILLIAMS; RALPH JONES; JOE MONETTE; RAY COLLINS; RAY HILL; MYRAL COLLINS; W. W. SIMPSON; RICHARD H. PARKER; RUDOLPH HUMPHREY; ERNEST W. HUMPHREY; JESSIE G. BYNUM; HAROLD MATTOCKS, JR.; WILLIAM F. MATTOCKS; J. J. CONWAY; R. E. PROVOST; CLINTON PHILLIPS; EUGENE SIMPSON; WAYNE SIMPSON; JOHNNY TOLER; JOHN H. TOLER; ROBERT H. TOLER; SAMUEL RIGGS; MELVIN E. HARRIS; MARY WOOTEN; EDWARD MEADOWS; CLEVE B. PROVOST, SR.; LELA S. EUBANK; HERBERT CONWAY; ELIJAH RIGGS; FURNEY COLLINS HEIRS; JAMES A. SIMPSON; JOE ED COLLINS; JOHN D. CARROWAY; MACK O. DANIELS; M. O. LaROQUE; NEIL RIGGS; AUGUSTA FRANKS; SPENCER HASKINS, JR.; MARTHA LOUISE AND GLENNIE HASKINS; PRESTON D. REYNOLDS; REX MILLS; WILLIAM E. KORNEGAY; C. V. MILLS; FRANK HOWARD; ALVA B. HOWARD; MARVIN BANKS; EARL F. GREENE; WILLIAM MILLS; NINA T. MILLS; HARVEY KING; J. E. TURNER, JR.; CONRAD JONES; LINWOOD F. COX; CARL KILLINGSWORTH; FRED HILL; ESSIE M. WHITE; B. B. STANLEY; HAZEL H. TURNAGE; PRESTON H. BANKS; LINWOOD B. SCOTT; NANNIE E. SCOTT; H. V. WILSON; RACHEL K. BANKS; ALPHEUS BANKS; BEN LANG; JOHN PARKS, AND HENRY FOSCUE, PETITIONERS v. NORTH CAROLINA PROPERTY TAX COMMISSION SITTING AS THE STATE BOARD OF EQUALIZATION AND REVIEW; N. D. McNAIRY, CHAIRMAN; WAYNE A. CORPENING, ROBERT C. BLACK, KYLE HARRINGTON AND MRS. E. B. HOWARD, MEMBERS OF THE NORTH CAROLINA PROPERTY TAX COMMISSION SITTING AS THE STATE BOARD OF EQUALIZATION AND REVIEW, RESPONDENTS

No. 7510SC769

(Filed 5 May 1976)

Taxation § 25— tax valuation schedules — failure to appeal in apt time

The Property Tax Commission properly dismissed petitioners' appeal without allowing petitioners to offer evidence and to be heard on the merits of their appeal where petitioners sought "a percentage

reduction of all farm property" in the county rather than the application of valuation schedules to their individual tracts, and petitioners did not contest the valuation schedules by appealing to the Commission within 30 days after the publication of notice in a newspaper with general circulation in the county that the schedules had been approved by the county commissioners. G.S. 105-317.

Judge CLARK concurring.

Judge VAUGHN dissents.

APPEAL by petitioners from *Hall, Judge.* Judgment entered 30 July 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 21 January 1976.

Jones County was required to make an octennial revaluation of real property within the County as of 1 January 1974. In furtherance of that revaluation, Southern Appraisal Company was employed to assist the County with the reappraisal, including the preparation of uniform schedules of value. The Board of Equalization and Review adopted its schedules on 4 September 1973, and gave notice of adoption of the schedules in the Kinston Daily Free Press and the New Bern Sun-Journal on 10 September 1973, and in the Jacksonville Daily News on 12 September 1973. Thereafter, the County proceeded with its revaluation so as to accomplish it by 1 January 1974.

On 6 May 1974, the petitioners appeared before the Jones County Board of Equalization and Review to request "a percentage reduction of all farm property in Jones County." This request was denied, and petitioners appealed to the North Carolina Property Tax Commission on 31 May 1974. From the final decision rendered by the North Carolina Property Tax Commission, dated 4 December 1974, the petitioners appealed to the Superior Court of Wake County. The petition for review was heard and judgment was rendered by Judge Hall on 30 July 1975 affirming the administrative decision of the Property Tax Commission. From this judgment, petitioners appealed.

Brock & Foy, by Louis F. Foy, Jr., for petitioners.

Attorney General Edmisten, by Assistant Attorney General Myron C. Banks, for respondents, Property Tax Commission.

James R. Hood, for respondents, Jones County Board of Commissioners and Jones County Board of Equalization and Review.

MARTIN, Judge.

Petitioners contend that the North Carolina Property Tax Commission erred in dismissing their appeal without allowing petitioners the opportunity to offer evidence and to be heard on the merits of their appeal.

G.S. 105-317 provides that prior to the octennial revaluation of real property in any county, the tax supervisor must prepare countywide valuation schedules to be used by the appraisers in valuing individual tracts of land. When the schedules are approved by the county commissioners, a notice to that effect must be published in a newspaper with general circulation in the county. Within thirty days after publication of the notice, any property owner may contest the schedules by appealing to the Property Tax Commission. After the thirty day period has passed, the schedules may no longer be challenged, and taxpayers appealing the valuation of their property may only contest the application of the schedules to their individual tracts.

In the present case, the notice of approval of valuation schedules was published in three newspapers on or before 12 September 1973, and petitioners' notice of appeal was not filed until 31 May 1974. Petitioners contend that even though their appeal was not filed within 30 days after publication of the notice, it should not have been dismissed. To support this contention, petitioners make several arguments. First, they argue that the county commissioners did not "approve" the valuation schedules as required by the statute, but only "accepted" them. We find this argument to be without merit.

Another argument put forth by petitioners is that the newspapers in which the notice of adoption of the valuation schedules was published are not newspapers of general circulation in Jones County. Under G.S. 1-598, the affidavits of publication, signed by employees of the three newspapers in which notice of adoption of the schedules was published, were sufficient to establish that these newspapers had a general circulation in Jones County.

A further argument advanced by petitioners is that the provision of the statute allowing notice of adoption of the valuation schedules to be given by publication violates the due process clause of the Constitution. We find this argument to be without merit.

Petitioners also argue that they were not challenging the valuation schedules, but rather the application of the valuation schedules to their individual tracts. Petitioners' notice of appeal and application for hearing clearly show that they were not contending that their own tracts were overvalued in comparison to other land in the county, but were instead contending that all farm land and woods land in Jones County was valued too high. Such a contention amounts to a challenge of the valuation schedules.

For the above reasons, the decision of the trial court is

Affirmed.

Judge VAUGHN dissents.

Judge CLARK concurs.

Judge CLARK concurring.

I concur in the result and concede that petitioners requested "a percentage reduction of all farm property in Jones County." However, in their brief and in the hearing before this Court, the petitioners contend that they are challenging only the application of valuation schedules to their individual tracts. Further, in the hearing before this Court counsel for respondent Jones County Board of Equalization and Review indicated that said respondent had no objection to now applying the valuation schedules to the individual tracts of the petitioners. Under these circumstances, it is my opinion that this cause should be remanded to the Jones County Board of Equalization and Review so that it may determine if, as so indicated to this Court, it now elects to apply the valuation schedules to the individual tracts of the petitioners.

DAVID MILLARD, EMPLOYEE, PLAINTIFF v. HOFFMAN, BUTLER & ASSOCIATES, EMPLOYER; HOME INDEMNITY CO., CARRIER, DEFENDANTS

No. 7528IC909

(Filed 5 May 1976)

1. Master and Servant § 50— workmen's compensation — independent contractor defined

An independent contractor is defined as a person who exercises an independent employment and contracts to do certain work accord-

ing to his own judgment and method without being subject to his employer except as to the result of his work.

2. **Master and Servant § 50— workmen's compensation — surveyor as independent contractor — conclusion of Industrial Commission supported by findings**

Findings of fact by the Industrial Commission that plaintiff did survey work for defendant employer, that defendant had no right of control with respect to the manner or method plaintiff chose to do the work, and that plaintiff contracted to be paid a fixed fee for a final work project were sufficient to support the Industrial Commission's conclusion that plaintiff was an independent contractor.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 24 June 1975. Heard in the Court of Appeals 8 March 1976.

This action arose out of an accident which occurred on 23 November 1971 while claimant was running survey lines on a land development project known as Connestee Falls, near Brevard, North Carolina. Claimant was struck in the eye by a stick, and as a result he lost total sight in the injured eye.

The cause was originally heard in Asheville on 4 June 1973, before C. A. Dandelake, Commissioner. The evidence presented at the hearing established that the claimant and Keith Bradburn worked together as a survey crew, doing survey work for Hoffman, Butler & Associates. The claimant and Bradburn were paid by the footage (11¢ per foot) rather than by the hour as the other suveyors employed by Hoffman were paid. As compensation for their work the claimant and Bradburn were paid one check for the total value of their work, with no deduction for income tax withholding or social security, and neither man received a W-2 form from Hoffman, Butler and Associates. The claimant testified that Hoffman would control which particular section to survey but not "how to run the line."

The Commissioner concluded that the North Carolina Industrial Commission had no jurisdiction because claimant was an independent contractor and dismissed the claim. Claimant appealed to the Full Commission. On 6 May 1974 the Full Commission set aside the opinion and award of Commissioner Dandelake and remanded it for further hearing. Hearing was held before Commissioner A. E. Leake 25 June 1974, and the matter was remanded to Commissioner Dandelake for opinion and award. On 28 August 1974 Commissioner Dandelake entered his opinion and award, and again held that the North Carolina

Industrial Commission did not have jurisdiction over the matter because the plaintiff-claimant was not an employee under the Act. From this opinion and award the plaintiff-claimant appealed once more to the Full Commission. Upon the hearing of the appeal, and arguments, the Full Commission adopted the opinion and award of Commissioner Dandelake of 28 August 1974 as the final determination of the North Carolina Industrial Commission. From the Final Determination adopting Commissioner Dandelake's opinion and award of 28 August 1974, the plaintiff-claimant appeals to this Court.

Richard B. Ford for plaintiff appellant.

Hedrick, McKnight, Parham, Helms, Kellam and Feerick, by Philip R. Hedrick and Edward L. Eatman, Jr., and J. A. Gardner III, for defendant appellees.

ARNOLD, Judge.

The Commissioner's conclusions of law were based upon findings of fact substantially as follows:

(1) Plaintiff and Bradburn had worked with Hoffman for about three weeks when the injury occurred. Plaintiff was an experienced surveyor, though not registered, and he and Bradburn worked as a team.

(2) Plaintiff and Bradburn had an oral contract with Hoffman. They were to stake out lots at a price of eleven cents per foot, which compensation was to be divided between plaintiff and Bradburn. The lots and streets to be staked were indicated by one of Hoffman's supervisors from a map, and the two men reported the amount of footage they ran. No social security or income tax was withheld, and no W-2 forms were issued to plaintiff and Bradburn.

(3) Hoffman's supervisor assigned work to eight different crews working on the project. Except for Millard and Bradburn all the crews worked on an hourly basis.

(4) Mr. Hoffman testified that he knew plaintiff and Bradburn, and that plaintiff approached him with regards to subcontracting work by the foot, and that "each of them wanted to be his own man," and that they worked for several weeks on the project.

(5) Plaintiff and his partner were engaged in an independent occupation. They used their own special skills, knowledge and training, and they did the work at a fixed price. They were not subject to discharge because of the method of work they selected, and they were free to choose their own time to do the work. They were not regularly employed by Hoffman.

(6) An employer-employee relationship did not exist. Plaintiff was an independent contractor and while so engaged he lost the eyesight in his right eye as a result of being struck in the eye by a stick.

Plaintiff-claimant concedes that the findings made by the Commissioner are "reasonably based on the evidence adduced at the hearings and the fundamental facts and circumstances of the case." He contends that the conclusions of law are not supported by the findings, and that is the only argument presented for consideration in this appeal.

[1] An independent contractor is defined as a person "who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work. *Perley v. Paving Co.*, 228 N.C. 479, *supra.* When one undertakes to do a specific job under contract and the manner of doing it, including employment, payment and control of persons working with or under him, is left entirely to him, he will be regarded as an independent contractor unless the person for whom the work is being done has retained the right to exercise control in respect to the manner in which the work is to be executed. *Denny v. Burlington,* 155 N.C. 33, 70 S.E. 1085. The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract." *McCraw v. Mills, Inc.*, 233 N.C. 524, 526-527, 64 S.E. 2d 658 (1951).

[2] The Commissioner's findings of fact, adopted by the Full Commission, support the conclusion that claimant was an independent contractor. Hoffman, Butler and Associates had no right of control with respect to the manner or method claimant chose to do the work, and he contracted to be paid a fixed fee for a final work project. *McCraw v. Mills, Inc., supra; Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Richards v.*

Nationwide Homes, 263 N.C. 295, 139 S.E. 2d 645 (1965); *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137 (1944).

The opinion and award of the Industrial Commission is

Affirmed.

Judges MORRIS and MARTIN concur.

ROBERT LEGGETT AND MOZETTA LEGGETT v. W. K. (KENNETH) COTTON, D/B/A COTTON INSURANCE AGENCY AND NORTH CAROLINA INSURANCE PLACEMENT FACILITY

No. 758SC940

(Filed 5 May 1976)

1. **Insurance § 2— agent's promise to procure insurance — duty to use diligence — liability for loss suffered by proposed insured**

If an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so; the proposed insured has the election to sue for breach of contract or in tort for negligence to enforce liability.

2. **Insurance § 2— inability of agent to procure insurance — requirement of notice to proposed insured**

If a broker or agent is unable to procure the insurance he has undertaken to provide, he impliedly undertakes—and it is his duty—to give timely notice to his customer, the proposed insured, who may then take the necessary steps to secure the insurance elsewhere or otherwise protect himself.

3. **Insurance § 114— agent's promise to procure insurance — failure to do so — failure to notify proposed insured — negligence a jury question**

In an action to recover damages which plaintiffs alleged they sustained as a result of the negligent failure of defendant to procure fire insurance on their house and its contents, the trial court erred in directing a verdict for defendant where the evidence tended to show that defendant undertook the procurement of fire insurance for plaintiffs, two weeks expired before he forwarded plaintiffs' application for insurance to the Fire Insurance Operating Bureau, and plaintiffs were given no notice concerning the delay in forwarding the application which had to be approved before coverage could be provided, but were told instead that the policy had not arrived.

Leggett v. Cotton

APPEAL by plaintiffs from *Webb, Judge.* Judgment entered 9 June 1975 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 March 1976.

This is an action to recover $18,000 damages which plaintiffs alleged that they sustained as a result of the negligent failure of defendant Cotton to procure fire insurance on their house, and the contents of their house. [The action was dismissed with prejudice as to defendant North Carolina Insurance Placement Facility.] It was alleged that defendant was negligent and failed to use reasonable diligence to procure the insurance. Defendant denied all allegations of negligence.

When the case came on for trial the plaintiffs' evidence, except where quoted, was in substance as follows: Plaintiff Mozetta Leggett visited defendant's office during the first week of November, 1971, to obtain fire insurance coverage for the house which she and her husband owned. Mrs. Leggett stated that "[a]fter I discussed the amount of insurance he went out for a few seconds. He came back in and told me that he could get some insurance but that he thought that, well, he felt by it being somewhere in the middle of the week, I do know we discussed about a couple of days, and he said he should get the mail out today. He said, 'If we can get the mail out today, they will have two working days to get it straightened out.'

He told me the policy would have to come in from Raleigh. I said, 'I can wait until they go and come back.' In the meantime I asked him to let me leave a deposit. I asked him about three times during the conversation I would feel better knowing I had insurance if he would take a deposit on the insurance and he assured me that it wasn't necessary like I know that you know you can pay it when the policy come and the books comes back with it and so forth. He said, 'Leave everything just like it is.' "

The amount of insurance being sought by plaintiffs was $15,000 for the house and $3,000 for its contents. Before leaving defendant's office Mrs. Leggett signed a paper which she did not read.

Defendant never contacted plaintiffs, but plaintiffs contacted defendant on several occasions, and they were informed that the policy had not come. On 3 December 1971, plaintiffs' house burned.

Marvin Wilson, an employee of the North Carolina Fire Insurance Operating Bureau, testified that on 18 November 1971

he received an application, dated 17 November 1971, for plaintiffs' fire insurance. He stated that the application showed on its face that it was in no way a binding insurance contract.

At the close of plaintiffs' evidence the court granted defendant's motion for a directed verdict, and plaintiffs appealed.

Dees, Dees, Smith, Powell and Jarrett, by John W. Dees, for plaintiff appellants.

Smith, Anderson, Blount and Mitchell, by Samuel G. Thompson, for defendant appellee.

ARNOLD, Judge.

[1] Plaintiffs in this case alleged that defendant did not use reasonable diligence in performance of his promise to procure fire insurance. "It is well established in this State that, if an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so." *Mayo v. Casualty Co.*, 282 N.C. 346, 353, 192 S.E. 2d 828 (1972); *Wiles v. Mullinax*, 267 N.C. 392, 148 S.E. 2d 229 (1966); *Kaperonis v. Underwriters*, 25 N.C. App. 119, 212 S.E. 2d 532 (1975); *Musgrave v. Savings and Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970). The plaintiffs have the election to sue for breach of contract or in tort for negligence to enforce liability. *Johnson v. Tenuta & Co.*, 13 N.C. App. 375, 185 S.E. 2d 732 (1972), citing *Bank v. Bryan*, 240 N.C. 610, 83 S.E. 2d 485 (1954).

[2] " '[T]he better considered decisions on the subject are to the effect that while the agent or broker in question was not obligated to assume the duty of procuring the policy, when he did so, the law imposed upon him the duty of performance in the exercise of ordinary care, ... ' [Citation omitted] 'If a broker or agent is unable to procure the insurance he has undertaken to provide, he impliedly undertakes—and it is his duty—to give timely notice to his customer, the proposed insured, who may then take the necessary steps to secure the insurance elsewhere or otherwise protect himself. [Citations omitted.] When under these circumstances, the broker fails to give such notice, he renders himself liable for the resulting damage which his

client suffered from lack of insurance.' " *Musgrave v. Savings and Loan Assoc., supra,* at 393.

[3] In considering whether the trial court erred in directing a verdict for the defendant in a jury case we must view the evidence in the light most favorable to plaintiffs. Evidence appears that defendant undertook the procurement of fire insurance for plaintiffs, and that two weeks expired before he forwarded the application for plaintiffs' insurance to the Fire Insurance Operating Bureau. Moreover, it appears from the evidence that plaintiffs were given no notice concerning the delay in forwarding the application, which had to be approved before coverage could be provided, but were told instead that the policy had not arrived. Whether this evidence was sufficient to prove that defendant failed to exercise reasonable diligence to procure the insurance was for the jury.

The judgment directing verdict for defendant is

Reversed.

Judges MORRIS and HEDRICK concur.

JOHN L. PIERCE, JR. v. THOMAS L. JONES

No. 756SC816

(Filed 5 May 1976)

Boating — overtaking another boat — collision — sufficiency of evidence of negligence — no sudden emergency

In an action to recover damages for injury to person and property sustained when defendant's boat collided with the rear of plaintiff's boat, evidence of defendant's negligence was sufficient to be submitted to the jury where it tended to show that defendant followed plaintiff for some 300 yards without overtaking him, plaintiff slowed down to negotiate the wake of a large party boat, and as plaintiff was crossing the second or third swell, the bow of defendant's boat came over the rear of plaintiff's boat and then slid off to the left; moreover, there was no evidence to support the conclusion that any negligence on the part of the party boat was the proximate cause of the accident so as to give rise to any rule that might relate to an inevitable accident or a sudden emergency.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 22 May 1975 in Superior Court, BERTIE County. Heard in the Court of Appeals 10 February 1976.

Plaintiff sought to recover damages from defendant for the negligent operation of his boat, alleging that the resulting collision caused both personal injury and property damage. Defendant counterclaimed for damages to his own boat.

The evidence for the plaintiff tended to show that on 14 July 1974, he was operating his 14 foot Boston Whaler near the Oregon Inlet channel. As he proceeded up the channel in a westerly direction he saw a much larger vessel, a party boat, heading east out of the channel toward the ocean. At the time the party boat was over 300 yards away.

Plaintiff proceeded at about 15 miles per hour on a course to keep clear of the party boat and when they met, they were about 100 yards apart. As the boats met, plaintiff decreased the speed of his boat to about 8 miles per hour in order to negotiate the 2 foot swells created by the party boat. He maintained a steady course and as he was crossing the second or third swell he was struck from the rear by defendant's 17 foot Glassmaster boat. The bow of defendant's boat came over the rear of plaintiff's boat and then slid off to the left. Plaintiff had not looked to his rear and did not see defendant's boat prior to the collision. As a result of the collision, plaintiff sustained personal injuries and his boat was damaged. Defendant told plaintiff that he would pay the repair bill for plaintiff's boat and that if plaintiff saw a doctor he would pay that bill.

Defendant testified that before the collision his boat had taken a position some 50 to 75 feet behind plaintiff's boat and about 10 or 15 feet to the right thereof.

The two boats had been travelling at the same speed and in the same position for about 300 yards. Defendant saw the party boat headed east at an estimated speed of 20 or 25 miles per hour. Plaintiff and defendant were proceeding west, and the party boat was about 50 or 75 yards north of them. The party boat was leaving a wake from four to six feet high. Plaintiff's boat encountered the wake before the defendant's boat and defendant did not see plaintiff's boat again until after the collision. When defendant's boat hit the wake, defendant cut off his power and then heard the noise of the collision. When he next saw plaintiff's boat it was facing north at an angle and the bow of defendant's boat was sliding off the rear of plaintiff's boat.

Defendant was not concerned about the size of the wake with respect to his boat but was afraid that plaintiff's smaller boat could not take the wake. After the collision, plaintiff told defendant that he had slowed down and turned north to get through the wake. Defendant did not tell plaintiff that he would pay for the repairs to plaintiff's boat or his doctor bills.

The jury answered issues of negligence and contributory negligence in favor of the plaintiff. The jury awarded $500.00 in property damages and $1583.00 for personal injury. From judgment on the verdict, defendant appealed.

Pritchett, Cooke & Burch, by Stephen R. Burch and W. W. Pritchett, Jr., for plaintiff appellee.

Gillam & Gillam, by M. B. Gillam, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's first assignment of error raises the question of whether the evidence warranted the submission of the case to the jury. In essence, he argues that only two conclusions can be drawn from the evidence, and either of those precludes recovery by plaintiff as a matter of law.

He first argues that plaintiffs' own evidence discloses that plaintiff, while his boat was being overtaken by defendant, failed to maintain his speed and that that failure was negligence *per se*. Defendant argues, therefore, that plaintiff's contributory negligence would bar recovery as a matter of law.

Defendant then argues that if the court could conclude that plaintiff's reduction of speed was excused by the "emergency" created by the party boat's wake, then the collision by defendant's boat with plaintiff's precipitated by that change of speed, would also be excusable. Defendant further argues that the operator of the party boat was negligent in creating the dangerous wake and that that negligence created the "emergency." He concludes, therefore, that if contributory negligence by plaintiff is absent, the negligence of the party boat in creating the "emergency" was the sole proximate cause of the accident.

We are not persuaded by the foregoing arguments and conclude that the evidence presented a case for the jury.

The rules of navigation for harbors, rivers and inland waters require that "every vessel, overtaking any other, shall

keep out of the way of the overtaken vessel." 33 U.S.C.S. Sec. 209. The rules also provide that where by these rules, "one of the two vessels is to keep out of the way, the other shall keep her course and speed." 33 U.S.C.S. Sec. 206. Defendant contends that plaintiff's admission that he decreased his speed from 15 miles per hour to eight miles per hour (in order to negotiate the wake of the party boat) is a violation of that safety section and is negligence *per se*. In the first place, defendant's testimony that he was proceeding behind plaintiff and that the boats were moving at the same speed would seem to negate the conclusion that defendant was overtaking plaintiff's boat. To have been an overtaking boat it would have to have been proceeding at such speed that, if maintained, it would have passed plaintiff's boat. If they were moving at the same speed it is obvious defendant would not have passed plaintiff. Secondly, the law is not so absurd that it prohibits the boat ahead from decreasing its speed when a reasonable man should know that the reduction is necessary in order to avoid a danger to navigation.

The record in this case does not support a conclusion that any negligence on the part of the party boat was the proximate cause of this accident so as to give rise to any rule that might relate to an "inevitable" accident or a "sudden emergency."

While charging the jury on negligence, the judge said:

> " 'In the absence of anything which would give rise to the contrary he has the right to assume and act on the asumption that the other boat driver in this instance will obey the rules of the road, and that the term 'rules of the road' is referred to in maritime law just as it is in the operation of motor vehicles.' "

When the above excerpt is considered in the context of the entire charge, it is an accurate statement of law as it applies to the evidence in this case.

In summary, the case was properly submitted to the jury. It was for the jury to find the truth under the appropriate instructions that were given by the court as to the applicable law. After careful consideration of all of defendant's assignments of error, we find no reason, as a matter of law, to disturb the verdict.

No error.

Judges MORRIS and CLARK concur.

NORTH CAROLINA FIRE INSURANCE RATING BUREAU v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA

No. 7510SC621

(Filed 5 May 1976)

Insurance § 116— fire insurance rates — appeal — jurisdiction — prohibiting Insurance Commissioner from violating statutory stay

Where the Commissioner of Insurance ordered a 19% reduction of extended coverage rates as set forth in a filing of the Fire Insurance Rating Bureau which had been withdrawn and a further 3.4% decrease in rates, the Commissioner thereafter announced that the 19% decrease set forth in the filing would go into effect but a further hearing would be held regarding the 3.4% decrease in rates, and the Rating Bureau gave notice of appeal to the Court of Appeals, subject matter jurisdiction of both the 19% and 3.4% decreases became vested in the Court of Appeals under G.S. 58-9.3 and G.S. 58-9.4; therefore, the proper remedy for the Rating Bureau to prohibit the Commissioner of Insurance from taking action on the 3.4% decrease in violation of G.S. 58-9.5(10), which stays his order pending appeal, is to seek in the Court of Appeals the issuance of the prerogative writ of supersedeas under G.S. 7A-32(c) and App. R. 23, not to seek an injunction in the Superior Court of Wake County.

APPEAL by defendant from *Bailey, Judge.* Order entered 16 May 1975, Superior Court, WAKE County. Heard in the Court of Appeals 23 October 1975.

On 6 January 1975, the North Carolina Fire Insurance Rating Bureau filed a request for an adjustment in the premium rates for extended coverage insurance with the North Carolina Commissioner of Insurance. The filing called for a 19% reduction in the rates. This filing was subsequently withdrawn by letter from the Bureau to the Commissioner dated 6 March 1975. The reason for this withdrawal was to avoid the operation of the "deemer" provision of G.S. 58-131.1. By letter dated 11 April 1975, the Commissioner approved a "reduction of 19% set forth in your filing" and directed a further 3.4% decrease "as determined by the attached rate development exhibit . . . . "

On 22 April 1975, the Bureau filed a motion with the Commissioner praying that the Commissioner's letter order of

11 April 1975 be set aside. On 28 April 1975 the Commissioner denied the request and announced that the 19% decrease set forth in the filing would go into effect 1 May 1975 but that a further hearing would be scheduled for 12 May 1975 regarding an additional 3.4% decrease in the rates.

On 30 April 1975 the Bureau filed with the Commissioner a notice of appeal to the North Carolina Court of Appeals from the 11 April letter order, and from the order denying the Bureau's motion to set aside that order. The opinion of the Court of Appeals in that case (No. 7510INS581) is filed simultaneously with this opinion.

On the afternoon of 6 May 1975, the Bureau received a letter from the Commissioner advising that the Commissioner took the position that the hearing set for 12 May 1975 on the 3.4% decrease was not stayed by reason of the Bureau's appeals and that the hearing would be held as scheduled.

On 9 May 1975, the Bureau filed an affidavit and complaint in Superior Court seeking to temporarily restrain and temporarily and permanently enjoin the Commissioner from holding the hearing set for May 12, 1975 and from taking "any other or further steps, proceeding, or action with respect to said hearing or the matter now on appeal to the North Carolina Court of Appeals in connection herewith" and seeking a further injunction "at the time of the hearing of this matter on its merits" "ordering the Defendant to cease and desist from blocking the insurance rate making processes." On the basis of the complaint and affidavit, and without notice to the Commissioner, Superior Court Judge James H. Pou Bailey issued an order on 9 May 1975 temporarily restraining the Commissioner from conducting or holding a hearing on Extended Coverage Insurance Rates on 12 May 1975, and ordering that the Bureau's motion for a preliminary injunction be heard on 16 May 1975. In this hearing Judge Bailey considered the complaint and affidavit of the Bureau, considered an affidavit of Deputy Insurance Commissioner Robert E. Holcombe, heard arguments of counsel, and issued a preliminary injunction continuing the terms of the previous restraining order and enjoining the Commissioner from "conducting" or holding a hearing on Extended Coverage Insurance rates concerned in the matter now on appeal until the appeals thereof are dismissed or otherwise disposed of by the North Carolina Court of Appeals . . . . "

On 23 May 1975, the Commissioner filed exceptions to this order and gave notice of appeal to the North Carolina Court of Appeals.

Attorney General Edmisten by Assistant Attorney General Isham B. Hudson, Jr., for appellant, Commissioner of Insurance.

William T. Joyner and James E. Tucker for plaintiff, North Carolina Fire Insurance Rating Bureau.

CLARK, Judge.

The pivotal question on appeal is whether the Superior Court had jurisdiction to act on the motion by the Bureau for an injunction. We find that it did not have such jurisdiction. The procedure for appeal from orders of the Commissioner of Insurance is set out in Chapter 58, Insurance, of the General Statutes. G.S. 58-9.3(a) provides in part as follows:

> "Any order or decision made, issued or executed by the Commissioner, *except* an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets *and except an order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory, or not in the public interest, shall be subject to review in the Superior Court of Wake County* . . . . " (Emphasis added.)

G.S. 58-9.4 provides:

> "Any order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification or classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory or not in the public interest *may be appealed to the North Carolina Court of Appeals* by any party aggrieved thereby. . . . " (Emphasis added.)

G.S. 58-9.5 provides further that:

"Appeals to the North Carolina Court of Appeals pursuant to G.S. 58-9.4 shall be subject to the following provisions:

* * *

(10) An appeal under this section shall operate as a *stay of the Commissioner's order or decision* until said appeal has been dismissed or the questions raised by the appeal determined according to law." (Emphasis added.)

We find that without question the matter involved in this appeal was one continuous rate filing activity. When the Bureau gave notice of appeal to this Court, subject matter jurisdiction over both the 19% and 3.4% decrease became vested in the Court of Appeals, through the terms of G.S. 58-9.3 and 58-9.4. Reading these sections *in para materia* it is quite clear that the Court of Appeals and not the Superior Court of Wake County has subject matter jurisdiction of this case.

If the Commissioner of Insurance proposes to take action in violation of G.S. 58-9.5(10) which stays his order or decision pending appeal, the proper remedy for the plaintiff Bureau was not to seek an injunction in the Superior Court, but to seek in the Court of Appeals the issuance of the prerogative writ of supersedeas under G.S. 7A-32(c) and App. R. 23.

The order of the Superior Court granting the preliminary injunction was error, and the same is vacated. This cause is remanded to the Superior Court, Wake County, for entry of an Order dismissing plaintiff's action.

Reversed and remanded.

Chief Judge BROCK and Judge HEDRICK concur.

BETSY CHOPLIN HAMPTON v. RONALD GRANT HAMPTON

No. 7521DC826

(Filed 5 May 1976)

Divorce and Alimony §§ 18, 23, 24— alimony pendente lite — child custody and support — insufficiency of findings

In an action for alimony without divorce, alimony *pendente lite*, child custody and child support, the trial court erred in failing to make any findings with respect to whether defendant was capable of making alimony *pendente lite* payments, whether plaintiff was entitled to the relief demanded, what the reasonable needs of the minor children were, what the best interests and welfare of the children required with respect to custody, and whether plaintiff was entitled to counsel fees.

APPEAL by defendant from *Clifford, Judge.* Judgment entered 25 April 1975 in District Court, FORSYTH County. Heard in the Court of Appeals 11 February 1976.

Plaintiff (wife) instituted this action against the defendant (husband) to obtain alimony without divorce, alimony pendente lite, custody of the parties' two minor children, and child support payments. Plaintiff alleged in her complaint that the defendant has abandoned her and the parties' two minor children. Plaintiff further alleged that the defendant engaged in homosexual conduct and offered plaintiff such indignities so as to render her life burdensome and her condition intolerable.

Defendant answered and specifically denied that he had abandoned the plaintiff, that he was a homosexual, and that he had offered such indignities to the plaintiff as to render her life burdensome and intolerable. Defendant counterclaimed for custody of the children.

The court found that plaintiff was unemployed and that she could not find work; that "two children were born to this marriage"; that defendant abandoned plaintiff and the children; and the court further made findings related to defendant's income. The court concluded that plaintiff was a dependent spouse. Custody of the children was awarded to the plaintiff, and defendant was ordered to make alimony payments of $50 per week, child support payments of $50 per week, and a payment of $200 for plaintiff's counsel fees. The order further provided for an increase in alimony and support payments when defendant resumed regular working hours.

From the order, dated 25 April 1975, defendant appealed to this Court.

White and Crumpler, by Michael J. Lewis and J. Earl McMichael, for plaintiff appellee.

John E. Gehring and Hatfield and Allman, by James W. Armentrout, for defendant appellant.

ARNOLD, Judge.

In order to be entitled to alimony pendente lite one must be a dependent spouse, and the provisions of G.S. 50-16.3 must be met. In *Little v. Little,* 18 N.C App. 311, 196 S.E. 2d 562 (1973), this Court stated that the trial court must make findings of fact to show three requirements: (1) the existence of a marital relationship; (2) the spouse is either (a) actually or substantially dependent upon the other spouse for maintenance and support, or (b) is substantially in need of maintenance and support from the other spouse; and (3) the supporting spouse is capable of making the required payments.

Defendant challenges the sufficiency of the court's findings of fact. There is merit in his contention that the court failed to make any finding with respect to whether he was capable of making the payments.

Citing *Manning v. Manning,* 20 N.C. App. 149, 201 S.E. 2d 46 (1973), defendant also contends that the award of alimony pendente lite is insufficient because there was no finding or conclusion that plaintiff was "entitled to the relief demanded" as required by G.S. 50-16.3(a). This contention is also correct. The factual findings were held to be insufficient where "there were no findings or conclusions with respect to whether the dependent was 'entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made.'" *Manning v. Manning, supra* at 153.

The court's findings also failed to support the award of child support. G.S. 50-13.4(c) requires "[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child. . . . " Where the court does not make appropriate findings based on competent evidence as to what are the reasonable needs of the children for health, education, and maintenance, it is error to direct payments for their support. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77

(1967); *Manning v. Manning, supra.* No findings were made in the instant case concerning the needs of the children.

Defendant argues that the findings are likewise insufficient to support the order of custody. G.S. 50-13.2(a) provides that "[a]n order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person . . . as will, in the opinion of the judge, best promote the interest and welfare of the child."

Findings by the trial court in regards to custody are conclusive when supported by competent evidence. 3 Strong, N. C. Index 2d, Divorce and Alimony, § 24, p. 377. "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." *Crosby v. Crosby, supra* at 238-239, citing *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967).

The court must make findings, based on competent evidence, of whether the best interest and welfare of the children will be promoted by awarding custody to plaintiff or defendant. *Powell v. Powell,* 25 N.C. App. 695, 214 S.E. 2d 808 (1975). The record contains no finding regarding the best interest and welfare of the children.

There is also merit in defendant's contention that the findings of fact were not sufficient to sustain the award of counsel fees. In *Austin v. Austin,* 12 N.C. App. 286, 296, 183 S.E. 2d 420 (1971), this Court said:

> " . . . It is uncontroverted that G.S. 50-16.4 and G.S. 50-13.6 permit the entering of a proper order for 'reasonable' counsel fees for the benefit of a dependent spouse, but the record in this case contains no findings of fact, such as the nature and scope of the legal services rendered, the skill and time required, et cetera, upon which a determination of the requisite reasonableness could be based. Compare, for example, the evidence and findings in *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221 (1967). See also, *Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899 (1949)."

Moreover, since the findings were not sufficient to support an award of alimony pendente lite they are not sufficient to

support an award of counsel fees. *Newsome v. Newsome*, 22 N.C. App. 651, 207 S.E. 2d 355 (1974).

The judgment is vacated and the cause is remanded for further hearing and findings consistent with this opinion.

Vacated and remanded.

Chief Judge BROCK and Judge PARKER concur.

ROBERT FRANKLIN JOHNSTON v. MARY JANE RUTLAND JOHNSTON

No. 7626DC11

(Filed 5 May 1976)

Infants § 8— custody of minors — defendant and minors in Tennessee — jurisdiction of N. C. court

The trial court in a child custody action (1) properly exercised jurisdiction in the matter pursuant to G.S. 50-13.5(c)(2)b, since defendant had been personally served in N. C. with summons and complaint, (2) was not required to give full faith and credit to a *temporary* order of the Juvenile Court of Memphis, Tennessee, which granted temporary custody to defendant, and (3) did not abuse its discretion by retaining jurisdiction of the action pursuant to G.S. 50-13.5(c)(5), though defendant and the two children were no longer residents of N. C., since the court determined that plaintiff, defendant and the two children had lived in N. C. for two years, there were witnesses in N. C. who could testify as to the fitness of the parties and best interests of the children, and trial of the action in N. C. would not cause an undue burden on defendant.

APPEAL by defendant from *Lanning, Judge*. Judgment entered 15 September 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 April 1976.

Plaintiff instituted action for custody of his two minor children. He alleged that he and the defendant were married and that they were residents of Mecklenburg County. Plaintiff alleged that the defendant left him without notice and took their children with her to Memphis, Tennessee, and that she refuses to let the plaintiff visit or communicate with his children. Plaintiff alleged that it was in the best interest of the children that they be placed in his care, custody and control.

Defendant entered a special appearance for the purpose of contesting jurisdiction and alleged that she and the two children were residents of Memphis, Tennessee, and that the District Court of Mecklenburg County lacked jurisdiction over her. She moved that the action be dismissed. Defendant subsequently amended her special appearance to allege that the Juvenile Court of Memphis and Shelby County, Tennessee, had entered an order granting defendant temporary custody of the children, and that the said Juvenile Court had assumed jurisdiction to determine the custody of the children and therefore the District Court of Mecklenburg County should refuse to exercise jurisdiction and dismiss plaintiff's action.

At the hearing plaintiff testified that he and defendant were married in 1962. They lived in Memphis for the first six years of their marriage and then moved to Birmingham, Alabama, where they lived for the next six years. The two children were born in Birmingham. Plaintiff and defendant lived in Charlotte for the past two years. The children's ages are six and four.

Upon conclusion of the hearing, the court entered an order concluding that "this Court has jurisdiction of the parties and the subject matter of this action" and that "this Court has discretion to retain jurisdiction of this action pursuant to the authority of North Carolina General Statutes § 50-13.5." The trial court found that defendant had been personally served in North Carolina with summons and complaint, and that custody should be determined in Mecklenburg County where the children had resided for the past two years, and where there were witnesses to testify as to the fitness of the parties and the best interest of the children.

The trial court further found that the Protective Order of the Memphis Juvenile Court was a temporary protective order, and not an adjudication of the custody of the children. The court found also that defendant and the children were no longer residents of Mecklenburg County, and that trial of the action in Mecklenburg County would not cause an undue burden on the defendant.

From the denial of defendant's motion to dismiss, she appeals to this Court.

Hamel, Cannon and Hamel, P.A., by I. Manning Huske, for plaintiff appellee.

Mraz, Aycock, Casstevens and Davis, by Robert P. Hanner II and Nelson M. Casstevens, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant's contention that the trial court erred in holding that it had jurisdiction of the parties and the subject matter of this action is without merit.

G.S. 50-13.5(c) (2) provides:

> "The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:
>
> a. The minor child resides, has his domicile, or is physically present in this State, *or*
>
> b. *When the court has personal jurisdiction of the person, . . . having actual care, control, and custody of the minor child.*" [Emphasis added.]

On 23 June 1975, according to the record, personal service of defendant was acquired. Pursuant to G.S. 50-13.5(c) (2)b the court properly exercised jurisdiction in this matter.

Defendant argues that the Protective Custody Order of the Memphis Juvenile Court should be given full faith and credit because it was entered prior to any order of custody entered by a North Carolina court. This is unfounded. "The Full Faith and Credit Clause of the United States Constitution, Article IV, § 1, does not conclusively bind the North Carolina courts to give greater effect to a decree of another state than it has in that state, or to treat as final and conclusive an order of a sister state which is interlocutory in nature." *In re Kluttz,* 7 N.C. App. 383, 385, 172 S.E. 2d 95 (1970). The District Court in Mecklenburg County was not required in this case to give full faith and credit to the temporary order of the Juvenile Court of Memphis, Tennessee.

Defendant's final contention that the trial court abused its discretion by retaining jurisdiction of this action pursuant to G.S. 50-13.5 is groundless.

G.S. 50-13.5(c) (5) provides: "If at any time a court of this State having jurisdiction of an action or proceeding for

the custody of a minor child finds as a fact that a court in another state has assumed jurisdiction to determine the matter, and that the best interest of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court of this State may, in its discretion, refuse to exercise jurisdiction, and dismiss the action or proceeding or may retain jurisdiction and enter such orders from time to time as the interest of the child may require."

The trial judge found that the parties and the two minor children resided in Mecklenburg County from 1973 until 10 March 1975, and that the witnesses who could testify regarding the fitness of either of the parties, and regarding what might be in the best interest of the two minor children, resided in Mecklenburg County. There was no evidence offered in contradiction to these findings, and we find no basis to show that the trial judge abused his discretion by not relinquishing jurisdiction to the Tennessee court.

Affirmed.

Judges BRITT and VAUGHN concur.

RALPH W. EARLES v. MARY PERGERSON EARLES

No. 7517DC915

(Filed 5 May 1976)

1. **Appeal and Error § 6— striking of entire answer — right of appeal**
An order striking defendant's entire answer is appealable.

2. **Divorce and Alimony § 13— separation for statutory period — order for alimony pendente lite and possession of home — legal separation**
An order awarding the wife not only alimony *pendente lite* but also exclusive possession of the residence of the parties constituted a legal separation such that in the husband's action for absolute divorce under G.S. 50-6, the one-year separation began to run on the date of that order, not on the date the wife was subsequently granted a divorce from bed and board.

APPEAL by defendant from *Clark, Judge.* Order entered 28 July 1975, in District Court, ROCKINGHAM County. Heard in the Court of Appeals 9 March 1976.

On 25 August 1972, Mary Earles brought an action for divorce from bed and board against her husband, Ralph Earles. On 18 January 1973, the District Court issued an order requiring Ralph Earles to make alimony and child support payments pendente lite and gave Mary Earles possession of the home. The parties were granted a divorce from bed and board on 17 December 1974. On appeal that judgment was modified and affirmed in an opinion by this Court at 26 N.C. App. 559.

On 9 May 1975, Ralph Earles brought the present action for absolute divorce based on a year's separation. He alleged that the alimony pendente lite order of 18 January 1973, constituted a judicial separation. Mrs. Earles' answer denied a judicial separation on 18 January 1973, and alleged that such separation began on 17 December 1974, the date of the judgment of divorce from bed and board. Mr. Earles moved to strike Mrs. Earles' entire answer, and his motion was granted. From this order of the trial court, Mrs. Earles appeals.

Bethea, Robinson, Moore & Sands by Alexander P. Sands for plaintiff.

Gwyn, Gwyn & Morgan by Melzer A. Morgan, Jr., for defendant.

CLARK, Judge.

[1] The order striking defendant's entire answer is appealable. *Bank v. Printing Co.*, 7 N.C. App. 359, 172 S.E. 2d 274 (1970).

[2] Defendant's only assignment of error presents the question of whether an order awarding a wife alimony pendente lite and undisturbed possession of the residence constitutes a legal separation such that in an action for absolute divorce under G.S. 50-6 the one-year separation begins to run on the date of the order.

The words "separate and apart," as used in G.S. 50-6, mean that there must be both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation. *Mallard v. Mallard*, 234 N.C. 654, 68 S.E. 2d 247 (1951); *Beck v. Beck*, 14 N.C. App. 163, 187 S.E. 2d 355 (1972). In an action for absolute divorce under G.S. 50-6 the plaintiff need not allege and prove, as required for divorce under G.S. 50-5(4), that he or she is an injured party. Never-

theless, since the decision in *Sanderson v. Sanderson,* 178 N.C. 339, 100 S.E. 590 (1919), the North Carolina Supreme Court has held that the plaintiff cannot take advantage of his own wrong and plaintiff's action for absolute divorce may be defeated by showing as an affirmative defense that the separation was occasioned by act of the plaintiff in wilfully abandoning the defendant. *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466 (1943); *Overby v. Overby,* 272 N.C. 636, 158 S.E. 2d 799 (1968); *Rupert v. Rupert,* 15 N.C. App. 730, 190 S.E. 2d 693 (1972).

The doctrine of recrimination announced in *Sanderson* is still recognized and approved in this State, but it has been eroded by court decisions holding that though the separation was initially due to the fault of the husband in wilfully abandoning his wife, an absolute divorce may be granted in North Carolina where the parties have been separated for the requisite period under a divorce from bed and board, *Lockhart v. Lockhart,* 223 N.C. 123, 25 S.E. 2d 465 (1943); *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562 (1968); under a valid separation agreement, *Richardson v. Richardson,* 257 N.C. 705, 127 S.E. 2d 525 (1962); *Becker v. Becker,* 262 N.C. 685, 138 S.E. 2d 507 (1964); or under a judgment for alimony without divorce, *Rouse v. Rouse,* 258 N.C. 520, 128 S.E. 2d 865 (1963); *Wilson v. Wilson,* 260 N.C. 347, 132 S.E. 2d 695 (1963).

In the case at bar, subsequent to the order of 18 January 1973 awarding her alimony pendente lite and undisturbed possession of the home, the wife was granted a divorce from bed and board on the ground of abandonment by the plaintiff-husband. The defendant contends that the legal separation began, not from the order of 18 January 1973, but from the judgment for divorce from bed and board entered on 17 December 1974. Defendant relies on *Rouse v. Rouse, supra,* at page 521, and the language therein of Justice Sharp (now Chief Justice) as follows:

> ". . . When the law, by civil judgment, has secured to the wife reasonable support and maintenance after a husband has wrongfully separated himself from her, it has required him to perform his legal obligation and can do no more. The separation is legalized from then on unless marital relations are resumed thereafter. . . . "

The quoted language in *Rouse* suggests that the Court is stating a result rather than a basic reason for the ruling. The

stated reason appeared to be that since both divorce from bed and board and alimony without divorce under G.S. 50-16 suspend the effect of the marriage as to cohabitation, the separation was legalized from the date of such judgment. Even so, the alimony pendente lite order secured to the wife reasonable support and maintenance in the sense that the order could not under G.S. 50-11 be impaired or destroyed by a subsequently rendered decree of absolute divorce. *Johnson v. Johnson,* 17 N.C. App. 398, 194 S.E. 2d 562 (1973). The order was rendered in her action for divorce from bed and board, and the defendant-wife in this action for absolute divorce had the opportunity to protect her right to reasonable support and maintenance, which she has in fact done by judgment for permanent alimony in her action before final disposition of her husband's action for absolute divorce.

In *Johnson v. Johnson,* 12 N.C. App. 505, 509, 183 S.E. 2d 805, 807 (1971), where the factual situation is similar to that in the case at bar, this court stated:

> "When the order dated 27 March 1964 was entered on motion of the wife in her action for alimony without divorce, the court not only awarded her alimony *pendente lite,* but went further and awarded her 'sole and exclusive possession, for herself and the infant child,' of the residence of the parties. This had the effect of legalizing the separation of the parties from the date of the order, and such separation having continued for the requisite statutory period thereafter, the husband became entitled to a divorce. . . . "

We hold that the pendente lite order of 18 January 1973 in the wife's action for divorce from bed and board legalized the separation between the husband and wife since it provided not only for alimony pendente lite and child custody but also that the wife "have the sole use and peaceful and undisturbed possession of the residence. . . . " And such separation having continued for the requisite one year thereafter, the plaintiff-husband became entitled to a divorce. The trial court properly struck defendant's entire answer, and the order is

Affirmed.

Judges BRITT and PARKER concur.

POLLY ROSE MOZINGO v. MID-SOUTH INSURANCE COMPANY

No. 757DC898

(Filed 5 May 1976)

1. **Insurance § 67— death by accidental means — auto accident — sufficiency of evidence for jury**

In an action by plaintiff beneficiary to recover on a policy of insurance issued by defendant which insured plaintiff's husband against loss of life "effected solely by accidental means," the trial court properly submitted the case to the jury where the evidence tended to show that the insured met his death when a truck occupied by him ran off a highway and struck a tree, and evidence that the vehicle had been traveling at a high rate of speed and that, thereafter, blood taken from defendant's heart was .21 percent alcohol did not preclude the jury from finding that decedent's death was effected solely by accidental means.

2. **Insurance § 45— death by accidental means — jury instruction proper**

In an action to recover on an insurance policy insuring plaintiff's husband against loss of life "effected solely by accidental means," the trial court properly explained "accidental means" within the meaning of the policy in question.

3. **Trial § 33— jury instructions — failure to declare and explain law arising on the evidence**

In an action to recover on an insurance policy the trial court erred in failing to declare and explain the law arising on the evidence, it being insufficient for the court to recite only what the parties contended the law was.

APPEAL by defendant from *Carlton, Judge.* Judgment entered 4 June 1975 in District Court, NASH County. Heard in the Court of Appeals 19 February 1976.

Plaintiff is the beneficiary of an insurance policy issued by defendant. Among other things, the policy insured her husband against loss of life "effected solely by accidental means independent of all other causes."

Plaintiff last saw her husband about 11:00 a.m. on February 16, 1974. At that time, he was in good health. To the best of her knowledge her husband had not been a "drinking man" for the past two years and had no trouble of which she was aware. Later that day, a highway patrolman found insured's body pinned in the cab of a pickup truck that had crashed into a tree about 30 feet from the edge of N. C. Highway 581 near Spring Hope. The truck was severely damaged and was described as a "total loss." Apparently without objection, the

patrolman was allowed to venture his estimate that, immediately prior to the accident, the truck had been travelling at a speed of 80 miles an hour. A small boat and a toolbox were found about 300 feet from the truck. The vehicle was found near a curve in the highway. A blood sample was later taken from deceased's heart. The alcoholic content was .21 percent.

The following issue was submitted to the jury:

> "1. Is the plaintiff, Polly Rose Mozingo, entitled to recover of the defendant the proceeds under the insurance policy as alleged in the Complaint?"

The jury answered that issue "yes" and judgment was entered for plaintiff in the amount of the policy.

Milton P. Fields and Leon Henderson, Jr., for plaintiff appellee.

Vernon F. Daughtridge, for defendant appellant.

VAUGHN, Judge.

[1] Defendant brings forward several assignments of error wherein it contends, in essence, that the judge should not have submitted the case to the jury but should have entered judgment for defendant as a matter of law. These contentions cannot be sustained. The evidence tends to show that the insured met his death by external violence which was not totally inconsistent with an accident. The evidence tends to show that he met his death when a truck occupied by him [the parties seem to assume that inferences arising on the evidence are conclusive as to insured's having been the operator] ran off a highway and struck a tree. That there is evidence that the vehicle had been travelling at a high rate of speed and that, thereafter, blood taken from decedent's heart was .21 percent alcohol does not preclude the jury from finding that decedent's death was effected solely by accidental means. The policy contained no specific exclusions from coverage if death occurred while decedent was intoxicated or engaged in a violation of the law.

Defendant brings forward a number of other assignments of error directed to the charge to the jury.

[2] In a long line of cases, our courts have emphasized that the term "accidental death" and "death by accidental means" are not synonymous.

The able trial judge's explanation of "accidental means" within the meaning of the policy in question is in accord with numerous decisions of the Supreme Court. We quote his explanation here.

> "Accidental means refers to the occurrence or happening which produces the result and not to the result. That is, accidental is descriptive of the term 'Means'. The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. The emphasis is upon the accidental character of the causation, not upon the accidental nature of the ultimate sequence of the chain of causation.
>
> Now, members of the jury, in laymen's language, we ordinarily think of an accident insurance policy as an accident in a pure sense, that is, a totally, unforeseen, unpredictable, unexpected result. Accidental means, which is the language employed in this policy, goes not to the actual results, in this case the striking of a truck against a tree but goes to the cause of that happening, the cause of the result and the question before you is with reference as to whether or not the cause leading to the striking of the truck against the tree was accidental."

After the foregoing, the court gave a lengthy statement of the contentions of the parties and then closed with this mandate:

> "So, finally, members of the jury, with respect to the issue I instruct you that if you should find from the evidence and by its greater weight, that on the 16th day of February, 1974, that the deceased, Mr. Mozingo, was operating his truck along the highway and that while doing so his truck left the highway accidentally, as that accidental means has been defined to you in this charge, independent of all other causes, if you should find those facts by the greater weight of the evidence and you go further and find that the movement of the truck in leaving the highway and striking the tree resulted in his death, I instruct you that it would be your duty to answer the issue in favor of the plaintiff, that is, you would answer the issue yes.
>
> On the other hand, members of the jury, if after considering all of the evidence, the plaintiff has not so satis-

fied you, or if you find the truth to be evenly balanced, or if you are unable to tell where the truth lies, then your verdict on that issue must be for the defendant and you would answer the issue no."

The foregoing two quotations from the charge constitute the only explanation of the law arising on the evidence given in the case. The rest of the charge, as it relates to the issue at trial, was devoted to a recapitulation of the evidence and a statement of the contentions of the parties.

[3] We regret to say that the judge did not declare and explain the law arising on the evidence. It is true that the judge told the jury that defendant *contended* that insured voluntarily drove at a high rate of speed after drinking alcohol and that these voluntary acts of insured caused the result, but at no time did the judge tell the jury how they should apply that evidence in arriving at their verdict.

> "The decisions of this Court are consistently to the effect that G.S. 1-180 imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties with respect to a particular issue is not sufficient to meet the requirements of the statute. The judge must explain and apply the law to the specific facts pertinent to the issue involved." *Saunders v. Warren,* 267 N.C. 735, 739, 149 S.E. 2d 19.

A recital of what the parties contend the law to be is not sufficient. *Tate v. Golding,* 1 N.C. App. 38, 159 S.E. 2d 276. *See also Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331 and cases cited therein.

In applying the law to the evidence, the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted either in the affirmative or the negative. *Credit Co. v. Brown,* 10 N.C. App. 382, 178 S.E. 2d 649.

For the reasons stated, there must be a new trial.

New trial.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. JOHN ROBERT HAYES, JR.

No. 7521SC1005

(Filed 5 May 1976)

1. **Jury § 5— jury selection while defendant absent**

Defendant was not prejudiced by the fact that jury selection occurred while defendant was not in court where the trial judge gave defendant the opportunity, before the jury was impaneled, to confer with counsel concerning the composition of the jury, and defense counsel thereafter announced that the jury was acceptable to defendant.

2. **Searches and Seizures § 3— sufficiency of affidavit for warrant**

An officer's affidavit based on information received from a confidential informant was sufficient to support the issuance of a search warrant for marijuana where it alleged that the informant had previously given reliable information which led to several arrests, including one for possession of lottery tickets; the informant had seen marijuana on the premises shortly before the application for a warrant; and the informant had seen defendant use marijuana and sell drugs.

3. **Criminal Law § 51— qualification of expert**

In a prosecution for felonious possession of marijuana, the trial court did not err in ruling that a toxicologist was qualified to express his opinion that the substance in question was marijuana.

APPEAL by defendant from *Long, Judge.* Judgment entered 18 September 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 March 1976.

Defendant was indicted for the felonious possession of marijuana.

The evidence at trial tended to show the following:

An investigator with the narcotics division of the Winston-Salem Police Department obtained a search warrant for defendant's premises. The investigator and other officers arrived at defendant's house about 9:15 p.m. on 21 March 1975. Defendant opened the door and the search warrant was read to him. After the warrant was read, defendant took three bags from his pocket and said, "I guess you want this." The officers had a police dog with them that was capable of helping locate marijuana. Defendant told them that if they would not carry the dog upstairs, he would show them what they wanted. He directed them to an upstairs closet where they found a bag containing 16 envelopes. An assistant toxicologist at North Carolina Bap-

tist Hospital examined the contents of one of the first three bags and determined that it contained marijuana. The same tests were made on four of the sixteen bags found in the closet and it was determined that they also contained marijuana. All of the bags were of the same size and shape, and all appeared to contain the same substance. The total weight of the substance seized was 56.4 grams.

Defendant offered no evidence.

The verdict was guilty. Judgment was entered imposing a prison sentence of not less than two and one-half nor more than three years. Defendant's court appointed trial counsel was appointed to perfect his appeal to this Court.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Stephens, Peed & Walker, by Herman L. Stephens, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first complains that jury selection was commenced while he was not in court. The case was scheduled for Monday. On that day, the District Attorney informed defendant's counsel that defendant could be excused from the courtroom and that they would be given a half day's notice before trial. About 10:30 a.m. on Thursday of the same week, the District Attorney's office started trying to locate defendant's counsel and defendant. The court waited for one hour for counsel to get there and, after his arrival, directed them to start selecting the jury. Counsel objected but was told by the court that the jury would not be impaneled until defendant arrived and discussed the composition of the jury with counsel. After twelve were in the box, defendant still had not arrived and the court began hearing defendant's motion to suppress, based on the alleged insufficiency of the search warrant. At 2:17 p.m. defendant arrived while the only witness on the motion to suppress was still on the stand. Defendant remained during the rest of the hearing and trial.

After he denied defendant's motion to suppress, the judge gave defendant the opportunity to confer with counsel concerning the composition of the jury. Thereafter, defense counsel announced, "Your Honor, I discussed the jury with the defend-

ant and the Jury is acceptable to him." Defendant's assignments of error based on the foregoing are overruled.

[2] The second question raised is the correctness of the denial of defendant's motion to suppress, made on the ground that no probable cause was shown for the issuance of the search warrant. We hold that the affidavit in support of the application for the search warrant is clearly sufficient to support a finding of probable cause for the issuance of the warrant. This can best be demonstrated by simply setting out the affidavit.

"AFFIDAVIT TO OBTAIN A SEARCH WARRANT

F. A. Holman, Investigator Winston-Salem Police Dept. Narcotics Div. being duly sworn and examined under oath, says under oath that he has probable cause to believe that John Hayes aka Spanky has on his premises certain property; to wit; certain property, to wit: marijuana, the possession of which is a crime, to wit: a violation of the Controlled Substances Act 21 March 1975 2775 Piedmont Circle, Winston-Salem, N. C. This property described above is located on the premises and on his person described as follows: Brick duplex apts. trimmed in white with gray roof. Has the number 2775 on the door. The facts which establish probable cause for the issuance of a search warrant are as follows: I am Officer F. A. Holman of the Winston-Salem Police Dept. (Narcotics Unit) and as such am empowered to enforce the drug laws set forth in Chapter 90 of the North Carolina General Statutes. I have received information from a confidential informer that the narcotic drug marijuana is being kept and stored at 2775 Piedmont Circle. The informer has been to the above location in the past few hours and observed the narcotic drug marijuana being possessed and controlled at the above location. This information was received on the 21 March 1975.

The informant has furnished information in the past and the same has proven reliable. Information furnished by this informant has led to several arrests, information received from this information led to the arrest of Miss Elizabeth Furches for the possession of lottery. This case is now pending in Criminal Court.

The informant has seen the person named in this search warrant using marijuana in the past and has seen this individual sell drugs from his person."

Among other things, the affidavit discloses information that (1) the informer had, theretofore, given information that has proven reliable and led to several arrests, including one for the unlawful possession of lottery tickets, and (2) the informer has seen marijuana on the premises shortly before the application for the warrant and (3) the informant has seen the defendant use marijuana and sell drugs. Surely this discloses the *probability* that the criminal activity is being carried on.

We repeat what we said in *State v. Staley,* 7 N.C. App. 345, 172 S.E. 2d 293.

> "Only the probability and not a prima facie showing of criminal activity is the standard of probable cause. *Beck v. Ohio,* 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223. The affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant. *Jones v. United States,* 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725. Affidavits of probable causes are tested by much less rigorous standards than those governing the admissibility of evidence at trial. *McCray v. Illinois,* 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056. It must be remembered that the object of search warrants is to obtain evidence—if it were already available there would be no reason to seek their issuance. They must be issued upon information which may not at that time be competent as evidence by strict rules. *State v. Bullard,* 267 N.C. 599, 148 S.E. 2d 565. In judging probable cause, issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741. Their determination of probable cause should be paid great deference by reviewing courts. *Jones v. United States, supra.* As Justice Fortas observes in his dissenting opinion in Spinelli, 'a policeman's affidavit should not be judged as an entry in an essay contest.' " *State v. Staley, supra,* at 349, 350.

[3] Defendant contends that the court abused its discretion when it allowed the toxicologist to express his opinion that the substance was marijuana. The argument is without merit. Generally, the qualifications of a witness to testify as an expert in a particular field is a matter addressed to the sound discretion of the trial court. Moreover, the court made due inquiry of the qualifications of the witness and there is ample evidence to support its decision.

We have considered defendant's remaining assignments of error and conclude that no prejudicial error in defendant's trial has been shown.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES KIRBY POLK

No. 7526SC996

(Filed 5 May 1976)

1. **Assault and Battery § 14— assault on police officer with firearm — sufficiency of evidence**

In a prosecution for assault on a police officer with a firearm while the officer was in performance of his public duties, evidence was sufficient to be submitted to the jury where it tended to show that an officer out of uniform approached defendant and his companion in an apartment parking lot as they were letting air out of the apartment manager's car tires, the officer told the two men to stand and identified himself as a police officer, one of the men fled, the officer pointed his gun at defendant and patted him down, as the officer and defendant walked across the parking lot the officer heard something behind him and turned around, and defendant "jumped the gun" and thereafter fired two shots at the officer's head, one of which grazed his shoulder. G.S. 14-34.2.

2. **Assault and Battery § 8— assault on a police officer with firearm — self-defense**

In a prosecution for assault on a police officer with a firearm while the officer was in performance of his public duties, the trial court erred in refusing to instruct the jury as to self-defense.

APPEAL by defendant from *Martin (Harry), Judge.* Judgment entered 5 September 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 March 1976.

The defendant, James Kirby Polk, was charged in a bill of indictment, proper in form, with the felonious assault of a police officer with a firearm while the officer was in performance of his public duties, a violation of G.S. 14-34.2. He pleaded not guilty but was found guilty of assault with a deadly weapon. From judgment imposing a twelve-month prison sentence, suspended for three years, and defendant placed on probation, he appealed.

Attorney General Edmisten by Associate Attorney Norma S. Harrell for the State.

Gene H. Kendall for defendant appellant.

HEDRICK, Judge.

[1] The defendant assigns as error the denial of his motions for judgment as of nonsuit made at the close of the State's evidence and at the close of all the evidence.

Evidence offered by the State tended to show the following: Lloyd E. Miller, a patrolman for the Charlotte Police, was in his apartment at approximately 3:00 a.m. on 22 March 1975 packing clothes for a fishing trip when he heard a noise outside "which sounded like metal hitting metal." He put on a pair of bluejeans and a T-shirt and walked outside to investigate. He carried his .22 calibre pistol, his keys, and his wallet. Once outside he noticed two men in the parking lot squatting behind a car owned by Mr. Van Johnson, the apartment manager. The defendant, who was one of the men, was at the rear of the car. The other man was at the other end of the car, separated from the defendant by the length of the automobile. Miller noticed that two of the tires on the car were flat and another was going flat. He "told the men to stand up, that he was a police officer." The defendant stood and, at the direction of Miller, put his hands on his head, but the other man fled. Miller pointed his gun at the defendant, took out his wallet, and identified himself with his identification card as being a police officer. He patted the defendant down, then told him they were going to see Johnson. When they were across the parking lot almost to the adjacent apartment building, Miller heard a noise behind him and turned around. The defendant "jumped the gun." They wrestled and went in to the bushes, "and the defendant came up with the gun." Miller told the defendant to put down the gun, that he was a police officer. The defendant told Miller he was going to blow his head off, and as they stood about three feet apart, the defendant cocked the gun and fired two shots at Miller's head. Miller ducked but one of the bullets grazed his shoulder. The defendant then fled.

Evidence for the defendant tended to show that the defendant and his wife were returning from a party at about 3:00 a.m. When they arrived home the defendant parked his car in the space assigned to him, next to Johnson's car. His wife went

directly into the apartment while the defendant delayed in order to lock his car. When he finished he heard a noise, like air seeping, and noticed that Johnson's car had a flat tire. He looked to see if the tires had been cut and heard someone say, "Hold it." As he stood and turned around he saw someone else run from the other end of the car. The defendant testified that Miller did not identify himself as a police officer, that he did not know who Miller was, and that he was scared he might be shot or robbed by Miller. He walked toward Miller with his hands on top of his head. Miller pushed the defendant around, grabbed him by the belt, and led him between two apartment buildings. When they were between the buildings, the defendant jumped Miller and twisted the gun out of his hand. He told Miller to get away, but Miller walked toward him instead. He shot twice in order to scare Miller. He again told Miller to get away or he would blow Miller's head off. Miller then left. The defendant testified further that he was familiar with guns and if he had been aiming to hit Miller, at that range, he would have hit him.

Viewing this evidence in the light most favorable to the State, it was sufficient to submit the case to the jury and to support the verdict. This assignment of error is overruled.

[2] The defendant next assigns as error the refusal of the court to instruct the jury as to self-defense on the charge of assault with a deadly weapon.

"If one is without fault in provoking, or engaging in, or continuing a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumtances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm." *State v. Anderson,* 230 N.C. 54, 56, 51 S.E. 2d 895, 897 (1949).

At trial, the defendant's whole defense to the charge against him was that he was at all times exercising his right to defend himself against an unprovoked assault upon him by Miller. Since the assault of which the defendant stands convicted must be considered as a culmination of a single episode between Miller and the defendant, we hold the evidence here is sufficient to raise an issue as to whether it was actually or reasonably necessary for the defendant to use force to defend himself against "bodily injury or offensive physical contact."

Since the defendant must be given a new trial, it is not necessary that we discuss the other assignments of error.

New trial.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. ROGER DALE STAPLETON

No. 7518SC934

(Filed 5 May 1976)

1. **Criminal Law § 80— computer printouts — requirements for admissibility**

Printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

2. **Criminal Law § 80— airline reservation computer printout — proper foundation laid for admission**

In a prosecution for forgery, conspiracy to utter a forged instrument, and conspiracy to forge where defendant's defense was that he was in Florida during the commission of the crimes, the trial court did not err in allowing into evidence an airline reservation printout showing that defendant had booked a seat on a flight originating from Greensboro on a critical date in question, since an airline employee testified that he was familiar with the interpretation of the computer records, that he knew how the information was gathered, stored and utilized, that the computer entries were made in the regular course of business and that they were based, defined and calculated on what he understood to be reliable systems and safeguards.

3. **Forgery § 2— jury instructions — failure to include intent as element of forgery — subsequent correct instruction adequate**

The trial court's omission of the element of intent in its instruction on forgery was promptly corrected where the court shortly thereafter reiterated its definition of forgery, but included at that time a proper definition of the intent requirement for forgery.

APPEAL by defendant from *Kivett, Judge.* Judgments entered 12 June 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 March 1976.

Defendant was charged under four separate indictments with various counts of forgery, conspiracy to utter a forged instrument, and conspiracy to forge. From pleas of not guilty, the jury returned verdicts of guilty of forgery and conspiracy to forge. From judgments sentencing him to terms of imprisonment, defendant appealed.

Other facts necessary for decision are set out below.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Assistant Public Defender David H. Beard for defendant appellant.

MORRIS, Judge.

Defendant, whose defense was that he was in Florida during the commission of these crimes, contends that the trial court erred in admitting into evidence an airline reservation computer printout showing that defendant had booked a seat on a flight originating from Greensboro on a critical date in question. Specifically, defendant contends that witness William F. Hunter, Eastern Airlines Passenger Services Supervisor, was not "familiar" with the computerized records and computer operation and that the State consequently failed to show

> " . . . in what form the information is retained in computer set in Charlotte; in what manner the information is transferred from Charlotte to Miami; in what form the information is retained in Miami; what procedures the Miami office went through to have information placed on the print-out introduced into evidence; how the information is fed into the computer in Miami; what type of computer the Charlotte Office uses either Ratheon, IBM or Univac; if it was IBM or Univac, whether the witness' testimony was based upon his use of Ratheon in Greensboro; any witness who had any passing mechanical knowledge of either computer."

Thus, defendant asserts that the State presented exhibit evidence without first laying a proper foundation required by G.S. 55-37.1 and 55A-27.1. We disagree.

[1] Our Supreme Court, interpreting the record keeping provisions of G.S. 55-37.1 and 55A-27.1, has held " . . . that print-

out cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is *familiar* with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *State v. Springer,* 283 N.C. 627, 636, 197 S.E. 2d 530 (1973). (Emphasis supplied.)

[2] On voir dire examination, witness Hunter agreed that he was not a computer expert, but testified that he was "familiar" with the "interpretation" of the computer records and further that he knew how the information was gathered, stored and utilized. Mr. Hunter explained that when

> " . . . a reservation is made we have what we call a C R T reservation set at our ticket counters and/or in a reservations office. The most important entries are flight, date, name, time of departure, time of arrival of a passenger. Those are the procedures that we follow when we are making reservations. Now, after those reservations are made in our computer office in Charlotte and after a 24-hour period, those records are forwarded to our Miami computer center for filing there."

Mr. Hunter further testified that the computer entries were made in the regular course of business and based, defined and calculated on what he understood to be reliable systems and safeguards.

Mr. Hunter, explaining the printout to the jury, testified that his airline held " . . . a reservation for R. Stapleton . . . [for a flight] from Greensboro to Atlanta on March 16 . . . and connecting to [a] flight . . . for Orlando, March 16. . . . [I]t was made through Charlotte Reservations General Sales office at . . . approximately 11:38 p.m. on the night of the 15th of March. It indicates that the call came from Golden Eagle Motel Downtown, Room 224-A, in Greensboro, North Carolina."

We hold that the State provided a proper foundation for the introduction of the airline reservation information.

Moreover, the evidence of a flight reservation was corroborated by Kenneth Lee Council, an alleged participant in the

offenses charged, who testified without objection, that defendant, while in North Carolina, had advised him that " . . . he was going to take the next flight out of Greensboro to Orlando. . . . " We find no merit in defendant's contention.

[3] Defendant next contends that the trial court erred in failing adequately and correctly to define forgery. We disagree.

During one initial portion of the charge on forgery the trial court failed to include the element of intent but advised the jury that it would " . . . go into this [definition] in more detail in a minute." Shortly thereafter, the trial court reiterated its definition, including this time a proper definition of the intent requirement for forgery. We hold that this total charge, when read contextually, properly defined forgery, and we find no prejudice to defendant.

We further note that this case is distinguishable from *State v. Jones,* 20 N.C. App. 454, 456, 201 S.E. 2d 552 (1974), wherein the trial court, after first failing to include any instruction on the intent element, stated subsequently that "fraudulent intent was immaterial." Here, unlike *Jones,* the trial court's omission was promptly corrected and the more complete and final instruction properly and correctly stated.

Defendant's remaining contentions go to various aspects of the charge, the indictment, and the trial court's rulings on certain motions. We have reviewed these contentions and find them also to be without merit.

No error.

Judges HEDRICK and ARNOLD concur.

GOUGER & VENO, INC. v. DIAMONDHEAD CORPORATION

No. 7620SC8

(Filed 5 May 1976)

1. Contracts § 29— loss of profits — requirements for recovery

Prospective profits, prevented or interrupted by breach of contract, are properly the subject of recovery when it is made to appear (1) that it is reasonably certain that such profits would have been realized except for the breach of the contract, (2) that such profits

can be ascertained and measured with reasonable certainty, and (3) that such profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of the breach.

2. **Contracts § 29; Damages § 15— breach of contract — lost profits — insufficient evidence — nominal damages awarded**

In an action to recover lost profits which plaintiff alleged it suffered because of defendant's breach of a contract with plaintiff, the trial court did not err in limiting plaintiff's recovery to nominal damages, since plaintiff failed to present sufficient evidence for the jury to determine with reasonable certainty an amount plaintiff should recover for lost profits.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 27 August 1975 in Superior Court, MOORE County. Heard in the Court of Appeals 14 April 1976.

In this action plaintiff seeks to recover lost profits in the sum of $39,266.30 which it alleges it suffered because of defendant's breach of a contract with plaintiff.

In its complaint plaintiff alleges in pertinent part: On 13 January 1973, it entered into a contract with defendant to perform the labor in connection with the electrical wiring of a large number of condominiums being constructed by defendant at Pinehurst, N. C. The contract covered all condominiums scheduled for completion during 1973. In May of 1973, defendant instructed plaintiff not to perform any further labor on the construction project and proceeded to employ another electrical contractor to perform the work.

Defendant filed answer in which it denied entering into or breaching any contract with plaintiff.

Following the presentation of plaintiff's evidence, pertinent portions of which are hereinafter summarized, defendant moved for a directed verdict pursuant to Rule 58. The court denied the motion "except as to actual damage." Defendant presented no evidence.

Issues as to (1) the existence of a contract, (2) breach of the contract, and (3) amount of damage, if any, were submitted to the jury with instructions that if they reached the third issue, they would award only nominal damages. The court instructed that nominal damages "consists of some trivial amount such as one cent or one dollar in recognition of a technical damage resulting from the breach."

The jury answered the first two issues in favor of plaintiff and the third issue in the sum of one cent. Plaintiff appealed.

Seawell, Pollock, Fullenwider, Van Camp & Robbins, P.A., by P. Wayne Robbins, for plaintiff appellant.

Boyette and Boyette, by M. G. Boyette, Jr., for defendant appellee.

BRITT, Judge.

By its sole assignment of error, plaintiff contends the court erred in not instructing the jury on, and submitting the issue as to, actual damages. We find no merit in the contention.

[1] The specific question presented is whether plaintiff introduced sufficient evidence to sustain its claim for loss of profits. Plaintiff argues, and we agree, that prospective profits, "prevented or interrupted by breach of contract, are properly the subject of recovery when it is made to appear (1) that it is reasonably certain that such profits would have been realized except for the breach of the contract, (2) that such profits can be ascertained and measured with reasonable certainty, and (3) that such profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of the breach." *Perkins v. Langdon,* 237 N.C. 159, 171, 74 S.E. 2d 634, 644 (1953).

In 22 Am. Jur. 2d, Damages, § 296, pp. 392-393, we find: "Where the plaintiff sues for profits lost because of the refusal of the defendant to permit him to complete a contract, he has the burden of proving such profits, including the constituent elements entering into the cost to him of doing the work." Quoted with approval in *Peaseley v. Coke Company,* 282 N.C. 585, 606, 194 S.E. 2d 133, 147 (1973).

[2] We think plaintiff failed on requirement (2) stated above and that it did not present sufficient evidence for the jury to determine with reasonable certainty an amount plaintiff should recover for lost profits.

Plaintiff presented evidence tending to show: After the agreement was signed on 17 January 1973, plaintiff had five people report for work the following Monday. Later on it *probably* had as many as fifteen assigned to the job, but at *some point* the number was reduced to thirteen, which was the

number on the job in early May 1973. The number of employees plaintiff had working on the job varied from time to time, anywhere from twelve to fifteen after the work "got going." After May plaintiff discharged all but two of its employees.

Plaintiff determined its profits on its account with defendant for four months of 1973 as follows: In February the total bill was $4,152.10; plaintiff's expense for labor and "other costs" amounted to $3,615.00 leaving a profit of $537.10. In March the total bill was $3,806.00 with a profit of $842.00. In April the total bill was $12,104.16 with a profit of $4,582.16. In May the total bill was $10,225.12 with a net profit of $4,194.12.

Plaintiff's evidence fell far short of providing the jury with information upon which they might determine loss of profits with reasonable certainty. For example, plaintiff presented no evidence tending to show what its wage scale for the remaining months of 1973 would have been and how it would have compared with the four preceding months; how its "other costs" in determining profits for the remainder of 1973 would have compared with the four previous months; and how many employees plaintiff could have counted on to perform work during the remainder of the year. Had the jury attempted to project profits on a percentage basis, they would have found no solid pattern as the profit for February was approximately 13 percent of the gross, for March approximately 22 percent, for April approximately 38 percent, and for May approximately 41 percent.

We hold that the trial court did not err in limiting plaintiff's recovery to nominal damages.

No error.

Judges VAUGHN and ARNOLD concur.

MILDRED WILLIAMSON v. CARL C. WALLACE, EDWARD POPE, I. L. DEAN AND BURT WILKINS, TRUSTEES OF THE GREY STONE BAPTIST CHURCH

No. 7614SC19

(Filed 5 May 1976)

Religious Societies and Corporations § 3— Baptist Church — collapse of risers — injury to church member — no standing to maintain action

Plaintiff, as a member of the unincorporated defendant Baptist Church, had no standing to maintain an action against the church to recover for bodily injuries sustained when risers which were located in the church collapsed, striking plaintiff who was there for the purpose of attending a worship service.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 2 October 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 April 1976.

Plaintiff, a member of Grey Stone Baptist Church, brought this action against the Trustees of the Church to recover damages for bodily injuries sustained by plaintiff which she alleges were caused by negligence of the church. Through pleadings and discovery, it was established that: On Sunday 9 April 1972 plaintiff entered the church for the purpose of attending the morning service of worship. As she was walking to her seat, a three-tiered set of risers, erected by the youth choir that morning, collapsed against and injured her. The building superintendent of the church verified on the following week that of the three locking devices on the riser which fell against plaintiff, one of the locking braces had a screw pulled out of the brace and the wood connection, and the other two locking braces had not been properly coupled and locked together.

Defendant's motion for summary judgment was allowed and the action was dismissed by the following judgment:

> "This cause coming on to be heard and being heard before the undersigned Judge Presiding at the September 29, 1975 Civil Session of the Superior Court of Durham County, upon Defendant's Motion for Summary Judgment pursuant to Rule 56, and the Court, after considering the pleadings, Answers to Interrogatories, documents produced by Defendants pursuant to a Court Order, and argument of counsel, is of the opinion that Plaintiff member of the congregation of Defendant Church, has no standing or right

to maintain this action against Defendant Church; that, although there are genuine issues of fact concerning the issues of the negligence of Defendant Church and of Plaintiff's damages, there is no genuine issue as to the material fact of Plaintiff's status as a member of the congregation of Defendant Church at the time of the injury alleged; that the liability insurance policy purchased by Defendants, a copy of which was produced by Defendants pursuant to Court Order, does not by its terms, provide that it is for the benefit of members of the congregation of Defendant Church nor is its language broad enough to permit such interpretation thereof; that such liability insurance policy does not give Plaintiff any right of action against Defendant Church; and that the Defendants, Trustees of Grey Stone Baptist Church are entitled to a Judgment as a matter of law.

NOW, THEREFORE, it is hereby ordered and adjudged that the Plaintiff have and recover nothing of the Defendant Trustees of Grey Stone Baptist Church.

Entered this 2 day of October, 1975.

s/E. MAURICE BRASWELL
Judge Presiding"

From this judgment, plaintiff appeals.

Bryant, Bryant, Drew & Crill, P.A. by Victor S. Bryant, Jr. for plaintiff appellant.

Spears, Spears, Barnes, Baker & Boles by Alexander H. Barnes and Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by James T. Hedrick for defendant appellees.

PARKER, Judge.

The question presented is whether plaintiff, as a member of defendant church, has standing to maintain this action. We agree with the trial court that she does not.

Defendant is an unincorporated Baptist Church and as such is an independent and self-governing entity whose governing body is its entire congregation. When the courts are called upon to determine legal questions involving this type of organization, such questions must be "resolved on the basis of principles of law equally applicable to the use of properties of an unincorpo-

rated athletic or social club." *Atkins v. Walker,* 284 N.C. 306, 319, 200 S.E. 2d 641, 650 (1973). In an Annotation entitled "Recovery by member from unincorporated association for injuries inflicted by tort of fellow member," in 14 A.L.R. 2d 473, the general rule is stated to be

> "that the members of an unincorporated association are engaged in a joint enterprise, and the negligence of each member in the prosecution of that enterprise is imputable to each and every other member, so that the member who has suffered damages to his person, property, or reputation through the tortious conduct of another member of the association may not recover from the association for such damage, although he may recover individually from the member actually guilty of the tort." See, 6 Am. Jur. 2d, Associations and Clubs, § 31.

Our decision here is controlled by *Goard v. Branscom,* 15 N.C. App. 34, 189 S.E. 2d 667 (1972), which held that each member of an unincorporated church is engaged in the joint enterprise of worship and therefore one member may not recover from the church for damages sustained through tortious conduct of another member.

Other questions might arise had defendant church been incorporated or had it been one having a more hierarchical structure, but such problems are not now before us.

The judgment appealed from is

Affirmed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. GEORGE WILLIAM SALTER

No. 753SC985

(Filed 5 May 1976)

1. Automobiles § 2— habitual offender — defendant same person named in abstract — burden of proof

Before a person can be determined an habitual offender as defined by G.S. 20-221, the court is required by G.S. 20-226 to find that "such person is the same person named in the abstract and that

such person is an habitual offender," and the burden of proof is on the State, the moving party, to satisfy the court by the greater weight of the evidence that the defendant is the same person named in the abstract and that the defendant is an habitual offender.

2. **Automobiles § 2— habitual offender — certified abstract of driving record — defendant same person named in abstract**

In an action to have defendant determined an habitual offender under G.S. 20-221, a certified abstract of the conviction record of George William Salter introduced by the State was competent evidence that the defendant George William Salter was the same person named in the abstract and fully supported the trial court's findings that defendant was the person named in the petition and that he was an habitual offender.

APPEAL by defendant from *Browning, Judge.* Judgment entered 11 September 1975, Superior Court, CARTERET County. Heard in the Court of Appeals 17 March 1976.

In August 1974 the State filed a petition to have the defendant determined an habitual offender under G.S. 20-221. To the petition was attached a certified abstract of the driving record of George William Salter. A show cause order was issued on 19 August 1974 and served on the defendant on 1 September 1974. At the hearing on the matter in September, 1975, one George William Salter appeared with counsel. The Court, over defendant's objection, received the driving record into evidence. Defendant offered no evidence. Judgment was entered which found (1) that defendant was the person named in the petition and (2) that he was an habitual offender. He was ordered to surrender his driver's license and to refrain from operating motor vehicles upon state highways. From this judgment, defendant appeals.

Attorney General Edmisten by Special Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray for the State.

Wheatly & Mason, P.A., by L. Patten Mason for defendant.

CLARK, Judge.

It is the contention of the defendant that there was no competent evidence to support the finding of the trial court that the defendant George William Salter was the same person named in the driving record abstract.

[1] Before a person can be determined an habitual offender as defined by G.S. 20-221, the court is required by G.S. 20-226

to find that "such person is the same person named in the abstract and that such person is an habitual offender . . . . "

The burden of proof is on the State, the moving party, to satisfy the court by the greater weight of the evidence that the defendant is the same person named in the abstract and that the defendant is an habitual offender. See *Joyner v. Garrett, Comr. of Motor Vehicles,* 279 N.C. 226, 182 S.E. 2d 553 (1971) ; 60 C.J.S., Motor Vehicles, § 164.28. Though G.S. 20-224 provides that the court enter an order directing the person named to show cause why he should not be barred from operating a motor vehicle on the highways of this State, the burden of proof is not on the defendant. In hearings to show cause why an injunction ought not to be continued pending final hearing on the merits, the burden of proof is on the party seeking injunctive relief, even though traditionally the notice order directs the defendant to show cause why the injunction should not be continued. *Mason v. Apt., Inc.,* 10 N.C. App. 131, 177 S.E. 2d 733 (1970). The proceeding under the habitual offender statutes is civil in nature. *State v. Carlisle,* 285 N.C. 229, 204 S.E. 2d 15 (1974).

[2] In this case the court properly received in evidence an abstract of the conviction record of George William Salter as maintained in the office of the Commissioner of Motor Vehicles, pursuant to G.S. 20-222 and G.S. 20-42(b). The defendant did not deny that he was convicted of any offense shown in the abstract. See G.S. 20-225. He offered no evidence, and his counsel stated to the court that he did not want to be heard. We hold that the abstract of the conviction record of George William Salter was competent evidence that the defendant George William Salter was the same person named in the abstract and fully supports that finding by the trial court in the judgment.

"The name as set out in the challenged commitment is exactly the same as the name of the defendant on trial. 'This identity of names, nothing else appearing, furnishes evidence of the identity of person. Identity of name is *prima facie* evidence of identity of person, and is sufficient proof of the fact, in the absence of all evidence to the contrary. . . . ' " *State v. Walls,* 4 N.C. App. 661, 663, 167 S.E. 2d 547, 548 (1969). See *State v. Mitchner,* 256 N.C. 620, 124 S.E. 2d 831 (1962) ; *State v. Herren,* 173 N.C. 801, 92 S.E. 596 (1917) ; 65 C.J.S., Names, § 15(b) (2), p. 41.

The judgment is

Affirmed.

Judges BRITT and PARKER concur.

SHIRLEY ANN DOWNEY v. WALTER LEE DOWNEY

No. 7521DC981

(Filed 5 May 1976)

1. **Divorce and Alimony § 25— Tennessee divorce decree — admission by defendant that it was entered**

In an action for alimony and counsel fees where plaintiff sought that full faith and credit be given a prior divorce decree entered in Tennessee and that defendant be ordered to pay the accrued payments under the decree, the trial court did not err in admitting the Tennessee decree into evidence, since the admission in defendant's answer that the Tennessee decree was entered amounted to a judicial admission as to its authenticity.

2. **Divorce and Alimony § 25— Tennessee divorce decree — full faith and credit given by N. C. court**

In an action for alimony and counsel fees, the trial court did not err in giving full faith and credit to a prior divorce decree entered in Tennessee, since the trial court had personal jurisdiction over both of the parties and had authority, pursuant to G.S. 50-16.9(c), to modify the Tennessee decree to the same extent as the Tennessee court in which it was entered.

APPEAL by defendant from *Leonard, Judge.* Judgment entered 16 July 1975 in District Court, FORSYTH County. Heard in the Court of Appeals 17 March 1976.

Plaintiff brought this action in Forsyth County. She alleged that the parties obtained a divorce in 1965 in Blount County, Tennessee. She further alleged that the divorce decree directed defendant to pay her $700 per month as alimony and child support, and that defendant stopped the payments in May, 1974. Plaintiff prayed that full faith and credit be given the Tennessee decree, that defendant be ordered to pay the accrued payments under the decree, and that he be ordered to pay future alimony and counsel fees.

Defendant admitted the Tennessee decree, but he alleged it was not a final order and therefore not entitled to full faith and credit.

Plaintiff's evidence tended to show that defendant made payments pursuant to the Tennessee decree until the youngest child reached the age of eighteen. Defendant then terminated all payments.

The trial court concluded that the Tennessee decree was entitled to full faith and credit, but it modified the $700 per month alimony and child support payments to payments of $300 per month alimony. Defendant was further ordered to pay arrearages at the rate of $300 per month from June, 1974, and counsel fees for plaintiff were denied. Defendant appealed.

Carol L. Teeter for plaintiff appellee.

White and Crumpler, by Fred G. Crumpler, Jr., and Michael J. Lewis, for defendant appellant.

ARNOLD, Judge.

[1] Defendant assigns error to the admission into evidence of the Tennessee decree. He maintains that under G.S. 1A-1, Rule 44(a), and 28 U. S. Code, § 1738, the "certificate" of the Tennessee judge was not admissible because it lacked a seal, did not state that such judge was custodian of the records, and was not authenticated.

Plaintiff calls attention to G.S. 1A-1, Rule 44(c), and contends that official records are also admissible in accordance with any other applicable statute or rules of evidence at common law. She cites Stansbury's N. C. Evidence (Brandis Rev.), § 177, and argues that the admission in defendant's answer that the Tennessee decree was entered amounted to a judicial admission as to this issue. We agree and find no error in the admission of the Tennessee decree into evidence.

[2] Defendant next contends that the trial court committed error by giving full faith and credit to the Tennessee decree. He argues that under Tennessee statutory provision an order for support remains in the Tennessee court's control to be increased or decreased for cause shown by either party, and that such a decree is therefore not final and not entitled to full faith and credit.

We are persuaded that it was not error to give full faith and credit to the Tennessee decree. However, it is not necessary to discuss in this opinion the question of when full faith and credit should be given to a foreign decree. The General Assembly of North Carolina enacted G.S. 50-16.9(c), and that statute controls the circumstances of this case. It provides:

> "When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted."

The decree entered by the Tennessee court awarded alimony and support to plaintiff. Personal jurisdiction over both parties was acquired by the District Court of Forsyth County in an action seeking relief under the Tennessee order, and the court found, based upon competent evidence, that there had been a change in circumstances, i.e., that the two minor children referred to in the Tennessee decree had reached their majority. The District Court of Forsyth County had authority to modify the Tennessee decree to the same extent as the Tennessee court in which it was entered, including the authority to enforce payment under the Tennessee decree.

In not making findings of fact to support its order of prospective alimony the defendant contends the trial court erred. We disagree. This action was brought by plaintiff to enforce the Tennessee decree, and G.S. 50-16.9(c) authorized a modification of the Tennessee decree "upon a showing of changed circumstances." A change in circumstances was shown and there was no error in the court's modifying the Tennessee order by reducing the "$700 per month as alimony and support" to $300 per month "alimony."

We find no error in the decision of the trial court, and the order is

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM ALPHONSO FINNEY

No. 7521SC1071

(Filed 5 May 1976)

1. **Narcotics § 4— possession of marijuana — narcotic found in apartment — absent defendant — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for possession of marijuana where the evidence tended to show that officers searched an apartment and found marijuana therein on 28 July 1974, defendant was not present at the time the search was made but was apprehended about two weeks later in a nearby apartment, defendant had lived in the apartment which was searchd since 1967, the lease was in his name, and personal correspondence and receipts dating from October 1973 to 14 June 1974 and bearing defendant's name were found in a bedroom where the marijuana was found.

2. **Narcotics § 4.5— constructive possession — jury instruction proper**

The trial court's instruction concerning constructive possession that a person is in possession when he has the power and intent to control "either by himself or together with others" was proper.

Judge VAUGHN dissenting.

APPEAL by defendant from *Long, Judge.* Judgment entered 16 October 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 April 1976.

Defendant pled not guilty to an indictment charging felonious possession of marijuana. On 28 July 1974, Winston-Salem police officers, pursuant to a valid search warrant, searched Apartment C, 820 West Seventh Street, in Winston-Salem. According to the State's evidence, a bag of marijuana, two pipes, a set of scales, three hundred brown envelopes, and a driver's license registered to Vernard Rapley were found in the north bedroom of the apartment. In the bedroom on the south side of the apartment were found seven brown bags containing marijuana, a water bill, receipts, letters and other papers bearing defendant's name. None of the papers were dated later than 17 June 1974.

Evidence for the State also tended to establish that since 1967 the lease to Apartment C, 820 West Seventh Street had been in defendant's name. Defendant was not present at the time the apartment was searched. He was arrested on 15 September 1974, at Apartment A, 820 West Seventh Street.

Defendant's evidence tended to show that he had not lived in Apartment C since 14 June 1974 when he moved to Florida. He testified that he had paid the rent in full up to 14 June 1974, at which time he turned the key to the apartment over to Vernard Rapley. Rapley testified that all the marijuana found in the apartment belonged to him.

From a jury verdict of guilty as charged, and a judgment imposing sentence the defendant appealed.

Attorney General Edmisten, by Associate Attorney Joan Byers, for the State.

Richard C. Erwin for defendant appellant.

ARNOLD, Judge.

[1] The defendant assigns error to the trial court's denial of his motion for judgment of nonsuit made at the close of State's evidence and at the close of all the evidence. He argues that the State failed to prove he was in control of the apartment when the marijuana was found.

We fail to see any substantial distinction between the facts of this case and the facts in *State v. Wells,* 27 N.C. App. 144, 218 S.E. 2d 225 (1975), where this court held the defendant's motion for judgment of nonsuit was properly overruled. "The State may overcome this motion by evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'" *State v. Wells, supra,* at 146 [quoting *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972), and *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680 (1971).]

There was enough evidence for the jury to consider and decide whether defendant, either alone or with someone else, had control over the apartment and possession of the marijuana. The defendant had lived in the apartment since 1967, and the lease was in his name. Personal correspondence and receipts dating from October 1973 to 14 June 1974, and bearing defendant's name, were found in the bedroom. The matter was correctly submitted to the jury.

In his assignments of error relating to the jury instructions defendant asserts that error was committed in the instructions concerning circumstantial evidence and constructive possession. We do not agree.

No particular words or form is required in instructing the jury on the proof required for conviction based on circumstantial evidence. The State's brief correctly notes that in *State v. Bauguess*, 10 N.C. App. 524, 179 S.E. 2d 5 (1971), this Court found no error in the same charge on circumstantial evidence as was given in the instant case.

[2] Defendant contends the court's charge concerning constructive possession was error because the jury was told that a person is in possession when he has the power and intent to control "either by himself or together with others." We see no error in the use of the phrase, "either by himself or together with others." In *State v. Wells, supra,* this Court found no error in the trial judge's instructions that "a person possesses a controlled substance when he has either by himself or together with others both the power and intent to control the disposition or the use of that substance." The trial court's instructions were proper.

We have examined defendant's remaining assignments of error and find

No error.

Judge BRITT concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

In my opinion the evidence was insufficient to take the case to the jury and defendant's motion for nonsuit at the close of the evidence should have been allowed.

CLINTON HUNT v. LINDA WARD HUNT

No. 7526DC976

(Filed 5 May 1976)

1. Infants § 9— child custody — adultery of mother — evidence admissible

The trial court in a child custody proceeding erred in refusing to allow plaintiff's evidence of defendant's purported adultery.

2. Infants § 9— child custody — fitness of mother — insufficiency of findings of fact

In a child custody proceeding the trial court's findings of fact which stated merely that it would be in the child's best interest for custody to be placed with defendant mother and that defendant was a fit and proper person to have the care, custody and control of the child did not detail with sufficient particularity the question of fitness and failed to support the conclusions of law.

APPEAL by plaintiff from *Robinson, Judge.* Judgment entered 29 September 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 17 March 1976.

Plaintiff father, separated for approximately one year from the defendant mother, petitioned by verified pleading for custody of the estranged couple's minor child, who had been living with the defendant mother. Plaintiff alleged that during the course of the separation defendant moved to Murfreesboro, Tennessee, carried on an adulterous relationship with one James Fathera, and became pregnant as a result of the adulterous relationship. Plaintiff maintained that he was a fit and proper person, prayed for a grant of custody and noted that no court had yet awarded custody to either spouse.

At the hearing plaintiff was not permitted to testify as to defendant's purported adultery but testified for the record that Linda told him that James Fathera lived in the apartment with the child and her. Plaintiff, moreover, was prevented from introducing into evidence the death certificate of a child, born on 11 August 1975, who died on 15 August 1975.

Plaintiff testified that he and defendant "agreed that he would pay $25.00 per week for the support of the child . . . [and that] he paid her . . . [until she] told him she did not want any more money from him and that he could not visit the child anymore."

Plaintiff further denied ever assaulting the defendant and asserted that if awarded custody, he would take care of the child's needs.

Ventrice Lynn Oxendine, a witness for plaintiff, testified that in July 1975 he watched defendant and James Fathera enter the home of Daisy Ward and that they "had not left this house when he stopped watching it at approximately 10:00 p.m. That James Fathera's car was still there and all of the

lights had been put out in the house except one that was on in a back bedroom."

One Quessie Knuckles, also testifying for plaintiff, stated that "during the months of June and July, 1975, she saw James Fathera at Daisy Ward's house where Linda Hunt and Jamie were staying, many times. That on one occasion she saw Linda and James Fathera asleep on a mattress in the living room of the house."

Defendant, testifying on her own behalf, stated that plaintiff threatened and assaulted her, failed to pay the informally agreed upon child support, and contended that she moved to Tennessee "because she was afraid of the Plaintiff"; that in August of 1975, she and Jamie moved from her mother's home to a mobile home in Cabarrus County, in a trailer park just across from the Charlotte Motor Speedway; that they lived in James Fathera's trailer during the week and then went to her mother's on the weekends; that James Fathera stayed in his trailer on the weekends.

On cross-examination, plaintiff was unable to inquire into defendant's alleged adultery and was not able to ascertain whether James Fathera was listed on a birth certificate as the father of the child born to defendant on 11 August 1975.

In its findings of fact and conclusions of law the District Court stated inter alia that "the best interest of the minor child would be that the child be placed with the Defendant . . . [and that] the Defendant is a fit and proper person to have the care, custody and control of the minor child." The court further ordered plaintiff to pay defendant $35 per week for child support and granted him certain visitation rights.

Lacy W. Blue and Richard A. Cohan for plaintiff appellant.

MORRIS, Judge.

[1] Plaintiff contends, inter alia, that the trial court erred in refusing to allow evidence of defendant's purported adultery. We agree.

As our Court has stated previously, a trial court commits " . . . prejudicial error in refusing to allow plaintiff to introduce evidence of defendant's adultery. While evidence of adul-

tery does not impel a finding of unfitness of the adulterous parent, '[e]vidence of adulterous conduct, like evidence of other conduct, is relevant upon an inquiry of fitness of a person for the purpose of awarding custody of minor children to him or to her.'" *Darden v. Darden,* 20 N.C. App. 433, 435, 201 S.E. 2d 538 (1974). (Citation omitted.)

[2] Essentially, plaintiff also contends that the trial court's "findings of fact" fail to detail with sufficient particularity the question of fitness and fail to support the conclusions of law. We again find merit to plaintiff's position. See *Powell v. Powell,* 25 N.C. App. 695, 214 S.E. 2d 808 (1975).

In his findings of fact the trial court merely stated that it would be in the child's best interest for custody to be placed with the defendant and further found that the defendant was a fit and proper person to have the care, custody and control of the minor child. These findings fail as a matter of law in that we have no substantive factual basis for an adequate review of the matters resolved below. As we have stated previously

> "'. . . 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.'" (Citations omitted.) *Powell v. Powell, supra,* at 698.

The order is vacated and the cause remanded.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. TOMMY DAVIS

No. 7516SC1027

(Filed 5 May 1976)

1. Criminal Law § 169— evidence admitted over objection — similar subsequent testimony allowed — no prejudice

In a second degree murder prosecution, defendant was not prejudiced by the trial court's admission of testimony by a police officer that defendant, in making a statement at the time of his arrest, did not volunteer any information with respect to his victim having a weapon or defendant's having to defend himself, where defendant subsequently made statements to the same effect on cross-examination.

2. Criminal Law § 169— evidence improperly excluded — no prejudice

In a prosecution for second degree murder, the trial court's error in excluding defendant's testimony as to things the victim said to defendant prior to the homicide was not prejudicial to defendant.

ON *writ of certiorari* to review proceedings before *Godwin, Judge.* Judgment entered 14 April 1975 in Superior Court, ROBESON County. Heard in the Court of Appeals 6 April 1976.

Defendant was indicted for the first degree murder of Edward Brewer. When the case was called for trial the district attorney announced that the State would seek no verdict greater than second degree murder.

Evidence by the State tended to show that Edward Brewer and his brother were shooting pool at the Patio Club. As the brothers started to leave the poolroom and enter another room in the Club defendant drew a revolver and shot Edward Brewer.

Testimony by the detective who investigated the shooting and arrested defendant indicated that defendant made a statement to the effect that Brewer and defendant argued, and defendant shot Brewer.

Defendant presented testimony by himself and others that Brewer grabbed him and then followed him as he left the poolroom and pulled a gun on defendant. Defendant then shot Brewer "because I was fearful he would shoot me."

From a verdict of guilty of second degree murder, and a thirty year prison term, defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

J. H. Barrington, Jr., for defendant appellant.

ARNOLD, Judge.

[1] The investigating officer testified concerning the statement defendant had made at the time of his arrest. Over objection the officer stated that defendant did not volunteer information with respect to Edward Brewer's having a weapon or defendant's having to defend himself.

Appellant contends that it was error to allow the officer's testimony, and that he did not volunteer such information because he was merely exercising his Fifth Amendment rights.

On cross-examination defendant himself testified that the officers advised him of his constitutional rights, and that he [defendant] made a statement to the effect that he shot Brewer, "and that's all I said. I didn't tell them at that time that I had to shoot him in self defense, because I didn't feel like talking right then. I didn't even bother to tell them that he had a gun at that time." There was no objection to this testimony.

The established rule provides that where incompetent evidence is admitted over objection, but the same evidence is thereafter admitted without objection, the benefit of the objection is ordinarily lost. Stansbury, N. C. Evidence (Brandis Rev.) § 30, citing *Shelton v. R. R.*, 193 N.C. 670, 139 S.E. 232 (1927). See also *State v. Brown*, 1 N.C. App. 145, 160 S.E. 2d 508 (1968).

[2] During defendant's direct examination he testified that Brewer grabbed him and "he [Brewer] said wasn't nobody going to play no pool in here tonight" and that Brewer "told me not [to] walk away from him." The trial court immediately sustained an objection by the district attorney and instructed the jurors not to consider anything that the deceased said to defendant.

A second objection was sustained when defendant again stated that Brewer "told me not [to] walk away from him." The trial court then instructed the defendant: "You may not tell anything that Edward Brewer said to you."

While we agree with defendant's contention that the court erred in sustaining the objections and instructing the jury not to consider anything Brewer said to defendant, we nevertheless feel that the error was harmless beyond a reasonable doubt. All of defendant's evidence relevant to self-defense tended to show that Brewer grabbed defendant by the collar and shook him; that defendant left the poolroom but was followed by Brewer who pulled a gun on defendant; and that defendant shot Brewer in self-defense.

The record does not reflect, nor does defendant contend, that defendant would have testified that Brewer made any statements except those objected to by the district attorney. Although the exclusion of the statements by the trial court was error, it was not prejudicial to defendant. The "bare possibility" that defendant may have suffered prejudice is not enough to reverse the jury's verdict. See *State v. Best*, 280 N.C. 413, 186

S.E. 2d 1 (1972); *State v. Holden,* 280 N.C. 426, 185 S.E. 2d 889 (1972).

We hold that defendant received a fair trial without prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

JUANITA WILLIS v. REIDSVILLE DRAPERY PLANT, AND LIBERTY MUTUAL INSURANCE COMPANY

No. 7517IC947

(Filed 5 May 1976)

Master and Servant § 65— workmen's compensation — back injury — temporary total disability

Evidence was sufficient to support the Industrial Commission's finding that plaintiff was unable to resume her regular duties of employment due to a back injury suffered in the course of her employment; it could reasonably be inferred that whatever gainful employment plaintiff might engage in would be for a reduced wage since she was not able to return to the job on which she was injured; and such evidence was sufficient to support the Commission's determination that plaintiff was temporarily totally disabled for one year and three weeks and was due compensation therefor.

APPEAL by defendants from an order of the North Carolina Industrial Commission filed 26 August 1975. Heard in the Court of Appeals 12 March 1976.

Following a hearing held 27 March 1972 before Commissioner Stephenson, an award was rendered in favor of plaintiff upon a finding that she had suffered a back injury in the course of her employment and had been thereby temporarily totally disabled from the date of the accident, 6 August 1971, until the date of the hearing, but that plaintiff's total disability had not yet been established. A hearing was subsequently held before Deputy Commissioner Roney on 19 August 1974, and before Commissioner Vance on 7 November 1974. Evidence at these hearings indicated that plaintiff had been examined by numerous doctors since the earlier hearing. Dr. Maultsby stated in a letter dated 10 April 1972 that he had instructed plaintiff that she could

return to work on approximately 10 April 1972. In a letter dated 15 September 1972, Dr. Dilworth stated that he had examined plaintiff on 31 August 1972. After his examination, he stated that plaintiff should return to work and would show marked improvement with activity, work and an exercise program. Dr. Ames reported he had examined plaintiff last on 4 February 1974 and had been unable to diagnose the cause of her back pains. Dr. Klenner, plaintiff's regular doctor, stated in a deposition dated 1 November 1974 that he was treating plaintiff for arthritis which he believed was precipitated by plaintiff's work injury but that he felt plaintiff could be employed and had issued a return to work certificate to plaintiff on several occasions. He stated: "We gave her a return to work certificate after Dr. Ames saw her, but she was not to go back to her original work. We thought that would be ridiculous, the same situation would develop again and of course, she had difficulty raising the leg and could not do that job. . . . I told her on several occasions that she could go back to work, but not to the work that she was injured on."

Deputy Commissioner Roney entered an opinion and award concluding that plaintiff was able to return to work on 31 August 1972 and was therefore entitled to compensation commencing 27 March 1972 through 31 August 1972. On appeal, the Full Commission affirmed the result reached by the Hearing Commissioner. From the Opinion and Award for the Full Commission, defendants appealed.

Bethea, Robinson, Moore & Sands, by D. Leon Moore, for plaintiff.

Smith, Moore, Smith, Schell & Hunter, by Martin N. Erwin and J. Donald Cowan, Jr., for defendants.

MARTIN, Judge.

Defendants contend there is no competent evidence to support the factual finding and conclusion of law that the plaintiff was temporarily totally disabled beyond April 10, 1972, nor to support an award of temporary total disability benefits beyond that date.

"Upon review of an order of the Industrial Commission, this Court does not weigh the evidence, but may only determine whether there is evidence in the record to support the finding made by the Commission. (Citation omitted.) If there is any

evidence of substance which directly or by reasonable inference tends to support the findings, the Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. (Citation omitted.)" *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 196 S.E. 2d 571 (1973).

In the instant case, there was competent medical evidence that plaintiff was unable to resume her regular duties due to her accident. On 1 November 1974, Dr. Klenner was asked whether, in his opinion, the plaintiff was able to go to work as of that time. He answered as follows: "Yes, sir, I think that she is able to do so on a physical standpoint. I think that she is able to participate in a gainful occupation but I feel that she should not go back to the job that she was injured on. . . . " Further, there was evidence that plaintiff had sought lighter work, but was unable to find it. From this evidence, it may reasonably be inferred that whatever gainful employment plaintiff might engage in would be for a reduced wage, since she was, according to Dr. Klenner, not able to return to the job on which she was injured.

This reduction in wage amounts to a "disability" within the meaning of the Workmen's Compensation Act since the term "disability" means " . . . incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." G.S. 97-2(9). " ' . . . [D]isability refers not to physical infirmity but to a diminished capacity to earn money.' " *Burton v. Blum & Son*, 270 N.C. 695, 155 S.E. 2d 71 (1967).

In the instant case, the evidence was sufficient to support the Industrial Commission's determination that due to the injury by accident, plaintiff was temporarily but totally disabled beyond the date of 27 March 1972 through 31 August 1972 and is due compensation therefor.

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

PENELOPE F. TRAVIS, ADMINISTRATRIX OF THE ESTATE OF DAVID MICHAEL TRAVIS v. JAMES GEORGE McLAUGHLIN AND RYDER TRUCK RENTAL, INC.

No. 7528SC995

(Filed 5 May 1976)

1. **Rules of Civil Procedure § 12— motion to dismiss — method of making**

Under G.S. 1A-1, Rule 12(b) the motion to dismiss, for whatever grounds asserted, may be made at the option of the pleader, either by motion before pleading or in the responsive pleading demanded by the adversary pleading; therefore, defendant in this action properly exercised his option to assert the statute of limitations in a Rule 12 motion.

2. **Limitation of Actions § 10— defendant absent from State for more than one year — statute of limitations tolled**

The trial court in a wrongful death action erred in granting defendant's motion to dismiss on the ground that plaintiff's claim was barred by the two-year statute of limitations, G.S. 1-53, since the statute of limitations was tolled, pursuant to G.S. 1-21, by defendant's absence from the State for more than one year after the cause of action accrued.

APPEAL by plaintiff from *Martin (Harry C.), Judge.* Order entered 10 October 1975, Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 March 1976.

On 8 August 1972 plaintiff's intestate was killed when the motorcycle which he was driving collided with a truck driven by James George McLaughlin. A wrongful death action was filed 14 December 1973 and summons was issued. An associate in the law firm of plaintiff's counsel discovered that defendant had left the Yancey County area and left no forwarding address.

On 6 May 1975 plaintiff had issued an alias and pluries summons and sent it with a copy of the complaint to the Sheriff of Wake County for service upon the Commissioner of Motor Vehicles. A registered letter sent to defendant's last known address in Yancey County was returned to the Commissioner on 27 May 1975 marked, "Returned to Sender," "Moved, No Address (gone over 2 years)."

On 29 May 1975 a communication from the California Department of Motor Vehicles revealed that defendant McLaughlin had been issued a driver's license on 25 January 1974, and his address was given as 775 Belden Street, Monterey, California.

On 24 September 1975 defendant moved for dismissal pursuant to Rule 12 on the grounds that he had not been served with process within the period allowed by the statute of limitations. By an order entered 10 October 1975 the court granted this motion, and plaintiff appeals from that order.

Morris, Golding, Blue and Phillips by William C. Morris, Jr., for plaintiff.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, P.A., by O. E. Starnes, Jr., for defendant.

CLARK, Judge.

Plaintiff's first argument is that the statute of limitations is an affirmative defense which must be pleaded in an answer and which may not ordinarily be raised by a Rule 12 motion. Plaintiff cites *Iredell County v. Crawford,* 262 N.C. 720, 138 S.E. 2d 539 (1964), and several other cases as support for her position. We note, however, that these cases were decided before 1967 and before the effective date of the Rules of Civil Procedure in North Carolina.

In *Teague v. Motor Co.,* 14 N.C. App. 736, 189 S.E. 2d 671 (1972), the court was presented with the question of whether plaintiff can file a complaint against the wrong party and then after the *statute of limitations has run,* attempt to bring the correct party into the action by a purported amendment of the complaint. Defendant appellee raised the defense of the statute of limitations in a motion to dismiss under Rule 12 on the grounds that defendant was not served with process within two years after the death of plaintiff's intestate and the claim was barred by G.S. 1-53. The motion to dismiss was granted in the trial court and affirmed by this Court, which stated: "Defense of the Statute of Limitations was properly raised by a Motion to Dismiss for failure to state a claim for relief. 1A Barron and Holzoff, § 281; 2A Moore's Federal Practice, § 12.09; . . . " 14 N.C. App. at 740.

[1] Under Rule 12(b) the motion to dismiss, for whatever grounds asserted, may be made at the option of the pleader, either by motion before pleading or in the responsive pleading demanded by the adversary pleading. In the present case the defendant properly exercised his option to assert the statute of limitations in a Rule 12 motion.

[2] Plaintiff assigns as error the granting of defendant's motion to dismiss on the ground that her claim was barred by the two-year statute of limitations, G.S. 1-53.

G.S. 1-21 tolls the statute of limitations because of the absence of a defendant from the State at the time the cause of action accrued, or if the defendant resides out of the State or remains continuously absent therefrom for one year or more after such cause of action accrues. G.S. 1-105 and G.S. 1-105.1, providing for substitute service of a nonresident motorist by service upon the Commissioner of Motor Vehicles, are not in conflict with and do not repeal G.S. 1-21, even though there is no need for a tolling statute when a nonresident defendant is amendable to process. This Court so held in a recent decision which was filed while the present case was pending appeal, *Duke University v. Chestnut,* 28 N.C. App. 568, 221 S.E. 2d 895 (1976).

The order dismissing the plaintiff's claim is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. FRED BROWN

No. 7529SC896

(Filed 5 May 1976)

1. **Criminal Law § 91— judge's comment on guilty plea in narcotics trial — subsequent narcotics trial — denial of motion to continue — error**

In a prosecution for selling LSD, the trial court erred in denying defendant's motion for a continuance of his case where the court commented concerning a guilty plea to a charge of felonious sale of a controlled substance in the case heard immediately prior to defendant's at a time when all eligible jurors in defendant's case were present in the courtroom.

2. **Criminal Law § 89— allowing State to reopen case — impeachment of defense witness — evidence of misconduct**

In a prosecution for selling LSD, the trial court erred in allowing the State to reopen its case after defendant had rested for the pur-

pose of introducing evidence of the prior misconduct of defendant's witness whom the State had not attempted to cross-examine about prior misconduct.

APPEAL by defendant from *Gavin, Judge.* Judgment entered 11 June 1975 in Superior Court, McDOWELL County. Heard in the Court of Appeals 19 February 1976.

Defendant was convicted of the felonious sale and delivery of the controlled substance, Lysergic Acid Diethylamide. Judgment imposing a prison sentence of not less than five nor more than seven years was entered.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

Davis and Kimel, by Horace M. Kimel, Jr., for defendant appellant.

VAUGHN, Judge.

[1] The record on appeal discloses that the following took place:

"Immediately before the defendant was arraigned, the Court accepted a guilty plea from one, MICKEY CUNNINGHAM. CUNNINGHAM pled guilty to a charge of felonious sale of a controlled substance. This plea was taken in open court with all eligible jurors present. The Trial Judge made the following comments concerning CUNNINGHAM'S verdict:

THE COURT: 'I have no sympathy for drug users.' The Court also related in open court, with all jurors present, the details of a drug case that he had tried in Richmond County. In that case, the Trial Judge said, the drug users robbed the people in their hometown in North Carolina to get money for drugs and then had a good time out of state. These drug users returned to Richmond County on two occasions to steal money to buy drugs and to have a good time. The Court also commented that the McDowell County Commissioners should be upset if they appropriated the taxpayers money for the purchase of drugs and then got nothing in return.

While taking this guilty plea, District Attorney Lowe commented about one, RICHARD MCENTIRE, being a 'big pusher' and that McEntire was allowed earlier to plead

guilty to a misdemeanor drug charge and only got a probationary sentence. Mr. Lowe's comments were also in open court with all eligible jurors present in the courtroom.

When the guilty plea of CUNNINGHAM was accepted, the State put on two witnesses, Rudy Stroupe and Captain David Sigmon, who testified to a direct purchase of MDA from CUNNINGHAM. Stroupe and Sigmon were also the key witnesses in the next case called for trial, STATE OF NORTH CAROLINA VS. FRED BROWN. [The appellant in the case before us.]

Within minutes after taking CUNNINGHAM'S guilty plea, the State called defendant appellant's case for trial.

The State arraigned the defendant and the following proceedings were had:

MR. KIMEL: Before entering a plea, I would like to make a motion on behalf of the defendant to continue this case for the term for the reason that in view of what has just gone on, we cannot get 12 impartial jurors. I think these prior proceedings would inherently prejudice anyone who was present in the Courtroom and I do not feel that the defendant can get a fair and impartial trial."

We are thus faced with essentially the same problem presented in *State v. Carriker*, 287 N.C. 530, 215 S.E. 2d 134. When Carriker's case (for selling marijuana) was called for trial, his attorney moved for a continuance because of comments made before sentencing a defendant in the preceding case. That defendant had pled guilty to the possession of marijuana. After Carriker's motion for continuance, the following took place:

" 'The Court: I said when they got hooked on marijuana that my experience was that anything went, and I have tried them for robbery; they get desperate for money and anything goes, robbery or anything else.

'Mr. Lea: I think that is close to what you said; and further, as the defendant in a previous case left the Courtroom, the Presiding Judge looked at the Jury and stated substantially as follows: That they all got religion when they come in the Courtroom. Is this a fair statement, Your Honor?

'The Court: I don't know that I said they all do. I said a lot of them get religion when they come in the Courtroom.

'Mr. Lea: Is it necessary for me to give the reasons for this?

'The Court: I don't care anything about the reasons. You can take it up if you want to and tell the Court up there why you took it up. All I said in front of the Jury is what you get from the papers everyday, on the radio or on the television anytime you want to turn it on, and those people sitting on the Jury are grown men and women. The Motion is Denied.' " *State v. Carriker, supra.*

Under G.S. 1-180.1, if a judge comments on a *verdict* in a criminal case, all other defendants whose cases remain for trial during that week are entitled to continuance as a matter of right. In *Carriker* the Court said:

"This statute by its express terms applies to comments made by the presiding judge concerning verdicts rendered during the session. However, we fail to see how comments made by the judge in the presence of the jury panel concerning a verdict of guilty could be more prejudicial than the same remarks made concerning a plea of guilty. Such comments violate the spirit if not the letter of G.S. 1-180.1." *State v. Carriker, supra.*

The Court then held that the comments made by the trial judge concerning cases involving marijuana, coming shortly before defendant's case was called, entitled defendant to a continuance. A new trial was ordered for failure to grant the motion. The *Carriker* case was before the Supreme Court on *certiorari* to review the decision of the Court of Appeals reported at 24 N.C. App. 91, 210 S.E. 2d 98, wherein it was held that there was no error in denying the motion to continue.

We must, therefore, follow the opinion of the Supreme Court in *State v. Carriker, supra,* and hold that the trial judge erred in denying defendant's motion for a continuance.

[2] Brown, the defendant herein, did not testify at trial. He did, however, offer the testimony of his cousin, Steve Brown. Steve Brown's testimony was calculated to show that he was present during the time of the alleged transaction between

defendant and the undercover agent and that defendant did not sell or deliver any drugs to the agent. The State did not attempt to cross-examine Steve Brown about prior misconduct on his part. After defendant rested, the State was allowed to reopen its case. The State called an undercover agent who, over defendant's strenuous objection, was allowed to testify, in substance, that about one month after the date of the offense being tried, the witness Steve Brown had shown him some marijuana plants he was growing. The judge erred when he overruled defendant's objection to that testimony.

For the reasons stated, there must be a new trial.

New trial.

Judges MORRIS and CLARK concur.

ROBERT LEE HEWETT v. CONSTRUCTOR'S SUPPLY COMPANY, INC., EMPLOYER AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER

No. 7510IC865

(Filed 5 May 1976)

Master and Servant § 65— workmen's compensation — back injury — no accident

Evidence was sufficient to support the Industrial Commission's conclusion that there was no accident when plaintiff painter moved from a squatting position to a standing position.

APPEAL by plaintiff from an opinion and award of the Industrial Commission entered 24 July 1975. Heard in the Court of Appeals 17 February 1976.

The evidence for the plaintiff tended to show that he was employed by the defendant employer on or about 13 August 1974, and had been so employed for approximately 2 or 3 months. The plaintiff was employed as a "yard man." At the time of his alleged injury, he was assigned work as a painter. On the date in question, he was painting cement bins. An overhead beam necessitated his working from a squatting position. It was the first time he had worked in that squatting position. Plaintiff had worked in this position for approximately 1½

hours when a fellow employee requested that plaintiff help him out with some windows. As the plaintiff climbed out of the bin and straightened up, he experienced pain in the lower back area. Believing his ailment to be only a "catch" in his back, plaintiff continued to work until the pain became so severe he had to leave work and seek medical attention. Plaintiff received some medical treatment and was hospitalized twice.

Plaintiff offered the testimony of two co-workers who testified that claimant had, on the date in question, told them that he had hurt his back.

Defendants presented no evidence.

The hearing officer for the Industrial Commission found the facts to be substantially the same as those set out above and from those facts concluded that "Plaintiff sustained an injury arising out of and in the course of his employment on August 13, 1974. Such injury was not the result of an accident, however, and only those injuries suffered as a result of accident are compensable. G.S. 97-2(6)."

Based on this conclusion the hearing officer denied the plaintiff's claim, set an expert witness fee to be paid by the defendants and held that each side should bear its own cost. Thereafter, on appeal of the decision by the claimant, the full Commission issued an opinion and award affirming the opinion and award of the deputy commissioner, with one dissent.

From the opinion and award of the Commission, the plaintiff appealed.

Clayton, Myrick, McCain and Oettinger, by Grover C. McCain, Jr., for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by I. Edward Johnson, for defendant appellees.

VAUGHN, Judge.

The hearing before the hearing officer was conducted on 14 January 1975, and that opinion and award was filed 21 January 1975. The record discloses that thereafter claimant retained his present counsel and, on 19 June 1975, moved that the matter be remanded for the taking of additional evidence. This motion was supported by an affidavit of the claimant. The thrust of this affidavit is that claimant says he first noticed

pain after he dropped 10 feet from the top of the bin to the floor and fell when his right foot slipped on a wet spot on the floor. There was no reference to such an episode at the hearing in January, 1975. At that hearing in January, on cross-examination, defendant admitted executing a statement on 26 August 1974. That statement was admitted into evidence. In that statement, defendant did not mention a "fall" and the statement was generally consistent with his testimony at the hearing. A little over a month after claimant filed this motion and affidavit, the Commission, on 24 July 1975, entered its opinion and award affirming the award of the hearing officer. Apparently no action was taken on the motion. Neither the motion nor the affidavit is the subject of an exception and neither is mentioned elsewhere in the record or briefs.

On appeal, claimant contends that the Commission's conclusion that claimant's injury was not the result of an accident is inconsistent with the findings of fact. We concur with the implicit conclusion of the Commission that, on the evidence in this case, there was no accident when this painter moved from a squatting position to a standing position. The order is affirmed.

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. LARRY BOOZE

No. 7510SC867

(Filed 5 May 1976)

Narcotics § 2— attempt to acquire drug by forged prescription — sufficiency of indictment

In a prosecution for attempting to acquire the controlled substance Preludin by deception and forgery by using forged prescriptions and presenting them to two named pharmacists at specific drug stores, the bills of indictment were sufficient to charge the crime without setting out factual allegations as to the nature of the forged prescriptions or incorporating the forged prescriptions themselves in the bills. G.S. 90-108(10).

Chief Judge BROCK dissents.

State v. Booze

APPEAL by defendant from *Clark, (Giles R.), Judge.* Judgments entered 20 August 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 17 February 1976.

Defendant was tried and convicted on two bills of indictment charging him with the felonies of attempting to acquire the controlled substance Preludin (phenmetrazine) by deception and forgery by using forged prescriptions and presenting them to two named pharmacists at specific drug stores. Judgments imposing active prison sentences were entered.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, Jr., for the State.

George R. Barrett, for defendant appellant.

VAUGHN, Judge.

Defendant contends that the bills of indictment are insufficient. The essentials of a valid bill of indictment have been stated as follows:

> "The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case." *State v. Greer,* 238 N.C. 325, 327, 77 S.E. 2d 917.

The first bill of indictment under attack in the case is as follows:

"INDICTMENT — FORGED PRESCRIPTION — NO. 75CR36330

STATE OF NORTH CAROLINA COUNTY OF WAKE	In The General Court of Justice, Superior Court Division

1st July Crim. 'R' Session, 1975

The State of North Carolina

v.

Larry Booze, Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 4 day of June, 1975, in Wake County Larry Booze unlawfully and wilfully did feloniously and intentionally attempt to acquire and obtain possession of Preludin, a controlled substance included in Schedule II of the North Carolina Controlled Substances Act (phenmetrazine), by deception and forgery, to wit: by using a forged prescription and presenting it to pharmacist Charles Adams at Johnson Drug Store in Fuquay-Varina, North Carolina.

G.S. 90-98
G.S. 90-108(10)

s/ BURLEY B. MITCHELL, JR.
Assistant District Attorney

WITNESSES:

X J. Gerrell (FVPD)

The witnesses marked 'X' were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be X a true bills

This 7 day of July, 1975.

s/ HARRY W. MOORE
Grand Jury Foreman"

The other indictment is identical except that it alleges that the attempt was made at a different drug store.

We hold that the indictments in these cases meet the essentials for a valid indictment set out in *Greer*. Not only do they follow the language of the statute, they are supplemented by factual allegations which explicitly set forth every element of the particular offense and the means by which the accused is alleged to have committed the crime. A person may attempt to violate G.S. 90-108(10) by attempting to acquire a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge. The bills before us allege the time and place and the persons from whom defendant attempted to acquire the

controlled substance. The controlled substance is identified. The particular illegal means by which defendant attempted to obtain the substance is not alleged disjunctively or in general terms. The illegal means are alleged with particularity, "by using a forged prescription and presenting it to" the named pharmacists. We hold that it was not necessary to make further factual allegations as to the nature of the forged prescriptions or to incorporate the forged prescriptions in the bills.

We have carefully considered defendant's remaining assignments of error and the same are overruled.

No error.

Judge CLARK concurs.

Chief Judge BROCK dissents.

METROPOLITAN FURNITURE LEASING, INC. v. MARY H. HORNE

No 7510DC1076

(Filed 5 May 1976)

Contracts § 26; Evidence § 32— lease agreement — admission of parol evidence — error

In an action to recover from defendant certain items of furniture and a sum of money allegedly due on a lease agreement, the trial court erred in allowing parol evidence to vary the terms of the parties' contract, since those items were not ambiguous but were precise as to the terms, intent, and purpose of the contract.

APPEAL by plaintiff from *Greene, Judge.* Judgment entered 1 August 1975 in District Court, WAKE County. Heard in the Court of Appeals 13 April 1976.

Plaintiff brought this action to recover from defendant certain items of furniture and a sum of money allegedly due on a lease agreement. The complaint alleges that plaintiff has a security interest in the furniture, and that defendant has defaulted and otherwise breached the terms of the security agreement giving plaintiff a right to immediate possession of the secured property.

The trial court held that the contract was ambiguous on its face as to whether it was a contract of sale or a contract of lease, and from the parol evidence introduced by defendant the court concluded it was a contract of sale. Judgment was entered for defendant and plaintiff appealed to this Court.

Theodore A. Nodell, Jr., for plaintiff appellant.

No brief filed by defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the lower court erred in finding that ambiguity existed in the written provisions of the contract. Plaintiff argues that the contract, when viewed as a whole, contains all the terms essential for a lease agreement and contains no terms which would raise a doubt as to the true nature of the agreement. This contention appears to be correct.

Parol evidence is incompetent if its purpose is to vary, add to, or contradict, a written agreement on matters intended to be covered by the written agreement. *Neal v. Marrone,* 239 N.C. 73, 79 S.E. 2d 239 (1953) ; *Williams and Associates v. Products Corp.,* 19 N.C. App. 1, 198 S.E. 2d 67 (1973).

" . . . where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent." *Neal v. Marrone, supra,* at 77.

The contract is designated a "Lease Agreement," and it contains no option to purchase at the end of the rental period, no provision for interest, and except for a comparison of the sales price and the monthly lease rate for each item leased, the contract is couched entirely in terms of a lease agreement and not a sales contract. It provides that the defendant has leased the specified items of furniture for one year at a monthly rate of $54.75 plus $2.19 sales tax. It provides further that upon

expiration of the term of lease the defendant may continue the lease on a month to month basis. It stipulates that upon the failure of the defendant to pay "any installment of rental" the plaintiff may take possession of the furniture.

We see no ambiguity in the written provisions of the contract. It is precise as to its terms, intent and purpose, and parol evidence was erroneously admitted to vary its terms. The judgment of the district court is reversed and remanded for proceedings not inconsistent with this opinion.

Reversed.

Judges BRITT and VAUGHN concur.

CAROLE M. GRADY (NOW MOORE) v. JOHN W. GRADY

No. 754DC1055

(Filed 5 May 1976)

Husband and Wife § 11— support provided in separation agreement — continuation beyond divorce — intention of parties

In an action to have defendant pay the arrearages due under a separation agreement and to require defendant to continue the monthly payments as set forth in the separation agreement, the trial court did not err in refusing to allow defendant's evidence that, at the time the separation agreement was signed, it was his intention and understanding that the support payments were to cease upon divorce of the parties and his evidence in support of that contention that plaintiff had made no demand for payment from the time of the divorce until the commencement of this action, a period of 18 months.

APPEAL by defendant from *Henderson, Judge.* Judgment entered 29 August 1975 in District Court, ONSLOW County. Heard in the Court of Appeals 8 April 1976.

Plaintiff's complaint alleges that she and defendant entered into a separation agreement on 2 February 1972, and they were divorced on 8 February 1973. The separation agreement contained the following provision: "That the husband does hereby agree to pay to the wife for her maintenance and support the sum of One Hundred Dollars ($100.00) each and every month commencing with the month of February, 1972, said support pay-

ment to be due and payable on or before the 10th day of each calendar month."

It is alleged that defendant has made no payments since 1 February 1973, and plaintiff prays that defendant be required to pay the arrearages and continue the monthly payments as set forth in the separation agreement.

Jury trial was waived. Defendant moved that he be allowed to offer evidence that at the time the separation agreement was signed it was his intention and understanding that the support payments were to cease upon divorce of the parties. Defendant also moved for permission to introduce evidence that plaintiff had made no demand for payment from the time of the divorce until the commencement of this action. Both motions were denied.

The court held that defendant's obligation under the separation agreement to make support payments did not terminate upon the divorce. Defendant was ordered to pay $3,100.00 as arrearages due from February, 1973, through the end of August, 1975. He appealed to this Court.

Gene H. Kendall for plaintiff appellee.

Bailey & Gaylor, by Edward G. Bailey, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the court erred in not permitting his testimony. He argues that the separation agreement is ambiguous with respect to when the support payments will end, and he maintains that he should have been permitted to testify that it was his intention and understanding that the payments would cease upon divorce of the parties.

It is also argued by defendant that he should have been permitted to offer evidence that plaintiff had made no demand for payment since the divorce. He reasons that such evidence supports his contention that he was not required to make payments after the divorce.

The procedure in the trial court was somewhat irregular, but we disagree with defendant's contentions and find no error. The question of the intention of the parties at the time of the contract was a question of law for the court to determine. The

effect of the agreement is not controlled by what one of the parties intended or understood. Absent fraud or mistake the undisclosed intention of either party is immaterial. See *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968).

There was no allegation of fraud or mistake. The court merely construed the language of an agreement written in clear and unambiguous language. The judgment requiring defendant to pay the arrearages due at the time of the judgment is

Affirmed.

Judges BRITT and VAUGHN concur.

JOHN B. KENNEDY v. NANCY R. SURRATT

No. 7519DC888

(Filed 5 May 1976)

Divorce and Alimony § 22— child custody issue raised in divorce proceeding — subsequent independent child custody action improper

The District Court of Randolph County was without jurisdiction to entertain an independent action for custody of the minor children of the parties, since the question of their custody was brought to issue in a prior divorce action in Guilford County, and the District Court of that County retained jurisdiction of the question, even though the question was not determined in the divorce decree. G.S. 50-13.5(f).

APPEAL by defendant from *Warren, Judge.* Order entered 22 May 1975 in District Court, RANDOLPH County. Heard in the Court of Appeals 19 February 1976.

On 11 March 1975 defendant in this action filed a complaint in District Court, Guilford County, seeking an absolute divorce from the plaintiff in this action. In her complaint (then Nancy Kennedy, who has since remarried) she alleged that she was a fit and proper person to have custody of the minor children and prayed that she be awarded their custody. John Kennedy (defendant in the Guilford County action) filed answer admitting all allegations of the complaint. On 26 March 1975 a decree of absolute divorce was entered in the Guilford County action. There was no mention or disposition of the prayer for custody of the minor children in the divorce decree.

On 15 April 1975 the present civil action was instituted in District Court, Randolph County, wherein plaintiff seeks custody of the minor children. Defendant (plaintiff in the Guilford County action) on 3 May 1975 moved to dismiss the Randolph County action upon the grounds that the District Court, Guilford County, had already acquired jurisdiction of the custody question. On 5 May 1975 a notice and a motion for custody order in the Guilford County case were served on defendant (plaintiff in the Randolph County case). From the denial of her motion to dismiss the Randolph County action, defendant appealed.

Bell and Ogburn, by Deane F. Bell and William H. Heafner, for the plaintiff.

Clarence C. Boyan, for the defendant.

BROCK, Chief Judge.

General Statute 50-13.5(b) defines the types of actions in which custody and support of minor children may be determined. Subsection (f) of G.S. 50-13.5 provides for the proper venue for the actions allowed under subsection (b). Subsection (f) provides: "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." Then two provisos follow. The first proviso reads: "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." (Emphasis added.) The second proviso is not pertinent to this case.

> "The foregoing proviso, when read in conjunction with the first sentence of this subsection (f) and in conjunction with subsection (b), makes it clear that after final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. . . . Of course, if the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case,

because the issue of custody and support remains *in fieri* until the children have become emancipated." *In re Holt*, 1 N.C. App. 108, 160 S.E. 2d 90 (1968); *accord Wilson v. Wilson*, 11 N.C. App. 397, 181 S.E. 2d 190 (1971).

The pleadings in the divorce action which preceded *In re Holt, supra,* did not contain a prayer for custody or support. The pleadings in the divorce action which preceded *Wilson v. Wilson, supra,* did not disclose a prayer for custody or support. In contrast the pleadings in the divorce action (in Guilford County) which preceded this civil action for custody (in Randolph County) contained allegations and prayer for custody of the minor children.

In our opinion the allegations upon which custody can be granted and the prayer for custody in the divorce action brought the question of custody to issue even though the question was not determined in the divorce decree. In accordance with *In re Holt, supra,* and *Wilson v. Wilson, supra,* since the question of custody of the minor children was brought to issue in the divorce action in Guilford County *(Nancy R. Kennedy v. John B. Kennedy,* Guilford County No. 75CVD274), the District Court in Guilford County retained jurisdiction of the question of custody of the minor children of the parties. It follows that the District Court in Randolph County is without jurisdiction to entertain an independent action for custody of the minor children of the parties.

The order of the District Court, Randolph County, denying defendant's motion to dismiss is vacated, and this cause is remanded for entry of an order dismissing this action.

Vacated and remanded.

Judges PARKER and HEDRICK concur.

NANCY R. KENNEDY SURRATT v. JOHN B. KENNEDY

No. 7518DC889

(Filed 5 May 1976)

Divorce and Alimony § 22— child custody — jurisdiction of proceeding

In a divorce action where plaintiff also sought custody of the minor children, the trial court properly denied defendant's motion to

dismiss made on the ground that he had instituted an independent child custody action in the district court of another county, since the court in which the question was first raised retained jurisdiction of the issue.

APPEAL by defendant from *Washington, Judge.* Judgment entered 28 May 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 19 February 1976.

Plaintiff instituted this action in the District Court in Guilford County seeking a divorce on the grounds of one year's separation. In her verified complaint filed 11 March 1975, in addition to allegations concerning residence of the parties, their marriage on 19 June 1959, their separation on 6 January 1974, and that they lived separate and apart for more than one year, plaintiff alleged she was a fit and proper person to have custody of the three minor children born of the marriage. In her prayer for relief she asked for an absolute divorce and that custody of the three children be awarded to her. On 26 March 1975 defendant filed his verified answer in which he admitted all allegations in the complaint and in which he joined in plaintiff's prayer for relief. On 26 March 1975 judgment was entered in the District Court in Guilford County granting plaintiff an absolute divorce. This judgment made no reference to custody of the children.

On 5 May 1975 plaintiff served notice on defendant that she was applying in this Guilford County action for an order awarding her custody of the three children. At a hearing held 29 May 1975 defendant moved to dismiss under Rule 12(b) on the grounds of lack of jurisdiction in that on 15 April 1975 he had filed an independent action against the plaintiff herein in the District Court in Randolph County wherein he was seeking custody of the children.

Defendant's motion to dismiss the Guilford County action was denied, and defendant appealed.

Clarence C. Boyan for plaintiff appellee.

Bell and Ogburn, P.A. by Deane N. Bell and William H. Heafner for defendant appellant.

PARKER, Judge.

The allegations and prayer for custody in the pleadings brought the question of custody to issue in this action even

though the question was not determined in the divorce decree. Therefore, for the reasons stated by Brock, Chief Judge, in opinion filed this date in *Kennedy v. Surratt,* Case No. 7519DC888, which was an appeal from an order entered in the Randolph County action, the District Court in Guilford County retained jurisdiction in this action of the question of custody of the minor children of the parties. Accordingly, defendant's motion to dismiss was properly denied. The order appealed from is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. LEWIS WILLIAMS

No. 7527SC1059

(Filed 5 May 1976)

Criminal Law §§ 22, 91— negotiated plea — refusal of court to accept — continuance as a matter of right

Defendant was entitled to a continuance as a matter of right following the court's refusal to accept his negotiated plea and defendant's withdrawal thereof. G.S. 15A-1024.

APPEAL by defendant from *Friday, Judge.* Judgment entered 11 September 1975 in Superior Court, Gaston County. Heard in the Court of Appeals 7 April 1976.

Defendant was indicted and tried upon a bill of indictment charging forgery and uttering the forged check. When the case was called for trial [10 September 1975] a negotiated plea was tendered which the trial judge refused to accept, and the defendant's plea was withdrawn. The case was called for trial again on the following day [11 September 1975] and defendant moved for a continuance. The motion was denied. Defendant entered a plea of not guilty and upon a verdict of guilty as charged he was given an active sentence. Defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Henry H. Burgwyn, for the State.

Harris and Bumgardner, by Don H. Bumgardner, for defendant appellant.

ARNOLD, Judge.

Defendant maintains that when the trial judge rejected the plea arrangement it entitled defendant to a continuance until the next session of court. In view of G.S. 15A-1024 we must agree with this contention and award defendant a new trial.

Under G.S. 15A-1024, if the judge determines to impose a sentence other than that provided in the plea arrangement between the parties he must so inform the defendant, and further inform defendant that he may withdraw his plea. "Upon withdrawal, the defendant is entitled to a continuance until the next session of court."

The official commentary to G.S. 15A-1023 provides: "Subsection (1) requires the judge in open court, . . . , to tell the defendant whether he will abide by the recommendation as to the sentence. If the judge refuses to go along, the parties can either renegotiate or the defendant may withdraw his plea and secure a continuance as a matter of right. See § 15A-1024." Defendant was entitled to a continuance as a matter of right following the court's refusal to accept the negotiated plea and defendant's withdrawal thereof.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. SOLOMON BROWN

No. 7621SC32

(Filed 5 May 1976)

Constitutional Law § 31— confidential informer — disclosure of identity not required

The trial court in a prosecution for possession and sale of heroin did not err in refusing to require the disclosure of the identity of a confidential informer where the informer had little if any active participation in the actual crimes and where defendant did not make a sufficient showing of his need for disclosure of the informer's identity.

APPEAL by defendant from *Graham, Judge.* Judgment entered 19 August 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 April 1976.

Upon pleas of not guilty, defendant was tried on two bills of indictment charging him with (1) possession of heroin and (2) selling and delivering heroin to Martha Owens. A jury found him guitly of both charges. The court consolidated the cases for judgment and imposed a prison sentence of 10 years and a fine of $2,500.00.

Attorney General Edmisten, by Associate Attorney Norma S. Harrell, for the State.

W. Warren Sparrow for defendant appellant.

BRITT, Judge.

Defendant's only assignment of error is that the court erred in not requiring the State to disclose the identity of a confidential informant. We find no merit in the assignment.

Evidence presented by the State tended to show: In April of 1975, Martha Owens, an agent of the State Bureau of Investigation, went to Winston-Salem to purchase drugs as an undercover agent. On the afternoon of 17 April she and a female confidential source went to defendant's apartment. The source told defendant that Geraldine (defendant's wife) had sent them to him and that they wanted to buy some heroin. Defendant delivered 15 tinfoil packets to Owens for which she paid him $100.00. Thereafter, an analysis of the contents of the packets revealed the presence of heroin.

Defendant testified that he did not sell heroin on the day in question or at any other time and that he had never seen Agent Owens prior to seeing her in court.

It appears to be well settled that the nondisclosure of an informer's identity must be balanced against the need for effective law enforcement; but where the informer's identity and potential testimony are essential to a fair determination of the case or material to a defendant's defense, the privilege must give way and the informer's name be disclosed if the defendant is to be prosecuted. *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957); *State v. Ketchie,* 286 N.C. 387, 211 S.E. 2d 207 (1975).

The facts in the instant case are clearly distinguishable from *Roviaro* and other cases requiring disclosure of the informer's name. Here, the informer had little if any active participation in the actual crimes. The evidence showed that after

she told defendant that Geraldine sent them, the informer proceeded to go to and use the bathroom while Agent Owens made the actual purchase from defendant. In *Roviaro,* for example, the informer made the purchase of drugs while the police officer hid in the trunk of the informer's car and made a tape recording of the transaction.

Furthermore, we do not think defendant made a sufficient showing before the trial court of his need for disclosure of the informer's identity. The record reveals that the only time the question was raised was when Agent Owens was on *re*cross-examination. At that time she was asked, "Who is the source?" The State's objection to the question was sustained. The witness then testified that she did not know the source but she was not an agent; that she met the informer for the first time that afternoon, some hour or so before going to defendant's apartment. Defendant failed to show that the informer's identity and possible testimony were essential to a fair determination of the case or material to his defense. *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476 (1957), decided subsequent to *Roviaro.*

We hold that defendant received a fair trial free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. HAROLD DAVID POOLE

No. 7520SC963

(Filed 5 May 1976)

Kidnapping § 1— jury instructions — definition of kidnapping — sufficiency

Though the trial court in a prosecution for kidnapping failed to use the words "against the will of the victims" in defining kidnapping to the jury, the instruction given clearly informed the jury that if the alleged victims voluntarily went with defendant, he would not be guilty of kidnapping.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 17 July 1975, Superior Court, RICHMOND County. Heard in the Court of Appeals 16 March 1976.

Defendant pled not guilty to three separate charges of kidnapping (1) Keith Wilson, (2) Johnnie Bowers and (3) Elwood Cox.

State's evidence tends to show that on 16 March 1975 defendant entered Riverside Grocery and abducted Bowers, Wilson and Cox at gunpoint and forced them to drive him to a fire tower; that in the tower defendant tied them, called the Sheriff and demanded a helicopter to fly him to Brazil. After twelve hours in the tower, defendant surrendered after requesting and receiving from Superior Court Judge Robert Gavin a written statement that he would be sent directly to Dorothea Dix Hospital. Defendant's evidence tended to show that the occurrence was a hoax designed to enable defendant to escape capture by police on other charges, and that Bowers, Cox and Wilson pretended to be hostages.

Defendant was found guilty of kidnapping Keith Wilson and Johnnie Bowers, but not guilty of kidnapping Elwood Cox. From the judgments imposing consecutive prison terms of 40 years each, defendant appeals.

Attorney General Edmisten by Associate Attorney Noel Lee Allen for the State.

Webb, Lee, Davis, Gibson & Gunter by Hugh A. Lee for defendant appellant.

CLARK, Judge.

Defendant's sole assignment of error is that the trial court failed to instruct the jury that in order for the defendant to be guilty of kidnapping, the taking and carrying away of the victim must be against his will.

In instructing the jury the trial court defined kidnapping as "false imprisonment aggravated by conveying the imprisoned person to some other place." This definition has often been quoted with approval by the Supreme Court of North Carolina. *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897 (1973).

Though the above definition does not include specific language requiring that the taking and carrying away of the victim be against his will, the court then defined false imprisonment and added: "Now, actual force is not required. However, there must be a threat of force or implied threat of force which

compels a person to remain where he does not wish to remain or to go where he does not wish to go. If the person consents, that is, if the person goes voluntarily, then there can be no restraint of liberty."

We find the instructions of the trial court to be substantially in accord with the charge that was approved in *State v. Roberts,* 286 N.C. 265, 210 S.E. 2d 396 (1974).

Defendant's testimony tended to show that Bowers, Wilson and Cox voluntarily accompanied him, pretending that they were his hostages to aid him in his escape plan. The trial court applied the law to this evidence by instructing the jury in substance that if they voluntarily went with defendant, he would not be guilty of kidnapping. "Against the will of the victims" are not magic words which must be used to correctly define the crime of kidnapping, and in the failure of the court to use these words in this case we find

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN JUNIOR PARKER

No. 765SC5

(Filed 5 May 1976)

1. **Criminal Law § 126— unanimity of verdict — instruction misleading**

   Defendant is entitled to a new trial where the trial court's instruction on unanimity of the verdict was susceptible of the interpretation that when a vote was taken and there was a majority—either for conviction or acquittal—the minority must then cast their votes with the majority and make the verdict unanimous before returning the verdict in open court.

2. **Criminal Law § 89— corroborative evidence — time for giving instruction**

   The better practice requires the court, upon timely request, to instruct the jury with respect to corroborative evidence at the time the evidence is admitted rather than to wait until the final charge to give such an instruction.

APPEAL by defendant from *Martin (Perry), Judge.* Judgment entered 28 July 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 14 April 1976.

Defendant, indicted for murder, was tried for and convicted of second-degree murder. From judgment sentencing him to a term of imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorney Daniel C. Oakley, for the State.

Lionel L. Yow for defendant appellant.

MORRIS, Judge.

[1] During the course of its charge, the trial court advised the jury that " . . . before you return your verdict it must be unanimous. You cannot return a verdict without a majority vote. That does not mean that your verdict must be unanimous when you retire. It means that it must be unanimous when you return to open court to announce it, because the jury is a deliberative body. You are to sit together, discuss the evidence, recall and review it all and remember it all; then after you have deliberated together return an unanimous verdict to open court." Defendant contends that this portion of the charge constituted error sufficiently prejudicial to require a new trial. We agree.

In our opinion the instruction is misleading and confusing. It is true that the jury was properly instructed that before they returned a verdict, it must be unanimous. There can be no doubt but that in this State no person can be finally convicted of a crime except by the unanimous consent of a jury of 12 persons properly impanelled. *State v. Hudson,* 280 N.C. 74, 185 S.E. 2d 189 (1971), cert. denied 414 U.S. 1160; N. C. Const., Art. I, § 24. However, the instruction before us is susceptible of the interpretation that when a vote is taken and there is a majority—either for conviction or acquittal—the minority must then cast their vote with the majority and make the verdict unanimous, before returning the verdict in open court. This, of course, is not the case and must not be the case. Because we cannot know whether the jury was misled by the instruction, there must be a new trial.

[2] Defendant also contends that the court committed error in refusing, upon timely request, to instruct the jury with respect to corroborative evidence at the time the evidence was admitted. The court, when defendant asked for instructions to the jury on the purpose of the evidence, replied that he would instruct that when he gave the final charge. He did do this, and adequately. Nevertheless, the better practice requires that the

court, upon request, instruct the jury at the time the evidence is admitted, if timely request is made. See *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), cert. denied 410 U.S. 958 and 410 U.S. 987; *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968); *State v. Hardee*, 6 N.C. App. 147, 169 S.E. 2d 533 (1969); *State v. Battle*, 4 N.C. App. 588, 167 S.E. 2d 476 (1969), cert. denied 275 N.C. 500 (1969); 1 Stansbury, N. C. Evidence, § 52 (Brandis Rev. 1973).

New trial.

Judges PARKER and MARTIN concur.

PEGGY SUE W. JOHNSON v. OLIN B. AUSTIN

No. 7520SC1008

(Filed 5 May 1976)

1. **Compromise and Settlement § 1; Torts § 7— contributory negligence alleged — release executed by defendant — plaintiff's pleading of release as bar to action**

   In an action to recover damages for injuries sustained in an automobile collision, plaintiff's pleading of a settlement and release signed by defendant as a bar to defendant's counterclaim constituted a ratification of the settlement and barred plaintiff's action.

2. **Rules of Civil Procedure § 15— motion to amend pleadings — denial proper**

   The trial court did not err in refusing to permit the plaintiff to amend her pleadings to allege that the release referred to in her reply to defendant's counterclaim was taken without plaintiff's knowledge, consent or approval.

APPEAL by plaintiff from *Alvis, Judge*. Judgment entered 18 November 1975 in Superior Court, UNION County. Heard in the Court of Appeals 19 March 1976.

The plaintiff filed a complaint alleging that on 6 June 1972 she was injured and her automobile damaged in a collision proximately caused by the negligence of the defendant. The defendant answered, and by counterclaim alleged that his automobile was damaged as a proximate result of the negligence of the plaintiff. Plaintiff filed a reply to the counterclaim denying that plaintiff was negligent and alleged " . . . [t]hat as this plaintiff is ad-

vised, informed and does believe, the defendant has been satisfied for all damages, if any, that he received in the collision and has signed a complete release for all damages that he claimed as a result of said collision."

At the call of the case for trial the defendant moved the court for dismissal of plaintiff's cause under the provisions of G.S. 1A-1, Rule 12(b)(6) and under G.S. 1A-1, Rule 12(c). Plaintiff moved the court, under the provisions of G.S. 1A-1, Rule 15, for leave to amend Paragraph 3 of the reply so as to include in that paragraph a statement that the release referred to was taken without the plaintiff's knowledge, approval or consent.

The court allowed defendant's motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c) but denied all other motions, and dismissed plaintiff's action. Plaintiff appealed.

Coble Funderburk, for plaintiff.

Griffin & Caldwell, by C. Frank Griffin; Griffin & Humphries, by James E. Griffin, for defendant.

MARTIN, Judge.

Plaintiff contends the court erred in granting the defendant's motion for judgment on the pleadings and dismissing plaintiff's action.

[1] "A consummated agreement to compromise and settle disputed claims is conclusive and binding on the parties to the agreement and those who knowingly accept its benefits." *Keith v. Glenn,* 262 N.C. 284, 136 S.E. 2d 665 (1964). In the case at bar, the plaintiff alleged negligence on the part of the defendant, denied negligence on her part, and in her reply to defendant's counterclaim, alleged that the defendant had been satisfied of all damages, if any, that he received in the collision in that he had signed a complete release for all damages that he claimed as a result of said collision. The pleading of the release as a bar to the counterclaim constitutes a ratification of the settlement and bars plaintiff's action. *Keith v. Glenn, supra.* Therefore, this assignment of error is overruled.

[2] Plaintiff next contends the trial court erred in refusing to permit the plaintiff to amend her pleadings to allege that the release referred to in her reply was taken without the plaintiff's knowledge, consent or approval.

The record shows that the last pleading filed was plaintiff's reply, which was filed 1 August 1975. Plaintiff's motion was made after the case was called for trial on 18 November 1975. Substantially more than 30 days after service of the last responsive pleading had elapsed. The pleading was not necessary to conform with the evidence because no evidence had been introduced. Thus, the pleading could only have been admitted by leave of court or by written consent of the adverse party. G.S. 1A-1, Rule 15. The adverse party did not give written consent and the trial judge, in his discretion, chose not to grant such motion.

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

ADRIAN JESSIE BREWER, BETTY YOUNG BREWER AND BETTY YOUNG BREWER, GUARDIAN AD LITEM FOR ROBIN RENEE BREWER, A MINOR v. CATAWBA COUNTY

No. 7525SC876

(Filed 5 May 1976)

Counties § 4— county ABC board — employee not employee of county

The trial court properly concluded that an employee of the Catawba County Alcoholic Beverage Control Board was not an employee of Catawba County so as to make that county liable for torts committed within the scope of his employment by the Board.

APPEAL by plaintiffs from *Ervin, Judge.* Judgment entered 15 August 1975 in Superior Court, CATAWBA County. Heard in the Court of Appeals 18 February 1976.

Plaintiffs started this action to recover for personal injuries and property damage sustained by them in an automobile accident which occurred in late November, 1971. They alleged that a car driven by an employee of the Catawba County Alcoholic Beverage Control Board was negligently operated and collided with their automobile causing personal injuries and property damage. Plaintiffs further alleged that the automobile driven by said employee was owned by the Catawba County Alcoholic Beverage Control Board, "a legally established entity within and under the control of the defendant" and was being

used by the employee within the scope of his employment. Service of process was on the acting county manager.

Defendant filed a motion to dismiss on the grounds "[t]hat the County of Catawba and the Catawba County Alcoholic Beverage Control Board are completely separate and independent governmental bodies with separate and independent jurisdictions, functions and purposes;" that the employee of the ABC Board was not an employee of Catawba County and that Catawba County was not the proper defendant.

Prior to a hearing on the motion, plaintiffs' original counsel was allowed to withdraw due to a conflict of interest, in that he had been appointed county attorney for the County of Catawba after the filing of this action. Plaintiffs' present counsel was then employed. Thereafter, the defendant filed its answer and also filed affidavits to the effect that the employee was not employed by the County of Catawba on the date in question but was an employee of the Catawba County Alcoholic Beverage Control Board at that time.

By agreement of the parties, this matter came on for hearing before Judge Ervin who treated defendant's motion for judgment on the pleadings as a motion for summary judgment. Summary judgment was entered in favor of defendant and plaintiffs' action was dismissed.

Plaintiffs appealed.

Bailey, Brackett & Brackett, P.A., by Martin L. Brackett, Jr., for plaintiff appellants.

Smathers & Farthing, by Edwin G. Farthing, for defendant appellee.

VAUGHN, Judge.

The only question presented is whether the employee of the Catawba County Alcoholic Beverage Control Board is an employee of Catawba County so as to make that county liable for torts committed within the scope of his employment by the Board. We hold that Judge Ervin correctly concluded that he was not. In so doing, we follow the reasoning of the Supreme Court in *Hunter v. Retirement System,* 224 N.C. 359, 30 S.E. 2d 384. In that case, the Court held that employees of the Alcoholic Beverage

Control Board of New Hanover County were not employees of New Hanover County. The judgment is affirmed.

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

LARRY WALKER YOW, ADMINISTRATOR OF THE ESTATE OF NELSON ALLEN YOW, DECEASED, AND LARRY WALKER YOW AND SANDRA GAYNELL YOW AS PARENTS OF NELSON ALLEN YOW, DECEASED v. R. W. LLOYD NANCE

No. 7520SC1006

(Filed 5 May 1976)

Death § 3— wrongful death act — death of unborn viable child — no "person"

A viable unborn child whose death is caused while still in its mother's womb is not to be considered a "person" within the meaning of the wrongful death act.

APPEAL by plaintiffs from *Rousseau, Judge.* Judgment entered 6 October 1975 in Superior Court, STANLY County. Heard in the Court of Appeals 19 March 1976.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for plaintiff appellants.

Golding, Crews, Meekins, Gordon & Gray, by Fred C. Meekins, for defendant appellee.

VAUGHN, Judge.

This action was started to recover damages for the wrongful death of a viable unborn child, who was eight and one-half months developed at the time of the fatal accident.

The trial judge allowed defendant's motion to dismiss filed under Rule 12(b) (6) and (c).

In a case of first impression, *Cardwell v. Welch,* 25 N.C. App. 390, 213 S.E. 2d 382, *cert. den.* 287 N.C. 464, 215 S.E. 2d 623, this Court gave its answer to the identical question presented by this appeal. In *Welch,* this Court held that a viable unborn child whose death is caused while still in its mother's

womb is not to be considered a "person" within the meaning of the wrongful death act.

In that well reasoned opinion by Judge Parker, we find the following:

> "In making our decision we have not been concerned with the question of when human life begins from a biological or theological point of view. We have simply been called on to construe a statute. Furthermore, in making our decision we have not been insensitive to the rights of the unborn. In appropriate circumstances the law recognizes such rights and at times even requires that a guardian be appointed to protect them. We point out, however, that no wrongful death statute can ever operate to benefit the deceased; it can only operate to benefit others by granting a cause of action where none previously existed.
>
> Accordingly, we construe the word 'person' in our wrongful death statute to mean one who has become recognized as a person by having been born alive. If it be deemed desirable that a cause of action exist to recover for the wrongful death of an unborn fetus, that result would be accomplished more appropriately by legislative action than by strained judicial construction of an ancient statute."

For the reason stated in *Welch,* the judgment is affimed.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 APRIL 1976

HEATH v. BASDEN No. 758SC1025	Lenoir (75CVS147)	No Error
STATE v. BATTS No. 757SC933	Edgecombe (72CR7177)	Affirmed
STATE v. CRAWFORD AND MOSES No. 758SC901	Wayne (75CR429A) (75CR430A)	No Error
STATE v. GRADY No. 7514SC925	Durham (74CR10389)	No Error
STATE v. HOLLEY No. 7512SC1068	Cumberland (75CR18965)	No Error
STATE v. JOLLY No. 7525SC1010	Catawba (75CR551) (75CR552)	No Error
STATE v. MONTGOMERY No. 7527SC1043	Cleveland (74CR8563)	No Error
STATE v. SAWYER No. 7529SC1046	McDowell (75CR1321)	No Error
STATE v. TWEED No. 7528SC1012	Buncombe (74CR18573)	Affirmed
STATE v. WRIGHT No. 7521SC1066	Forsyth (74CR0056)	Affirmed

FILED 5 MAY 1976

BOLICK v. BOLICK No. 7525DC842	Catawba (74CVD2700)	Affirmed
DAY v. IRION No. 7520SC1052	Moore (74CVS37) (74CVS38)	Affirmed
IN RE DAVIS No. 7526DC1017	Mecklenburg (75SP922)	Affirmed
IN RE YOUNGBLOOD No. 7526DC1036	Mecklenburg (75SP931)	Affirmed
JENKINS v. BUILDING SUPPLY No. 7527DC1075	Gaston (72CVD2982)	Reversed and Remanded
N. C. AUTO RATE v. INGRAM No. 7510SC1061	Wake (75CVS5113)	Vacated and Remanded

STATE v. BROWN No. 7629SC3	McDowell (74CR4953)	No Error
STATE v. CABLE No. 7527SC1064	Gaston (74CR8504) (74CR14724)	Affirmed
STATE v. DRAUGHN No. 7622SC9	Davie (75CVS124)	Affirmed
STATE v. DRUMMOND No. 7520SC1009	Richmond (75CR3869) (75CR3870)	No Error
STATE v. FISHER No. 7520SC1062	Union (74CR6980)	Affirmed
STATE v. GILL No. 7522SC959	Iredell (74CR12728)	No Error
STATE v. JEWELL No. 754SC1039	Onslow (75CR5699)	No Error
STATE v. LARRY No. 7521SC1067	Forsyth (75CR21127)	No Error
STATE v. LITTLE No. 7526SC997	Mecklenburg (74CR74715)	No Error
STATE v. MALLOY No. 7516SC1002	Scotland (74CR6799)	No Error
STATE v. MILLER No. 7525SC1051	Caldwell (75CR113)	No Error
STATE v. RIDLEY No. 763SC14	Pitt (75CR4133)	Remanded
STATE v. SCULLEY No. 754SC955	Onslow (75CR9331) (75CR9332)	No Error
STATE v. SPRINKLE No. 7521SC1070	Forsyth (74CR49047)	No Error
STATE v. STALLINGS No. 761SC16	Pasquotank (75CR1642)	No Error
STATE v. STOKES AND WATKINS No. 7618SC12	Guilford (74CR19907) (74CR19910)	No Error
SUBURBAN TRUST CO. v. EDWARDS No. 7521DC916	Forsyth (75CVD0131)	Affirmed

Fogle v. Board of Education

WOODROW W. FOGLE, BROADUS McSWAIN, AND JAMES A. MELVIN III, AS TAXPAYERS AND VOTERS IN AND OF THE COUNTY OF GASTON, NORTH CAROLINA, AND ALL OTHER TAXPAYERS AND CITIZENS OF SAID COUNTY WHO MAY DESIRE TO JOIN IN THIS ACTION V. THE GASTON COUNTY BOARD OF EDUCATION

No. 7627SC328

(Filed 14 May 1976)

1. **Statutes § 11— public local law — subsequent statewide law — local law not repealed by implication**

A public local law applicable to a particular county or municipality is not repealed by a subsequently enacted public law, statewide in its application, on the same subject matter, unless repeal is expressly provided for or arises by necessary implication.

2. **Schools § 4— Board of Education — filling vacancy — election improper**

The legislative intent in enacting Chapter 906 of the 1967 Session Laws of North Carolina was that the remaining members of the Gaston County Board of Education, and only the remaining members of the Board, should fill the vacancy for an unexpired term, and absent a provision for an alternative method of filling the vacancy, the authority of the remaining members of the Board to fill the vacancy was not lost by their failure to have done so within thirty days after the vacancy occurred; therefore, the trial court erred in ordering an election to fill the vacancy under G.S. 115-24, a general law inapplicable by its express terms to Gaston County.

APPEAL by defendant from *Briggs, Judge.* Judgment entered in Superior Court, GASTON County, on 9 April 1976. Heard in the Court of Appeals 11 May 1976.

Plaintiffs, as voters and taxpayers of Gaston County, brought this action for a judgment declaring that the failure of the remaining members of defendant Board to fill a vacancy on the Board by appointment renders the vacant position eligible to be filled by election.

Chapter 906 of the 1967 Session Laws of North Carolina provides that The Gaston County Board of Education shall consist of nine members, four of whom shall be elected from specified areas or districts and five of whom shall be elected from Gaston County at large.

Three members of The Gaston County Board of Education are elected biannually at each general election for a term of six years. All candidates for election must file a notice of candidacy with The Gaston County Board of Elections within the

time required by law for county officers in primary elections which for this biennium is during the period of April 5 to May 28, 1976.

Emil F. Traenkner, chairman of The Gaston County Board of Education, died on September 17, 1975. He had been elected as a member at large for a term expiring on the first Monday in December of 1978.

Section 4 of Chapter 906 of the 1967 Session Laws of North Carolina contains the following language: "All vacancies in the membership of The Gaston County Board of Education by reason of death, resignation or removal from area or district from which elected shall be filled by the remaining members of said Board from the area of residence in which the vacancy occurs for the complete unexpired term and within 30 days after the vacancy occurs."

Although the question of filling the vacancy has been considered at the meetings of The Gaston County Board of Education held on October 2, 1975; October 14, 1975; October 20, 1975; November 17, 1975; December 15, 1975; March 15, 1976; March 22, 1976; and April 1, 1976, no replacement has been appointed. When a vote was taken, on every occasion there were two nominees and on every occasion there was a tie vote with four members voting for one candidate and four voting for the other candidate.

Based upon findings of fact substantially as recited above, Judge Briggs concluded and ordered as follows:

> "That the Gaston County Board of Education has not filled the vacancy in its membership of said Board within thirty (30) days from the time which said vacancy occurred.
>
> "That Chapter 906 of the 1967 Session Laws of North Carolina has no provisions for filling a vacancy in the Gaston County Board of Education when the same has not been filled within thirty (30) days after said vacancy occurred; and further, said act contains no provision for the breaking of a dead-lock in the vote of the membership of the Gaston County Board of Education to fill a vacancy of its membership; nor does the General Statutes of North Carolina provide a remedy in the event of a tie vote by a County Board of Education in the filling of a vacancy in its membership.

"That in the absence of any provision of law in said Chapter 906 and in the general or statutory laws of North Carolina, the provision of Chapter 115, Section 24 of Article 5 of the General Statutes of North Carolina is applicable in that the vacancy presently existing in the membership of the Gaston County Board of Education should be filled by the voters of Gaston County at the next general election in November, 1976, to serve the unexpired term of Emil F. Traenkner, deceased, which ends on the first Monday of December, 1978.

"BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS, THEREFORE, ORDERED that the unexpired term of Emil F. Traenkner be filled according to the provisions of G.S. 115-24 at the next general election to be held in November of 1976."

Defendant appealed.

Gaston, Smith & Gaston, by Willis C. Smith, for plaintiffs.

Garland & Alala, by James B. Garland, for defendant.

BROCK, Chief Judge.

Appellant argues that the trial court had no statutory or constitutional authority to order that the existing vacancy on The Gaston County Board of Education be filled by election. We agree.

By the clear and unambiguous language of Chapter 906, Session Laws of 1967 (applicable only to Gaston County), the legislature provided: "All vacancies in the membership of the Gaston County Board of Education by reason of death, resignation or removal from area or district from which elected shall be filled by the remaining members of said Board from the area of residence in which the vacancy occurs for the complete unexpired term and within 30 days after the vacancy occurs." The act makes no provision for an alternative method of filling the vacancy except upon expiration of the term of office in which the vacancy exists.

General Statute 115-24, under which the trial court purported to order the vacancy filled by election, is a general statute of Statewide application. This section by its express terms is applicable only to boards of education whose members are

elected pursuant to the provisions of G.S. 115-19. In turn, G.S. 115-19 provides: "The members of the County Board of Education in each county that does not on the effective date of this Act elect its members by a vote of the people, shall be elected in one of the following ways: . . ." The special statute applicable to Gaston County (Chapter 906, Session Laws of 1967) was in effect on the effective date of G.S. 115-19. Therefore, by its express terms, G.S. 115-19 is not applicable to Gaston County.

[1] A public local law applicable to a particular county or municipality is not repealed by a subsequently enacted public law, statewide in its application, on the same subject matter, unless repeal is expressly provided for or arises by necessary implication. *Rogers v. Davis,* 212 N.C. 35, 192 S.E. 872 (1937). "The general law will not be so construed as to repeal an existing particular or special law, unless it is plainly manifest from the terms of the general law that such was the intention of the lawmaking body. A general later affirmative law does not abrogate an earlier special one by mere implication. Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter the special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction." *Charlotte v. Kavanaugh,* 221 N.C. 259, 20 S.E. 2d 97 (1942).

Where the language of a statute is clear and unambiguous, there is no room for judicial construction; the courts must give it its plain and definite meaning and are without power to interpolate or superimpose provisions and limitations not contained therein. *State v. Camp,* 286 N.C. 148, 209 S.E. 2d 754 (1974). When the intention of the legislature as expressed in a statute is ascertained, the courts cannot refuse to enforce it because the facts of some particular case present a seeming

hardship. *Morris v. Chevrolet Co.*, 217 N.C. 428, 8 S.E. 2d 484 (1940).

[2] Although the members of the Board of Education have been deadlocked in a four-to-four tie vote on each occasion they have tried to fill the vacancy created by Mr. Traenkner's death, there is no statutory or constitutional provision for an alternative method of filling the vacancy. In the enactment of Chapter 906, Session Laws of 1967, it must be presumed that the legislature knew that a voting deadlock could occur in the attempt by the remaining members of the Board of Education to fill a vacancy on the Board. Had the legislature desired an alternative method of filling a vacancy, it would have provided for one. It follows that the legislative intent was that the remaining members of the Board, and only the remaining members of the Board, shall fill the vacancy for the unexpired term. Absent a provision for an alternative method of filling the vacancy, the authority of the remaining members of the Board to fill the vacancy is not lost by their failure to have done so within thirty days after the vacancy occurred. *See In re Westlund*, 427 Pa. 358, 236 A. 2d 120 (1967); 78 C.J.S., Schools and School Districts, § 117.

Although the remaining members of The Gaston County Board of Education have failed to perform their statutory duty to fill the vacancy on the Board within thirty days after it occurred, it was error for the trial court to order an election under G.S. 115-24 to fill the vacancy. Plaintiffs may wish to consider the propriety of an action for writ of mandamus to compel the remaining members of the Board to perform their statutory duty to fill the vacancy on the Board. The judgment appealed from is reversed, and the cause is remanded to the Superior Court, Gaston County.

Reversed and remanded.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION AND CAROLINA POWER AND LIGHT COMPANY, APPLICANT v. RUFUS L. EDMISTEN, ATTORNEY GENERAL; EXECUTIVE AGENCIES OF UNITED STATES OF AMERICA; THE NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.; AND BALL CORPORATION, INTERVENORS, PROTESTANTS

No. 7510UC604

(Filed 19 May 1976)

1. **Electricity § 3; Utilities Commission § 6— interim rate increase — moot question**

Questions presented by the contention that the Utilities Commission committed reversible error by allowing an electric utility an additional interim rate increase after it had allowed one such increase are moot where the Commission's final order determined that a rate increase of almost twice the combined interim increases was just and reasonable.

2. **Electricity § 3; Utilities Commission § 6— additional interim rate increase**

The Utilities Commission had authority, in the exercise of the discretionary power granted it by G.S. 62-134(b), to modify its order allowing an interim rate increase by granting an additional interim rate increase without basing such further order on new evidence of a type competent to support a final order in a general rate case.

3. **Electricity § 3; Utilities Commission § 6— failure to order refund of interim rate increase**

The Utilities Commission did not err in failing to order a power company to refund revenues collected subject to refund during the pendency of a general rate hearing where the Commission found such revenues to be just and reasonable, notwithstanding the Commission in its final order approved new residential rate schedules which allowed no increase in basic rates for customers in the low use category and smaller than requested increases in basic rates for customers in the medium use category.

4. **Electricity § 3; Utilities Commission § 6— return on rate base — return on equity**

The record in this case, considered as a whole, contains substantial evidence supporting the Utilities Commission's subjective judgment that 8.24 percent was a fair rate of return to be allowed on a power company's fair value rate base as determined by the Commission and that 10.44 percent was a fair rate of return on the power company's fair value equity which resulted from adding the fair value increment to the equity component in the capital structure.

5. **Electricity § 3; Utilities Commission § 6— return on equity — increased revenues requested by power company**

The fact that the 10.44 percent return on fair value common equity of a power company allowed by the Utilities Commission pro-

duced the exact amount of increased revenues for which the power company applied does not show that the Commission acted arbitrarily or failed to comply with statutory procedures in fixing the power company's rates.

6. **Electricity § 3; Utilities Commission § 6— elimination of customer classifications**

The Utilities Commission did not err in approving the elimination of the previously established textile mill, high load factor, and military service customer classifications in a power company's rate structure.

7. **Electricity § 3; Utilities Commission § 6— changes in customer classifications — question presented**

Changes in established customer classifications of an electric utility may be approved by the Utilities Commission without a showing that the old classifications have become unreasonable because of some change in conditions or costs of rendering service, the question being whether the new classifications proposed by the utility are themselves reasonable.

Judge MARTIN dissents.

ON *writ of certiorari* to review final order of the North Carolina Utilities Commission entered 6 January 1975 in Docket #E-2, Sub 229. Heard in the Court of Appeals 12 November 1975.

This general rate case was commenced 29 October 1973 when Carolina Power and Light Company filed with the North Carolina Utilities Commission its application for authority to increase its retail rates for electricity sold in North Carolina by approximately 21 percent, the increases to become effective 1 December 1973. The proposed increases were not across-the-board, but varied as among various customer classes. On 9 November 1973 the Commission entered an order suspending the proposed increases, declaring this to be a general rate case, fixing the test period to be used in the general rate proceeding as the year ending 31 December 1973, and setting the case for investigation and hearing. In its application filed 29 October 1973 CP&L also applied for an 11 percent interim rate increase. After notice and public hearing, the Commission by order dated 25 January 1974 authorized an interim increase, subject to refund upon final hearing and determination, of 5.94 percent. On 22 February 1974 CP&L moved for permission to place into effect the remainder of the originally requested 11% interim increase, and on 1 April 1974 the Commission, after notice and public hearing, entered an order which authorized the additional

requested interim increase of 5.06% to be placed into effect subject to refund.

On 10 May 1974 CP&L gave notice of intention to place rate increases up to 20 percent into effect as provided in G.S. 62-135, and on 16 May 1974 the Commission, as provided in G.S. 62-135(c), approved CP&L's undertaking for refund. On 1 June 1974 CP&L placed the 20 percent increase into effect, subject to refund. The remaining portion of the requested increases in rates was placed into effect pursuant to G.S. 62-134 on 1 October 1974, after expiration of the 270 day period of suspension.

Nineteen days of public hearings were held on CP&L's application in Raleigh, Wilmington, and Asheville during July, August, and September 1974. At these hearings numerous witnesses were heard and many exhibits were introduced. Following these public hearings and after receiving briefs of the parties, the Commission entered its final order on 6 January 1975, making detailed findings of fact and conclusions, and approving the increased rates as applied for by CP&L. The order also approved the rate schedules essentially as filed for by CP&L, but with some slight downward adjustments in schedules affecting low usage customers.

To this order the Attorney General of North Carolina, the North Carolina Textile Manufacturers Association, Inc., the Executive Agencies of the United States of America, and Ball Corporation, intervenors and protestants, timely filed notice of appeal and exceptions. To permit perfection of the appeals of these parties, this Court on 12 June 1975 granted their petition for writ of certiorari.

R. C. Howison, Jr., and William E. Graham, Jr., for applicant, Carolina Power & Light Company, appellee.

Edward B. Hipp, General Counsel, and Assistant Commission Attorney Wilson B. Partin, Jr., and Associate Commission Attorney Jane S. Atkins for North Carolina Utilities Commission, appellee.

Attorney General Edmisten by Deputy Attorney General I. Beverly Lake, Jr., and Assistant Attorney General Robert P. Gruber for the Attorney General, appellant.

Hovis, Hunter & Eller by Thomas R. Eller, Jr., for the North Carolina Textile Manufacturers Association, appellant.

United States District Attorney Thomas P. McNamara and R. C. Hudson for Executive Agencies of United States of America, appellant.

Broughton, Broughton, McConnell & Boxley by J. Melville Broughton, Jr., for Ball Corporation, appellant.

PARKER, Judge.

Appeal by the Attorney General

In its application filed 29 October 1973, CP&L asked the Commission to allow the entire 21 percent increase applied for to become effective on 1 December 1973 without suspension. In the event, however, that the Commission should deny this request and should suspend the proposed rate increases, CP&L prayed that the Commission permit it to place in effect an 11 percent interim increase. On 9 November 1973 the Commission did suspend the increased rates but did not immediately allow the 11 percent interim increase. Instead, on 25 January 1974, after notice and public hearing, it allowed an interim increase of only 5.94 percent. Later, on 1 April 1974, on CP&L's motion and after further notice and public hearing, the Commission entered its order allowing the remaining 5.06 percent of the originally requested 11 percent interim increase to go into effect, subject to undertaking and refund.

On this appeal the Attorney General contends that the Commission committed reversible error in entering its order of 1 April 1974 and in support of that contention advances three arguments as follows: (1) The only new evidentiary support for the 1 April 1974 order consisted in evidence and exhibits showing CP&L's declining per share earnings, declining returns on book equity, and deterioration in coverage of its fixed charges, and such data does not furnish a legally competent basis for the Commission's order allowing an increase in rates charged North Carolina customers, since it clearly relates to CP&L's company-wide operations which include its operations in South Carolina and its operations subject to the jurisdiction of the Federal Power Commission. (2) The findings of fact and conclusions as contained in the order entered after notice and public hearing on 25 January 1974, which allowed only 5.94 percent of the requested 11 percent increase, should remain intact, since in absence of further competent evidence upon which to base the granting of the additional

5.06% interim rate increase all material issues raised by the application for the 11 percent interim rate increase were adjudicated and resolved by the 25 January 1974 order. (3) No competent evidence was presented to show a change in CP&L's circumstances such as to warrant a change in the amount of the interim rate increase allowed. We do not find these arguments persuasive.

[1] At the outset we observe that the questions presented by the Attorney General's contention that the Commission committed reversible error by entering its 1 April 1974 order are now moot. By the final order entered 6 January 1975 the Commission found, after lengthy public hearings and after making extensive findings of fact on the basis of data relating to a test period ending on 31 December 1973, that rates permitting a 21 percent rate increase, almost twice the combined interim increases approved by the 25 January and 1 April 1974 orders, were just and reasonable. The Attorney General, who represents the using and consuming public in this proceeding, has failed to show that the rights of those whom he represents were impaired because for a period of time CP&L's customers were required to pay only approximately one-half of the increase in rates which the Commission ultimately determined CP&L was justly entitled to receive.

[2] Quite apart from any question of mootness, we find no error in the Commission's interim order of 1 April 1974. The power granted the Commission by G.S. 62-134 to suspend a requested change in rates is a discretionary one which the Commission may, but need not, exercise. *Utilities Comm. v. Morgan*, 16 N.C. App. 445, 192 S.E. 2d 842 (1972). In the opinion in that case we observed that nothing in the statute indicates a legislative intent that once the Commission exercises its discretionary power and suspends rates, it thereby necessarily exhausts its authority in that regard so as thereafter to be precluded from withdrawing or modifying the suspension, and we affirmed an order of the Commission, entered after a requested increase in rates had been suspended, which withdrew the suspension and allowed the new rates to become effective on an interim basis and subject to refund pending final hearing and determination. In the present case the Attorney General does not challenge the Commission's order of 25 January 1974 by which it modified its previous suspension order and permitted an interim increase of 5.94 percent to go into effect. His

position on this appeal seems to be that the Commission, once having entered that order, was thereafter precluded from modifying it by a further interim order unless the further order is based on new evidence of a type competent to support a final order in a general rate case and sufficient in itself to show a material change in conditions. We find nothing in the statute which places such a limitation on the Commission's discretionary authority. On the contrary, the discretionary power granted the Commission by G.S. 62-134(b) to suspend a proposed change in rates for a period not longer than 270 days clearly includes the lesser power to suspend a portion of the change for some lesser period, and "nothing in the language of the statute suggests that the Legislature intended that the Commission could exercise the discretionary authority granted it only if it did so on an all-or-nothing, once-and-for-all basis." *Utilities Comm. v. Morgan, Attorney General, supra*, p. 451. Accordingly, we hold that the Commission had the authority, in the exercise of the discretionary power granted it by G.S. 62-134(b), to enter its order of 1 April 1974 by which it modified its earlier discretionary order of 25 January 1974. Before entering each of these orders the Commission held a public hearing, as it was authorized but not required to do. Since both orders could have been validly entered even without any public hearing, we find no merit in appellant's contention that the second order was not lawfully entered because not supported by new evidence of a type competent to support a final order in a general rate case. In deciding whether to exercise its discretion by entering the second order, the Commission was entitled to look at and make a fresh appraisal of all of the evidence before it, including all data filed with the original application on 29 October 1973 and all evidence presented prior to entry of the 25 January 1974 order. The burden is on the appellants to show an abuse of the Commission's discretion in entering its interim order of 1 April 1974 by which it further modified its previously entered suspension order to permit an additional 5.06 percent increase to go into effect. On this record no abuse of the Commission's discretion is shown. Appellant's assignments of error directed to the Commission's interim order of 1 April 1974 are overruled.

[3] In its final order dated 6 January 1975 the Commission approved new residential rate schedules which allowed no increase in basic rates for customers in the low use category and smaller than CP&L's requested increases in basic rates for

customers in the medium use category. Nevertheless, the Commission expressly found all revenues collected subject to refund during the pendency of this proceeding to have been "just and reasonable," and in accord with this finding cancelled CP&L's undertaking to refund. Appellant Attorney General assigns error to this action. The precise question presented by this assignment of error has already been decided by this Court in *Utilities Comm. v. Edmisten, Attorney General,* 26 N.C. App. 613, 216 S.E. 2d 743 (1975). On authority of that case, this assignment of error is overruled.

[4] The Attorney General next challenges, as being arbitrary, capricious, and unsupported by competent, material, and substantial evidence in the record, the Commission's finding in its order of 6 January 1975 that CP&L was entitled to a return of 10.44 percent on fair value common equity and additional gross revenues of $11,846,000 for fair value. Consideration of the questions raised by this challenge requires that we first analyze the steps followed by the Commission in arriving at the rates finally approved in this case. As required by G.S. 62-133(b)(1), the Commission first ascertained the fair value of CP&L's property used and useful in providing retail electric service in North Carolina as of the end of the test period. The Commission determined this to be $885,355,000. (This figure was arrived at in the following manner: (1) Reasonable original cost of electric plant was found to be $891,313,000, from which there was deducted reasonable accumulated depreciation of $161,065,000 and contributions in aid of construction of $3,843,000, leaving a net original depreciated cost of $726,405,000, (2) Reasonable replacement cost was determined to be $1,026,186,000. (3) Fair value was derived by giving two-thirds weighting to net original depreciated cost of $726,405,000 and one-third weighting to replacement cost of $1,026,186,000, resulting in a fair value for electric plant of $826,332,000. To this was added an allowance for working capital, found to be reasonable in the amount of $59,023,000, resulting in a determination of the fair value rate base of $885,355,000. The Attorney General does not challenge any of these figures or the method followed by the Commission in arriving at its determination of the fair value rate base.) After estimating CP&L's revenue under its present and proposed rates and ascertaining its reasonable operating expenses, as required by G.S. 62-133(b)(2) and (3), the Commission, as required by G.S. 62-133(b)(4), fixed the fair rate of return on the fair value rate base at 8.24

percent. The Commission, as required by G.S. 62-133(b)(5), then fixed rates which permitted CP&L to earn, in addition to reasonable operating expenses, the rate of return which the Commission found to be fair on the fair value rate base as determined by the Commission. In arriving at its conclusion that 8.24 was a fair rate of return, the Commission analyzed the effect of inserting pro forma the fair value rate base as determined by the Commission into CP&L's balance sheet, and found that the result was to increase book common equity by $99,927,000. (The difference between $826,333,000, the fair value of electric plant as determined by the Commission in the manner noted above, and $726,405,000, the net original depreciated cost of electric plant.) The addition of this increment to book common equity increased common equity from $250,489,000 to produce a fair value common equity of $350,416,000, and changed the ratio of equity in the capital structure from 31.89 percent to 39.58 percent. Allocating the net earnings to be derived from the new rates to the pro forma revised capital structure resulted in a rate of return on the fair value equity of 10.44 percent. The Commission found 12.5 percent to be a fair return on book common equity. It concluded that "[t]he required rate of return on fair value equity is reduced by the resulting change in capital structure, based upon the reduced risk to the equity component," and the Commission found that 10.44 percent was a fair rate of return on the resulting fair value equity. It is this finding that 10.44 percent was a fair rate of return on fair value common equity which the Attorney General now challenges as being arbitrary and capricious and unsupported by competent, material, and substantial evidence.

In his brief, the Attorney General states his contention as follows: "The approach used by the Commission was as a general proposition proper, but the error complained of arises from the fact that there is no evidence in the record to support the Commission's conclusion that the cost of equity for CP&L decreases from 12.5 percent to 10.44 percent as equity increases from 31.89 percent to 39.58 percent." We find no error.

At the outset we note that at almost every step along the way in a general rate case the Utilities Commission, in following the procedure prescribed by G.S. 62-133(b), is required to exercise a subjective judgment. For example, the weighting to be given the respective indications of "fair value," the determination of the total amount reasonably necessary for work-

ing capital, and the determination of what constitutes a fair rate of return, all require exercise of a subjective judgment by the Commission. "When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of these factors in the fixing of reasonable rates, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission, nor is the Commission required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness." *Utilities Comm. v. Power Co.*, 285 N.C. 398, 415, 206 S.E. 2d 283, 296 (1974). We find that the record in the present case, considered as a whole, does contain substantial evidence supporting the Commission's subjective judgment that 8.24 percent was a fair rate of return to be allowed on CP&L's fair value rate base as determined by the Commission and that 10.44 percent was a fair rate of return on CP&L's fair value equity which resulted from adding the fair value increment to the equity component in the capital structure.

The Attorney General's own witness, David A. Kosh, who was recognized by the Commission as an expert in economics, cost of capital, and fair rate of return, testified:

> "The problems involved in determining the cost of capital and its major components are in substantial measure matters of judgment. Necessarily, so many factors enter into a determination of fair rate of return that many judgments have to be made. If, at each point where a judgment has to be made, or where a question has to be resolved, the benefit of any reasonable doubt is resolved in the direction of a lower cost, then the result will tend to be at, or in the direction of, the lower end of fair rate of return.
>
> On the other hand, if most reasonable doubts, or questions, are resolved in the direction of a higher cost rate, then the end result will be at or near the upper end of the range or fair rate of return."

This testimony clearly points out the many subjective value judgments which the Commission, or anyone else, must necessarily exercise in arriving at a determination of fair rate of return. This witness, David A. Kosh, testified that he had made

a detailed study of the cost of capital and fair rate of return for CP&L. When he testified he did not, of course, know what the Commission would ultimately determine the fair value rate base should be. He did testify, however, that in his opinion 8.22 percent would be a fair rate of return if applied to a fair value rate base determined as being equal to 109.6 percent of depreciated original cost and that 10% was a fair rate of return on the fair value equity. These figures from the Attorney General's witness were remarkably close to the Commission's ultimate findings that 8.24 percent was the fair rate of return when applied to the fair value rate base which, as determined by the Commission, was 108.9 percent of depreciated original cost, and that 10.44 percent was a fair rate of return on fair value equity.

[5] The Attorney General, pointing to the fact that a 10.44 percent return on fair value common equity produced the exact amount of increased revenues for which CP&L applied, contends from this fact that the Commission must have acted arbitrarily in selecting the figure of 10.44 percent in order to accomplish a preconceived objective. The fact stated, however, does not compel the conclusion drawn. That the Commission ultimately approved CP&L's application furnishes no proof that it acted arbitrarily. No rule of law requires the Commission to presume that the rates requested in a utility's application are excessive, nor does approval of the requested rates raise any presumption that the Commission failed to comply with the procedures specified in G.S. 62-133(b) or with the mandate of G.S. 62-133(a) to "fix such rates as shall be fair both to the public utility and to the consumer." Upon appeal, the rates fixed by the Commission under the provisions of G.S. Chap. 62 "shall be prima facie just and reasonable." G.S. 62-94(e). On review of the entire record as submitted in this case, we find the Commission's findings, conclusions, and its decision in this case to be supported by competent, material, and substantial evidence, and we find that appellant Attorney General has failed to show that the Commission acted arbitrarily or capriciously.

Appeals by the North Carolina Textile Manufacturers Association, Inc., Ball Corporation, and Executive Agencies of United States of America.

[6] In its application, filed 29 October 1973, CP&L, in addition to applying for an increase in rates, proposed to make a change in its rate structure to eliminate certain previously

established customer classification schedules. Among the schedules which it proposed to eliminate were the Textile Mill Schedule (TM), the High Load Factor Schedule (HLF), and the Military Service Schedule (MS). Customers formerly in these schedules were moved to a general service classification, Schedule G-3. In its order of 6 January 1975 the Commission, with certain modifications, approved the proposed changes in CP&L's rate structure. (The modifications made by the Commission related to low and medium use residential customers and resulted in practically no increase in basic rates for residential customers using less than 300 KWH monthly and smaller than the overall increase for residential customers using less than 725 KWH monthly.) The elimination of the TM, the HLF, and the MS classifications resulted in rate increases greater than the 21 percent overall increase for customers who were formerly in those classifications. The intervenors, the North Carolina Textile Manufacturers Association, Ball Corporation, and Executive Agencies of the United States of America, previously classified in the TM, HLF, and MS schedules respectively, contend that the Commission committed reversible error in that portion of its order of 6 January 1975 which approved elimination of the previously established textile mill, high load factor, and military service customer classifications. We find no error in this regard.

When this proceeding was commenced, CP&L had 35 different rate schedules for its customers. This compared with 10 to 15 rate schedules used by the typical electric utility. This proliferation in customer classifications was not the result of comprehensive planning made at any one time, but rather was the result of historical development which occurred during the period when CP&L, having an ample and growing supply of electric power available for sale, was engaged in promoting the increased usage of electric power by new as well as by its existing customers. In recent prior rate cases CP&L had applied for and been granted across-the-board increases, applying the same percentage increase to all rate schedules without changes being made in the customer schedules. The rate structure which resulted from this process favored the large-use customers by granting them lower KWH rates than charged the small-use customers. While, as noted above, the elimination of the TM, the HLF, and the MS classifications and the moving of customers from these eliminated schedules into the G-3 schedule resulted in rate increases greater than the average 21 percent

overall increase for customers formerly on the eliminated classifications, such customers, even after being placed in the G-3 schedule, still enjoyed lower KWH rates than those charged small-use customers. Appellants here, although still enjoying lower rates than charged residential and other small-use customers, nevertheless contend that the Commission committed error as a matter of law in approving elimination of the customer classification schedules in which they had formerly been placed.

[7] The gist of appellants' contention is that existing customer classification schedules, having heretofore been approved by the Commission in prior rate cases, must be deemed reasonable and cannot be changed except upon specific evidence, such as fully distributed cost studies, showing by its greater weight that existing approved rate differentials within or among customer classes or schedules are no longer just and reasonable. They further contend that in the present case there was no competent evidence showing CP&L's fully distributed costs of serving the customers formerly in the TM, HLF, and MS classifications, and that absent such evidence the Commission lacked lawful authority to approve any change in customer classification schedules. We do not agree with these contentions. It is true, of course that "[t]here must be no unreasonable discrimination between those receiving the same kind and degree of service." *Utilities Comm. v. Mead Corp.*, 238 N.C. 451, 462, 78 S.E. 2d 290, 298 (1953). The governing statutes, G.S. 62-140(a), expressly mandates that "[n]o public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service." We do not understand this to mean, however, that customer classifications, once established by a utility, must remain frozen absent a showing of change of conditions justifying a change in classifications. The question is not whether the old classifications, because of some change in conditions or of costs of rendering service, have become unreasonable. Rather, the question is whether the new classifications proposed by the utility are themselves reasonable. The simplied rate structure which resulted from the elimination of the TM, HLF, and MS schedules in the present case still provides customer classifications based upon substantial differences in conditions of service. The Commission has approved the new simplified rate structure, and on this appeal the Commission's determination in that regard must be deemed "prima facie just and reasonable." G.S. 62-94(e).

There is, of course, an almost infinite variety in the ways in which customers may be classified, and experts may differ as to which is the best. To be lawful the classification need not be one which a majority of experts consider to be the best and most reasonable. It need only be one which is based on reasonable differences in conditions and in which the variance in charges bears a reasonable proportion to the variance in conditions. Review of the record before us reveals this to be true of the rate structure and schedule approved in this case.

The order appealed from is

Affirmed.

Judge CLARK concurs.

Judge MARTIN dissents.

STATE OF NORTH CAROLINA v. BRYAN BOARD

No. 7519SC1054

(Filed 19 May 1976)

1. **Criminal Law § 7; Narcotics § 4— possession and sale of MDA — no entrapment as matter of law**

In a prosecution for possession with intent to sell and sale of MDA, the evidence did not disclose as a matter of law that defendant was entrapped by law enforcement officers into committing the criminal offenses charged, since the State's evidence raised an inference that a paid SBI informer used his position as basketball coach, confidant, and friend of defendant to induce defendant to commit offenses which he did not otherwise contemplate committing, but the State's evidence also raised the inference that the SBI agents and informer merely afforded defendant the opportunity to commit offenses which he was predisposed to commit and which actually originated in defendant's mind.

2. **Criminal Law § 114— jury instructions — expression of opinion on witness's credibility**

In a prosecution for possession with intent to sell and sale of MDA where defendant's entire defense was that he was entrapped by SBI informer Casey, the credibility of the testimony of Casey was critical to defendant's defense, and the trial court erroneously expressed an opinion on the witness's credibility when he stated to the jury, ". . . that a person such as Ernie Casey who honestly and in good faith carried out the instructions of a police officer and who

acts for the exclusive purpose of assisting in law enforcement does not violate the law."

APPEAL by defendant from *Braswell, Judge.* Judgment entered 24 October 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 7 April 1976.

The defendant, Bryan Board, was charged in separate indictments, proper in form, with possession with intent to sell and sale of MDA (a Schedule I controlled substance) on 8 February and possession with intent to sell and sale of MDA on 14 February 1975. He pleaded not guilty to each charge, and the State offered evidence tending to show the following:

Earnest Casey, age twenty, and the defendant, age seventeen, were friends. Casey had known the defendant almost all his life, having gone to school with him and having participated in activities with him. The defendant played for the basketball team at the church he and Casey attended, and Casey coached the team.

Casey was an employee of North Carolina National Bank in January 1975 when SBI Agent Barry Lee approached him concerning working with Lee in investigating drug traffic in China Grove, North Carolina, where Casey lived. He agreed to help Lee because he was trying to start a career in law enforcement. Casey testified: "After talking to Mr. Lee, I went around the China Grove area, talked with several different people and on my own talked to find out if there was any drug traffic in that area." As a result of his investigation, he introduced the defendant to SBI Special Agent Adcox on 7 February 1975. They met in the Methodist Church parking lot in China Grove at about 8:00 p.m. and agreed to return there between 9:15 and 9:30 p.m. when Adcox was going to pick up a gram of MDA from the defendant. Adcox gave the defendant $50.00 to purchase the MDA and they left. The meeting never took place, though, because, as Casey was driving with Adcox back to the parking lot at about 9:30, he was stopped by the local police.

The following morning Casey talked with the defendant and arranged for Casey and Adcox to meet him at his house that afternoon. When they arrived at the house, Casey went into the house and into the defendant's room. The defendant showed him "a white baggy with a white powdery substance

in it" and Casey told him to carry it out to Adcox who was still in the car, which he did. Casey remained in the house to make a phone call.

Adcox testified that the defendant came out and gave him the baggy which contained three-quarters of a gram of MDA. The defendant also gave him $15.00 in change saying that he had not been able to purchase a full gram. They discussed drugs generally for a few minutes, the defendant relating that he had tried speed and had purchased drugs in the past. Adcox asked the defendant if he could obtain other drugs for him. The defendant discussed the possibility of buying an ounce of MDA from the Moores for $400.00. Adcox replied that he did not have the money but that he was interested in having the defendant find out more about it. The defendant then told him he could get an ounce of "crystal" for $50.00. Adcox gave him $25.00 toward the purchase price and they agreed to meet later that night. By then Casey had returned to the car, and he and Adcox left.

Around 9:00 that night they met at "King of Pizza." The defendant, with three friends, approached Casey's car, and the defendant handed Adcox another baggy. They discussed the price, with Adcox finally giving the defendant $10.00, making the total price $35.00. Subsequent analysis revealed that the substance contained in this baggy was not a controlled substance.

On 14 February Casey called the defendant about buying another gram of MDA. Casey and Adcox met the defendant at about 4:00 p.m. in the A & P parking lot; and as they drove around town together, the defendant gave Casey another baggy containing MDA. Adcox paid the defendant $45.00 for the gram. Adcox also told him that the crystal purchased on the 8th had been no good, that he had gotten mad and thrown it away. The defendant told him how to test the substance he was buying. They discussed the ounce of MDA again and talked about drug business in general. The defendant then agreed to take them to Joel Patterson's house to purchase some "T"; but Casey testified that as they drove up, "Mr. Board saw some cars he knew that was (sic) parked there and said he did not want to go in because he knew whose cars they were and that most of the guys were hoods." They left and carried the defendant home.

On cross-examination, Casey testified that he had known the defendant and his family most of his life. They attended

the same church, and he participated with the defendant in "outside activities like softball and things like that." Prior to January 1975, he had been in the defendant's home either to play basketball or to go to the flower shop which Mrs. Board ran at the house. After meeting Mr. Lee, he would go to the defendant's home once a week or once every two weeks.

Casey became coach of the basketball team at about the same time he began working for the S.B.I. After a game, he would talk to the defendant about the defendant getting drugs for him. Casey testified:

> "I was the coach and he was a player. After a game I just asked him if he knew where any were at or if he could find some. He told me at the time he did not know where he could find any. He told me he couldn't find any but he'd keep hunting. * * * I called his home and talked to him on the telephone about trying to get it. * * *
>
> I asked his mother and father to allow him to be in a Scout Explorer Troop. That I would like to have him in that troop and they encouraged it and said yes they'd like to have him in the troop. * * * In February of 1975. There was an explorer post. I talked to this young man about being in the post. I even gave him an application blank for it. He was never in the post. He never did return the application to me and never said nothing about it after talking to me."

Prior to talking with Mr. Lee, he had never asked the defendant to join the Explorers, although he had been active in the organization for over four years.

Casey represented to the defendant that he had been involved in drugs while in the Air Force stationed in Mississippi and that he needed some drugs. He smoked marijuana with the defendant and other "young boys" who were there "to act like [he was] with the crowd." Casey testified that it was only when he told the defendant that he had a friend in Charlotte, "Big Jim," who wanted some drugs, and that Jim was coming to town on Friday, 7 February, that the defendant said he would try and find Casey some drugs.

On Friday, when they met in the parking lot, Agent Adcox played the part of Jim. When Casey introduced Jim to the defendant, he told him "it would be better not to rip Jim off."

Casey was paid by the S.B.I. for his expenses. At the time he was doing this undercover investigation "he answered to Mr. Lee of the S.B.I.," and he was paid specifically for his work involving the defendant.

On cross-examination, Adcox testified that he understood the defendant to believe that the initial purchases were for Casey's and Adcox's personal use—that it was not until the defendant met Adcox that he learned that the purchases were for resale.

The defendant offered evidence tending to show that while he supplied Adcox with the two bags of MDA, he did so only to satisfy his friend Casey, who had been persistent in wanting him to find some drugs. When Casey asked him if he could get some drugs, the defendant initially refused because he did not know where they could be purchased. Because of his friendship and respect for his coach and friend, though, when Casey said he "needed" some drugs and "had to have" some drugs for his friend Jim, the defendant asked several of his fellow students where he could find some drugs.

At the time he first purchased the MDA he did not even know what it was. While he admitted to boasting to Jim about his expertise and knowledge of drugs, he contended he had never used any drugs other than marijuana and the only "sales" he had ever made were when he would buy marijuana and friends would pay him for part of it. His talk was to impress "Big Jim" who he thought was a big time dealer.

The defendant and both his parents testified to the persistence of Casey in developing a close relationship with the defendant. Beginning in January, Casey called at least once and sometimes two or three times a day to speak with the defendant. He came to the defendant's house four or five times a week. He often left with the defendant after basketball games. He developed a close relationship with defendant's parents who encouraged the defendant to be friends with Casey.

After the defendant had made the two purchases for Casey, he refused to supply Adcox with any more drugs. He felt that if they wanted the drugs he would introduce them to the people who sold the drugs but that he should not have to make their purchases for them. He tried to avoid Casey. He refused to see Casey when he came over and would not return his calls. Defendant's parents noticed the change in attitude. They became

insistent with the defendant that he maintain his friendship with Casey. They demanded that he return Casey's calls and continue to see Casey. They encouraged him to join the Explorer Scouts with Casey. It was only after it was apparent the defendant would not make additional drug purchases that Casey stopped calling and coming by the defendant's home.

Casey smoked marijuana with several of the players at one of the basketball games. Yancy Doby testified that Casey had "offered" him some drugs and had tried to get him to purchase drugs for him, even to the point of coming by his house with Adcox and a black male and trying to get him to go with them, but that Doby had refused.

The defendant was convicted on all four charges. From judgment entered on one charge that the defendant be imprisoned for four weekends in the county jail and on the other three charges suspending a sentence of six years, fining the defendant, and placing him on probation for five years, the defendant appealed.

Attorney General Edmisten by Associate Attorney T. Lawrence Pollard for the State.

Davis, Ford and Weinhold by Robert M. Davis for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motions for judgment as of nonsuit. Citing *State v. Stanley,* 288 N.C. 19, 215 S.E. 2d 589 (1975), and numerous other cases, defendant contends the evidence discloses as a matter of law that he was "entrapped" by law enforcement officers into committing the criminal offenses which he did not otherwise contemplate doing. We do not agree.

In *State v. Stanley, supra* at 32, Justice Branch wrote the following:

> "The rule governing the application of the defense of entrapment as a matter of law is clearly and concisely stated by the New Hampshire Supreme Court in *State v. Campbell,* [110 N.H. 238, 265 A. 2d 11]. We quote from that case:
>
> Ordinarily, if the evidence presents an issue of entrapment it is a question of fact for the jury to determine. The

court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take." (Citations omitted.)

While the State's evidence, particularly that elicited from Casey on cross-examination, raises an inference that Casey used his position as basketball coach, confidant, and friend of the defendant to induce the defendant to commit offenses which he did not otherwise contemplate committing, the evidence likewise raises an inference that the agents of the SBI and Casey merely afforded the defendant the opportunity to commit offenses which he was predisposed to commit and which actually originated in the defendant's mind. These conflicting inferences of fact must be resolved by the jury under proper instructions. Upon this record we cannot say the "undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take."

[2] This brings us to the defendant's contention that the court erred in its instructions to the jury. Defendant excepted to the following instructions.

> "I instruct you that a person such as Ernie Casey who honestly and in good faith carried out the instructions of a police officer and who acts for the exclusive purpose of assisting in law enforcement does not violate the law."

At trial, defendant's entire defense was that he was entrapped into the commission of the offenses charged. Whether the defendant was entrapped necessarily depended upon the conduct of the witness Casey and his association with the defendant. The defendant's evidence with respect to Casey's conduct and his relation with the defendant was in conflict with that of the State. Thus, the credibility of the testimony of Casey was critical to the defendant's defense. In the challenged instruction, the judge clearly expressed an opinion on the credibility of the witness Casey. It was for the jury to say whether he "honestly and in good faith" carried out the instructions of an agent of the SBI. It must be remembered that Casey was a bank employee who wanted a career in law enforcement, and he was acting as an undercover agent only at the time of his involvement with the defendant. We think the challenged in-

struction was prejudicial to the defendant and entitles him to a new trial.

We need not discuss defendant's additional assignments of error since they are not likely to occur at a new trial.

New trial.

Judges MORRIS and ARNOLD concur.

WILBUR SMITH AND ASSOCIATES, INC., A CORPORATION v. SOUTH MOUNTAIN PROPERTIES, INC., A CORPORATION; DIVERSIFIED MORTGAGE INVESTORS, A MASSACHUSETTS BUSINESS TRUST; AND THOMAS M. STARNES, TRUSTEE

No. 7525SC869

(Filed 19 May 1976)

Laborers' and Materialmen's Liens § 1— planning and consulting services — improper subject of lien

In an action to recover an amount due for planning and consulting services rendered by plaintiff and for a judgment declaring said indebtedness a first lien on defendant's property, plaintiff's professional services which were furnished between 1 September 1972 and 9 October 1974 were not covered by the lien law in force at the time, though since 1 July 1975 services of the type furnished by plaintiff are covered by the N. C. lien law. G.S. 44A-7(1).

APPEAL by plaintiff from *Ervin, Judge.* Judgment entered 28 August 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 17 February 1976.

Plaintiff is an engineering and consulting firm with offices in Columbia, South Carolina. Defendant South Mountain Properties, Inc. (South Mountain), is a real estate development company with properties situate in Burke County, North Carolina. In early summer 1972 defendant South Mountain began to acquire options on certain acreage in Burke County for commercial development and construction of a totally planned resort community. On 1 September 1972 plaintiff entered into contract with South Mountain for planning, design, and consulting services incident this development.

In the fall of 1972 plaintiff, through its agents and employees, began working on the development site. Crews operating

under plaintiff's control and direction surveyed some 2,500 acres of up-country mountain land and subsequently staked out more than 3,400 individual lot sites for residential and commercial use. Plaintiff also conducted extensive subsurface analysis to evaluate soil and water quality preparatory to the design and construction of a motel, various clubhouses, a golf course, lake and water treatment complex.

While plaintiff received $924,492.51 for work done, as of 31 August 1974 South Mountain was still indebted to plaintiff in the amount of $247,518.27. On 11 October 1974 plaintiff caused a notice of claim of lien to be filed with the Clerk of Burke County Superior Court. A civil action was commenced on 17 October 1974 by filing of a complaint wherein plaintiff sought to recover the balance due it and a judgment declaring said indebtedness a first lien on South Mountain's property. Defendants Diversified Mortgage Investors (DMI) and Thomas M. Starnes as trustee, were joined as parties defendant and an amended complaint was filed 23 October 1974.

Defendants answered, contending plaintiff's professional services did not give rise to a lienable claim under the North Carolina Lien Law, Chapter 44A of the General Statutes; and that South Mountain did not become the lawful owner of the property until 8 December 1972 at which time deeds of trust in the amounts of $2,000,000.00 and $12,000,000.00 respectively were given to defendant DMI as purchase money mortgages or deeds of trust. A counterclaim was asserted by defendant South Mountain, contending that as a result of plaintiff's negligence and dereliction, contruction of a lake, designed and located by plaintiff, had become impossible, resulting in damage to South Mountain in the amount of $2,000,000.00.

The cause came on for hearing on defendants' motion for partial summary judgment. The trial judge considered the pleadings, various exhibits, and affidavits, and found them to establish the following:

> "1. That no genuine issue as to any material facts exists with respect to the claim of lien sought to be perfected by the plaintiff and that the defendants are entitled to summary judgment, as a matter of law, declaring said claim of lien invalid and unenforceable for the reason that the professional services provided to the defendant, South Mountain Properties, Inc., by the plaintiff were not of the

kind and nature giving rise to the lawful attachment of a lien under and pursuant to the provisions of Chapter 44A of the North Carolina General Statutes; and,

"2. That the deeds of trust from South Mountain Properties, Inc. to Thomas M. Starnes, Trustee, and Diversified Mortgage Investors were purchase money deeds of trust to the extent of One Million, Three Hundred Forty-eight Thousand, Six Hundred and Fifty Dollars ($1,348,650.00) and, even if the claim of lien asserted by the plaintiff are valid and enforceable, it would be secondary and subordinate to the first lien of said deeds of trust in the aforesaid amount of One Million, Three Hundred Forty-eight Thousand, Six Hundred Fifty Dollars. ($1,348,650.00).

On the basis of said findings, the court allowed defendants' motion for partial summary judgment, discharged plaintiff's claim of lien for the reason that it was without lawful force or effect, and dismissed the action as to defendants DMI and Starnes, trustee. The court concluded that plaintiff's claim for debt against South Mountain, and South Mountain's counterclaim, should be determined in a trial of the cause. By an amendment to the judgment, filed 24 February 1976, the court determined that with respect to the partial summary judgment there was no just reason for delay. Plaintiff appealed.

Whitesides and Robinson, by Henry M. Whitesides, for plaintiff appellant.

Patton, Starnes, Thompson & Daniel, P.A., by Thomas M. Starnes, for defendant appellees.

BRITT, Judge.

Did the trial court err in allowing defendants' motion for partial summary judgment? We hold that it did not.

North Carolina's Lien Law is mandated by Article X, Section 3, of our State Constitution which states that "The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject matter of their labor."

From 1869 until 1969 our lien law mandated by the Constitution was substantially unchanged and from 1901 until 1969

provided as follows: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for payment of all debts contracted for work done on the same, or material furnished." *See* G.S. 44-1 (1966 Replacement).

In applying and construing said law prior to the effective date of changes made by the 1969 General Assembly, our Supreme Court consistently held that no lien for labor arose under the statute except for actual *labor* performed in the physical improvement of the property.

In *Whitaker v. Smith,* 81 N.C. 340 (1879), the court held that an overseer was not entitled to a lien where the work performed by him was supervisory.

In *Cook v. Ross,* 117 N.C. 193, 23 S.E. 252 (1895), the court held that the plaintiff, who was employed under a *per diem* contract to assist in purchasing machinery, superintending the installation and erection of the machine, and making repairs in a factory necessary to make it operative, was not entitled to a lien.

In *Nash v. Southwick,* 120 N.C. 459, 27 S.E. 127 (1896), the court held that plaintiff, who was employed on a fixed salary as a clerk and bookkeeper in connection with the repair and renovation of a hotel, was not entitled to a lien.

In *Moore v. American Industrial Company,* 138 N.C. 304, 50 S.E. 687 (1905), the court held that plaintiff, as superintendent of manufacturing operations and the general conduct of the business of defendant company, was not a laborer entitled to a lien.

In *Stephens v. Hicks,* 156 N.C. 239, 72 S.E. 313 (1911), the court held that plaintiff, an architect employed to prepare and furnish plans and specifications for the erection of an apartment house, was not entitled to a lien. In the opinion, page 240, we find: "Whatever may be law, as declared in other jurisdictions, this Court has thoroughly settled the principle that a mechanic or laborer, within the meaning of our lien laws, is one who performs manual labor—one regularly employed at some hard work, or one who does work that requires little skill, as distinguished from an artisan. . . . "

In the contract between plaintiff and South Mountain, plaintiff is referred to as a "consultant" who would render "professional services," particularly in the area of *planning* and *engineering*. In view of the cases above mentioned, and particularly *Stephens*, we see no way that plaintiff could have qualified for a lien under the law existing through 1969. We then consider the effect of subsequent legislative changes in the law.

Chapter 1112 of the 1969 Session Laws, effective 1 January 1970, repealed G.S. 44-1 quoted above, and amended G.S. Chapter 44A to include the following:

"Sec. 44A-7. *Definitions.* Unless the context otherwise requires in this Article:

(1) 'Improve' means to build, erect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements.

(2) 'Improvement' means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

(3) 'Real property' means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon.

(4) An 'owner' is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. 'Owner' includes successors in interest of the owner and agents of the owner acting within their authority.

"Sec. 44A-8. *Mechanics', laborers' and materialmen's lien; persons entitled to lien.* Any person who performs or furnishes labor or furnishes materials pursuant to a contract, either express or implied, with the owner of real property, for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts

owing for labor done or material furnished pursuant to such contract."

While the 1969 amendments enlarged our lien law, in our opinion the enlargement was not sufficient to include the services rendered by plaintiff. In the definition of "improve" provided by the new statutes, no term specifically covers any of the eighteen types of service enumerated in plaintiff's claim of lien and complaint. The new G.S. 44A-8 uses the term "labor" in the place of "work" as contained in repealed G.S. 44-1, but we do not think the difference in terms is sufficient to include the type of service performed by plaintiff.

The 1975 General Assembly, S.L. Ch. 715, amended G.S. 44A-7(1) by adding the following language: " . . . and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyers and landscape architects registered under Chapter 83, 89 or 89A of the General Statutes."

At the same time, the General Assembly amended G.S. 44A-8 by adding persons who perform or furnish "professional design or surveying services" to those entitled to a lien. The 1975 amendments became effective 1 July 1975.

It would appear that since 1 July 1975 services of the type furnished by plaintiff are covered by our lien law. The services which are the subject of this action were furnished between 1 September 1972 and 9 October 1974. Defendant argues that the enactment of the 1975 amendments indicates that the General Assembly did not intend prior to that time that the type of services rendered by plaintiff would be covered by our lien law. Plaintiff argues that this is not necessarily true.

In *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E. 2d 481, 483 (1968), we find: "In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it. 82 C.J.S. *Statutes* § 384, p. 897 (1953). The presumption is that the legislature 'intended to change the original act by creating a new right or withdrawing any existing one.' 1 Sutherland, Statutory Construction § 1930 (Horack, 3d ed. 1943)...."

In our opinion the 1975 amendments created a *new* right in those who perform or furnish professional design or surveying

services. Since plaintiff's services were furnished prior to their effective date, the 1975 amendments do not help plaintiff.

In view of our holding that the services furnished by plaintiff were not covered by the lien law in force at the time the services were furnished, we do not reach the question whether the deeds of trust to defendant Starnes, trustee, were purchase money deeds of trust.

Our holding in this case is in accord with our holding in *Loddie D. Bryan, Jr. v. Projects, Inc.*, et al (No. 7510SC860, Filed 19 May 1976).

For the reasons stated, the judgment appealed from is

Affirmed.

Judges HEDRICK and MARTIN concur.

LODDIE D. BRYAN, JR. v. PROJECTS, INC., CHARLES MORRIS, TRUSTEE AND PEASE AND ELLIMAN REALTY TRUST

No. 7510SC860

(Filed 19 May 1976)

Laborers' and Materialmen's Liens § 1— landscape architect and planning consultant — services improper subject of lien

Plaintiff's professional services as a landscape architect and planning consultant which were first furnished on 7 May 1973 and last furnished on 3 April 1974 were not the proper subject of a laborer's lien. G.S. 44A-7(1).

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 23 July 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 16 February 1976.

Plaintiff alleged in his complaint that defendant Projects, Inc. was the owner of a tract of land in Wake County, while defendant Morris was the trustee and defendant Pease and Elliman Realty Trust was the beneficiary of a deed of trust on this tract. Pursuant to a contract with Projects, Inc., plaintiff had performed "professional services as a landscape architect and planning consultant . . . " in connection with an apartment complex being built on the property at issue. Projects, Inc. failed

to pay plaintiff for services, and a claim of lien was filed together with the complaint, showing that plaintiff's services were first furnished on 7 May 1973 and last furnished on 3 April 1974.

Default judgment was entered against defendant Projects, Inc. Defendants Morris and Pease and Elliman Realty Trust answered and admitted that they had an interest in the property at issue, but denied that plaintiff was entitled to the lien on the property. Plaintiff moved for summary judgment declaring that the default judgment obtained against defendant Projects, Inc. is a lien against the tract of land at issue with priority over the Trustee's Deed conveying the property to the Defendant Pease and Elliman Realty Trust. In support of his motion he presented affidavits and an exhibit tending to show that he had furnished professional services for Projects, Inc. as alleged in the complaint, that Projects, Inc. had not paid for these services, and that Projects, Inc. was indebted to him in the amount of $4,322.04.

Defendants Morris and Pease and Elliman Realty Trust submitted no materials in opposition to the motion other than their verified answer. The court denied plaintiff's motion and granted summary judgment for defendants Morris, Trustee, and Pease and Elliman Realty Trust. From this judgment, plaintiff appealed.

Boyce, Mitchell, Burns & Smith, by Robert E. Smith, for plaintiff.

Jordan, Morris and Hoke, by Charles B. Morris, Jr., for defendants.

MARTIN, Judge.

Plaintiff contends that the court erred in granting summary judgment for defendants. He contends that he is entitled to a laborer's lien for the value of the professional services he performed for Projects, Inc. Although plaintiff recognizes that in *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911), the Supreme Court held that architects are not entitled to a laborer's lien, he points out that in 1969, the laborer's lien statutes were completely rewritten. As rewritten, G.S. 44A-8 provided that "[a]ny person who performs or furnishes labor . . . pursuant to a contract . . . with the owner of real property for the

making of an improvement thereon" is entitled to a lien. G.S. 44A-7(2) defines "improvement" in very broad language. In view of this broad definition, plaintiff argues, the 1969 statute should be interpreted to change the result of the Stephens case and allow architects, (including landscape architects), to obtain a lien for their services. He argues that the 1975 amendments to G.S. 44A-7 and 44A-8, expressly providing that architects may obtain a lien for their services, were not intended by the legislature to change the law, but rather to clarify the previously existing meaning of the statute.

Defendants contend that the laborer's lien statute in effect at the time of the *Stephens* decision was as broadly worded as the 1969 statute, and that in adopting the 1969 statute, the General Assembly did not intend to make liens more widely available and overturn the *Stephens* case. Further, defendants contend, the 1975 amendments were not intended to clarify the meaning of the statute, but rather to change its meaning and allow architects to obtain liens when they could not have been obtained before.

Prior to enactment of Chapter 44A of the General Statutes (effective 1 January 1970), there was no question that one providing professional services was not included within the term "mechanic" under the earlier existing lien laws. This matter was settled in 1911 in the case of *Stephens v. Hicks, supra.*

Therefore, we are left to construe the applicable provisions of the new Chapter 44A. The original lien law, G.S. 44-1 which was interpreted in the *Stephens* case, and repealed effective 1 January 1970 read in part:

> "Every building built, rebuilt, repaired or improved . . . shall be subject to a lien for the payment of *all debts contracted for work done* on the same. . . ." (Emphasis added).

The pertinent portions of the applicable statutes which become effective 1 January 1970 and were contained in G.S. 44A-7(1) and (2) and G.S. 44A-8 read as follows:

G.S. 44A-7:

> "(1) 'Improve' means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to con-

struct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements.

(2) 'Improvement' means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways in private roadways on real property."

G.S. 44A-8:

"Any person who performs or furnishes labor or furnishes materials pursuant to a contract, either express or implied, with the owner of real property, for the making of an improvement thereon shall, upon complying with the provisions of this article, have a lien on such real property to secure payment of all debts owing for *labor done* or material furnished pursuant to such contract." (Emphasis supplied.)

In the latest session of the Legislature amendments to G.S. 44A-7(1) and G.S. 44A-8 were passed. As of July 1, 1975, the effective date of the amendments, these statutes read as follows:

"G.S. 44A-7(1)—'Improve' means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83, 89 or 89A of the General Statutes."

"G.S. 44A-8—Mechanics', laborers' and materialmen's liens: persons entitled to lien.—Any person who performs or furnishes labor [or professional design or surveying services] or furnishes materials pursuant to a contract, either express or implied, with the owner of real property, for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing *for labor done or professional design or surveying services* or material furnished pursuant to such contract." (Emphasis supplied.)

The plaintiff argues that Chapter 44A of the General Statutes includes services performed by a landscape architect and

that amendments to G.S. 44A-7(1) and 44A-8 enacted by the 1975 Session of the General Assembly were "clarifying" that point. Without a qualifying preamble to the statutory amendments setting forth the reasoning of the Legislature in the enactment of these sections, any argument as to what the Legislature intended in 1969 or in 1975 would be purely speculation. The statutes must be read and interpreted as written. Had the Legislature intended a change in pre-1969 lien law, then it would have been simple to use such terms as "services," or "professional" as was done in the 1975 amendments, including specific statutory reference to the professions included.

Our holding in this case is in accord with our holding in *Wilbur Smith and Associates, Inc. v. South Mountain Properties, Inc., et al* (No. 7525SC869, Filed 19 May 1976).

For the reasons stated, the judgment appealed from is

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. SEARS WILLIAM SAULS

No. 7518SC1018

(Filed 19 May 1976)

1. **Criminal Law § 10— accessory before the fact — elements**

The crime of accessory before the fact is a common law offense, and its necessary elements are that: (1) the defendant counseled, procured or commanded the principal to commit the offense, (2) he was not present when the offense was committed, and (3) the principal committed the crime.

2. **Forgery § 2— forging and uttering forged check — accessory before the fact — insufficiency of evidence**

In a prosecution for accessory before the fact to forgery and uttering a forged check, evidence was insufficient for the jury where it tended to show that the principals went to defendant and informed him that they needed to get a N. C. driver's license in a fictitious name in order to cash checks, defendant told them the requirements for obtaining a license and the location of the licensing office, defendant loaned the principals a car to drive to the license bureau, the principals obtained licenses and then forged a check for $2100, on the next day the principals returned to defendant's place of busi-

ness, paid him cash for two used cars, and handed him $2000, nothing was said when the $2000 was passed, and defendant pocketed the money.

Judge PARKER dissenting.

APPEAL by defendant from *Collier, Judge.* Judgment entered 10 July 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 April 1976.

In a bill of indictment it was charged that on 28 November 1973 the defendant (1) forged a check in the sum of $2,100.00 drawn on the trust account of Hoyle, Hoyle and Boone, Attorneys at Law, and (2) uttered the forged check.

The State elected to try the defendant on the charges of (1) accessory before the fact to forgery, and (2) accessory before the fact to uttering. The jury found the defendant guilty of both crimes; Judge Collier deferred sentence pending probation report; from judgment imposing imprisonment, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Archie W. Anders for the State.

William C. Ray for defendant appellant.

CLARK, Judge.

The crime of accessory before the fact to the crime charged in an original indictment is a lesser included offense. *State v. Simons,* 179 N.C. 700, 103 S.E. 5 (1920); *Richardson v. Ross,* 310 F. Supp. 134 (E.D.N.C. 1970). The State having elected to proceed on the charges of accessory before the fact to the principal charges in the indictment, the trial court properly submitted to the jury these lesser offenses.

G.S. 14-5 provides in part as follows: "If any person shall *counsel, procure,* or *command* any other person to commit any felony . . . the person . . . shall be guilty of a felony . . . . " (Emphasis added.)

[1] The crime of accessory before the fact is a common law offense. In this State the necessary elements of the crime are: (1) that the defendant counseled, procured, or commanded the principal to commit the offense; (2) that he was not present when the offense was committed; and (3) that the principal

committed the crime. *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580 (1961).

A defendant may be tried and convicted as a principal in the first degree as the actual perpetrator of the offense, or as a principal in the second degree as an aider or abettor of the perpetrator, in which case he must be actually or constructively present. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Buie,* 26 N.C. App. 151, 215 S.E. 2d 401 (1975). If not present either actually or constructively, he may be tried and convicted of accessory before the fact to the principal charge, which is a lesser offense thereof. "Thus, ordinarily, the only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed." *State v. Benton,* 276 N.C. 641, 653, 174 S.E. 2d 793, 801 (1970). However, an examination of the decisions leads to the conclusion that presence at the scene of the crime and little else is sufficient to constitute "aiding and abetting," *i.e.,* under some circumstances mere presence plus friendship with the perpetrator. But for a defendant, not actually or constructively present at the scene, to be criminally responsible for the acts of others as an accessory before the fact, it must be shown that he counseled, or procured, or commanded the others to perpetrate the crime. An accessory before the fact has been described as one who furnishes the means to carry on the crime, whose acts bring about the crime through the agency of or in connection with the perpetrators, who is a confederate, who instigates a crime. See 22 C.J.S., Criminal Law, § 90.

[2] The evidence for the State in the present case tends to show that Edward George Busby and Ronald McVey, in the car sales business at Portsmouth, Virginia, purchased some printed checks and identification cards from a "Mr. Frazier." The check in question apparently had been stolen from the law office of Hoyle, Hoyle and Boone, without the knowledge of any member of the firm. Busby had previously known for over a year the defendant Sauls, who was employed as a used car salesman in Greensboro. They went to see defendant and told him they were there to get a North Carolina driver's license in a fictitious name to be used in cashing checks. Defendant told them that to get the license they would have to show identification and take a written test and explained to them where to go to get the license. At their request defendant let them use a car on

the lot to go to the licensing office. Busby and McVey then left, went to the licensing office, and each obtained a North Carolina driver's license to correspond to the names on two identification cards. They went to Portsmouth, spent the night and returned to Greensboro the following day. They typed in on the $2,100.00 check drawn on the Trust Account of Hoyle, Hoyle and Boone the name Hugh Harrison as payee to correspond to the name on the North Carolina driver's license issued to McVey, who cashed the check at a branch of First Union National Bank. They forged and cashed other checks. They then went to the automobile sales lot where defendant worked; Busby bought and paid cash to him for two used cars and at the same time McVey handed him $2,000.00 cash; defendant gave the money for the cars to the manager and stuck the $2,000.00 in his pocket. Neither McVey nor defendant said anything when the $2,000.00 was passed.

Considering this evidence in the light most favorable to the State, we find that there is not sufficient evidence to carry the case to the jury on either charge of accessory before the fact. The plan to commit the crime was conceived by Busby and McVey. Defendant did little more than tell them where and what they would have to do to obtain a North Carolina driver's license. There was no evidence that defendant was shown the check in question, or that he was told how, when or where this check would be forged and uttered, or that he thereafter advised or counseled them in any way or planned to share in the money obtained by them in cashing the $2,100.00 forged check or any other forged checks. Nothing was said when McVey gave to defendant the $2,000.00 cash after the crimes were committed. Two thousand dollars is a handsome reward for the routine information as to the location of the state licensing office and the requirements for obtaining a driver's license, but this evidence is sufficient only to create a suspicion that defendant and the perpetrators conspired to commit the offenses, or that the sum was paid to defendant as "hush money." Mere concealment of knowledge that a felony is to be committed does not make the party concealing it an accessory before the fact. 21 Am. Jur. 2d, Criminal Law, § 124.

The Supreme Court of North Carolina and this Court have held in many cases that evidence which raises no more than a surmise or conjecture of guilt is insufficient to overrule nonsuit, and there must be legal evidence of each fact necessary

to support conviction. 2 Strong, N. C. Index 2d, Criminal Law, § 106.

Defendant's motion for judgment of nonsuit on both charges should have been allowed.

Reversed.

Judge BRITT concurs.

Judge PARKER dissenting.

In my view the State's evidence was sufficient to carry the case to the jury on the charge that defendant was an accessory before the fact to the crimes described in the indictment. Evidence presented by the State shows the following:

1. Busby and McVey went to defendant in the last week of November 1973 and told him they needed to get a North Carolina driver's license in a fictitious name in order to cash checks;

2. Defendant gave them directions to the license bureau and instructed them that in order to get the licenses they needed to take a written test and show identification;

3. Defendant loaned the men a car to drive to the license bureau;

4. At the license bureau, Busby obtained a North Carolina driver's license in the name of Irvin R. Squires and McVey obtained a North Carolina driver's license in the name of Hugh C. Harrison;

5. On 27 November 1973, Busby filled out a check in the name of E. E. Boone, Jr. as maker. The next day McVey cashed this check on 28 November 1973 at the First Union National Bank in Greensboro, signing the name Hugh C. Harrison and presenting his North Carolina driver's license in the name of Hugh C. Harrison;

6. Defendant personally received $2,000 in cash from the two men upon their return from cashing the checks;

7. When Busby relayed his worry to defendant that a patrolman had taken down the license plate number of

their car while at the license bureau, defendant told him "not to worry about anything, that if anybody came by, he'd cover up for [him]."

8. Some days later, defendant called Busby to inform him that the police "know who you are" and advised him to get out of town.

One is guilty as an accessory before the fact if he shall "counsel, procure or command any other person to commit any felony." G.S. 14-5. The term "counsel" is frequently used in criminal law to "describe the offense of a person who, not actually doing the felonious act, by his will contributed to it or procured it to be done." *State v. Bass,* 255 N.C. 42, 51, 120 S.E. 2d 580, 586 (1961). Although defendant was not the originator of the criminal activities disclosed in this case, the above facts tend to show that, with full knowledge of what was going on, he actively contributed to the criminal activities of Busby and McVey by giving them advice on how to accomplish a key step in their unlawful scheme and by furnishing them transportation for that purpose. "To render one guilty as an accessory before the fact, he must have had the requisite criminal intent; and it has been said that he must have the same intent as the principal. It is well settled, however, that he need not necessarily have intended the particular crime committed by the principal; an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded." 22 C.J.S., Criminal Law, § 92, p. 271. Thus, the defendant in this case, just as did the defendant in *State v. Bass, supra,* with full knowledge of the other men's intentions, gave both advice and assistance "in regard to and in furtherance of the proposed line of conduct and thereby contributed to it." *State v. Bass, supra,* p. 51.

In my view the State's evidence was sufficient to make out a prima facie case of counseling the commission of the felonies charged, and I would find no error in submitting the case to the jury.

JAMES F. BOWEN AND JAMES G. BOWEN, BY HIS GUARDIAN *ad litem*, JAMES F. BOWEN v. HODGE MOTOR COMPANY

No. 7518DC989

(Filed 19 May 1976)

1. **Courts § 13— expiration of session of district court**

A session of district court will be deemed to have terminated on the date the words "Court expires" were recorded in the court minutes, although the parties disagreed on the meaning of those words.

2. **Courts § 11.1— chambers matters — authority of district court judge**

While chambers matters may be heard by the chief district judge at any time and place within the district, other district judges have no authority to hear chambers matters out of session except upon written order or rule of the chief district judge. G.S. 7A-192.

3. **Appeal and Error § 15; Rules of Civil Procedure § 41— post-trial motion for voluntary dismissal — abandonment of appeal from directed verdict**

Since the purpose of plaintiff's post-trial motion under Rule 41(a)(2) voluntarily to dismiss the action without prejudice was to obviate the effect of a directed verdict for defendant, the motion for voluntary dismissal and the proceedings thereon constituted an abandonment of plaintiff's appeal from the directed verdict for defendant, and the trial court then had authority to grant plaintiff's motion for voluntary dismissal.

4. **Rules of Civil Procedure § 41— voluntary dismissal after directed verdict**

The trial court did not abuse its discretion in granting plaintiff's post-trial motion for voluntary dismissal without prejudice after having directed a verdict for defendant.

APPEAL by defendant from *Washington, Judge.* Orders entered 5 August 1975 and 12 August 1975, District Court, GUILFORD County. Heard in the Court of Appeals 17 March 1976.

This action to recover damages for personal injury came on for trial at the 28 July 1975, Civil Session, High Point Division, District Court. A jury was duly sworn and empaneled on 30 July 1975. The motions of defendant for directed verdict at the close of plaintiff's evidence and at the close of all the evidence were denied, but on the following morning, 31 July 1975, Judge Washington reconsidered and granted defendant's motion. Plaintiff gave notice of appeal. After court business on 31 July 1975, the following entry appears in the court minutes: "Court expires."

On 1 August 1975, plaintiff filed a motion to voluntarily dismiss the action without prejudice. After leaving on 5 August, Judge Washington entered an order dismissing the action without prejudice. On 7 August, defendant filed a motion to vacate the dismissal order of 5 August. This motion after hearing was denied.

Defendant appeals from the order of dismissal without prejudice entered on 5 August 1975, and from the order denying his motion to vacate.

Bencini, Wyatt, Early & Harris by A. Doyle Early, Jr., for plaintiff appellees.

Henson, Donahue & Elrod by Richard L. Vanore for defendant appellant.

CLARK, Judge.

The defendant contends that (1) the district court had no jurisdiction after directing the verdict for defendant on 31 July 1975 and plaintiff gave notice of appeal to thereafter order a voluntary dismissal without prejudice, and (2) the district court was in error in granting the voluntary dismissal after directed verdict.

The general rule is that an appeal takes the case out of the jurisdiction of the trial court. Exceptions to the general rule are:

(1) Notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, and

(2) The trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned.

Sink v. Easter, 288 N.C. 183, 217 S.E. 2d 532 (1975); *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971).

All proceedings of a court of record *in fieri* are under the absolute control of the trial judge, subject to be amended, modified or annulled at any time before the expiration of the term in which they are done. *Green v. Insurance Co.*, 233 N.C. 321, 64 S.E. 2d 162 (1951).

[1] The district court minutes show that the session of court expired on 31 July 1975. Plaintiff and defendant disagree on

the meaning of the words "Court expires" as recorded in the court minutes as applied to that session, but we are bound by the record on appeal, not arguments in the briefs, and we find from this record that the session terminated on 31 July 1975.

[2] G.S. 7A-190, providing that district courts shall be deemed open for the disposition of matters properly cognizable by them, and G.S. 7A-191 providing that trials shall be conducted in open court and that chambers matters may be heard at any time and place within the district, are both subject to the provisions of G.S. 7A-192. This statute provides that district judges preside over sessions of court as assigned by the Chief District Judge. Chambers matters may be heard by the Chief District Judge at any time and place within the district, but other district judges have no authority to hear chambers matters out of session except upon written order or rule of the Chief District Judge. See *Austin v. Austin,* 12 N.C. App. 286, 183 S.E. 2d 420 (1971).

We find from the record before us that the district court to which Judge Washington was assigned was not in session on 1 August 1975, when the motion for voluntary dismissal was made, or on 5 August 1975, when the order of dismissal was entered. But the question whether Judge Washington had authority to hear the post-trial chambers matters on 5 August 1975, is not before us since all parties appeared before him at this hearing and did not question his authority. Since the district court was not in session after 31 July 1975, the first exception to the general rule, that an appeal takes the case out of the jurisdiction of the trial court, is not applicable in this case.

[3] We turn now to the second exception: Did plaintiff's motion of 1 August 1975 to voluntarily dismiss his action without prejudice and the subsequent appearance of the parties at the hearing thereon constitute an abandonment of his appeal from the directed verdict for the defendant?

In the recent case of *Sink v. Easter, supra,* the trial court granted defendant's motion to dismiss on the ground that plaintiff's action was barred by the statute of limitations; plaintiff appealed, and then filed a motion seeking relief from the dismissal, but the trial court ruled that it had no jurisdiction to consider the motion, but on 1 April 1974 the trial judge informed the parties that he would reconsider his ruling. It was

held that the proceedings of 1 April 1974 constituted an adjudication that plaintiff's appeal on his Rule 60(b) motion was abandoned; that the plaintiff by appearing at the hearing gave notice of his intention to abandon the same; and that the trial court had jurisdiction to reconsider the prior denial of plaintiff's motion seeking relief from the dismissal of his action.

In *Reavis v. Campbell,* 27 N.C. App. 231, 218 S.E. 2d 873 (1975), the trial court granted defendant's motion for summary judgment; plaintiff appealed; plaintiff then moved in the trial court to set aside the summary judgment; the motion was granted. On appeal by defendant, it was held the proceedings in the trial court constituted an adjudication by the trial court that plaintiff's appeal had been abandoned, citing *Sink v. Easter, supra.* See also *Leggett v. Smith-Douglas Co.,* 257 N.C. 646, 127 S.E. 2d 222 (1962); and *Williams v. Contracting Co.,* 257 N.C. 769, 127 S.E. 2d 554 (1962).

Though in the present case the plaintiff's motion to voluntarily dismiss without prejudice was not a direct attack upon the directed verdict for defendant, the purpose of the motion was to obviate the effect of the directed verdict, which would have been a final judgment if unchallenged by plaintiff. Therefore, this motion under Rule 41(a)(2) and the proceedings thereon constitute an abandonment of the appeal from the directed verdict for defendant, and we so hold.

[4] Did the trial court err in granting the G.S. 1A-1, Rule 41(a)(2) motion of plaintiff for voluntary dismissal without prejudice after entering the directed verdict for defendant?

Rule 41(a)(1) provides that plaintiff has the right to a voluntary dismissal at any time before he rests his case or by filing a stipulation of dismissal signed by all parties. In the case before us, plaintiff's motion for voluntary dismissal was made under Rule 41(a)(2), which provides that, except as provided in subsection (1), *supra,* an action shall not be dismissed at the plaintiff's instance "save upon order of the judge and upon such terms and conditions as justice requires."

The rule prescribes no time limit on the right of the plaintiff to move for a voluntary dismissal with the court's permission.

In *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971), the court stated: "When a motion for a directed verdict

under Rule 50(a) is granted, the defendant is entitled to judgment unless the Court permits a voluntary dismissal of the action under Rule 41(a)(2). Under this rule, at the instance of the plaintiff, the Court may permit a voluntary dismissal upon such terms and conditions as justice requires."

In *King v. Lee,* 279 N.C. 100, 181 S.E. 2d 400 (1971), the court sustained the trial court's granting of a motion for a directed verdict, then remanded the case to the trial court for the purpose of permitting the plaintiff to consider making a motion for voluntary dismissal, which the trial court could grant or deny in the exercise of its discretion.

Shuford, N. C. Civil Practice and Procedure, at § 41-5 states:

> "In attempting to obtain a second chance by means of a voluntary dismissal without prejudice under Rule 41(a)(2), the plaintiff must convince the judge that he has a meritorious claim and that his evidence was insufficient without fault on his part, or merely technically insufficient, and that it is probable that the evidence would be sufficient on a second trial. The judge passes on the plaintiff's motion in the exercise of his discretion and his ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion."

We conclude that plaintiff's appeal from the directed verdict for defendant has been abandoned, that the trial court had the authority to grant plaintiff's motion for voluntary dismissal and defendant has shown no abuse of discretion by the court in so doing. The order of the district court granting the voluntary dismissal is

Affirmed.

Judges BRITT and PARKER concur.

IN THE MATTER OF THE APPEAL OF DAVID E. BOSLEY FROM THE VALUATION PLACED ON PROPERTY BY PITT COUNTY FOR 1974

No. 753SC971

(Filed 19 May 1976)

1. **Taxation § 25— county property owner — standing to attack method of appraisal of household property**

Petitioner, a resident and property owner of Pitt County, had standing to attack broadly the percentage method of appraisal of household property in Pitt County. G.S. 105-322(g)(2).

2. **Taxation §§ 2, 25— household property — percentage method of appraisal — no improper classification of property**

The percentage method of appraisal of household personal property in Pitt County does not violate Art. V, Sec. 2(2) of the N. C. Constitution, since the percentage method of appraising household property is not a classification of this property separate and apart from other personal property, but is a method or formula for determining the "true value in money" of this kind of property.

3. **Taxation § 25— household property — percentage method of valuation — appraisal at market value requirement satisfied**

The percentage method of valuation of household personal property in Pitt County does not violate G.S. 105-283 and G.S. 105-317.1, which in substance provide that all property shall be appraised at market value, and that all the various factors which enter into the market value of property are to be considered by the assessors in determining this market value for tax purposes, since it is impossible to appraise each item of such property precisely at actual market value, and there may be variations from market value in appraisals of property for tax purposes if these variations, as in this case, are uniform.

4. **Taxation § 25— household property — frequency with which value dedermined**

Petitioner's contention that, because G.S. 105-285(d) and G.S. 105-286 require that the value of real property be determined only every eight years, the percentage method of appraisal of household property results in the determination of the value of personal property only every eight years in violation of G.S. 105-285(b) is without merit, since it is assumed that the taxing authority of Pitt County determined annually that the percentage method established as a result of a 1968 study was a reasonably accurate valuation of household property in the county until 1972, at which time another study was made to determine value of household property in the county.

APPEAL by petitioner from *Lanier, Judge.* Judgment entered 9 September 1975, Superior Court, PITT County. Heard in the Court of Appeals 16 March 1976.

In Pitt County household personal property is appraised in the following manner:

> a. The taxpayer is given a choice to accept as tax value of all his household personal property 10% of his residence tax value (less statutory exemptions) if he is a homeowner, or 120% of his annual rental paid (less statutory exemption) if he is a lessee.
>
> b. If the taxpayer chooses not to accept the percentages listed in "a." above as the tax value of his personal property, then he may ask that an "on the spot" appraisal be made of his household property.

Petitioner, a resident and property owner of Pitt County, did not accept the percentage valuation of his property, which amounted to $3,660, but received an on-site appraisal which amounted to the sum of $4,100.

In the proceeding petitioner does not seek relief regarding the valuation of his own property, but attacks the use of the percentage method of appraisal; he requests the removal of all illegally appraised household personal property from the tax lists or, in the alternative, to appraise all household personal property at its true value in money.

His petition was denied by the Pitt County Board of Equalization and Review on 3 June 1974; on appeal to the North Carolina Property Tax Commission the evidence tended to show that from a study made in 1968 by the Pitt County Tax Supervision and consultants it was determined that the average valuation by the owners of their household personal property was 14% of their residence value, that the value of some taxpayer's household personal property was above 14% and some below 14%. A new study in 1972 showed the average value of household personal property to be 10%. The 14% figure was reduced to 10% beginning with the tax year of 1973.

On 16 January 1975, the Property Tax Commission dismissed his appeal. Upon petition for review in the Superior Court under G.S. 143-306, *et seq.*, judgment was rendered affirming the ruling of the Tax Commission, and petitioner appeals.

Attorney General Edmisten by Assistant Attorney General Myron C. Banks and Pitt County Attorney W. W. Speight, for respondent appellee.

Gaylord, Singleton & McNally by Danny D. McNally for petitioner appellant, David E. Bosley.

CLARK, Judge.

Though petitioner's household personal property was valued for tax purposes by Pitt County under the percentage method of appraisal at $3,660 but was valued at $4,100 under an on-site appraisal made at his request, he does not contend that this property was appraised in excess of its "true value in money," the appraisal standard required by G.S. 105-283. Rather, he attacks the percentage method of appraisal on the following grounds: (1) that the method violates Article V, Sec. 2 (2) of the North Carolina Constitution because it results in an unauthorized classification of property by Pitt County and the taxation of a class of property by a non-uniform rule; and (2) that the method violates G.S. 105-283 because it does not appraise household personal property at its true value in money, and violates G.S. 105-317.1(a) because the assessors do not consider the factors therein listed in appraising this property.

[1] We consider first the standing of the petitioner to attack broadly the percentage method of appraisal of household personal property in Pitt County. G.S. 105-322(g)(2) provides:

> "On request, the board of equalization and review shall hear *any* taxpayer who owns or controls property taxable in the county with respect to the listing *or appraisal* of his property *or the property of others.*" (Emphasis added.)

In *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12 (1970), it was held that statutes (now G.S. 105-322(g)(2) and G.S. 105-324(b)) of the Machinery Act provide adequate means whereby the taxpayer may contest not only the valuation of his own property but also the entire tax list or assessment valuation. And see *In Re Valuation,* 282 N.C. 71, 191 S.E. 2d 692 (1972); *In re King,* 281 N.C. 533, 189 S.E. 2d 158 (1972).

We hold that petitioner has the right in this proceeding to attack the percentage method of appraisal of household property used in and by Pitt County.

[2] We turn now to the merits of petitioner's contention that the percentage method violates the following provision of North Carolina Constitution, Art. V, Sec. 2(2):

> "*Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis. No class shall be taxed except by a uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other local taxing unit of the State. The General Assembly's power to classify property shall not be delegated."

The fallacy in this position is that the percentage method of appraising household property is not a classification of this property separate and apart from other personal property, but is a method or formula for determining the "true value in money" of this kind of property. Appraising each item of household property would be an impossible task. There is some reasonable relationship between the value of a home and the value of the household property within. The percentage method is thus a reasonable one in accomplishing the object of determining the market value of household property. And petitioner's evidence that under the percentage method his household property was valued at $3,660 but was valued at $4,100 by the "on-site" appraisal does not establish that the percentage method of valuation results in household property being valued at less than market value in Pitt County, or that the method is arbitrary *per se*. The taxing authority of Pitt County concedes that the percentage method resulted in the household property of some taxpayers being appraised above and some below market value. The average percentage method value and the average market value of all household property in the county is approximately the same, and there is a reasonable relationship between the two among all taxpayers. We find no violation of this constitutional provision.

[3] Too, the petitioner contends that the percentage method of valuation violates G.S. 105-283 and G.S. 105-317.1. In substance these two statutes provide that all property shall be appraised at market value, and that all the various factors which enter into the market value of property are to be considered by the assessors in determining this market value for tax purposes. The difficulty of estimating the value of household property makes it impossible to appraise each item of such

property precisely at actual market value, and in construing the applicable provisions of the Machinery Act, we must assume that the legislature recognized this impossibility and did not intend an unjust or absurd result. *King v. Baldwin, supra.*

Equality of appraisal, with resulting equity in taxation, is fundamental in the Machinery Act. There may be reasonable variations from market value in appraisals of property for tax purposes if these variations are uniform. A uniform and dependable method of property appraisal which gives effect to the various factors that influence the market value of property and results in equitable taxation does not violate the appraisal provisions of the Machinery Act. See *In re Block Co.*, 270 N.C. 765, 155 S.E. 2d 263 (1967), and *In re Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972), which upheld the method of appraising motor vehicles by the "Blue Book" if the method was not used arbitrarily in ascertaining fair market value.

[4] Petitioner points out that G.S. 105-285 requires that the value of personal property be determined annually, but G.S. 105-285(d) and G.S. 105-286 require that the value of real property be determined every eight years; therefore, the percentage method of appraisal of household property results in the appraisal only every eight years in violation of G.S. 105-285. It is noted that the taxing authority in Pitt County made a study in 1968 which showed the value of household property to be 14% of the value of the taxpayers' residence and lot, and that four years later in 1972 a new study was made which determines the value of household property to be 10% of the value of such realty. Under these circumstances we must assume, nothing else appearing, that the taxing authority of Pitt County found no significant change in the household and home realty ratio during the period from 1968 to 1972 and determined annually that the percentage method established as a result of the 1968 study was a reasonably accurate valuation of household property in the county during this period. Ad valorem tax assessments are presumed to be correct, and when such assessments are challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975).

It would be meaningless to construe literally the applicable appraisal statutes of the Machinery Act. These statutes must be interpreted in the light of tax history and legislative purpose in formulating laws to guide local authority in the difficult

and complex problem of appraising property for tax purposes. We find in this case that Pitt County has adopted an appraisal method for household property which is equitable and with reasonable uniformity and accuracy reflects market value, and in so doing does not violate the applicable appraisal statutes.

The evidence and the findings fully support the conclusions of the State Board of Assessment and the judgment entered in Superior Court.

The judgment is

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. LARRY SOUSA

No. 764SC30

(Filed 19 May 1976)

1. **Criminal Law § 92— consolidation of charges against defendant and wife — offenses on different days**

The trial court did not err in consolidating for trial charges against defendant and his wife for possession of L.S.D. with intent to distribute and distribution of L.S.D., although the offenses allegedly committed by the wife occurred on the day before the offenses allegedly committed by the husband, since the offenses were sufficiently connected in time, place and circumstances, and evidence obtained in a search of the residence of defendant and his wife was admissible in the trial of either.

2. **Searches and Seizures § 3— affidavit for search warrant — information from confidential informant**

Affidavit based on information received from a confidential informant was sufficient to support issuance of a warrant to search defendant's premises for narcotics where it alleged that the informant had been to defendant's premises on three specific dates and bought specific amounts of L.S.D., and that the informant had more than fifteen buys for the narcotics division of the sheriff's office and had given information in the past which led to numerous arrests and convictions.

3. **Searches and Seizures § 3— warrant to search for "marijuana and L.S.D." — showing of probable cause for L.S.D. only**

Warrant authorizing a search of defendant's premises for "marijuana and L.S.D." was not invalid where the affidavit showed prob-

able cause only as to the presence of L.S.D. since the inclusion of "marijuana" in the warrant in no way affected its validity in authorizing a search for L.S.D.

4. **Criminal Law § 122— instructions to deliberate further — verdict not coerced**

The trial court did not coerce a verdict when the jury, after one hour's deliberation, indicated that it might not be able to reach a unanimous verdict, the court instructed the jurors to attempt to reconcile their differences unless they could not do so without violating their individual consciences, the jury deliberated further without reaching a verdict, the court then instructed that if the jury failed to reach a verdict the case would be tried again by another jury, and the jurors were again asked to attempt to reconcile their differences.

APPEAL by defendant from *James, Judge.* Judgment entered 14 August 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 16 April 1976.

Defendant was charged in a two-count indictment with (1) felonious possession of L.S.D. with intent to sell and deliver and (2) felonious sale and delivery of L.S.D. Defendant's wife was also indicted on similar charges, and their cases were consolidated for trial. Defendant pleaded not guilty, but the jury returned a verdict of guilty of both counts.

An undercover agent, Ken Jones, testified for the State that on 17 April 1975 he went to defendant's house and bought six green pills from defendant's wife. Defendant's wife indicated that defendant was at softball practice, but that he [defendant] had left the drugs there, and the cost was $2.50 "a hit." Jones paid her $15.00.

On 18 April 1975 Jones returned to defendant's house and defendant and his wife were present. Jones testified that defendant sold him four green pills and he paid $10.00.

Jones went to defendant's house on 21 April 1975 and defendant was not at home. Defendant's wife sold him one green pill and indicated that was all she had.

It was stipulated that all of the pills obtained by Agent Jones contained lysergic acid diethylamide.

Again on 22 April 1975 Jones returned to defendant's house and he was told that defendant had no drugs, but defendant stated that he was expecting delivery of a pound of marijuana later on that night.

Randy Scott testified that he accompanied Jones on 22 April to defendant's house and he overheard defendant say that he expected delivery of a pound of marijuana at nine p.m. that night.

According to their testimony, Deputy Sheriff Henderson and Jones returned to defendant's house about 9:00 p.m. on 22 April 1975. Deputy Henderson had obtained a search warrant and searched the house. No drugs were found, but Henderson did find a "smoking bong," smoking pipes, and two pieces of paper, discovered in a dresser drawer in defendant's bedroom, which contained numbers in multiples of $2.50. Henderson testified that he had a "strong opinion" as to what the numbers meant.

Defendant testified that on 18 April 1975 he smoked marijuana with Jones, and that he occasionally smoked marijuana but not in a "smoking bong." He testified that the bong was not his, and he stated that he never sold L.S.D. to anyone. He identified the slips of paper as betting arrangements with a friend concerning softball hits that each would get during the softball season.

Defendant's wife also testified that neither she nor defendant ever sold L.S.D. to anyone. She said the numbers on the paper referred to a bet her husband had with a friend concerning hits in a softball game.

Donnie Ross testified that he and defendant were on a Marine Corps softball team, and that they had bet $2.50 concerning hits that each would make during the season.

From judgment imposing prison sentence of not less than four nor more than five years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Bailey & Gaylor, by Edward G. Bailey, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that it was error to consolidate for trial the charges against him and his wife because the offenses allegedly committed by his wife occurred on 17 April 1975 while the offenses for which he was charged occurred on

18 April 1975. We find no merit in the contention. Defendant and his wife were indicted for identical offenses which were connected in time, place and circumstances. Evidence resulting from the lawful search of the residence of defendant and his wife was competent and admissible at the trial of either of them. *See* G.S. 15-152; *State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Keitt,* 19 N.C. App. 414, 199 S.E. 2d 23 (1973).

[2] Defendant next contends that the affidavit upon which the search warrant was issued is defective. We disagree. The affidavit reads as follows:

> "James E. Henderson Narcotic Agent Sheriff Dept.; being duly sworn and examined under oath, says under oath that he has probable cause to believe that Larry Sousa—Doreen Sousa has on their Premises and Curtilage certain property, to wit: Marijuana and L.S.D. the possession of which is a crime, to wit: G.S. 90-95. The property described above is located on the Premises and Curtilage described as follows: Beige trailer trimmed in gold outline with black at lot 110 Gatlin Trailer Park, Hubert, N. C. The facts which establish probable cause for the issuance of a search warrant are as follows: A reliable and confidential informant has purchased L.S.D. from this residence on three occasions. On 17 April 75 he purchased 6 tablets L.S.D. for $15.00. On 18 April 75 he purchased 4 tablets L.S.D. for $10.00. On 21 April 75 he purchased 1 tablet L.S.D. for $2.00. This informant has given information in the past leading to numerous narcotic arrest and conviction. This informant has made over fifteen Narcotic buys for this Narcotic division and has testified in Court before on Narcotic buys.
>
> s/ JAMES E. HENDERSON
> Signature of Affiant"

Before issuing a search warrant the magistrate must have before him circumstances which form a reasonable ground to believe that the proposed search will reveal the presence of the objects sought upon the premises to be searched, and that such objects will aid in apprehension or conviction of the offender. *State v. English,* 27 N.C. App. 545, 547, 219 S.E. 2d 549 (1975).

The affidavit in this case is not conclusory. It states the underlying circumstances upon which the conclusions are based.

The basis for the informant's belief that the drugs were where he said they were is provided by the averment that the informant had been to defendant's premises on three specific dates, and that he purchased specific amounts of L.S.D. The basis for the informant's reliability is also provided by the averment that this informant has made more than fifteen buys for the narcotic division of the sheriff's office, and that he has given information in the past which led to numerous arrests and convictions.

[3] Defendant further attacks the sufficiency of the affidavit to support the search warrant because it refers to marijuana, and fails to state the basis for any marijuana, since all the informant's purchases were of L.S.D. Defendant cites *State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353 (1973), where the search warrant was held to be invalid by this Court and the Supreme Court. In *Miller* the warrant authorized a search for intoxicating liquor while the affidavit alleged gambling devices. Clearly there was no probable cause to search for intoxicating liquor.

The warrant in the instant case authorizes a search for "marijuana and L.S.D." We hold that there was an ample showing of probable cause as to the presence of L.S.D., and the inclusion of "marijuana" in the warrant in no way affects its validity authorizing the search for L.S.D.

[4] After one hour's deliberation a juror indicated the jury might not ever reach a unanimous verdict. The jury was then allowed to go home and report back the next morning. The next morning the court instructed the jury to attempt to reconcile their differences unless they could not do so without violating their individual consciences. The jury resumed deliberations but subsequently returned again and stated that they were deadlocked. The court then instructed them that if they failed to reach a verdict the case would be tried again by another jury, and the jury was again asked to attempt to reconcile their differences.

It is defendant's contention that the court improperly coerced the jury to reach a verdict by failing to remind the jurors not to violate their consciences and principles in attempting to reach a verdict.

The court gave specific instructions to the jury that they should not violate their consciences in an attempt to reach a

verdict. Considering all of the court's instructions we fail to see how the jurors could possibly have been misled. Moreover, we find nothing in the instructions that tends to coerce, or in any way intimate an opinion as to what the verdict ought to be. We find no error in the additional instructions to the jury concerning their duty to make an effort to reconcile differences and reach a verdict.

We have examined defendant's remaining assignments of error, including those relating to the court's charge to the jury, and we find no prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN COLLINS

No. 7626SC4

(Filed 19 May 1976)

1. **Criminal Law § 91— extradited defendant — unavailability of witnesses — continuance proper**

Where defendant was extradited from New York approximately six years after the commission of the crime charged, the trial court did not err in determining that the State did not have all its witnesses available and for that reason extending the time of defendant's trial beyond the 120 days after defendant arrived in the State from New York. G.S. 15A-761, Article IV(c).

2. **Criminal Law § 66— in-court identification of defendant — observation at crime scene as basis**

The trial court in a first degree murder prosecution did not err in allowing an eyewitness's in-court identification of defendant, since the court determined that the identification was based on the witness's observation of defendant at the crime scene and was not tainted by a photographic identification by the witness.

3. **Homicide § 28— defense of accident — jury instructions proper**

In a first degree murder prosecution the trial court's jury instructions regarding the defense of accidental homicide were proper.

APPEAL by defendant from *Lewis, Judge*. Judgment entered 28 October 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 April 1976.

On 6 April 1969 a warrant was issued charging defendant with the first degree murder of David Ford. The defendant was apprehended by the New York police authorities, and the State of North Carolina requested that he be extradited to North Carolina to stand trial. New York granted extradition on 25 April 1975 and on 13 June 1975 the defendant was returned to North Carolina.

Defendant was charged by the Grand Jury at the August 4 Session of the court with the first degree murder of David Ford. He was arraigned on 25 September 1975.

On 10 October 1975, 120 days after the defendant had been returned to North Carolina to stand trial, the State moved for a continuance pursuant to G.S. 15A-761, Article IV(c). The trial court granted the State's request, and trial was set for 27 October 1975, 137 days after the defendant had been received by the State.

On 24 September 1975, the defendant filed a motion to suppress the potential testimony of the State's witness, Willie Culthbertson, regarding his identification of the defendant. A hearing on the motion was held immediately prior to trial. Culthbertson testified that at approximately 9:45 p.m., on 22 March 1969, he was working in the Blue Mist Restaurant when he observed the defendant Collins walking down the length of the counter with a pistol in his hand. He stated that the room was well lighted, and that he could observe that Collins was approximately five feet six inches tall, 160 pounds, in his late twenties, with light skin, and a large Adam's Apple. Culthbertson said that the defendant was no more than ten feet from him.

Culthbertson further stated that defendant shot three times. The first shot struck Culthbertson in the arm, the second shot struck David Ford and killed him, and the third shot hit the wall. The defendant immediately ran out of the restaurant.

Culthbertson had earlier selected defendant's picture from a group of photographs, and he had identified defendant as the perpetrator of the crime. Later Culthbertson also identified the defendant in a lineup in New York. Culthbertson had never seen the defendant prior to the shooting, and he had not seen the defendant since the shooting until he identified the defendant in New York.

The court denied the motion to suppress and concluded that Culthbertson had ample opportunity to observe the defendant

in the Blue Mist Grill in 1969, and that the photographic identification was not so suggestive as to permit a substantial likelihood of irreparable misidentification. The court finally concluded that "the in-court identification of the defendant by the witness Culthbertson is of independent origin, based solely on what the prosecuting witness saw at the time of the crime, and does not result from any unlawful, out-of-court confrontation or from any photograph or from any pre-trial identification procedures suggestive or conducive to misidentification." Culthbertson testified to essentially the same facts at the trial as he did on voir dire.

Officer H. R. Smith testified that in April 1969 he showed twelve photographs to Culthbertson and asked him to select the photograph of the person who shot him and David Ford. The only photograph Culthbertson selected was of the defendant. Officer M. H. Godfrey testified that prior to the trial in 1975 he exhibited six photographs to Culthbertson and asked him to pick out the picture he identified in 1969. Culthbertson selected the photograph of the defendant.

The defendant testified that on 22 March 1969 he went to the Blue Mist Grill at about 9:30 or 10:00 p.m. He stated that he had never been to the Grill prior to 22 March 1969, and that he did not know David Ford, Culthbertson, or any of the other persons in the Grill. The defendant stated that earlier in the evening he had taken a gun away from his brother because his brother was drunk and he did not want to see his brother get into trouble. Defendant had his brother's pistol when he entered the Blue Mist Grill.

Defendant testified that as he was sitting down in a booth one of the patrons of the bar accused the defendant of stepping on his shoes. Defendant stated that the man demanded an apology, and also demanded that the defendant buy him a beer. Defendant apologized but refused to purchase the beer. The man tried to hit defendant and defendant backed away. Culthbertson grabbed the defendant from the back, and the defendant shot Culthbertson in the arm. Defendant stated also that Culthbertson grabbed his arm again and the gun fired accidentally. According to defendant when he ran away he did not know that anyone had been killed. He moved to New York a few days later.

The jury returned a verdict of guilty of second degree murder. From a judgment imposing a prison sentence defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Robert P. Gruber, for the State.

Waggoner, Hasty and Kratt, by John H. Hasty, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court erred in extending the time of defendant's trial beyond the 120 days provided in G.S. 15A-761, Article IV(c). We cannot agree.

G.S. 15A-761, Article IV(c) provides: "In respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, *but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.*" [Emphasis added.]

A hearing was held 10 October 1975 to determine whether there was "good cause" to extend the date of defendant's trial beyond the 120 days statutory period. The State's attorney argued that "all the witnesses are not available . . . [and] [t]he State, based on these reasons, would request that the case be called at the next convenient date for the purposes of disposition."

At the conclusion of the hearing the trial judge found "that on October 10, 1975, the State had some, but not all, of its witnesses available . . . [and] [u]pon the foregoing findings of fact, the court concludes that the State has shown good cause in open court, the prisoner and his counsel being present, for the requested and reasonable continuance."

It was approximately six years after the crime before defendant was apprehended. We see no error in the continuance for "good cause" because of the unavailability of the State's witnesses.

[2] Defendant next contends that the trial court erred in failing to suppress the testimony of Willie Culthbertson regarding his in-court identification of defendant. He argues that Culthbertson's in-court identification was tainted by the earlier photographic identification.

"The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness, and justice." *State v. Henderson,* 285 N.C. 1, 9, 203 S.E. 2d 10 (1974). The pretrial identification procedure in the instant case was not suggestive or otherwise improper. The trial court properly determined on voir dire that Culthbertson's in-court identification was based on his observations of the defendant at the scene of the crime. Furthermore, we note that defendant admitted that he was in the Blue Mist Grill on 22 March 1969, and that he did the shooting. The trial court did not err in denying the defendant's motion to suppress Culthbertson's testimony.

[3] Defendant assigns error to the trial judge's instructions to the jury. He argues that the trial court improperly instructed the jury regarding the defense of accidental homicide. The trial judge charged the jury as follows: "If David Ford died by accident or misadventure, that is, without wrongful purpose or negligence or criminal negligence on the part of the defendant, the defendant would not be guilty. The burden of proving an accident is not on the defendant. His assertion of accident is merely a denial that he has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt."

The trial judge properly stated the law and we do not find the charge to be misleading. *See State v. McLamb,* 20 N.C. App. 164, 200 S.E. 2d 838 (1973).

Defendant's remaining assignments of error have been carefully reviewed and they are without merit.

No error.

Judges BRITT and VAUGHN concur.

CALVIN MONROE BULLARD v. ELON DICKENS CONSTRUCTION COMPANY, INC.

No. 7511SC1058

(Filed 19 May 1976)

Negligence § 35— collapse of scaffold — contributory negligence

In an action by an employee of a shingling subcontractor to recover for injuries received when a scaffold furnished by defendant general contractor collapsed, plaintiff's own evidence disclosed that he was contributorily negligent as a matter of law where plaintiff testified that he failed to inspect the scaffold and only noticed lack of adequate cross-member support after going upon the scaffold and using it, that he remained on the scaffold while trying to add more nails to the cross-members although the safer method would have required reinforcing the scaffold while standing on an adjacent ladder, and that the scaffold collapsed when he attempted to drive a nail into it.

APPEAL by plaintiff from *Gavin, Judge.* Judgment entered 25 September 1975 in Superior Court, LEE County. Heard in the Court of Appeals 9 April 1976.

Plaintiff, working for a shingling subcontractor, brought this action against the general contractor for personal injuries sustained on a job site due to defendant's allegedly defective and negligent construction and maintenance of a scaffold which collapsed throwing plaintiff to the ground. Plaintiff alleged that defendant provided the scaffolding for the subcontractor and that through defendant's negligence plaintiff sustained injuries totalling $100,000.

Defendants' answer, inter alia, denied negligence, and averred that plaintiff was contributorily negligent and had assumed the risk. Regarding contributory negligence, defendant averred that plaintiff "failed to inspect the scaffold and test the same before making use of it, in that he carelessly and negligently failed to inspect the cross-members before entering onto said scaffold, in that he carelessly and negligently attempted to secure the scaffold to cross-members while upon said scaffold when he knew that said scaffold needed additional support, and that he failed to use due care for his own safety when he knew or should have known that said scaffold was not constructed for his use and in that he otherwise failed to exercise reasonable care for his own safety. Such negligence on the part of plaintiff is hereby pleaded as contributory negligence and in bar of plaintiff's right to recover herein."

At trial, Thomas Garner, employed by the subcontractor, testified for plaintiff that defendant gave the subcontractor permission to use the scaffolding. Plaintiff and Mr. Garner went onto the scaffold with "a bunch of shingles," weighing approximately 80 pounds, and chalk line "and chalk to lay the roof off." Garner recalled that after "chalking the courses," he "went down on the ground for something, I don't remember what. While I was going down to the ground, Calvin Bullard told me that there wasn't but one nail on the end of the scaffold, and he wanted me to throw up some nails. That was after I reached the ground. I went around there to the porch and got some sixteen penny nails and throwed them to him. Then he walked over to the end of the scaffold and the next thing I knew it was coming down. When it came down, as to whether I saw Mr. Bullard land, a glimpse I did, but I don't readily recollect exactly how it happened, I was getting something out of the truck when he fell, I forgot what it was. I seen him coming down. I didn't exactly see him when he reached the ground, I couldn't honestly say. I did see a 2 by (sic) hit him in the head."

On cross-examination, Garner, whose brother owned the roofing company, stated that they " . . . did not make an inspection of the scaffolding before we got on the scaffolding." Apparently, plaintiff started to nail the scaffolding while standing on it and the next thing Garner saw was the unit collapse.

Plaintiff, testifying on his own behalf, stated that he did not inspect the unit but "generally looked it over" before going upon it. He recalled that during the course of their work, he "saw a cross section of two by fours where there was only one nail. It was the section or joint on the right end on the end one. That is on the outside post. I didn't see any nail holes or holes around that one nail. When I saw that there wasn't but one nail, I told Tom to see if he could find me some nails that we was going to have to have more than one bundle of shingles up there to get five courses of shingle spacing. Mr. Garner threw me some nails. When he threw me the nails, I started to get one started, and that is when the scaffold fell. As to where that was at when it started, it was in that piece that had one nail in it. I did not try to drive it in. I decided to drive another nail. As to how hard I hit it, I just tapped it enough to get it started. Yes, I just tapped it enough to get it started. Then the scaffold fell. The end of the scaffold fell, the

right end. After that, all of the scaffold fell, that end, that part; from the middle to the end that fell. The two by eights fell, they come down. Yes, I did fall." Plaintiff explained that he tried to put more nails into the unit because they were about " . . . to bring up a right smart more shingles, and I felt a little better about it since the shingles were so heavy and all."

Plaintiff explained further that he " . . . didn't come down off the scaffold and get a ladder and go up [on the ladder] . . . [to] secure the cross-members, rather than standing on the scaffold and nailing it [because] I thought it would be faster. Looking back now I don't see how I could have been hurt if I had left the scaffold and come down from the scaffold and gotten on a ladder and driven the nails." Plaintiff further noted that they usually worked "off the ladder," but used the scaffold because they could do their task "faster from a scaffold than we could from a ladder." Plaintiff also recalled that "Mr. Garner suggested to me that I nail it from the ladder. . . . " Plaintiff further agreed that the "safe and proper procedure for nailing it . . . [would be] to get a ladder and stand it up beside the house."

Plaintiff also presented medical evidence, indicating back injuries.

At the close of plaintiff's evidence, defendant moved for a directed verdict. From the order granting defendant's motion, plaintiff appealed.

Other facts necessary for decision are set out below.

Ronald T. Penny for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by I. Edward Johnson, for defendant appellees.

MORRIS, Judge.

Plaintiff, noting the evidence of defendant's negligence, contends that the trial court erred in granting defendant's motion for a directed verdict. We disagree.

Judge Graham stated in *May v. Mitchell,* 9 N.C. App. 298, 300, 176 S.E. 2d 3 (1970), that

"In determining whether a judgment directing verdict for the defendant may be sustained on the grounds of insuffi-

> cient 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. . . . 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 . . . . 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. . . . " (Citations omitted.)

Plaintiff's own evidence, taken in the light most favorable to plaintiff, indicates that plaintiff was contributorily negligent as a matter of law. The uncontroverted testimony presented by plaintiff shows that he failed to inspect the unit and only noticed the lack of adequate cross-member support after going up on the equipment and using it. He also stated that he remained on the scaffold while trying to add more nails to the cross-members and indicated that the safer and better method would have required leaving the scaffold and reinforcing the cross-members while standing on an adjacent and freestanding ladder. Plaintiff instead for the sake of expediency rendered the repairs while remaining on the scaffold.

The long-standing general rule requires that the entry of directed verdict, is warranted " ' . . . when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them.' " *Matheny v. Motor Lines,* 233 N.C. 673, 681, 65 S.E. 2d 361 (1951). (Citation omitted.) Also see *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38 (1965). Here all of plaintiff's evidence indicates that his own negligence was a proximate cause of the mishap, and this contributory negligence, as a matter of law, bars plaintiff's recovery. Every person bears " ' . . . the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided.' " *Blevins v. France,* 244 N.C. 334, 342, 93 S.E. 2d 549 (1956). (Citation omitted.) This plaintiff improvidently failed to take those steps which would have avoided the fall.

Thus the evidence " . . . establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Leonard v. Garner,* 253 N.C. 278, 280, 116 S.E. 2d 731 (1960).

The directed verdict was properly granted.

Affirmed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. ALLEN WAYNE CRAWFORD

No. 7526SC1073

(Filed 19 May 1976)

1. **Criminal Law § 43— questions about photograph — proper foundation**

A proper foundation was laid for cross-examination of defendant about a photograph taken of him in a hospital emergency room where defendant admitted that it was a photograph of himself.

2. **Criminal Law § 89— impeachment of witness — criminal and degrading conduct**

District attorney's questions to defendant's alibi witness as to whether the witness had participated in a school riot and beat up an officer did not exceed the bounds of propriety since the questions were proper inquiries for the purpose of impeachment and there is no suggestion that the questions were groundless or not asked in good faith.

3. **Criminal Law § 102— jury argument — use of photograph not admitted in evidence — harmless error**

Defendant was not prejudiced by the district attorney's use in his jury argument of a photograph of defendant not introduced in evidence for the purpose of contradicting defendant's assertion that he was assaulted by officers while in the hospital where the court sustained defendant's objection thereto, the district attorney apologized for using the photograph, and defendant had been cross-examined regarding the photograph and admitted it was a photograph of himself.

APPEAL by defendant from *Thornburg, Judge.* Judgments entered 21 August 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 April 1976.

Defendant, along with one Leon Erain Foster, was tried and convicted of (1) the felony of armed robbery and (2) the misdemeanor of assault with a deadly weapon.

The State's evidence tends to show the following: At about 3:00 p.m. on 8 March 1974 three or four Negro youths entered Douglas Furs in Charlotte. Two of them brandished pistols and demanded that the cash drawer be opened. A visitor in the business establishment was forced to lie on the floor. After the sole employee on duty opened the cash drawer, she too was forced to lie on the floor. Officer Love became suspicious when he saw four Negro youths run across Elizabeth Avenue from the Douglas Furs Store and decided to follow them in his car. Defendant Crawford was in the group. About two blocks from the store Crawford and the other three youths entered defendant Crawford's automobile and drove away. Officer Love learned by radio that Douglas Furs had been robbed, and as he followed defendant Crawford's car, he used his police radio to ask for assistance. A high speed chase ensued, and defendant Crawford wrecked his car; thereafter, three of the four were apprehended. A paper bag of money, specifically identified as having come from Douglas Furs, was found under the front seat of Crawford's wrecked car. The two pistols were also recovered, one of them from defendant Crawford.

Defendant Crawford offered evidence which tended to show the following: Crawford was sitting in his parked car when four youths approached and asked for a ride. After the four entered his car, one of them threatened him with a pistol and forced him to try to outrun Officer Love's car. Crawford did not know the names of the four youths, and Crawford did not participate in the robbery or the assault.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Jerry W. Whitley, for the defendant.

BROCK, Chief Judge.

[1] On direct examination defendant Crawford testified that four police officers beat him while he was in the hospital emergency room for treatment of a gunshot wound received in his attempt to avoid apprehension. On cross-examination the district attorney asked defendant if he remembered a police officer taking his picture while he was in the emergency room, and then displayed a photograph to him. Defendant answered that he did not, but also refused to deny that it was a picture of himself. The district attorney then asked defendant to show him any

bruise or cut on his face visible in the picture. Defendant objected on the grounds that taking his picture in the hospital emergency room constituted an invasion of his right of privacy. The objection was overruled, and defendant answered that he could show where his lip was cut. Defendant argues on appeal that it was error to permit the questions about the photograph because no proper foundation had been laid. It is questionable whether this argument is preserved by the exception because at trial the objection was on the specific ground of invasion of privacy. In any event the argument is feckless. Defendant admitted that it was a photograph of himself.

[2] On cross-examination of defendant's alibi witness, one Bobby Westbrook, the district attorney sought to impeach Westbrook by the following questions:

> Question: "Not even a month had passed at Myers Park High when you participated in a riot there, didn't you?"
>
> Defense Counsel: "Objection."
>
> The Court: "Sustained."
>
> Question: "In fact, you were beating up an officer."
>
> Defense Counsel: "Object."
>
> The Court: "Sustained."

From the remarks thereafter made by the trial judge to the district attorney, it seems that the trial judge considered the foregoing questioning improper conduct on the part of the district attorney and specifically restricted the further cross-examination as follows: "Now if you want to ask him what he has been convicted of, do that, otherwise we will go on to another area." Defendant argues on appeal that the district attorney's conduct exceeded the bounds of propriety and such conduct entitles defendant to a new trial. This argument is wholly without merit.

There is no suggestion that the questions by the district attorney were groundless or otherwise not asked in good faith. The questions appear to be proper inquiries for the purpose of impeaching the witness. If the trial judge committed error, it was error favorable to defendant and prejudicial to the State by confining the district attorney to questions of what the wit-

ness "has been convicted of." A witness, including a defendant in a criminal case, "may not be cross-examined as to whether he has been indicted or is under indictment, or has been accused either informally or by affidavit on which a warrant is issued, or has been arrested, for a criminal offense other than the one for which he is then on trial," *State v. Sharratt and Richardson,* 29 N.C. App. 199 (filed 21 April 1976), because such questions relate only to accusations against the witness. However, for purposes of impeachment a witness, including the defendant in a criminal case, may be cross-examined concerning prior convictions. *State v. Sharratt and Richardson, supra.* And, for purposes of impeachment, such witness may be cross-examined "by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. (Citations omitted.) Such questions relate to matters *within the knowledge of the witness,* not to accusations of any kind made by others." *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971).

[3] During argument to the jury the district attorney picked up the photograph of defendant Crawford taken while Crawford was lying in the hospital. The record on appeal does not disclose what the district attorney did with the photograph or what he said about it. Nevertheless, if we assume that the district attorney referred to the photograph as contradicting defendant's assertion that he was assaulted by the police officers while he was lying in the hospital, defendant's prompt objection was timely and properly sustained. The district attorney apologized to the court and to the jury for overlooking the fact that the photograph had not been formally introduced in evidence. In view of the fact that defendant had been cross-examined regarding the photograph, admitted that it was a photograph of himself, and admitted that it displayed only a cut on his lip, coupled with the court's action and the apology by the district attorney, we deem this inadvertence on the part of the district attorney to be nonprejudicial.

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

JAMES PRENTICE FRANKLIN, JR., WIDOWER, AND JAMES PRENTICE FRANKLIN, JR., GUARDIAN AD LITEM OF JAMES PRENTICE FRANKLIN III, MINOR CHILD OF SHELLEY HARRIS FRANKLIN, DECEASED, EMPLOYEE, PLAINTIFFS v. WILSON COUNTY BOARD OF EDUCATION, EMPLOYER SELF-INSURER, DEFENDANT

No. 757IC910

(Filed 19 May 1976)

Master and Servant § 62— death of school teacher at end of school day — no accident arising out of and in course of employment

In an action to recover death benefits under the Workmen's Compensation Act for the death of a school teacher which occurred when she backed her car, at the end of the school day, into the path of a tractor trailer truck, there was no evidence which would support a finding that the deceased was performing one of the duties of her employment at the time of the accident.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 28 July 1975. Heard in the Court of Appeals 8 March 1976.

This is a proceeding wherein the plaintiff, James Prentice Franklin, Jr., individually and as guardian ad litem of James Prentice Franklin III, a minor, seeks to recover death benefits pursuant to the North Carolina Workmen's Compensation Act for the death of Shelley Harris Franklin, his wife and mother of the child, allegedly arising out of and in the course of her employment with the Wilson County Board of Education.

The Industrial Commission made findings of fact in pertinent part as follows:

> "1. The deceased, Shelley Harris Franklin, was a twenty-seven-year-old married female. She died on November 22, 1972, as a result of a head injury, skill fracture and brain damage. On and prior to November 22, 1972, the deceased was an employee of the defendant employer. She was a teacher of Home Economics and a teacher in the occupational exploratory program with the defendant employer. The deceased taught two classes in Home Economics at the Saratoga Central High School. She also had a homeroom at the high school. The deceased taught in the occupational exploratory program at the Speight Middle School. She was assigned to the Saratoga Central High School and was under the supervision of Tom I. Davis, the principal of the high school.

2. Saratoga Central High School and Speight Middle School are located two miles apart. The deceased's normal work hours were from 8:00 a.m. to 3:30 p.m. At 8:00 a.m. the plaintiff reported to Saratoga Central High School where she prepared for her classes, conducted a homeroom and taught two classes in Home Economics. Her classes in Home Economics ended at 10:30 a.m. and she then traveled to the Speight Middle School in her automobile. She spent the rest of the day at the Speight Middle School. On pay day the deceased customarily returned to the high school to pick up her pay check which was placed in her mail box by the principal at about 1:00 p.m.

3. In addition to traveling between Saratoga Central High School and Speight Middle School, the plaintiff was required to travel to the homes of her pupils to supervise them in their home economics projects and to travel to retail stores to purchase incidental supplies for use in her classes at the two schools. She received a monthly travel allowance in the amount of $37.00 from the defendant employer . . . for the use of her automobile in the performance of these duties. When the plaintiff purchased supplies she obtained receipts which she submitted to the defendant employer for reimbursement. It was customary for the deceased to transport school equipment, which was used in the Home Economics classes and projects, in her automobile. The deceased visited the homes of her pupils, purchased supplies and transported home economics equipment, at her discretion after school hours. There were no limitations placed on the plaintiff as to when she was to perform these duties.

4. It was stipulated that Saratoga Central High School is located on the southwest side of U. S. 264 and thirty feet from U. S. 264. The high school is in the town of Saratoga, North Carolina, and the front of the high school faces U. S. 264. U. S. 264 is a paved two-lane road running generally in an easterly and westerly direction. It is a very heavily traveled highway at and near the high school. Employees of the defendant employer and visitors to the high school were permitted to park their automobiles in the thirty-foot area between the high school and U. S. 264. It was the practice of Tom I. Davis, Jr., to let his high school pupils out early on the day before a school holiday.

On these occasions he also permitted the teachers to leave the school when the pupils were released.

5. On Wednesday, November 22, 1972, Tom I. Davis, Jr., released the pupils and teachers at the Saratoga Central High School at 3:00 p.m. since this was the day before a school holiday, Thanksgiving. November 22, 1972, was also pay day for the defendant employer's teachers. The deceased drove her Volkswagen from the Speight Middle School to the high school and parked it in the thirty-foot area between the high school and U. S. 264 at about 3:05 p.m. A bookmobile was parked facing an easterly direction in this thirty-foot area. The deceased parked her Volkswagen facing a southerly direction in front of the bookmobile. She then went into the high school office and picked up her pay check in the mail box. The deceased remained in the office about one minute and then left the school building by the front exit. She returned to her Volkswagen and drove it in a backward direction from the parking area into the eastbound lane on U. S. 264. Just after the deceased entered the eastbound lane a tractor-trailer vehicle which was traveling east on U.S. 264, collided with the Volkswagen. The front of the tractor-trailer vehicle collided with the right side of the Volkswagen. The point of impact was in the eastbound lane on U. S. 264. The Volkswagen made about eight feet of tire marks in the dirt parking area. These marks were perpendicular to and ran straight to U. S. 264. The deceased died about fifteen minutes after the collision.

6. After the collision a cake pan, which was owned by the defendant employer was found in the back seat of the Volkswagen. A list of items which the deceased purchased . . . and three invoices from retail stores showing items the deceased purchased . . . were found in her handbag in the Volkswagen after the accident. Only one of these items revealed a date and it was dated September 13, 1972. Tom I. Davis, Jr., did not know where the deceased was going when she left the office on the afternoon of November 22, 1972.

7. The deceased sustained an injury by accident on November 22, 1972, and said injury by accident resulted in her death on the same day. This injury by accident which

resulted in the death of the deceased did not arise out of and in the course of her employment with the defendant employer."

From an order denying compensation, plaintiff appealed.

White, Allen, Hooten and Hines by John R. Hooten for plaintiff appellant.

Attorney General Edmisten by Assistant Attorney General Ralf F. Haskell for the defendant appellee.

HEDRICK, Judge.

The one question presented on this appeal is whether the Industrial Commission erred in finding and concluding that Shelley Harris Franklin's injuries and death did not arise out of and in the course of her employment as a home economics teacher for the defendant.

To be awarded compensation under the Workman's Compensation Act, the plaintiff has the burden of showing that deceased's injury and resulting death were the result of an accident which arose out of and in the course of deceased's employment. G.S. 97-2; *Robbins v. Nicholson,* 281 N.C. 234, 188 S.E. 2d 350 (1972).

Recognizing that ordinarily an employee's injuries or death resulting by accident going to or returning from work do not arise out of and in the course of one's employment and are not compensable, *Humphrey v. Laundry,* 251 N.C. 47, 110 S.E. 2d 467 (1959), plaintiff, citing numerous cases, contends that his case falls within one of the recognized "exceptions" to the general rule. Neither the "coming or going rule" nor any of the "exceptions" to the rule has any application in this case simply because there is no evidence in this record as to where the deceased was going when she backed her Volkswagen onto the highway from the parking area at Saratoga Central High School. When we say that there is no evidence as to where the deceased was going, we are also saying that there is no evidence in this record that the deceased was performing one of the duties of her employment at the time of the accident. Evidence and findings that deceased was required as part of her duties to visit her students in their homes after school hours to check on their projects and observe their home backgrounds, and that she was also required from time to time to purchase incidental

supplies at retail stores for use in her class, and that she was reimbursed for her expenditures and received a travel allowance to cover, in part, the visits to the homes and to stores to buy supplies, and that there was no set schedule for deceased to perform these duties, presents nothing more than a scenario of what deceased might do on any given day. Such evidence, under the circumstances of this case, is not sufficient to support a finding by the Commission that the deceased was performing one of the duties of her employment at the time of the accident. The material findings of fact made by the commission support the conclusion that Mrs. Franklin's death by accident did not arise out of and in the course of her employment. The order appealed from is affirmed.

Affirmed.

Judges MORRIS and ARNOLD concur.

ANNE B. RAFTERY, ADMINISTRATRIX OF THE ESTATE OF ALLEN G. RAFTERY, DECEASED v. WM. C. VICK CONSTRUCTION CO. AND CLARK EQUIPMENT COMPANY, A CORPORATION

No. 7511SC932

(Filed 19 May 1976)

Death § 4; Limitation of Actions § 4— wrongful death — defective product — statute of limitations

A cause of action for wrongful death alleged to have resulted from a hidden defect in a product accrues at the time of decedent's death rather than at the time the product was sold; therefore, a wrongful death action based on an alleged defect in a crane was not barred by the statute of limitations where it was brought within two years after decedent's death, G.S. 1-53(4), although it was brought more than ten years after the crane was sold and an action by decedent, had he not been killed, would have been barred by G.S. 1-15(b).

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 7 August 1975 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 11 March 1976.

This action for wrongful death arose from alleged negligent acts by defendants in the design, manufacture and sale of a crane which on 14 June 1972 collapsed and fell on decedent, causing his death. On 12 June 1974 this action was commenced.

The equipment involved is a crane manufactured by Michigan Power Shovel Company and sold through its distributor, North Carolina Equipment Company, to J. M. Thompson Company of Raleigh on 23 June 1953. The crane, serial number 8298, was used by the J. M. Thompson Company until 1966 when Thompson Company sold it to Roger K. Barbour.

On 16 September 1974, defendant Clark Equipment Company moved for summary judgment on grounds that the plaintiff's action was barred by the statute of limitations. In support of its motion Clark Equipment Company submitted affidavits stating that the crane had been sold by Michigan to a Raleigh firm in 1953, and that the crane was new at that time; and that since 1953 neither Michigan nor Clark had owned the crane, done any work on it, or had any possession of the crane. Plaintiff submitted no proof in opposition to the summary judgment motion.

A voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a), was entered by plaintiff as against Vick Construction Company, and the trial court granted summary judgment for defendant Clark Equipment Company.

Hedrick, McKnight, Parham, Helms, Kellam & Feerick, by Richard T. Feerick, for plaintiff appellant.

Maupin, Taylor & Ellis, by Armistead J. Maupin and Richard M. Lewis, for defendant appellee.

ARNOLD, Judge.

In an action for wrongful death alleged to have resulted from a hidden defect in a product, does the cause of action accrue at the time the product is sold, or at the time of decedent's death? That is the question raised by this appeal.

It is alleged by plaintiff that decedent was killed as a result of a hidden defect in a crane. Plaintiff contends that under G.S. 1-53(4) the limitation period for wrongful death is two years, and she contends further that her cause of action accrued, not when the crane was sold in 1953, but when decedent died [14 June 1972].

Defendant maintains that a cause of action for wrongful death resulting from a defective product accrues when the defective product is sold. In support of this position defendant

argues that if the action does not accrue until death occurs an action could be brought against a seller of a defective product one hundred years after it was sold, if the product does not malfunction and cause death until one hundred years have elapsed.

According to defendant, an action for wrongful death is governed not only by G.S. 1-53(4) but also by the statute of limitations which would have applied in a similar action brought by decedent himself had he lived. Defendant relies on G.S. 28-173 [now G.S. 28A-18-2] which provides: "When the death of a person is caused by a wrongful act, neglect or default of another, *such as would, if the injured party had lived, have entitled him to an action for damages therefor,* the person or corporation that would have been so liable . . . shall be liable to an action for damages . . . . " (emphasis added). The limitation period for tort actions based on hidden defects in products is ten years. G.S. 1-15(b). Had decedent not been killed, but only injured by the collapse of the crane, his action against defendant would have been barred by G.S. 1-15(b), and defendant, therefore, argues that plaintiff's action for wrongful death ought to be barred.

While we are persuaded by the logic of defendant's arguments we are nevertheless bound by *Causey v. R. R.,* 166 N.C. 5, 81 S.E. 917 (1914). In *Causey v. R. R., supra,* there was an action for wrongful death of plaintiff's intestate who was injured on 1 December 1903, and died on 7 June 1912. There was evidence to support a finding that the injury in 1903 caused the death of the intestate. It was held in *Causey* that the cause of action accrued at the death of the intestate.

Plaintiff also cites *Williams v. General Motors Corporation,* 393 F. Supp. 387, 395-396 (1975), in which pertinent comment is made of the *Causey* decision.

> " . . . *Causey* holds that an administrator may bring an action even though the deceased would have been barred at the time of his death from bringing the action while N.C.G.S. § 28-173, on the other hand, requires that the cause of action, in order to be brought by the administrator, must have been one which the deceased had the right to bring at the time of his death. The above-quoted phrase from N.C.G.S. § 28-173 was in basically the same form in 1914 when *Causey* was handed down that it is today and

thus it cannot be said that the conflict exists because the North Carolina Supreme Court was construing a different statute."

Based on the authority of *Causey v. R. R., supra*, entry of summary judgment for defendant was error. Judgment is therefore vacated and the cause is remanded for further proceedings.

Vacated and remanded.

Judges MORRIS and CLARK concur.

KOEHRING COMPANY v. SEACREST MARINE CORPORATION

No. 7610SC22

(Filed 19 May 1976)

1. **Appeal and Error § 17— surety on stay bond as party to action**

The Home Indemnity Company voluntarily made itself a party to this action and submitted itself to the jurisdiction of the court when it executed its bond to stay execution of plaintiff's judgment against defendant; moreover, Home Indemnity was served with notice of the motion for judgment on its stay bond, and it participated in the hearing by offering evidence.

2. **Appeal and Error § 17— stay bond — judgment on bond prior to execution against defendant proper**

The trial court did not err in entering judgment against The Home Indemnity Company, which had executed a bond to stay execution of plaintiff's judgment against defendant pending defendant's appeal, prior to execution against defendant.

APPEAL by The Home Indemnity Company, surety for Seacrest Marine Corporation, from *Smith, Judge*. Judgment entered 23 September 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 15 April 1976.

On 11 April 1975 judgment was entered in favor of plaintiff and against defendant for the sum of $71,941.74 plus interest at the rate of twelve percent (12%) from the date of judgment until paid and the costs of this action. Defendant gave notice of appeal, and on 23 April 1975 posted a bond executed by The Home Indemnity Company to stay execution of the judgment by plaintiff pending defendant's appeal pursuant to the provisions of G.S. 1-289.

Since defendant's notice of appeal was given before 1 July 1975, the procedure for defendant's appeal was governed by the Rules of Practice in the Court of Appeals of North Carolina. Therefore, on 8 August 1975 plaintiff moved in superior court, pursuant to former G.S. 1-287.1, to dismiss defendant's appeal because defendant had not served its case on appeal within the time allowed. Plaintiff also moved that it be awarded judgment against The Home Indemnity Company, as surety for defendant, for any amount of the previously rendered judgment found to be due. By order dated 10 September 1975 defendant's appeal was dismissed, and a hearing on plaintiff's motion for judgment against The Home Indemnity Company was set to determine what amount of the previously rendered judgment against defendant was due.

On 23 September 1975 judgment against The Home Indemnity Company was entered as follows:

> "THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding upon motion of plaintiff for a judgment against Home Indemnity Company in the amount set forth in the judgment entered herein against Seacrest Marine Corporation and the Court after reviewing the pleadings and hearing the evidence of plaintiff and defendant finds as facts:
>
> "1. That after judgment had been entered herein the Home Indemnity Company filed on April 23, 1975, a bond to stay execution on the money judgment pursuant to N.C.G.S. 1-289.
>
> "2. That by order dated September 10, 1975, the defendant's appeal herein was dismissed.
>
> "3. That one payment on the judgment in the amount of $5,000 was made on August 11, 1975.
>
> "4. That Orville Mertz, Chairman of the Board of Koehring Company, did not agree on behalf of Koehring Company to accept payments of $5,000 per month from Seacrest Marine Corporation until October 1, 1975, at which time the entire balance of the unpaid indebtedness would be paid in full.
>
> "5. That there has been no agreement between Koehring Company, the plaintiff, and Seacrest Marine Corpora-

tion, defendant for an accord and satisfaction of the judgment which has been entered herein.

"6. That the judgment which has been entered herein is enforceable in the full amount less the $5,000 payment made on August 11, 1975.

"7. That the plaintiff is entitled to judgment against Home Indemnity Company in the amount of the judgment.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Koehring Company have and recover of Home Indemnity Company the sum of $71,941.74 plus interest at the rate of twelve (12%) percent from April 11, 1975, until said judgment is paid, less credit for payment in the amount of $5,000 made on August 11, 1975, Home Indemnity Company to pay the costs of this action."

The Home Indemnity Company appealed.

Ragsdale & Kirschbaum, by William L. Ragsdale for plaintiff.

Davis & Hassell, by Charles R. Hassell, Jr., for The Home Indemnity Company.

BROCK, Chief Judge.

Since notice of appeal by The Home Indemnity Company was given after 1 July 1975, its appeal is governed by the North Carolina Rules of Appellate Procedure.

Two exceptions appear in the record on appeal:

"At the close of the evidence, Mr. Hassell OBJECTED on behalf of Home Indemnity Company to Home Indemnity Company being a party to this matter.

EXCEPTION NO. 1."

"To the Judgment of the Court entered September 23, 1975, Home Indemnity Company OBJECTS, and gives Notice of Appeal.

EXCEPTION NO. 2."

By assignments of error Nos. 4, 5, and 6 The Home Indemnity Company undertakes to attack certain of the findings of fact and conclusions of law of the trial court. There are no exceptions in the record on appeal to any findings of fact or conclusion of law. The pertinent portion of App. R 10(b)(2) provides: "A separate exception shall be set out to the making

or omission of each finding of fact or conclusion of law which is to be assigned as error." The above purported assignments of error are not supported by exceptions and will not be considered on appeal.

The Home Indemnity Company's assignments of error Nos. 1, 2, and 3 constitute three arguments based upon its exception to the entry of the judgment on 23 September 1975.

[1] First, it argues that judgment should not have been entered against it because it was not a party to the action and the court did not have jurisdiction over it. The Home Indemnity Company voluntarily made itseslf a party to the action and submitted itself to the jurisdiction of the court when it executed its bond to stay execution of plaintiff's judgment against defendant. It was served with notice of the motion for judgment on its stay bond, and it participated in the hearing by offering evidence. This argument is without merit.

[2] Second and third, it argues that judgment should not have been entered against it on its stay bond prior to execution against the defendant. The stay bond executed by The Home Indemnity Company was for the explicit purpose of stopping execution against defendant on plaintiff's judgment. The bond specifically provides that The Home Indemnity Company guarantees that defendant "will pay the amount directed to be paid by the judgment" in the event "the appeal is dismissed." This constitutes a guarantee of payment of the judgment, not a guarantee of payment of such amount as execution against the defendant does not produce. The surety, if it wishes, can take an assignment of plaintiff's judgment after payment thereof and then issue execution against defendant. Having elected to deprive the judgment creditor of the opportunity of enforcing its claim by voluntarily, and presumably for a fee, executing the supersedeas bond, The Home Indemnity Company cannot now with propriety complain if it is required to live up to the terms of its undertaking. This argument is without merit.

The findings of fact by the trial court support its conclusions of law, and the findings and conclusions support the judgment entered.

Affirmed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. JULIE BARNES

No. 7614SC60

(Filed 19 May 1976)

Indictment and Warrant § 9; Municipal Corporations § 29— violation of city code — failure of warrant to allege crime committed in city

The warrant upon which defendant was arrested and which alleged a violation of a named section of the Durham City Code "at and in the County named above" [Durham County] failed on its face to charge the commission of a crime, since it did not charge defendant unequivocally with the doing of acts therein specified within the city.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 4 September 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 May 1976.

Defendant was tried upon charges of violating § 13-31 of the Durham City Code. She was found guilty in the District Court of Durham County and ordered to pay a fine of $5.00 and costs. Upon appeal to Superior Court she was again found guilty and sentenced to a term of 15 days in Durham County jail, execution of the sentence being suspended for one year upon condition she pay a fine of $5.00 and costs.

Attorney General Edmisten by Special Deputy Edwin M. Speas, Jr. for the State.

Murdock, Jarvis, Johnson & LaBarre by William H. Murdock and David Q. LaBarre for defendant appellant.

PARKER, Judge.

The magistrate's warrant on which this criminal prosecution is based authorized the arrest of defendant for the alleged criminal offense described in the attached affidavit of Robin T. James, a Durham City police officer, which was as follows:

> "The undersigned, Robin T. James, being duly sworn, complains and says that at and in the County named above and or about the 1 day of June, 1975, the defendant named above did unlawfully, wilfully, massage the private parts of another for hire; to wit: the defendant named above gave massage to the Private Parts of Officer Robin T. James for the sum of $35.00.

The offense charged here was committed against the peace and dignity of the State and in violation of law City Code, Section 13-31."

Section 13-31 of the Durham City Code provides as follows:

"Section 13-31. Massage of Private Parts for Hire Prohibited.

It shall be unlawful for any person to massage or to offer to massage the private parts of another for hire. 'Massage' means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device. 'Private Parts' means the penis, scrotum, mons veneris, vulva or vaginal area. The provisions of this ordinance shall not apply to licensed medical practitioners, osteopaths or chiropractors, or persons operating at their directions, in connection with the practice of medicine, chiropractic, or osteopathy."

The warrant upon which defendant was arrested alleged a violation of the City Code "at and in the County named above" [Durham County]. In the absence of a grant of power from the Legislature, "a city or town may not, by its ordinance, prohibit acts outside its territorial limits or impose criminal liability therefore." *State v. Furio,* 267 N.C. 353, 356, 148 S.E. 2d 275, 277 (1966). As this warrant does not charge the defendant, unequivocally, with the doing of the acts therein specified within the city, the warrant on its face fails to charge the commission of a crime. The court erred in denying defendant's motion to quash the warrant and dismiss the charges contained therein.

The verdict and judgment are set aside. The cause is remanded to the Superior Court for the entry of a judgment quashing the warrant. *State v. Freedle,* 268 N.C. 712, 151 S.E. 2d 611 (1966).

Error and remanded.

Judges MORRIS and MARTIN concur.

TERESA STOUT TATUM v. ROYALL BROWN, SR., INDIVIDUALLY AND AS AGENT OF THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, AND THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

No. 7621DC39

(Filed 19 May 1976)

1. **Master and Servant § 10— employment contract — duration**

When a contract of employment contains no provision concerning the duration or term of employment or the means by which it may be terminated, it is terminable at the will of either party.

2. **Master and Servant § 10— breach of contract to employ — insufficiency of complaint**

Plaintiff's complaint failed to state a claim for relief where she alleged that she applied for a job with defendant at a certain salary, the job was to be a long term career, defendant notified her that she had the job and directed her to give her present employer notice of termination, plaintiff gave such notice, and defendant then revoked his offer of the job, there being no allegation concerning the duration or means of termination of the employment.

APPEAL by plaintiff from *Leonard, Judge.* Judgment entered 4 December 1975 in District Court, FORSYTH County. Heard in the Court of Appeals 5 May 1976.

Plaintiff alleged that she had been employed for six years by Integon Insurance Corporation earning $545 per month. On 26 June 1975, in response to an advertisement, she applied for a position with defendant which would earn her $625 per month and employment was to be permanent and a "long term career." On 30 June 1975 defendant notified plaintiff that she had the job, and, it is alleged, defendant directed plaintiff to give notice of termination to her present employer so she could begin her duties with defendant on 14 July 1975. Plaintiff relied upon defendant's promise and gave notice to Integon on 30 June 1975, and on 10 July 1975 defendant revoked his offer.

Action was instituted by plaintiff to recover the salary promised her until such time as she located comparable employment. The court granted defendant's motion to dismiss for failure to state a claim upon which relief could be granted and plaintiff appealed.

H. Glenn Pettyjohn for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by J. Robert Elster and W. Thompson Comerford, Jr., for defendant appellees.

ARNOLD, Judge.

Plaintiff's contention in this appeal is that the motion to dismiss was improperly granted. Defendant's position is that plaintiff alleged a contract of employment at will, and that her allegations, taken as true for purposes of the motion to dismiss, give rise to no claim upon which relief can be granted. We agree with defendant's position.

[1, 2] Where a contract of employment contains no provision concerning the duration or term of employment, or the means by which it may be terminated, it is terminable at the will of either party, with or without cause. *Still v. Lance,* 279 N.C. 254, 182 S.E. 2d 403 (1971); 5 N. C. Index 2d, Master and Servant, § 10, p. 327. There is no allegation in the instant case concerning the duration or means of termination of the employment. It therefore appears as a certainty that plaintiff is entitled to no relief. Even though there may be merit in her allegations plaintiff does not stake a claim upon which relief can be granted. The action was not improperly dismissed. *Smith v. Ford Motor Co.,* 289 N.C. 71, 221 S.E. 2d 282 (1976).

We also agree with defendant's position that the doctrine of promissory estoppel does not apply in this action for breach of employment contract.

The order of the trial court is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHANCY JUNIOR SAWYER

No. 752SC1026

(Filed 19 May 1976)

Assault and Battery § 14— putting hand on gun — sufficiency of evidence of assault

Evidence that defendant put his hand on a gun which was lying on the dashboard of his truck, defendant instructed the victim not to go to his truck, and the victim got into a boat and left the place where defendant was, was sufficient to raise an inference that defendant's overt act, coupled with his threat, was a sufficient show

of force to put a person of reasonable firmness in fear of immediate bodily harm; therefore, the evidence was properly submitted to the jury in a prosecution for assault.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 20 October 1975 in Superior Court, HYDE County. Heard in the Court of Appeals 6 April 1976.

The defendant, Chancy Junior Sawyer, was charged in a warrant, proper in form, with assault on Clafton Williams. The defendant pleaded not guilty but was found guilty by the jury. From a judgment that defendant be imprisoned for thirty days, suspended for one year on payment of a fine, defendant appealed.

Attorney General Edmisten, by Associate Attorney William A. Raney, Jr., for the State.

G. Irvin Aldridge for defendant appellant.

HEDRICK, Judge.

This appeal presents the single question of whether the evidence was sufficient to require submission of the case to the jury and to support the verdict. The defendant offered no evidence. Evidence offered by the State tended to show the following:

George Clafton Williams was a commercial fisherman living in Sladesville, North Carolina. On 1 March 1975, at about 3:00 p.m., he and Murphis Credle were at a dock off River Shore Road, where Williams kept his boat, preparing to go out and pull in some nets that Williams had set earlier in the day. The defendant drove up in his truck and stopped behind Williams's truck. He spoke to Williams: "How come you run over my nets last night?" Williams replied that he was not even down there. The defendant then "threw" his hand on a pistol in a holster lying on the dashboard of his truck and said to Williams: "Don't go to your truck." Williams testified: "I would say Mr. Sawyer's statements worried me because if I had gone back to my truck I would have been done. He had done forbid me from going in there." Williams did not go back to the truck. Instead, he and Credle got into the boat and went out to pull in the nets. When they left, the defendant was still parked up on the bank.

The North Carolina Supreme Court in *State v. Roberts*, 270 N.C. 655, 155 S.E. 2d 303 (1967), set forth the following definition of assault:

> "The court generally defines the common law offense of assault as 'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menance of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.'" (Citations omitted.) *Id.* at 658.

When the evidence is considered in the light most favorable to the State, in our opinion, it is sufficient to raise an inference that the overt act of defendant in putting his hand on the gun, coupled with the threat, was a sufficient show of force to put a person of reasonable firmness in fear of immediate bodily harm. This assignment of error is not sustained. The judgment appealed from is affirmed.

No error.

Judges MORRIS and ARNOLD concur.

CAMERON M. McRAE AND WIFE, ALETA M. McRAE v. JERRY MOORE AND WIFE, JENNETTE MOORE

No. 7613DC1

(Filed 19 May 1976)

Appeal and Error § 6; Rules of Civil Procedure § 54— judgment not adjudicating all claims — premature appeal

Purported appeal is premature where the judgment appealed from adjudicates fewer than all the claims of the parties and contains no finding by the trial judge that there is no just reason for delay. G.S. 1A-1, Rule 54(b).

APPEAL by plaintiffs from *Sauls, Judge*. Judgment entered 24 September 1975 in District Court, BRUNSWICK County. Heard in the Court of Appeals 13 April 1976.

This is a civil action wherein plaintiffs, Cameron M. McRae and wife, Aleta M. McRae, seek specific performance of an

option contract with defendants, Jerry Moore and wife, Jennette Moore, to purchase a house and lot located in Brunswick County, North Carolina. In their complaint, plaintiffs alleged that they entered into an option to purchase a piece of property from defendants described as follows:

> "Rt. #1, Box 379-A Causeway RD Brunswick Cty., Supply, N. C. Approximately 105 x 209.7 lot size presently occupied by Cameron M. & wife Aleta M. McRae as Residence and Real Estate Office."

They alleged further that prior to the expiration of the option agreement they "notified the defendants that they were exercising the option and tendered to the defendants the full purchase price . . . ", but defendants refused to convey the property.

In their answer, defendants admitted entering into the option with plaintiffs but denied that plaintiffs had exercised the option in accordance with its terms. They likewise filed a counterclaim for rent and for damages allegedly resulting from the filing of a *lis pendens* on the property by plaintiffs.

After a trial without a jury, the judge made findings and concluded that plaintiffs were not entitled to specific performance. The court also concluded that plaintiffs were indebted to defendants for unpaid rent and entered a judgment on defendants' counterclaim for rent in the amount of $375.00. Plaintiffs appealed.

Powell and Smith by William A. Powell for plaintiff appellants.

Mason H. Anderson by Douglas W. Baxley for defendant appellees.

HEDRICK, Judge.

The court made no adjudication of defendants' counterclaim for damages allegedly resulting because plaintiffs filed a *lis pendens* on the property after the expiration of the option, which prevented defendants "from selling their property or from using it as collateral to obtain money badly needed in their business affairs." Thus, the judgment from which plaintiffs appeal adjudicates fewer than all the claims of the parties.

Since the trial court made no determination that "there is no just reason for delay," the judgment "does not terminate the

action as to any of the claims," G.S. 1A-1, Rule 54(b), and is not now appealable. *Durham v. Creech*, 25 N.C. App. 721, 214 S.E. 2d 612 (1975); *Leasing, Inc. v. Dan-Cleve Corp.*, 25 N.C. App. 18, 212 S.E. 2d 41 (1975), *cert. denied* 288 N.C. 241, 216 S.E. 2d 910 (1975); *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974).

Appeal dismissed.

Chief Judge BROCK and Judge CLARK concur.

JANE W. WILLIAMS v. JOHN F. WILLIAMS

No. 7610DC71

(Filed 19 May 1976)

Appeal and Error § 6— interlocutory order not appealable

The trial court's order that the parties and their child submit to a psychiatric examination prior to final determination on the question of child custody was interlocutory and not appealable.

APPEAL by plaintiff from *Bullock, Judge*. Order entered 28 October 1975 in District Court, WAKE County. Heard in the Court of Appeals 7 May 1976.

This is a civil action wherein plaintiff Jane W. Williams seeks an order for custody of Angela Denise Williams, born 4 March 1969, the only child of the marriage between plaintiff and the defendant, John F. Williams.

On 25 April 1975, when plaintiff filed her complaint for custody of the child, Judge Bason entered an order granting temporary custody to plaintiff and set a date for a hearing in the matter. On 18 July 1975, after a hearing, Judge Bullock entered an order continuing custody of the child with the plaintiff until after the parties and the child had submitted to psychiatric counseling. On 28 October 1975, the parties not having consulted any psychiatrist, Judge Bullock entered an order that plaintiff, defendant, and minor child submit themselves to Dr. Henry Lineberger or to someone recommended by him for counseling. On 18 November 1975, Judge Bullock entered another order directing plaintiff, defendant, and minor child to submit themselves to Dr. Betty Hydrick (recommended by Dr. Lineber-

ger) at Suite 101, Doctor's Building, St. Mary's Street, Raleigh, North Carolina, at 1:00 p.m. on Friday, November 21, 1975. Plaintiff appealed.

Dixon and Hunt by Daniel R. Dixon for plaintiff appellant.

No counsel for defendant appellee.

HEDRICK, Judge.

G.S. 1-277 in pertinent part provides:

> *"Appeal from superior or district court judge.*—(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, 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."

This section provides that no appeal lies to an appellate court from an interlocutory ruling or order of the trial court unless such ruling or order deprives the appellant of a substantial right. *Funderburk v. Justice,* 25 N.C. App. 655, 214 S.E. 2d 310 (1975).

Judge Bullock's order that the parties and the child submit to a psychiatric examination prior to final determination on the question of custody is interlocutory. The trial judge is empowered to order the plaintiff to submit to a psychiatric examination. G.S. 1A-1, Rule 35. Clearly, the order appealed from does not deprive plaintiff of a substantial right which she might lose if the order is not reviewed before a final determination of custody.

Appeal dismissed.

Chief Judge BROCK and Judge CLARK concur.

IN RE REVOCATION OF THE LICENSE TO OPERATE A MOTOR VEHICLE OF THOMAS DELAND CHURCH

No. 7625SC23

(Filed 19 May 1976)

Appeal and Error § 44— failure to file brief — dismissal of appeal

Appeal is dismissed by the Court of Appeals *ex mero motu* for failure of appellant to file a brief. App. R. 13(c).

APPEAL by petitioner from *Briggs, Judge.* Judgment entered 5 September 1975 in Superior Court, CATAWBA County. Heard in the Court of Appeals 15 April 1976.

On 25 March 1975, petitioner, Thomas Deland Church, received notice from the Division of Motor Vehicles that his motor vehicle operator's license was suspended, pursuant to the provisions of G.S. 20-16.2, for a period of six months for willfully refusing to submit to a breathalyzer test after having been arrested for driving under the influence of intoxicating liquor. Petitioner requested and was afforded a hearing before the Division pursuant to G.S. 20-16.2(d). After the hearing, petitioner received notice that the suspension should be sustained effective 3 June 1975. He petitioned the Superior Court for a hearing *de novo* as to the validity of the suspension pursuant to G.S. 20-16.2(e) and G.S. 20-25 and for an order suspending the effective date of the license suspension until after a determination of the matter. Judge Ferrell entered an order on 3 June 1975 staying the effective date of the license suspension pending the hearing.

From judgment entered on 5 September 1975, after the hearing dissolving "all restraining or stay orders" and affirming the order of revocation, petitioner appealed.

No counsel appeared for the State.

No counsel appeared for petitioner appellant.

HEDRICK, Judge.

Rule 13(c) of the Rules of Appellate Procedure provides:

"*Consequence of Failure to File and Serve Briefs.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an

appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court."

Appellant has not filed a brief in this Court. The Court, *ex mero motu,* dismisses the appeal.

Appeal dismissed.

Chief Judge BROCK and Judge CLARK concur.

INVESCO FINANCIAL SERVICES, INC. v. C. D. ELKS, D/B/A C. D. ELKS TRUCK LINE

No. 762SC38

(Filed 19 May 1976)

Appeal and Error § 30— testimony admitted without objection — subsequent motion to strike

Where testimony is first admitted without objection, a subsequent motion to strike the testimony is addressed to the sound discretion of the court, and its ruling thereon will not be disturbed unless an abuse of discretion has been shown.

APPEAL by defendant from *Walker, Judge.* Judgment entered 15 October 1975 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 5 May 1976.

McMullan & Knott, by Lee E. Knott, Jr., for plaintiff appellee.

Leroy Scott and Stephen A. Graves, for defendant appellant.

VAUGHN, Judge.

This is an action to recover the balance due by defendant on a contract in connection with his purchase of a truck. The verdict was for the plaintiff in the amount sued for.

The tenth assignment of error is the only one brought forward on appeal. It presents defendant's exception to the denial of his motion to strike testimony of plaintiff's witness relating

to the amount owed plaintiff by defendant as reflected in plaintiff's records. On page 18 of the record it appears that the witness testified that the balance due was $8,134.58. That testimony and other testimony of the evidence relating to the account was admitted without objection. Thereafter, on cross-examination, defendant elicited testimony calculated to show that the witness was not familiar with the records about which he testified. Defendant's motion to "strike all his testimony" was denied.

Where, as here, testimony is first admitted without objection, a subsequent motion to strike the testimony is addressed to the sound discretion of the court and its ruling will not be disturbed unless an abuse of discretion has been shown. The conflicts in the witness' testimony went to his credibility for resolution by the jury.

Defendant brings forward only one exception and that one fails to show prejudicial error.

No error.

Judges BRITT and ARNOLD concur.

THOMAS A. DILLON III v. NUMISMATIC FUNDING CORPORATION

No. 7518SC949

(Filed 2 June 1976)

1. Process § 14— foreign corporation — in personam jurisdiction

Neither G.S. 55-144 nor G.S. 55-145 could be the basis for *in personam* jurisdiction over a foreign corporation in an action for breach of contract where the cause of action did not arise out of business transacted by the foreign corporation in North Carolina.

2. Constitutional Law § 24; Process § 14— foreign corporation — in personam jurisdiction — insufficient minimum contacts — due process

It would be a violation of due process to subject a foreign corporation to the *in personam* jurisdiction of the North Carolina courts in an action for breach of contract where defendant corporation has not engaged in extensive business activities in this State but has made only a few sporadic mail order sales of coins to North Carolina residents and has mailed advertisements to addresses on a rented commercial mailing list which may have contained the names of North Carolinians, and the cause of action arose in South Carolina while

plaintiff was living there and is unrelated to defendant's nominal contacts with North Carolina.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 12 September 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 March 1976.

Defendant is a New York corporation which sells valuable coins, metals, and securities to investors throughout the country. Plaintiff is presently a resident of North Carolina, but at the time this cause of action arose he was a resident of Greenville, South Carolina. In August 1974, while employed as an investment portfolio manager in Greenville, plaintiff was offered a job as "Institutional Sales Manager," at a potentially higher salary than his current job, by the executive vice-president of defendant (Mr. Corbett). Plaintiff accepted defendant's offer and, in reliance thereon, terminated his job in Greenville, cancelled his lease, and had his personal effects shipped to New York. Shortly before plaintiff left the Greenville area, Mr. Corbett informed plaintiff by phone that the position for which he had been hired was no longer available. The plaintiff proceeded to Greensboro, North Carolina, to stay with his parents and began looking for another job. While in Greensboro plaintiff received a letter dated 28 August 1974 from Mr. Corbett confirming the fact that the job previously offered was no longer available. Plaintiff spent the remainder of the year looking for a job in Greensboro. Finally in January 1975 plaintiff found work as a stockbroker at a salary substantially below his previous salary and the salary he would have earned with defendant. Thereafter plaintiff instituted an action for fraudulent breach of contract against defendant in Superior Court, Guilford County.

Pursuant to G.S. 1A-1, Rule 33, the plaintiff prepared interrogatories to uncover the extent of defendant's business activities in North Carolina during the period 1 January 1970 to 1 April 1975. Defendant's answers to these interrogatories disclose the following pertinent facts: (1) During the five-year period described above, defendant mailed informational and advertising materials to addressees obtained from a commercial mailing list which defendant rented. "Defendant was not permitted to retain a copy of such mailing lists and does not know or have any record of the names of any residents of North Carolina who may have appeared on said mailing lists and may have received the materials." (2) Defendant sold coins to twenty-

seven customers residing in North Carolina during this five-year period by mail order. (3) On one occasion during this period, an employee of defendant visited a North Carolina customer's home to appraise the coin collection of the customer's late husband. (4) In general, "defendant has not submitted proposals for the sale of coins, securities or things of value to customers or prospective customers in N. C.," except for the limited mail solicitation described in (1). Based on this information defendant moved to dismiss the action for lack of *in personam* jurisdiction. The trial court denied this motion and ruled that it was proper to assume *in personam* jurisdiction in this action.

Dameron, Turner, Enochs & Foster, by James H. Burnley IV, for the plaintiff.

Jordan, Wright, Nichols, Caffrey & Hill, by William L. Stocks, for the defendant.

BROCK, Chief Judge.

The sole question presented by this appeal is whether defendant, a foreign corporation with no office, agents, or regular business activity in North Carolina, is subject to the *in personam* jurisdiction of the North Carolina courts for purposes of a cause of action arising outside North Carolina, brought by a plaintiff who was a resident of another state at the time the action arose, and which is entirely distinct from defendant's nominal contacts with North Carolina.

[1] First, defendant contends that the plaintiff lacks adequate statutory authority upon which to base *in personam* jurisdiction. Apparently plaintiff relied upon several alternative statutory grounds for *in personam* jurisdiction: G.S. 55-144, G.S. 55-145, G.S. 1-75.4(3), and G.S. 1-75.4(1). General Statute 55-144 authorizes substituted service upon the Secretary of State in actions against foreign corporations transacting business within the State, provided the cause of action arises out of the business transacted in the State. This statute "provides no jurisdiction . . . for foreign transitory causes of action." *R. R. v. Hunt & Sons, Inc.*, 260 N.C. 717, 133 S.E. 2d 644 (1963). It is clear that the cause of action for breach of contract arose at the time defendant notified plaintiff by phone in Greenville, South Carolina, that the job previously offered to plaintiff was no longer available. A cause of action for breach of contract arises at the time the breach occurs. *See* 5 Strong, N. C. Index, Limita-

tion of Actions, § 4, p. 235. In this case the breach occurred in South Carolina. Thus, due to the fact that plaintiff's cause of action did not arise out of business transacted by defendant in North Carolina, G.S. 55-144 does not apply.

General Statute 55-145 confers *in personam* jurisdiction over foreign corporations not transacting business in North Carolina, in special instances. Like G.S. 55-144, this statute only applies to actions arising in North Carolina. *Rendering Corp. v. Engineering Corp.*, 10 N.C. App. 39, 177 S.E. 2d 907 (1970). Since plaintiff's cause of action arose outside of North Carolina, G.S. 55-145 is inapplicable.

Alternatively plaintiff posits G.S. 1-75.4(1) as an appropriate statutory basis for *in personam* jurisdiction in this case.

General Statute 1-75.4(1) is entitled "Local Presence or Status." General Statute 1-75.4(1) (d) grants *in personam* jurisdiction "in any action whether the claim arises within or without this State, in which a claim is asserted against a party who . . . *is engaged in substantial activity* within this State. . . . " (Emphasis added.) Defendant argues that its business activities within the State during the past six years do not approach the magnitude of "substantial activity" as defined by G.S. 1-75.4(1) (d). In our opinion it would serve no useful purpose to decide this case on the basis of whether defendant's activities amount to "substantial activity" within the meaning of G.S. 1-75.4(1) (d). Due process and not the language of G.S. 1-75.4(1) (d) is the ultimate test of North Carolina's "long-arm" jurisdiction over a nonresident, *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974); and it is generally accepted that North Carolina's long-arm statute (G.S. 1-75.4) should be liberally construed in favor of finding personal jurisdiction, subject of course to due process limitations. *See Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E. 2d 556 (1973). Thus we are reluctant to define and apply the meaning of "substantial activity" in G.S. 1-75.4(1) (d) apart from considerations of due process.

Defendant contends that the trial court's findings of *in personam* jurisdiction in this action constitutes a violation of its rights to due process. We agree.

The test for determining whether the assertion of *in personam* jurisdiction over a nonresident defendant satisfies due

process is well-known: "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.' " (Emphasis added.) *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations *arise out of* or are *connected with* the activities *within the state,* a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. (Citations omitted.)" (Emphasis added.) *International Shoe Co. v. Washington, Id.* The underlying concern of the "minimum contacts" test is fairness: "The essence of the issue here, at the constitutional level, is . . . one of fairness to the corporation. Appropriate tests for that are discussed in *International Shoe Co. v. Washington, supra.* . . . The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case." *Perkins v. Benguet Consol. Min. Co.,* 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413 (1952).

[2] The distinguishing facts of this case can be summarized as follows: (1) The defendant has not engaged in extensive business activities in North Carolina; rather, it has made a few sporadic mail order sales of coins to North Carolina residents; the number of North Carolina residents who received defendant's mail advertising is not evident in the record, but the fact that defendant rented a special mailing list suggests that the number was relatively small. (2) The cause of action arose in South Carolina while plaintiff was living there; it is totally unrelated to defendant's nominal contacts with North Carolina;

the only apparent reason plaintiff brought this action in North Carolina was that he had moved to this State since the cause of action arose in South Carolina; the preliminary negotiations, the execution of the contract, and the performance required by the contract had no relation to North Carolina or defendant's nominal activities in North Carolina. (3) Plaintiff was not a resident of North Carolina at the time the cause of action arose. In short, defendant's contacts with North Carolina are casual and sporadic at best, and plaintiff's cause of action against defendant bears no relation to defendant's limited activities in the State. In view of these circumstances it would violate due process to subject defendant to the *in personam* jurisdiction of our courts for this particular cause of action.

Plaintiff's reliance upon *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957), and *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F. 2d 374 (1968), is misguided.

These cases are similar to the one before us only in the paucity of the defendant's contacts with the forum state; however, the cause of action in each of the cited cases was a direct and foreseeable outgrowth of defendant's contact(s) with the forum state. Thus in both cases it was sufficient for purposes of due process that the suit was based on a contract which had substantial connection with the forum state. There is no such substantial connection between the contract or its breach and this State in the case before us. In its dealings with the plaintiff the defendant corporation in no way invoked the protection of North Carolina laws or voluntarily exposed itself to legal proceedings in this State.

In addition plaintiff relies on *Perkins v. Benguet Consol. Min. Co., supra.* Plaintiff in that case was not a resident of the state in which the suit was brought (Ohio), and defendant was a Philippine corporation; moreover, the cause of action did not arise from defendant's contacts or business activities within the forum state. But the defendant's activities in the forum state were substantial: the president, general manager, and principal stockholder of the corporation was a resident of Ohio at the time suit was instituted; from an office in his home he carried on continuous and systematic supervision and direction of the corporation's activities; he used local banks for carrying company funds and as transfer agents of its stock, conducted several

directors' meetings at the office in his home, and kept important files of the company there. Recognizing that there are instances in which the continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities, the Supreme Court concluded that the assertion of *in personam* jurisdiction over the defendant corporation would not offend due process. Obviously the defendant's contacts with North Carolina in the case before us do not approach the degree or quality of those manifest in the *Perkins* case. In essence, it would be grossly unfair to subject the defendant to the *in personam* jurisdiction of our courts in view of its limited activities within North Carolina and the absence of any connection between these activities and plaintiff's claim. Defendant's contacts with North Carolina are insufficient to satisfy due process with respect to plaintiff's cause of action against defendant.

The order of the trial court finding *in personam* jurisdiction over defendant is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Judges VAUGHN and MARTIN concur.

D-E-W FOODS CORPORATION v. TUESDAY'S OF WILMINGTON, INC., GEORGE HARRISS, J. B. GERALD, AND RAYMOND G. BARTO

No. 7510SC918

(Filed 2 June 1976)

1. **Rules of Civil Procedure § 56— genuine issues of fact — essential element of claim missing — summary judgment proper**

Even where the record discloses that there are genuine issues of fact, if the uncontroverted facts show an essential element of plaintiff's claim is non-existent, defendants are entitled to judgment as a matter of law and summary judgment is appropriate.

2. **Unfair Competition — similar restaurants — distance between restaurants — dissimilar names — no unfair competition**

In an action to enjoin defendants from operating a certain restaurant and for damages for defendants' allegedly unfair competition in the operation of the restaurant, summary judgment was properly entered for defendants where the uncontroverted facts demonstrated

that the public could not be deceived into believing that they were patronizing one of plaintiff's "Darryl's" restaurants when they ate at defendants' restaurant, "Tuesday's"; moreover, even if the defendants' restaurant was so designed both in its interior and exterior and its business operation as to resemble either one or more or all of plaintiff's restaurants, the distance of 117 miles between the defendants' restaurant and the nearest "Darryl's" restaurant coupled with the conspicuous and admittedly dissimilar name removed as a matter of law any possibility that the defendants were palming off their restaurant as one of the "Darryl's" family of restaurants.

APPEAL by plaintiff from *McKinnon, Judge.* Judgment entered 20 June 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 10 March 1976.

This is a civil action wherein the plaintiff, D-E-W Foods Corporation, seeks to enjoin the defendants, Tuesday's of Wilmington, Inc., George Harriss, J. B. Gerald, and Raymond G. Barto, from operating a certain restaurant, "Tuesday's," in Wilmington, North Carolina, and asks for damages, both compensatory and punitive, for the defendants' alleged unfair competition in the operation of the restaurant.

In its complaint, plaintiff alleges that it owns and operates several restaurants in North Carolina called "Darryl's." There are two in Raleigh, "Darryl's 1906" and "Darryl's 1849," one in Greenville, "Darryl's 1907," and one under construction in Greenbsoro. Each of the restaurants is "distinctive and unique," being specially designed and constructed in a tavern atmosphere and incorporating many unusual architectural, construction, and "design features, fixtures, and furnishings." Because of their location in metropolitan areas and near university campuses, plaintiff alleges that the restaurants serve people from all over North Carolina, including New Hanover County, that such patronage is a substantial part of the overall business of the plaintiff, and that the reputation of the restaurants is well known throughout the State. "The distinctively constructed and designed restaurant buildings and premises of the plaintiff serve to identify the restaurant business of the plaintiff and are associated in the minds of the public with the restaurant business of the plaintiff."

Plaintiff alleges further that the defendants, Harriss, Barto, and Gerald, caused to be organized Tuesday's of Wilmington, Inc., for the purpose of carrying on a restaurant business. In the fall of 1973, they opened a restaurant called "Tuesday's" in Wilmington.

"In the construction of the restaurant building in Wilmington, North Carolina, the defendants deliberately copied and imitated the architectural, construction and design features, including fixtures and furnishings, of the restaurants of the plaintiff in Raleigh and Greenville, North Carolina, so that the restaurant of the defendant in Wilmington is virtually identical in appearance, decor and design, both exterior and interior, to the restaurants of the plaintiff.

The defendants serve in their restaurant similar food and beverage items, which are described in their menu in a similar manner, to those served in the restaurants of the plaintiff, and the overall operations of the restaurant of the defendants are imitative and patterned after the restaurant operations of the plaintiff."

The acts of the defendants in copying and imitating the restaurant design and operation of the plaintiff's restaurants are alleged to be deliberate and with the intent to deceive and defraud the public so as to confuse the public as to the distinction between the restaurant of the defendants and the plaintiff's restaurants and to induce people "to visit, recommend and refer to the restaurant of the defendants when they intended to visit, recommend and refer to the restaurants of the plaintiff." By causing such confusion, the defendants "are unfairly trading upon and appropriating" the reputation, good will, and business of the plaintiff.

Defendants, in their answer, admit that Tuesday's of Wilmington, Inc., did build and operate the restaurant, "Tuesday's," in Wilmington but deny all other material allegations in the complaint.

After the completion of discovery, the defendants moved for summary judgment. In support of their motion, they submitted affidavits, exhibits, depositions, and answers to interrogatories, which show that there are substantial differences in the exterior design of the "Darryl's" restaurants, and that there are differences in the interior size and design and arrangement of fixtures and decorations of the "Darryl's" restaurants. "Tuesday's" restaurant is dissimilar in several respects from the "Darryl's" restaurants in its size, interior design, and location and nature of fixtures and decorations. It is substantially dissimilar in exterior design to all but the "Darryl's 1849" res-

taurant in Raleigh. "Tuesday's" restaurant is conspicuously labeled as such across the front of the building and on a stagecoach placed in front of the building, and the name "Tuesday's" in itself is not confusingly similar to the name "Darryl's." The name appears on the menus, placemats, beer mugs and matchbooks inside "Tuesday's." "Tuesday's" is 117 miles from the nearest "Darryl's" in Greenville.

Through affidavits, depositions, exhibits, requests for admissions and interrogatories, the plaintiff offers evidence to show that there are numerous common features of interior design and decoration throughout all the "Darryl's" restaurants. "Tuesday's" restaurant utilizes many of these common features of "Darryl's" in its own interior design. There is substantial similarity in the exterior design of "Darryl's 1849" and "Tuesday's." The sign "Tuesday's" on the front of defendants' building is substantially the same in lettering and placement as is the sign on "Darryl's 1849." Plaintiff's evidence further shows that the officers in the defendant corporation had an opportunity, prior to construction of the "Tuesday's" building, to observe the exterior and interior of several "Darryl's" restaurants. Pictures had been taken of the interior of "Darryl's 1906" restaurant and the exterior of "Darryl's 1849" in Raleigh, which were used in designing portions of "Tuesday's."

After considering the evidence, the court entered summary judgment for the defendants. Plaintiff appealed.

Allen, Steed and Pullen by Thomas W. Steed, Jr., and D. James Jones, Jr., for plaintiff appellant.

Mills and Coats by Larry L. Coats and Marshall, Williams, Gorham and Brawley by Lonnie B. Williams and Daniel Lee Brawley for defendant appellees.

HEDRICK, Judge.

Plaintiff assigns as error the entry of summary judgment for defendants. It contends the record raises genuine issues of material fact.

[1] Even where the record discloses that there are genuine issues of fact, if the uncontroverted facts show an essential element of plaintiff's claim is non-existent, defendants are entitled to judgment as a matter of law and summary judgment is appropriate. *Zimmerman v. Hogg and Allen,* 286 N.C. 24, 209

S.E. 2d 795 (1974). While the record before us discloses that there are issues of fact as to the degree of similarity between the restaurants of plaintiff and defendants, and as to whether defendants have copied the restaurant design of the plaintiff, the following facts are not in controversy:

1. Plaintiff admits that the name "Tuesday's" is not "in and of itself confusingly similar" to the name "Darryl's," and the name "Tuesday's" is conspicuously and extensively used in connection with defendants' restaurant services.

2. Plaintiff's four "Darryl's" restaurants are not of a common size or design relative to each other and are not even substantially similar in exterior design.

3. "Tuesday's" is in Wilmington, 117 miles from the nearest "Darryl's" restaurant in Greenville.

Plaintiff's action for an injunction and damages from the defendants is based on the theory that defendants have attempted to "palm off" or "pass off" their "Tuesday's" restaurant to the public as being owned by or identified with the "Darryl's" family of restaurants. "The underlying principle, which is the foundation of . . . relief in this class of cases, is that one trader shall not compete with another for public patronage by adopting intentionally means adapted to deceive the public into thinking that it is trading with the latter when in fact dealing with the former, and thus palming off his goods as those of another." *Summerfield Co. v. Prime Furniture Co.*, 242 Mass. 149, 155, 136 N.E. 396, 398 (1922). *Accord, Steak House v. Staley*, 263 N.C. 199, 139 S.E. 2d 185 (1964); *Cab Co. v. Creasman*, 185 N.C. 551, 117 S.E. 787 (1923). Plaintiff is entitled to protection "to prevent reasonably intelligent and careful persons from being misled" as to the *source* of the business which defendant operates. *Steak House v. Staley, supra. See also, Sears Roebuck and Co. v. Stiffel Co.*, 376 U.S. 225, 11 L.Ed. 2d 661, 84 S.Ct. 784 (1964); *Compco. Corp. v. Day-Brite Lighting*, 376 U.S. 234, 11 L.Ed. 2d 669, 84 S.Ct. 779 (1964); *Beconta, Inc. v. Larson Industries, Inc.*, 330 F. Supp. 116 (N.D. Ill. 1971).

[2] The uncontroverted facts disclosed here demonstrate that the public could not be deceived into believing that they were patronizing one of "Darryl's" restaurants when they ate at "Tuesday's." Even if the defendants' restaurant is so designed

both in its interior and exterior and its business operation as to resemble either one or more or all of plaintiff's restaurants, we are of the opinion that the distance between the defendants' restaurant and the nearest "Darryl's" restaurant, *Allen's Products Company v. Glover*, 18 Utah 2d 9, 414 P. 2d 93 (1966), coupled with the conspicuous and admittedly dissimilar name, *Steak House v. Staley, supra*, removes as a matter of law any possibility that the defendants are palming off their restaurant as one of the "Darryl's" family of restaurants. Accordingly, the motion for summary judgment was properly granted.

Plaintiff has brought forth one other assignment of error relating to the judge's discretionary rulings made after the granting of summary judgment for the defendants on plaintiff's motions for leave to add additional parties defendant, to amend the complaint, to file supplemental pleadings and to extend discovery. This assignment of error has no merit.

Summary judgment for defendants is affirmed.

Affirmed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHNNY BLUE McKENZIE

No. 7620SC18

(Filed 2 June 1976)

1. **Automobiles § 113— striking bicyclist — involuntary manslaughter**

The State's evidence was sufficient for the jury on the issue of defendant's guilt of involuntary manslaughter in the death of a bicyclist where it would support inferences that defendant was operating his automobile while under the influence of an intoxicating beverage in violation of G.S. 20-138, that he was operating his automobile at an excessive and unlawful rate of speed in a careless and heedless manner without due caution and circumspection in violation of G.S. 20-140, and that the violation of those statutes was one of the proximate causes of the collision between the automobile operated by defendant and the bicycle ridden by deceased.

2. **Automobiles § 114— acquittal of driving under influence — manslaughter prosecution based on driving under influence**

Although defendant was acquitted in the district court of the offense of driving under the influence in violation of G.S. 20-138(a)

and was convicted only of the lesser offense of operating a motor vehicle with a blood alcohol content of .10 percent in violation of G.S. 20-138(b), the trial court in a prosecution for involuntary manslaughter arising out of the same occurrence did not err in instructing the jury that a violation of G.S. 20-138(a) could be a basis for a jury finding of defendant's guilt of involuntary manslaughter where there was evidence in the manslaughter trial that defendant was operating his vehicle at the time of the collision with deceased while he was under the influence of intoxicants.

Judge CLARK dissenting.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 5 November 1975 in Superior Court, MOORE County. Heard in the Court of Appeals 15 April 1975.

The defendant, Johnny Blue McKenzie, was charged in a bill of indictment, proper in form, with involuntary manslaughter in the death of John Robert Chriscoe, Jr., arising out of an automobile accident on 11 July 1975. He was also charged in a warrant, proper in form, with operating a motor vehicle on the public highway while under the influence of intoxicating liquor, a violation of G.S. 20-138(a). However, in the district court, he was found guilty of operating a motor vehicle with a blood alcohol content of .10 percent, a violation of G.S. 20-138(b). He appealed the latter case to the superior court. In the superior court, he pleaded not guilty, both to the charge of involuntary manslaughter and to the charge of operating a motor vehicle with a blood alcohol content of .10 percent. The jury found him guilty of both charges. From judgment imposing a prison sentence of three to five years, defendant appealed.

Attorney General Edmisten by Associate Attorney Jesse C. Brake for the State.

Dock G. Smith, Jr., for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the denial of his motions for judgment as of nonsuit as to the charge of involuntary manslaughter. Evidence for the State tends to show the following:

The defendant was driving north along State Road No. 1209 at about 9:45 p.m., 11 July 1975, when he struck and killed the deceased who had been riding his bicycle, also going north, on the right side of the road. The road approaching from the

south curves uphill and then is straight for one-tenth of a mile to the point where the accident occurred. It is a two-lane paved road, 19 feet in width, with a 13-foot shoulder. The night was clear, but the road was unlighted.

Lloyd Chriscoe, whose home fronts State Road 1209 where the accident occurred, testified that he heard the accident. He went outside where he found the body of the deceased, his nephew, just on the pavement on the left-hand side of the road. The defendant's car was stopped 500 to 580 feet north of the body.

Patrolman J. W. Smith investigated the accident. He testified that the right front headlight and windshield were broken on defendant's car. Glass and debris were on the highway near the Lloyd Chriscoe home. Bloodstains were on the highway 231 feet north of the Lloyd Chriscoe home, and the bicycle was 562 feet north of the Chriscoe home. There were 66 feet of skid marks and then "gouge marks" the remainder of the distance on the highway to the point where the bicycle allegedly came to rest. The marks indicated a pattern of travel from right to left across the highway and then back across to the right.

Wanda Ritter testified that she was in the Chriscoe home sitting in the living room when she saw the deceased pass by on his bicycle. She saw the rear reflector on the bicycle and car lights shining on the back of the bicycle. About fifteen seconds later, she "heard a noise and saw sparks going up and down the road."

At the scene, the defendant told Patrolman Smith that he had been in Pinehurst and had consumed four or five beers. The defendant said he had not seen the deceased on his bicycle because "he was meeting two vehicles at the time and the headlights on these two vehicles had his attention." The defendant stated that when he hit the deceased "he was traveling not more than 5 to 10 miles of the speed limit."

When Smith arrived at the scene, the defendant was leaning against his vehicle and had an odor of alcohol on his breath. In Smith's opinion, the defendant was "under the influence of intoxicating liquor when first observed" on the highway. When Lloyd Chriscoe observed the defendant at the scene, he noticed also that the defendant was unsteady on his feet and had alcohol on his breath.

The defendant voluntarily took the breathalyzer test, the result showing .10 percent blood alcohol. Trooper Myron Gay, who administered the test, noticed the defendant was unsteady on his feet and crying and in his opinion was under the influence of alcohol.

Defendant offered the testimony of three witnesses who observed him at the accident, at the hospital, and later at the jail on the night of 11 July. All three described the defendant as being steady on his feet and talking clearly. They described him as being emotionally upset by the accident, but they could understand everything that he said to them.

Stacy Ritter, one of the three witnesses, said he talked with the defendant at the scene. The defendant told him that he did not see the bicycle until he passed the two approaching vehicles. "[H]e saw a speck and whipped his car to the left, but just couldn't miss whatever it was."

The defendant also testified. He said he was traveling about 55 to 56 m.p.h. at the time and because of the headlights from the approaching cars did not see deceased until he was only "4, 5, or 6 feet" from him. While he admitted consuming four beers earlier in the evening, he denied that they had affected the way he walked, talked, or drove.

[1] By the defendant, we are cited to *State v. Tingen*, 247 N.C. 384, 100 S.E. 2d 874 (1957), in support of his contention that the evidence here falls short of raising an inference that defendant's culpable negligence in the operation of his automobile caused the death of John Chriscoe. We do not agree. In our opinion, *Tingen* is distinguishable. There, although the defendant was operating his automobile while under the influence of intoxicating beverage, the court held that the evidence was not sufficient to raise an inference that defendant's driving under the influence was one of the proximate causes of the collision between defendant's automobile and the deceased. In the present case, the evidence is not only sufficient to raise inference that the defendant was operating his automobile while under the influence of an intoxicating beverage in violation of G.S. 20-138, and that he was operating his automobile at an excessive speed and an unlawful rate of speed in a careless and heedless manner without due caution and circumspection, in violation of G.S. 20-140, it is also sufficient to raise an inference that the violation of these statutes was one of the proximate causes of the

collision between the automobile operated by the defendant and the bicycle deceased was riding. This assignment of error is not sustained.

[2] Defendant next contends the court erred in its instructions to the jury with respect to the charge of involuntary manslaughter. Defendant argues that since he had been acquitted of the charge of driving under the influence and since there was no evidence offered at his trial in the superior court that he was driving while under the influence of an intoxicating beverage, the court erred in instructing the jury that a violation of G.S. 20-138(a) could be a basis of the jury's finding the defendant guilty of involuntary manslaughter. We do not agree. Suffice it to say, the record of defendant's trial in the superior court is replete with evidence tending to show that the defendant was under the influence of an intoxicating beverage when the automobile he was driving struck the bicycle operated by the deceased.

In our opinion, the acquittal of the defendant in the district court of the offense of driving under the influence in violation of G.S. 20-138(a) did not preclude the prosecution of the defendant of involuntary manslaughter for a death arising out of the same occurrence. *State v. Sawyer,* 11 N.C. App. 81, 180 S.E. 2d 387 (1971); *State v. Mundy,* 243 N.C. 149, 90 S.E. 2d 312 (1955); *State v. Midgette,* 214 N.C. 107, 198 S.E. 613 (1938). Thus, we hold that the court did not err in instructing with respect to the defendant's violation of G.S. 20-138(a) where there was evidence at trial on the manslaughter charge that the defendant was operating the motor vehicle at the time of the collision with the deceased while he was under the influence of an intoxicating beverage. This exception is not sustained.

We have carefully examined defendant's other exceptions and find them to be without merit. We hold the defendant had a fair trial free from prejudicial error as to the charges of involuntary manslaughter and operating a motor vehicle with a blood alcohol content of .10 percent.

No error.

Chief Judge BROCK concurs.

Judge CLARK dissenting.

I agree that the acquittal of the defendant in the District Court on the charge of violating G.S. 20-138(a) did not preclude his prosecution on the charge of involuntary manslaughter which arose out of the same transaction.

But I do not agree that in the trial on the charge of involuntary manslaughter the court could then use the violation of G.S. 20-138(a) as the basis for the conviction of the defendant of involuntary manslaughter and to so instruct the jury. This is contrary to the basic principle underlying double jeopardy, res judicata, and collateral estoppel.

In *State v. Heitter*, (Del. Sup. 1964), 203 A. 2d, 69, 9 A.L.R. 3d 195, the court held that the defendant's acquittal by a justice of the peace of two statutory misdemeanors of reckless driving and driving while intoxicated was res judicata to a prosecution for manslaughter by a motor vehicle arising out of the same transaction as the two statutory misdemeanors, but that a manslaughter prosecution under the counts of the indictment charging the defendant with driving at an excessive and unsafe speed was not barred under the constitutional prohibition of double jeopardy.

In the present case it is my opinion that the court could have properly used the violation of G.S. 20-138(b) or other statutes as the basis for conviction of involuntary manslaughter, but not G.S. 20-138(a) for which he was acquitted.

STATE OF NORTH CAROLINA v. BEAMON FOWLER

No. 7618SC55

(Filed 2 June 1976)

1. Criminal Law § 43— photograph of misdemeanant

A photograph taken of defendant when he was arrested on an unrelated misdemeanor charge was not illegal.

2. Criminal Law § 66— in-court identification of defendant — no improper pretrial photographic identification

A robbery and assault victim's out-of-court photographic identification of defendant was not inherently suggestive where the evidence tended to show that the victim was robbed on two occasions two weeks apart, after the first robbery the victim selected photographs of three

suspects, one of which was defendant, following the second robbery defendant was arrested on an unrelated misdemeanor charge and photographed, the recent picture of defendant along with seven others, but not including the other two suspects selected after the first robbery, were exhibited to the victim, and the victim selected defendant's photograph as that of her assailant.

3. **Criminal Law § 66— second in-court identification of defendant — necessity for second voir dire**

It was not error for the trial court to allow a second witness to identify defendant without conducting a *voir dire* and to allow an officer to testify regarding identification of defendant's photograph by the witness, since the court had already conducted a *voir dire* with respect to the procedure used in the selection of the photographs and since the officer's testimony was allowed solely for the purpose of corroboration.

4. **Criminal Law § 86— evidence of prior convictions — representation by counsel in prior trials — time for making determination**

Defendant was not prejudiced where the trial court admitted evidence of defendant's prior convictions without first making a determination that defendant was represented by counsel when he was convicted of the prior offenses, since the court made such a determination after the evidence was allowed.

5. **Criminal Law § 62— polygraph test — results inadmissible for corroboration**

Results of a polygraph test are inadmissible when offered to prove the guilt or innocence of defendant and when offered for the limited purpose of corroboration.

ON *certiorari* to review proceedings before *McConnell, Judge.* Judgment entered 9 May 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 May 1976.

Defendant was tried on indictments for crime against nature, assault with intent to commit rape, and two counts of armed robbery. The State presented evidence at trial tending to show that the defendant robbed an employee of Flash Market Number 1, in High Point. Susan Davis testified that on 12 December 1974 the defendant entered the Flash Market while she was working at the cash register and pointed a pistol at her and robbed her. She further stated that after defendant took the money he forced her to lie down and take off her pants. Defendant pinched her private parts before leaving, and said, "Thanks, baby, it's been fun."

Susan Davis testified that again on 26 December 1974 defendant entered the Flash Market while she was at work. Defendant forced her into a bathroom at the market and forced her to have oral sex after unsuccessfully attempting sexual in-

tercourse with her. Davis testified that she did not see a gun but that defendant placed a cold heavy object against her temple during the forced oral sex.

A voir dire was held during Susan Davis' testimony. Evidence was presented showing that following the 12 December robbery Susan Davis described the robber and selected photographs of three suspects, one of which was of the defendant. An investigation following the 26 December robbery led to the apprehension of defendant. Recent photographs were made of defendant when he was arrested for an unrelated misdemeanor, and a recent photograph of defendant, along with photographs of several other suspects, was exhibited to Susan Davis. She identified defendant. The trial court made findings that there were no illegal identification procedures, and that the in-court identification was of independent origin.

Iris Boyd, a thirteen year old customer at the Flash Market on 26 December, testified that she saw the defendant come out of the back room of the Market and take the money out of the cash register. Miss Boyd further stated that she saw Susan Davis come out of the back room crying. Miss Boyd's father, Robert Boyd, also testified that he saw a man come out of the back room, but he could not identify the man.

The State presented Phyllis Sipley, an employee of the Flash Market, who testified that she ran inventories of the Market's cash register on 12 December and 26 December and discovered shortages of $65.57 and $102.77 respectively.

Defendant presented evidence of alibi. He stated that on 12 December he was at a turkey shoot and that on 26 December he visited Triangle Billiards, Odell's service station, and the El Conquistadore. Defendant testified that he did not go to the Flash Market on either the 12th or 26th of December.

The jury found defendant guilty as charged of the 12 December armed robbery, and guilty of common law robbery on 26 December 1974. He was found guilty of assault with intent to commit rape, and crime against nature. Defendant appealed from the judgment imposing a prison sentence.

Attorney General Edmisten, by Special Deputy Attorney General James L. Blackburn, for the State.

Thomas F. Kastner, Assistant Public Defender, Eighteenth Judicial District, for the defendant.

ARNOLD, Judge.

[2] After the first robbery on 12 December 1974 Susan Davis selected photographs of three suspects. One of the photographs was of defendant. Following the second robbery on 26 December defendant was arrested on an unrelated misdemeanor charge, and he was photographed at this time. The recent picture of defendant, along with seven others, but not including the other two suspects selected after the first robbery, were exhibited to Davis. She selected defendant's photograph.

Defendant argues that the photographic identification was inherently suggestive and tainted the in-court identification since only one of the three photographs previously selected was included, and because the recent photograph of defendant was taken illegally. We disagree.

[1] There is no basis for defendant's contention that the photograph taken of him while he was under arrest for a misdemeanor was illegal. This Court, in *State v. Strickland,* 5 N.C. App. 338, 168 S.E. 2d 697 (1969), reversed on other grounds 276 N.C. 253, 173 S.E. 2d 129 (1970), held that G.S. 114-19, relied upon by defendant in his argument, did not prohibit the use in evidence of photographs made of a defendant charged with a misdemeanor. [In 1973 the General Assembly deleted the first two paragraphs of G.S. 114-19, including the provision relied upon by defendant which relates to photographing misdemeanants, but the same was in effect at the time these crimes occurred.] Strickland, *supra* at 341, held that G.S. 114-19 has no application to the taking and use in evidence of photographs of a defendant charged with a misdemeanor.

[2] Following the evidence presented on voir dire the trial court concluded that there were no illegal identification procedures. The court found that the witness had ample opportunity to observe defendant, and that the in-court identification was of independent origin, and based entirely on what the witness saw during the alleged crimes in the Flash Market. The court's findings and conclusions are fully supported by the record. *See State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206 (1971); *State v. McDonald,* 11 N.C. App. 497, 181 S.E. 2d 744 (1971).

[3] There is also no merit in defendant's contention that the court erred in allowing Iris Boyd to identify defendant without

conducting a voir dire, and in allowing Officer Kelly to testify regarding identification of defendant's photograph by Miss Boyd. A voir dire was held concerning the propriety of the pretrial identification procedure during Susan Davis' testimony. The court properly held that the procedure used in the selection of the photographs was not unduly suggestive or conducive to mistaken identification. The evidence from the record clearly indicates that the same eight photographs shown to Davis were shown to Miss Boyd, and that the same procedure was used in exhibiting the photographs to both witnesses. It was not necessary to conduct a second voir dire to determine the propriety of the pretrial photographic procedure. *See State v. Shutt, supra.*

Officer Kelly's testimony that he showed the photographs to Miss Boyd, and that she selected defendant's photograph, was allowed solely to corroborate the testimony of Miss Boyd.

[4] The district attorney cross-examined defendant with respect to defendant's prior convictions. Defendant asserts that the trial court erred in admitting evidence of defendant's prior convictions without first determining whether defendant was represented by counsel when he was convicted of the prior offenses. He cites *Loper v. Beto,* 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed. 2d 374 (1972), and argues the principle that the use of prior convictions, constitutionally invalid because of a denial of counsel, to impeach the accused's credibility as a witness deprives the accused of due process.

While the trial court did not determine whether defendant's prior convictions were valid and admissible before the testimony was received into evidence, he did, upon hearing the testimony regarding prior convictions, dismiss the jury and proceed to determine whether defendant had been represented by counsel. The court properly determined that at all of defendant's prior convictions he either had benefit of counsel or had waived his right to counsel. The determination by the court that the defendant's prior convictions were constitutionally valid with respect to having benefit of counsel might better have been made before the evidence was allowed. However, any defect was rendered harmless by the ultimate determinations made by the court.

Defendant offered the testimony of R. L. Tuttle that he, Tuttle, administered a polygraph test to defendant, and that no deception was indicated when defendant denied any connection with the robberies. The results of the test were not allowed

into evidence. Defendant moved that the testimony be admitted to corroborate his testimony, and he contends that the court erred in refusing to allow the testimony for the limited purpose of corroboration.

[5] It is established in North Carolina that results of polygraph tests are inadmissible when offered to prove the guilt or innocence of the defendant. *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169 (1961); *State v. Pope,* 24 N.C. App. 217, 210 S.E. 2d 267 (1974). We see no logic that compels us to admit the results of a polygraph, when offered to prove guilt or innocence of defendant, merely because they are offered for the limited purpose of corroboration.

Defendant's remaining assignments of error have been reviewed and found to be without merit. It is our view that defendant had a fair trial without prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JEROME ALLEN JOHNSON, ELARK MILTON FREDERICK, AND CHARLES EDWARD GOODS

No. 756SC849

(Filed 2 June 1976)

1. **Constitutional Law § 31; Criminal Law §§ 79, 95— statements of nontestifying defendants implicating codefendants — harmless error**

   The erroneous admission of the extrajudicial statements of three nontestifying defendants which implicated each other as well as the fourth defendant was harmless beyond a reasonable doubt since any incrimination of any of the defendants attributed to the statements of their codefendants was of insignificant probative value in relation to the competent and admitted evidence against all of them.

2. **Searches and Seizures § 1— warrantless search of car after removal to sheriff's office**

   Officers lawfully conducted a warrantless search of the car in which defendants were riding after removing it to the sheriff's office where they had reasonable grounds to believe that defendants had committed a robbery and that the car contained evidence pertaining

to the crime, and a box of stolen shotgun shells found in the car was properly admitted in defendants' trial for common law robbery.

APPEAL by defendants from *Tillery, Judge.* Judgment entered 3 May 1975 in Superior Court, HALIFAX County. Heard in the Court of Appeals 12 February 1976.

Defendants were charged in separate bills of indictment with the felony of common law robbery. The defendants entered pleas of not guilty and the State offered evidence tending to establish the following:

On 10 February 1975 James Clifton Willey and Mrs. Alice Mabel Willey were operating a small grocery store at Route 3, Enfield, North Carolina. Around three or four o'clock in the afternoon, two males came in the store and one asked for a package of Kool cigarettes. Mrs. Willey handed him the cigarettes whereupon he started hitting her with his fist until she fell to the floor. He then beat her husband, knocking him out of his wheel chair onto the floor. Mrs. Willey was knocked down and beaten a second time. They removed the money from the cash register and left the store. Mrs. Willey then went to the door in order to obtain aid and saw four males leaving in a white Ford. A box of gun shells, about sixty or seventy dollars, and Mrs. Willey's wristwatch were missing from the store after their departure.

Mrs. Willey identified Jerome Johnson as the person who beat her and took money from the register. She identified the box of gun shells as those which were removed from the store. The State's evidence further tended to show that Deputy Sheriff Charles William Wells took Charles Edward Goods, Elark Milton Frederick and Jerome Allen Johnson into custody after seeing them in a 1965 white Ford at the intersection of I-95 and N. C. 561. He took them to Halifax Memorial Hospital in the back seat of his patrol car where they remained seated until Jerome Johnson was called out of the car and interviewed by Deputy E. C. Warren. Winston Harper and Elark Frederick admitted their participation in the robbery.

Defendants offered no evidence.

The jury returned a verdict of guilty of common law robbery as to each defendant. From a judgment of imprisonment the defendants Johnson, Frederick, and Goods appealed.

Attorney General Edmisten, by Zoro J. Guice, Jr., Assistant Attorney General, for the State.

W. Lunsford Crew, for defendant Goods.

Arba S. Godwin, Jr., for defendant Johnson.

Nicholas Long, for defendant Frederick.

MARTIN, Judge.

Preliminary to consideration of the specific questions presented by the three appellants, we note the following: that some of the evidence at trial and in the record before us relates to a co-defendant who is not a party to this appeal; that the defendants were also charged with conspiring to commit common law robbery which was dismissed at the close of the State's evidence; and that no objection was made by Johnson or on his behalf at trial to the consolidation of the cases for trial.

Defendants Frederick and Goods contend the court erred by consolidating for trial the charges in the several indictments.

Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense(s). The judge in his discretion is authorized to order cases consolidated for trial when the offenses charged are of the same class, relate to the same crime, and are so connected in time and place that most of the evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972).

Whether the evidence presented at trial prejudiced defendants to such an extent that the failure to order separate trials constituted a denial of due process of law will be discussed together with the assignment of error made by each defendant in which they contend the admission of evidence of statements of one defendant tended to incriminate other defendants and thereby violated their rights to confrontation as guaranteed by the Constitution of the United States.

Under *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476, it is a clear violation of a defendant's constitutional rights in a joint trial to offer the confession of a co-defendant who does not testify where the confession incrimi-

nates and implicates the defendant not making the statement. In this instance, the defendant who is incriminated and implicated by the statement has been denied his Sixth Amendment right to confront and cross-examine the co-defendant making the statement.

Bruton was interpreted and applied in North Carolina by our Supreme Court in *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). In *Fox*, Sharp, J. (now C.J.) said:

> "The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra* [250 N.C. 113, 108 S.E. 2d 128 (1959)]), and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation."

Applying that rule to the facts here, we hold that it was error to admit those portions of Johnson's statements which might have implicated the defendants Goods and Frederick, and those portions of defendant Harper's statements which might have implicated defendants Goods, Johnson, and Frederick, and those portions of defendant Frederick's statements which might have implicated defendants Goods and Johnson. However, not all federal constitutional errors are prejudicial.

In *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970), Justice Huskins states the test for harmless error as follows:

> "Some constitutional errors in the setting of a particular case 'are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. . . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' (Citation omitted.). In deciding what constituted harmless error in *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229

(1963), the Court said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' "

[1] Applying the foregoing standard to the facts in this case, we hold that the admission of those portions of Frederick's, Johnson's, and Harper's statements which implicated each other as well as defendant Goods was harmless error beyond a reasonable doubt. Any incrimination of any of the defendants attributed to the statements of their co-defendant was of insignificant probative value in relation to the competent and admitted evidence against all of them. This is so although most of the evidence against the defendant Goods is circumstantial. Accordingly, this assignment of error is overruled.

[2] By their assignment of error number eleven, all three defendants contend that the warrantless search of the automobile in which they were riding when taken into custody was illegal. Hence, they argue, the trial court erred in admitting evidence, over their objection and motion to suppress, concerning the shotgun shells seized from the vehicle.

> "Evidence obtained by unreasonable search is inadmissible in both Federal and State courts. (Citation omitted.) It is equally well settled that the constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. (Citation omitted.) Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. (Citations omitted.)" *State v. Simmons,* 278 N.C. 468, 471, 180 S.E. 2d 97 (1971).

"If there is probable cause to search an automobile, the officer may either seize and hold the vehicle before presenting the probable cause issue to a magistrate, or he may carry out an immediate search without a warrant. 'For constitutional purposes we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to

a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search either course is reasonable under the Fourth Amendment.' (Citation omitted)." *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972).

In *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1972), the North Carolina Supreme Court listed the exceptions to the general rule that a valid search warrant must accompany every search and seizure. These are: (1) a warrantless search and seizure may be made when it is incident to a valid arrest, (2) evidence obtained by officers without a search warrant is admissible in evidence where the articles are seized in plain view without necessity of search, and (3) a warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant.

In the present case, the totality of the circumstances gave the officers reasonable grounds to believe that defendants had committed a crime and that the automobile in which they were riding contained evidence pertaining to the crime. Probable cause to search existed at the time of the arrest and continued to exist when the automobile was searched at the Sheriff's office. We think the action of the officers in removing the car and searching it at the Sheriff's office was reasonable. The exigent circumstances presented a "fleeting opportunity" which made it impracticable to obtain a search warrant. The trial judge correctly admitted evidence concerning the shotgun shells found pursuant to the search conducted at the Sheriff's office.

By the error assigned and based on exception no. 24, the defendants Frederick and Goods contend that the court committed error in its charge by repeating parts of statements of defendants which are not admissible against other defendants. By these assignments of error, the defendants are attempting to except to a part of the court's charge. Such exceptions are ineffective in this case since an assignment of error must be based on an exception duly noted, and the record does not show the portion of the charge to which the defendants are excepting. *State v. Hitchcock*, 4 N.C. App. 676, 167 S.E. 2d 545 (1969). Furthermore, these assignments of error have been thoroughly discussed under other assignments and will not be repeated here.

Defendants' remaining assignments of error are without merit and are overruled.

The three defendants were accorded a fair and impartial trial free of prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

NANCY H. SIDERS v. LARRY WAYNE GIBBS

No. 7614SC26

(Filed 2 June 1976)

1. **Rules of Civil Procedure § 56— affidavit verifying answer — time for filing**

The trial court did not err in considering defendant's affidavit verifying his answer, though it was filed on the date of the summary judgment hearing, since plaintiff was not unfairly surprised, as the affidavit merely verified defendant's previously filed answer and added no new matters to the case.

2. **Automobiles § 109— non-driving owner — driver's negligence imputed to owner**

Since generally an owner has the right to control and direct the operation of his vehicle, when the owner is an occupant of an automobile being operated by another with his permission or at his request, nothing else appearing, the operator's negligence is imputable to the owner.

3. **Automobiles § 109— non-driving owner — driver's negligence imputed to owner — failure of owner to rebut presumption — summary judgment proper**

In an action to recover for personal injuries sustained by plaintiff while she was a passenger in a vehicle driven by defendant Young which collided with an automobile driven by defendant Gibbs, defendant Gibbs established by verified answer and other matter dehors the pleading that the plaintiff was the owner-occupant of the car operated by Young, but plaintiff did not by affidavits or otherwise respond to show that she had relinquished the right to control the car or to show anything else tending to negate the presumption that she controlled or directed the operator; therefore, the alleged negligence of Young was imputed to plaintiff, and summary judgment was properly granted for defendant Gibbs.

APPEAL by plaintiff from *Hall, Judge.* Judgment entered 11 December 1974, Superior Court, DURHAM County. Heard in the Court of Appeals 15 April 1976.

In this action to recover for personal injuries, plaintiff alleged that she was injured on 7 April 1974 when she was a passenger in an automobile driven by defendant Young that collided with an automobile driven by defendant Gibbs.

Both defendants denied negligence and alleged contributory negligence by plaintiff. Defendant Gibbs further alleged that plaintiff was the owner of the car driven by defendant Young, and that his negligence was imputed to her. Defendant Young cross-claimed against defendant Gibbs for contribution, for indemnity, and for damages for personal injuries.

Defendant Gibbs moved for summary judgment, supporting his motion with an affidavit verifying his answer and with a certificate of title showing that plaintiff was the owner of the Chevrolet vehicle operated by defendant Young. Plaintiff submitted no materials in opposition to the motion.

The trial court granted defendant Gibbs' motion for summary judgment. Plaintiff appealed, but this Court in *Siders v. Gibbs*, 26 N.C. App. 333, 215 S.E. 2d 813 (1975), dismissed the appeal under G.S. 1A-1, Rule 54(b) on the ground that the judgment disposed of fewer than all the claims without a finding that there was "no just reason for delay." Subsequently, plaintiff dismissed her action against defendant Young, defendant Young dismissed his remaining cross-claim against Gibbs without prejudice, and plaintiff again appealed from the summary judgment for defendant Gibbs.

Clayton, Myrick, McCain & Oettinger by Grover C. McCain, Jr., for plaintiff appellant.

Haywood, Denny & Miller by George W. Miller, Jr., for defendant appellee.

CLARK, Judge.

[1] Plaintiff contends that the trial court erred in considering defendant Gibbs' affidavit verifying his answer since it was filed on the date of the summary judgment hearing, and this Court ruled in *Insurance Co. v. Chantos*, 21 N.C. App. 129, 203 S.E. 2d 421 (1974), that affidavits in support of summary judgment must be filed before the date of hearing. The purpose of the *Chantos* ruling is to prevent unfair surprise. There is no question of unfair surprise in this case since the affidavit merely verified defendant Gibbs' previously filed answer and added no new matters to the case. Further, in plaintiff's former

appeal, she stipulated that she was the owner of the automobile driven by Young.

The verified answer, certificate of title, and stipulation in the former appeal established that there is no genuine issue of fact as to plaintiff's ownership of the car driven by Young. There remains the question of whether the alleged negligence of operator Young is, nothing else appearing, imputed to the plaintiff who was the owner of and occupant in the automobile at the time of the alleged collision and her resulting injury.

[2] The liability of the owner-occupant does not rest upon the doctrine of respondeat superior but arises from the fact that the owner knowingly permits or directs the negligent operation of his car by another. Since generally the owner has the right to control and direct the operation of his vehicle, when the owner is an occupant of an automobile being operated by another with his permission or at his request, nothing else appearing, the operator's negligence is imputable to the owner. *Randall v. Rogers,* 262 N.C. 544, 138 S.E. 2d 248 (1964); *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543 (1960).

The foregoing rule of law is in effect only an evidentiary presumption or inference that the owner-occupant knowingly permits or directs the negligent operation of his car by another. But it does not necessarily follow as a matter of law that the negligence of the operator would be imputed to the owner-occupant. In *Green v. Tile Co.,* 263 N.C. 503, 139 S.E. 2d 538 (1965), the Court held that defendant's demurrer to complaint, which alleged that plaintiff was the owner of the car negligently operated by another, could not be sustained since the allegation that plaintiff was a passenger would permit her to show that she had relinquished the right to control to the operator.

The demurrer to the complaint under the applicable rules when *Green, supra,* was decided has since been abolished. As a substitute under the Rules of Civil Procedure, there may be used a motion for judgment on the pleadings under Rule 12(c), and motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). The ruling in *Green, supra,* would apply now to both of these motions if it appeared from the pleadings only that the plaintiff was the owner-occupant of the vehicle negligently operated by another.

But in the present case we have a motion for summary judgment under Rule 56, where a party is permitted to go be-

hind and beyond the pleadings to determine whether there is a genuine issue of fact, as contrasted to a Rule 12 pleading motion involving an *asserted* factual issue. The purpose of summary judgment is to save time and expense by disposing of cases where there is no genuine issue as to any material fact. Materials other than the pleadings may be considered in passing on the motion, Rule 56(c), for the purpose of determining the material facts and whether there is a genuine issue as to these facts.

Rule 56(e) in pertinent part provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." It has been well established that the unsupported allegations in a pleading are not sufficient to raise a genuine issue of material fact where the movant supports his motion by affidavits or other materials showing the facts to be contrary to that alleged in the pleading. *Caldwell v. Deese,* 26 N.C. App. 435, 216 S.E. 2d 452 (1975). *Doggett v. Welborn,* 18 N.C. App. 105, 196 S.E. 2d 36 (1973).

[3] In this case the moving defendant established by verified answer and other matter dehors the pleading that the plaintiff was the owner-occupant of the car operated by Young. This material fact, nothing else appearing, created the evidentiary presumption or inference that the plaintiff knowingly permitted or directed the negligent operation of her car by Young, so that the negligence of Young would be imputed to plaintiff. Plaintiff did not by affidavits or otherwise respond to show that she had relinquished the right to control the car or to show anything else tending to negate that she controlled or directed the operator. Plaintiff could not rely on the unsupported allegations of her complaint to the effect that she was a passenger in the car negligently operated by Young. Having failed to respond, it was appropriate that under Rule 56(c) summary judgment be entered against the plaintiff. The judgment is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

EARL SAMUEL FARMER v. EARL DAVIS CHANEY AND WIFE, BETTY BOWLIN CHANEY

No. 7519SC1041

(Filed 2 June 1976)

Automobiles § 60— water on highway — skidding — directed verdict for driver proper

In an action to recover for personal injury sustained by plaintiff while a passenger in an automobile owned and operated by defendants where the evidence tended to show that defendant hit a flow of water across the highway, lost control of his vehicle, and the vehicle skidded into the grass median and overturned, the trial court properly granted defendants' motion for directed verdict, since evidence was insufficient to show that defendant's speed was above the posted limit or was greater than reasonable and prudent under the existing conditions; it could not reasonably be inferred from the evidence that defendant failed to keep a reasonable lookout; the doctrine of *res ipsa loquitur* was inapplicable to the facts of this case; and the evidence was insufficient to make out a *prima facie* case of actionable negligence.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 17 September 1975, Superior Court, RANDOLPH County. Heard in the Court of Appeals 8 April 1976.

Plaintiff seeks to recover for personal injury sustained while a passenger in an automobile owned and operated by defendants when the vehicle skidded into the grass median and overturned.

At trial, Trooper Smith testified that he observed the accident which occurred about 9:30 p.m. during a heavy rain; that there was a flow of water across the paved highway about eighteen to twenty feet in width and about one-eighth inch deep; his vehicle approached defendants' vehicle near the water flow, both at a speed of 35 to 40 miles per hour; that he knew the water flow was there because once before he had hit and skidded through the flow, so he slowed down when he approached it; and that he saw defendants' car hit the water flow, skid into the median and turn over. Trooper Smith went to the overturned car, and defendant Earl Chaney told him he hit the water flow and lost control.

At the close of plaintiff's evidence, the trial court granted defendants' motion for directed verdict. Plaintiff appealed.

Ottway Burton and Millicent Gibson for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and William C. Raper for defendant appellees.

CLARK, Judge.

The evidence is not sufficient to show that defendant-operator was violating any of the provisions of the speed statute, G.S. 20-141. His speed was 35 to 40 miles per hour, well under the maximum speed limit of 55 miles per hour; and it cannot be reasonably inferred that the speed was greater than reasonable and prudent under the existing conditions. Trooper Smith testified, without objection or motion to strike by plaintiff, that he considered the speed of 35 to 40 miles per hour to be a safe speed for the existing conditions.

Nor can it be reasonably inferred from the evidence that defendant-operator failed to keep a reasonable lookout. The water flow across the paved surface of the highway, about 18 to 20 feet wide, was a thin film about one-eighth inch deep. Without question, the heavy rain covered the highway surface with a film of water. Under the existing conditions the evidence, when considered in the light most favorable to plaintiff, does not disclose that defendant-operator was negligent in that he failed to see the water flow or that he should have seen it in time to avoid it. Trooper Smith saw the flow only because from his past experience of skidding through the water he knew its location.

That the operating defendant lost control of his vehicle when it entered the water flow and skidded is not in itself evidence of negligence in failing to maintain proper control. In *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11 (1938), the automobile driven by the defendant during a rain suddenly skidded off the road and overturned several times and injured the plaintiff, a passenger. The court affirmed the nonsuit, stating: " 'Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means a partial or complete loss of control of the car under circumstances not necessarily implying negligence. Hence, plaintiff's claim that the doctrine of *res ipsa loquitur* applies to the present situation is not well founded.' " 212 N.C. at 828.

In *Webb v. Clark,* 264 N.C. 474, 141 S.E. 2d 880 (1965), the defendant-driver was operating his vehicle at a speed of about 35 m.p.h., the maximum speed limit in that area. There were wet places on the highway that looked like ice or water in shady places. The court affirmed the judgment of nonsuit and stated, "Plaintiff's evidence does not show that the condition of Highway 103 in the area where the skidding began and occurred was such that skidding could be reasonably anticipated, and does not show that the speeding of the automobile was caused by any failure of defendant to keep a proper lookout and to exercise reasonable care and precaution to avoid it." 264 N.C. at 478-9.

In *Lewis v. Piggott,* 16 N.C. App. 395, 192 S.E. 2d 128 (1972), plaintiff was riding in a vehicle operated by the defendant about midnight when the car hit a place where some water was running across the road. The car skidded off the road and hit a tree. The court affirmed the directed verdict granted by the trial court. The court pointed out that when a motor vehicle leaves the highway for no apparent cause the doctrine of *res ipsa loquitur* will apply to make out a *prima facie* showing of negligence. However, this doctrine of *res ipsa loquitur* does not apply where the cause of the accident is shown, and that the cause of the skidding was shown to be water on the road. "An inference of driver negligence cannot be made from an accident when the plaintiff's own testimony is that there was nothing wrong with defendant's driving." 16 N.C. App. at 397.

Finally, construing the evidence in the light most favorable to the plaintiff, the evidence is not sufficient to make out a *prima facie* case of actionable negligence. The evidence does not disclose that the defendant-operator could have reasonably anticipated a water flow which would cause him to skid and lose control of his vehicle.

No error.

Chief Judge BROCK concurs.

Judge HEDRICK dissenting.

I am unable to put the same construction on the evidence as does the majority. Trooper Smith testified:

"As the headlights approached me it seemed as though the headlights pointed towards the median. At this time I saw

the water running down in my lane. I slowed down. I saw a vehicle hit the shoulder of the median . . . . "

"Well, I approached Mr. Chaney, and I have known him. I said, 'Earl, what happened?" He said, 'I hit the water.' He said, 'We were talking and the next thing I knew we were over here in the median.'

"Q. Did he make any statements about losing it?

"A. He stated, he said, 'I must have lost it when I hit this water.' "

When all the evidence is viewed in the light most favorable to the plaintiff, it is sufficient, in my opinion, to raise an inference that the defendant drove his automobile in heavy rain without keeping a proper lookout and without keeping the automobile under proper control, and that these omissions caused the automobile to skid and overturn, causing some injuries to the plaintiff. The stream of water 18 to 20 feet wide and 1/8 of an inch deep flowed across both lanes of the highway. Trooper Smith saw the water, slowed down, and passed safely through it. The defendant, on the other hand, either failed to see the water because he was not keeping a proper lookout and did not slow down and lost control of his vehicle, or he saw the water and did not slow down and lost control of the vehicle. In either event, plaintiff's evidence is sufficient to raise an inference that his injuries were the proximate result of the negligence of the defendant in the operation of the motor vehicle. These inferences were for the jury, not the Court, to resolve.

I vote to reverse the judgment directing a verdict for the defendant.

SLEEPY CREEK CLUB, INC., ANDREW R. WADDELL AND WIFE, JACQUELINE M. WADDELL v. WILLARD E. LAWRENCE AND WIFE, ELIZABETH F. LAWRENCE, MARION C. SEDBERRY AND WIFE, LOUISE F. SEDBERRY, WIL-MAR ESTATES, INC.

No. 768SC10

(Filed 2 June 1976)

Deeds § 20— restrictive covenants — no uniform plan — unenforceability by other owners

Restrictive covenants in a deed to a subdivision lot could not be enforced by the owners of other lots in the subdivision where the cov-

enants placed in the deed by the grantor were not a part of any uniform plan of development by the original developer, and the deed contained no provision that other property owners in the subdivision should have the right to sue to enforce the restrictions.

APPEAL by plaintiffs from *Peel, Judge.* Judgment entered 8 December 1975 in Superior Court, WAYNE County. Heard in the Court of Appeals 14 April 1976.

This is an action to enjoin the violation of restrictive covenants contained in a deed from defendants Sedberry to defendants Lawrence. The case was tried by the court without a jury.

No exceptions were taken to the court's findings of fact. Those findings, in material part, are as follows:

"6. Plaintiff Sleepy Creek Club, Inc (formerly Sleepy Creek Hunting & Fishing Club) was the developer of a tract of land in Wayne County, NC, said tract being shown on a plat . . . dated August 25, 1958. . . . This plat is entitled 'Property of Sleepy Creek Hunting & Fishing Club' and said tract of land [henceforth referred to as Original Sleepy Creek Subdivision] consists of eighty-five lots, all originally owned by Sleepy Creek Hunting & Fishing Club (now Sleepy Creek Club, Inc, plaintiff in this action). Said lots are located on the north and south shores of a 51-acre lake presently owned by Sleepy Creek Club, Inc as shown on Exhibit B attached hereto.

7. Plaintiff Sleepy Creek Club, Inc is the present developer of a tract of land in Wayne County, NC lying adjacent to the Original Sleepy Creek Subdivision, said tract being shown on a map . . . dated June 6 . . . Said tract of land [henceforth called New Sleepy Creek Subdivision] consists of 26 lots, all owned, at the time of the filing of this action, by Sleepy Creek Club, Inc.

8. Between August 25, 1958 and December 1, 1969, Sleepy Creek Hunting & Fishing Club and its successor, Sleepy Creek Club, Inc. sold eighty or more lots in the Original Sleepy Creek Subdivision, being the owner of five or less lots in said subdivision on December 1, 1969.

9. On December 1, 1969, Sleepy Creek Club, Inc at a special called meeting of the membership . . . adopted a resolution requiring that before approval of membership in the Club after December 1, 1969, said Club would require

that future deeds transferring title to lots in the Original Sleepy Creek Subdivision would contain restrictive covenants as follows:

> 'No member shall construct, erect or allow to be placed on his lot or on the Club's property in front of his lot, any trailer, house trailer, tent, shack, garage, barn or other out-building to be used as a residence, either temporarily or permanently. . . . '

The intent of the majority voting at said meeting was that the restrictions inserted in subsequent deeds pursuant to said resolution be enforceable as against owners of the restricted lots by Sleepy Creek Club, Inc and other lot owners whose property was similarly restricted.

10. The deeds tendered to purchasers of lots in the Original Sleepy Creek Subdivision by Sleepy Creek Hunting & Fishing Club and its successor Sleepy Creek Club, Inc during the period of August 25, 1958 to December 1, 1969, contain no restrictions identical or similar to those restrictions enumerated in the resolution of December 1, 1969. However, each of said deeds did contain a provision granting Sleepy Creek Hunting & Fishing Club the first right of refusal, or the right to repurchase, in the event that the grantee elected to sell his property in the future. Said right to repurchase would be at the option of the Club and would be at a price that the grantee had intended his prospective buyer to pay.

11. On or about April 19, 1969, Eldridge A. Williams and wife, Sally E. Williams conveyed Lot # 46 in Original Sleepy Creek Subdivision to Marion C. Sedberry and wife, Louise F. Sedberry, defendants in this action. This deed . . . contains no restrictions identical or similar to those restrictions enumerated in the resolution of December 1, 1969.

12. Said Lot # 46 was owned August 28, 1958, by plaintiff Sleepy Creek Club, Inc and the deeds in the chain of transfer from Sleepy Creek Club to Eldridge A. Williams and Sally E. Williams contain no restrictions identical or similar to those restrictions enumerated in the resolution of December 1, 1969.

13. On or about January 24, 1973, defendants Marion C. Sedberry and wife, Louise F. Sedberry conveyed Lot

46 . . . to Willard E. Lawrence and wife, Elizabeth F. Lawrence, defendants in this action and the present owners of said Lot # 46. This deed . . . contains restrictions identical to those enumerated in the resolution of December 1, 1969, which were inserted in the deeds pursuant to the rules of Sleepy Creek Club, Inc.

14. On or about March 18, 1974, Jarvis M. Garris and wife, Joyce W. Garris conveyed Lot # 45 in Original Sleepy Creek Subdivision to Andrew R. Waddell and wife, Jacqueline M. Waddell, plaintiffs in this action and the present owners of said Lot # 45. This deed . . . contains restrictions identical to those enumerated in the resolution of December 1, 1969.

15. At the time of the filing of the Complaint, thirty-five of the lots in the Original Sleepy Creek Subdivision contained restrictive covenants identical to those enumerated in the resolution of December 1, 1969, in their respective chains of title. Fifty-three of the lots in the Original Sleepy Creek Subdivision, as of the date of the filing of the Complaint, contained no restrictions identical or similar to those restrictions enumerated in the resolution of December 1, 1969, in their respective chains of title. Attached is a map of said Subdivision labeled Exhibit B, which is hereby made a part of these findings and on which map the lots which are restricted similarly to the Lawrence lot are shown as shaded and the lots which have not been similarly restricted are shown as not shaded. This attached map fairly and accurately portrays the locations of lots similarly restricted in relation to the lots not similarly restricted.

16. After December 1, 1969, and prior to any date that restrictive covenants identical to those enumerated in the resolution of December 1, 1969, appeared in the chains of title of Lots # 27, # 47, # 54, # 65, # 73, and # 75, deeds were recorded in the chain of title of said lots transferring interests of owners in said lots, which deeds did not contain restrictions identical or similar to the restrictions enumerated in the resolution of December 1, 1969. At various times subsequent to the appearance of said deeds in said chains of title of said Lots, Lots # 27, # 37, # 65, and # 75 have been made the subject of restrictions identical to those restrictions enumerated in the resolution of December 1, 1969. At the date of the filing of the Com-

plaint, Lots # 27, # 54, and # 73 contain no restrictions identical or similar to those enumerated in the resolution of December 1, 1969, in their respective chains of title.

17. The restrictions appearing in the chains of title of the thirty-five lots of the Original Sleepy Creek Subdivision which are encumbered with the restrictions identical to those enumerated in the resolution of December 1, 1969, appear in the public record as follows: Five lots becoming so encumbered in 1970, nine in 1971, four in 1972, four in 1973, nine in 1974, and four in 1975.

18. The resolution of December 1, 1969, and the restrictions enumerated therein do not appear in the public records of Wayne County except where the restrictions are specifically incorporated in the individual chains of title.

19. Defendants Marion C. Sedberry and wife, Louise F. Sedberry, grantors of defendants Willard E. Lawrence and wife, Elizabeth F. Lawrence, are not attempting in this lawsuit to enforce the restriction contained in the deed to the Lawrences for Lot # 46 of the Original Sleepy Creek Subdivision.

20. On or about the 16th day of July, 1975, certain persons acting for or on behalf of the defendants, Willard E. Lawrence and wife, Elizabeth F. Lawrence and Wil-Mar Estates, Inc commenced to move and erect a structure on said Lot # 46 of Original Sleepy Creek Subdivision, which structure is hereinafter referred to as 'structure'.

* * *

30. If the defendants, Willard E. Lawrence and wife, Elizabeth F. Lawrence are allowed to place said structure, previously described, on Lot # 46 of the Original Sleepy Creek Subdivision, then the plaintiffs Andrew R. Waddell and wife, Jacqueline M. Waddell and Sleepy Creek Club, Inc will suffer a continuous and recurring injury in that the property values in the Original Sleepy Creek Subdivision will be substantially decreased. However, the Court further finds that in view of its other findings of fact and conclusions of law, this finding is not pertinent to the decision."

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

"1. That the Gemini structure is a double-wide mobile home. . . .

2. That a double-wide mobile home is a house trailer or a trailer within the meaning of the restrictions. . . .

3. That the placing of the Gemini double-wide mobile home on said Lot No. 46 would violate the terms of the restrictive covenant or the restrictions embodied in the resolution of December 1, 1969, as described in Finding of Fact No. 9, if said restrictions were enforceable against Willard E. Lawrence and wife, Elizabeth F. Lawrence in this cause of action.

4. That the lots in the Original Sleepy Creek Subdivision were not restricted pursuant to an original, general plan of development or to a general plan of development adopted for the use and benefit of all the owners of lots in the subdivision; that said restrictions are not enforceable *inter se.*

5. That neither Sleepy Creek Club, Inc nor plaintiffs Andrew R. Waddell and wife, Jacqueline M. Waddell are entitled to enforce the restrictions contained in the deed from Sedberry and wife to Lawrence and wife as third party beneficiaries.

6. That Plaintiffs Sleepy Creek Club, Inc, and Andrew R. Waddell and wife, Jacqueline M. Waddell, are not entitled to seek relief against the named defendants and the enforcement of said restrictions in this cause of action."

The court then entered judgment dismissing the action and plaintiffs appealed.

Kornegay, Bruce & Rice, P.A., by R. Michael Bruce, for plaintiff appellants.

John W. Dees, for defendant appellees.

VAUGHN, Judge.

The Lawrences' grantors (Sedberrys) placed the restrictive covenant in the deed. The restriction had not been in the chain

of title prior to the conveyance to the Lawrences. The servitude imposed by the restrictive covenant is a species of incorporeal right. When the Sedberrys impressed the servitude created by the restrictive covenants they thereby conveyed less than an unencumbered fee. A negative easement is a vested property right. The Sedberrys do not seek to enforce that right. The action is by plaintiffs who are strangers to the contract of conveyance.

We start with the well established proposition that since restrictive covenants are in derogation of the free and unfettered use of land, covenants imposing them are to be strictly construed against limitations on use. The same principle, we believe, should be observed when attempting to determine who may enforce the restrictive covenant.

The courts have indicated that for a covenant to be enforceable by a stranger, it must be shown to have been impressed for his benefit. Plaintiffs rely heavily on *Lamica v. Gerdes,* 270 N.C. 85, 153 S.E. 2d 814. In *Lamica,* the grantor expressly provided in the deed that other property owners in the subdivision should have the right to sue to enforce the restrictive covenant. The provision was obviously acceptable to the grantee and the consequent sale by deed, including the provision was, therefore, an express contract made for the benefit of third parties. The court simply enforced the contract of the parties. If the Lawrences and Sedberrys had desired to make a similar contract for the benefit of plaintiffs and others, they could have put the provisions in this deed and a similar result could have been obtained. They did not do so.

Neither can plaintiffs benefit from those cases holding that where a tract was originally sold under a uniform plan of development requiring the covenants to be placed in all deeds, it may be shown that the covenants were inserted for the benefit of all owners within the development and that they are enforceable *inter se.* Here, the covenants were not a part of any uniform plan of development by the original developer. They were, for the first time, inserted in the chain of title by the Sedberrys. Even now there is no uniform scheme of development (or redevelopment) of the subdivision.

The trial court concluded that plaintiffs cannot enforce the covenant found in the deed from the Sedberrys to the Lawrences. We hold that that decision was proper. It is not necessary,

therefore, for us to pass upon defendants' cross exceptions to the court's conclusion that the structure on the lot is a "house trailer" within the meaning of the restrictions.

The judgment dismissing the action is affirmed.

Affirmed.

Judges BRITT and ARNOLD concur.

KINSTON CITY BOARD OF EDUCATION v. BOARD OF COMMISSIONERS OF LENOIR COUNTY

No. 758SC1060

(Filed 2 June 1976)

Schools § 5— capital outlay funds for board of education — jury summoned from another county

The trial court did not err in ordering a special venire of jurors from another county to hear pursuant to G.S. 115-88 a dispute between a city board of education and a board of county commissioners as to the amount of capital outlay funds necessary for the board of education during the fiscal year.

Judge ARNOLD dissenting.

APPEAL by defendant from *Small, Judge.* Judgment entered 13 August 1975 in Superior Court, LENOIR County. Heard in the Court of Appeals 16 April 1976.

A disagreement arose between plaintiff, the Kinston City Board of Education and defendant, the Board of Commissioners of Lenoir County, as to the amount of capital outlay funds necessary for plaintiff during the fiscal year 1975-1976. When defendant deleted $400,000 of the amount requested by plaintiff, the clerk of Superior Court was called upon to act as arbitrator under the provision of G.S. 115-87 [Repealed effective 1 July 1976.] Plaintiff appealed from the clerk to the Superior Court where defendant requested a jury trial as provided by G.S. 115-88 [which has also been repealed effective 1 July 1976.]

Plaintiff moved that the court, in its discretion, order a special venire of jurors to be summoned from some other county as by law provided. Plaintiff alleged that, because of the nature

of the controversy and its widespread publicity, it would be difficult to obtain a fair and impartial jury from Lenoir County. Defendant opposed the motion. Defendant contended that the publicity had not been prejudicial to either party and that it would not be difficult to select jurors from Lenoir County who would render a fair and impartial verdict upon the issue before the court.

Judge Albert Cowper concluded that it would be difficult to obtain an impartial trial by a Lenoir County jury and ordered jurors summoned from Wayne County.

The case was later tried on the issues set out in the dissenting opinion. The first issue was answered "yes" and the second "$400,000.00." Judgment was entered and defendant appealed.

Jeffress, Hodges, Morris & Rochelle, P.A., by Thomas H. Morris and Barry Nakell, for plaintiff appellee.

Manning, Fulton & Skinner, by Howard E. Manning, Howard E. Manning, Jr., and Thomas B. Griffin, for defendant appellants.

North Carolina School Boards Association, by Frederic E. Toms, amicus curiae.

North Carolina Association of County Commissioners, by John T. Morrisey, Sr., and Charles Ronald Aycock, amicus curiae.

VAUGHN, Judge.

The only assignment of error is that the court erred in permitting a jury from Wayne County to sit and render a verdict in the case. As appellant puts it:

> "The question now before this Court on appeal is whether or not citizens and residents of another county than the county whose tax funds are at issue may render a decision which results in the tax levying authorities being ordered to allocate and appropriate tax funds to support the educational institutions in the county."

When the judge ordered that the jury be summoned from another county he was acting in accordance with the express authority granted by the statute:

> " . . . any judge of the superior court, if he is of the opinion that it is necessary in order to provide a fair trial in any case . . . may order as many jurors as he deems necessary to be summoned from any county or counties in the same judicial district as the county of trial or in any adjoining judicial district." G.S. 9-12.

The thrust of defendant's argument appears to be that the jury trial authorized by G.S. 115-88 is a delegation of the power to tax to the people residing within the jurisdiction of the local taxing authority and that only those people can make up the jury. Defendant then argues that the surrender of the decision on whether to tax citizens of another county is an unconstitutional surrender of the power of the people of Lenoir County to determine their own taxation.

Defendant is attempting to raise in this Court a constitutional question that was not raised at trial. Generally, appellate courts do not consider a constitutional question unless it was raised and considered at trial. Moreover, a jury passes on issues of fact and not political issues. Defendant's argument to the effect that citizens of one county would make better "representatives" of that county, while sitting as jurors in a court of law, than impartial jurors from another county only emphasizes the soundness of the discretion exercised by the trial judge.

The judgment is affirmed.

Affirmed.

Judge BRITT concurs.

Judge ARNOLD dissenting.

Any disagreement between the Board of Education and the Board of Commissioners concerning the current expense fund, the capital outlay fund, the debt service fund, or any item of either fund, is to be resolved, if possible, according to the provisions of G.S. 115-87. If there is an appeal to the superior court the statute directs the judge to "find the facts as to the

amount of the current expense fund, the capital outlay fund, and the debt service fund." The judge's findings are conclusive under G.S. 115-87, and he is directed to require the "tax-levying authorities to levy the tax which will provide the amount of the current expense fund, the capital outlay fund, and the debt service fund, which he finds necessary to maintain the schools in the administrative unit." See *Bd. of Education v. Bd. of Commissioners,* 26 N.C. App. 114, 215 S.E. 2d 412 (1975).

Pertinent to this appeal is G.S. 115-88 which permits a jury trial, and provides the issue to be submitted when there is a jury trial. Issues submitted to the jury in the case at bar were as follows:

> "1. Are additional capital outlay funds needed by the Kinston City Board of Education to maintain the schools in the Kinston Graded School District for the fiscal year 1975-1976?
>
> 2. What amount of additional capital outlay funds, if any, is necessary to maintain the schools in the Kinston School Administrative District?"

These issues do not comply with the statutory requirement that the jury consider the issue "what amount is needed to maintain the schools, and they shall take into consideration the amount needed and the amount available from all sources as provided by law." It was mandatory that the jury determine not just the item of capital outlay, but the total amount needed to maintain the schools, i.e., as to the amount of current expense fund, capital outlay fund, and the debt service fund, and on this basis I dissent. The case should be remanded for a new trial upon submission of the proper issue to the jury.

STATE OF NORTH CAROLINA v. TOMMY POLLARD

No. 764SC143

(Filed 2 June 1976)

1. Assault and Battery § 15— prior conviction of victim — consideration for credibility only — jury instructions proper

In a prosecution for assault with a deadly weapon, the trial court did not err in limiting the jury's consideration of the victim's prior conviction for manslaughter to the question of the victim's cedibility

rather than allowing the jury to consider the conviction with respect to the question of the reasonableness of defendant's apprehension that the victim would cause him death or bodily harm, since there was no evidence, either circumstantial or direct, that defendant knew of the victim's prior manslaughter conviction.

2. **Assault and Battery § 15— self-defense — jury instructions proper**

The trial court properly instructed the jury that defendant's actions would be excused if the circumstances were such as would create in the mind of a "person of ordinary firmness" a reasonable belief that such actions were necessary to protect his life, and that it was for the jury to determine the reasonableness of defendant's belief that it was necessary to protect himself by shooting his victim.

APPEAL by defendant from *James, Judge.* Judgment entered 25 September 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 5 May 1976.

Defendant was charged with assault on a female and assault with a deadly weapon with intent to kill resulting in serious injury. The State's motion to consolidate the two cases was allowed, and defendant was found guilty by a jury of assault with a deadly weapon inflicting serious bodily injury.

At trial Mary Jean Norton testified that she had previously been married to defendant, and that on 2 July 1975 defendant got into an argument with her and slapped her. She stated that Bill Norton, her father-in-law, came to her aid. According to her testimony, Bill Norton pulled a knife on defendant and struck him in the mouth. She told her husband, Terry Norton, about the incident when he returned home.

Terry Norton testified that on 3 July 1975 he and Bill Norton saw defendant at a restaurant, and that defendant was hit with a bottle of ketchup; and that he started beating up defendant until a waitress pulled a gun and ordered him to stop. Terry Norton did not recall hitting defendant with the ketchup bottle, but he did not deny doing it.

After the waitress pulled the gun, according to Terry Norton, he and Bill Norton went outside and got into their truck. Defendant followed them and fired into the truck, chased them out of the truck, and Terry Norton crawled under the truck where defendant shot him. Norton stated he had pleaded guilty to manslaughter when he was sixteen years old.

Defendant testified and denied hitting his former wife on 2 July 1975. He stated that Bill Norton cut him in the mouth

with a knife, and that on the following day at a restaurant Terry Norton threw a ketchup bottle at defendant, knocked him down, and that both Nortons began beating and kicking him. Defendant testified that he heard a shot and the Nortons left.

After the Nortons left the restaurant defendant stated that he took the pistol from his girl friend and went outside with the intention of protecting himself. He testified that he fired at the Nortons' truck, and that he chased Terry around the truck, and shot him in the leg after Terry crawled under the truck.

Defendant testified that he threw away the gun after emptying the shells, and that he was bleeding badly, in extreme pain, and "faintish," when Bill Norton grabbed him and cut him with a knife.

Dr. Piver testified that he examined defendant and Terry Norton on 3 July 1975, and that defendant had a broken jaw protruding through the skin, and that Norton had bullet wounds in his armpit and leg.

The restaurant owner, a waitress and defendant's girl friend corroborated defendant's testimony concerning the fight in the restaurant.

From a judgment imposing a three to four year prison sentence defendant appealed to this Court.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Bailey & Gaylor, by Edward G. Bailey, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred by failing to include "not guilty by reason of self-defense" in its last and concluding charge to the jury. This contention is unfounded since the trial court adequately instructed in its final mandate that if the jury were satisfied by the evidence that defendant acted in self-defense the defendant's actions were excused, and he would not be guilty of any offense.

[1] The trial court instructed the jury that they could consider the fact that Terry Norton, the victim, had pled guilty

to voluntary manslaughter, but they were to consider this only for the purpose of assessing the credibility of the witness. Defendant contends it was error to limit the jury's consideration of the victim's prior conviction for manslaughter. He argues that the prior manslaughter conviction was relevant to the question of the reasonableness of defendant's apprehension that Norton would cause him death or bodily harm.

"[W]hen the point in issue is the 'reasonableness of the defendant's apprehension or belief' the relevant circumstance is not the victim's actual character but the defendant's *knowledge* of facts which would reasonably create apprehension . . . . " Stansbury's N. C. Evidence, Brandis Revision, Character of victim in cases of homicide or assault, § 106, p. 332. There was no evidence, either circumstantial or direct, that shows that the defendant knew of the incident involving Norton's prior manslaughter conviction. The trial court did not improperly limit the jury's consideration of the victim's prior conviction for manslaughter.

[2] There is also no basis for defendant's assertion that the trial judge improperly charged the jury on self-defense. The jury was instructed that defendant's actions would be excused if the circumstances were such as would create in the mind of a "person of ordinary firmness" a reasonable belief that such actions were necessary to protect his life. Defendant argues that the use of the phrase "person of ordinary firmness" rather than the "defendant" imposed an objective standard rather than a subjective standard to determine his guilt.

The court further charged the jury that "[i]t is for you, the jury, to determine the reasonableness of the defendant's belief that it was necessary to protect himself by shooting Terry Norton . . . I say, it is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at that time." The instructions to the jury on the law of self-defense were proper. *State v. Jackson,* 284 N.C. 383, 200 S.E. 2d 596 (1973); *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24 (1968); *State v. Ward,* 26 N.C. App. 159, 215 S.E. 2d 394 (1975).

We have reviewed defendant's remaining assignments of error to the judge's charge, and to the consolidation of the charges for trial, and we find them to be without merit.

No error.

Judges BRITT and VAUGHN concur.

CORNELIA P. HICKS v. OLD REPUBLIC LIFE INSURANCE COMPANY

No. 7610SC113

(Filed 2 June 1976)

Insurance § 67— death from accidental bodily injury — pre-existing heart condition — accidental fall — summary judgment

The trial court properly entered summary judgment for defendant insurer in this action to recover under an accident policy where defendant presented evidence that the cause of the insured's death was a myocardial infarction due to coronary arteriosclerosis and plaintiff's opposing evidence raised an inference that an accidental fall could have contributed to the cause of death, since death caused by a pre-existing diseased condition in cooperation with an accident is not an accidental bodily injury independent of all other causes within the terms of the accident policy in this case.

APPEAL by plaintiff from *Smith, Judge.* Judgment entered 11 September 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 13 May 1976.

Plaintiff filed a complaint seeking to recover as beneficiary under an insurance policy executed by the Old Republic Insurance Company (Insurance Company). The insurance policy provided that "[i]f the Insured shall lose his life, independently of all other causes, as a direct result of an accidental bodily injury occurring while this policy is in force and death shall occur within one hundred and eighty days of the date of such accident, the Company will pay the sum specified in the above Schedule for such loss." The sum specified in the insurance policy was $10,000. However, plaintiff alleged that in consideration for an increase in the premium paid by the insured, the defendant issued an endorsement to the above-described policy increasing the accidental death benefit to $12,000.

Plaintiff further alleged that on 28 February 1973 Roy R. Hicks lost his life as a direct result of an accidental bodily injury independently of all other causes while the insurance policy was in full force, and that plaintiff, as beneficiary under the policy, was entitled to recover the sum of $12,000.

Defendant answered and denied that Roy Hicks died as a direct result of any accident independent of all other causes. Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure defendant moved for summary judgment.

In support of its motion for summary judgment defendant submitted answers by plaintiff to interrogatories, and the deposition of Dr. Laurin J. Kaasa. Dr. Kaasa stated his opinion that Roy Hicks died as a result of a "myocardial infarction which in turn, was due to coronary arteriosclerosis." On cross-examination plaintiff's counsel challenged Dr. Kaasa's theory regarding the cause of death:

"Q. What I'm saying, doctor, and I'm not trying to trap you, but could the shock and trauma of striking the ground from that height and under those conditions, could not that have been sufficient or could it have, that shock and trauma have caused this man's heart to fail or to fibrillate or to stop beating so it would be sufficient to cause death, the shock and trauma of that fall. Could not that have happened?

A. We are talking about a diseased heart to begin with.

Q. I'm talking about this man's —

A. His heart.

Q. This particular man, yes, sir.

A. Certainly direct blows to the heart do cause stimulation to the heart, cause abnormal rhythms. It is possible.

Q. You can't rule it out?

A. I can't rule it out.

Q. All right, sir.

A. I can't rule it out, sir. I might interject, contrarywise, that blows to the heart is the method that doctors use to rescusitate the heart."

Defendant also submitted the affidavit of Dr. W. W. Hedrick, Chief Medical Examiner for Wake County. Dr. Hedrick signed the death certificate for Roy Hicks and three Supplemental Reports of Cause of Death for Roy Hicks dated March 26, 1973, June 7, 1973, and July 26, 1974, all of which were introduced. The Supplemental Report of Cause of Death dated

March 26, 1973 gave the cause of death as "traumatic injuries" as a consequence of a "fall from scaffold." However, in his affidavit Dr. Hedrick stated that the 26 March Supplemental Report "was prepared prior to receipt of the autopsy report . . . and contains erroneous and improper designations and information . . . [and the] Supplemental Report of Cause of Death, dated and signed on June 7, 1973, was prepared and was signed by me to correct the contents of paragraph 18 [regarding cause of death] in the aforesaid Supplemental Report dated March 26, 1973." The 7 June 1973 Supplemental Report listed the cause of death as "myocardial infarction."

In response plaintiff submitted another affidavit of Dr. Hedrick in which he stated that he did not know the cause of decedent's death of his own knowledge, but signed the second and third supplemental certificates on the basis of Dr. Kaasa's autopsy report. Dr. Hedrick stated that given the decedent's condition "the shock and trauma of such a fall could not be ruled out as precipitating a fatal arhythmia of the heart which would have been the immediate cause of death."

The court granted summary judgment for the defendant and plaintiff appealed to this Court.

C. K. Brown, Jr., and William L. Thompson, for plaintiff appellant.

Emanuel and Thompson, by W. Hugh Thompson, for defendant appellee.

ARNOLD, Judge.

Plaintiff assigns error to the trial court's granting summary judgment for the defendant. Plaintiff argues that summary judgment should not have been granted because there is a genuine issue of fact presented as to the cause of death of Roy Hicks. We disagree.

Upon a motion for summary judgment, the burden is upon the moving party to establish that there is no genuine issue of fact remaining for determination and that the movant is entitled to judgment as a matter of law. *Savings and Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972); *Sanders v. Davis*, 25 N.C. App. 186, 212 S.E. 2d 554 (1975).

The defendant, as the moving party, supported its motion for summary judgment, as provided by Rule 56, with exhibits

(the death certificate and supplemental death certificates), answers to interrogatories and a deposition. Through its evidentiary material defendant established by expert medical opinion that Roy Hicks died as a result of a myocardial infarction which was due to coronary arteriosclerosis. Death of the insured from myocardial infarction would prohibit the beneficiary from recovering under the accidental insurance policy coverage and entitle defendant to a judgment as a matter of law.

Since defendant's evidentiary matter established that cause of death was due to heart failure the plaintiff had the burden to respond by affidavit or other evidentiary matter to establish that there was a genuine issue for trial with respect to the cause of death, i.e., that the cause of death was not due to heart failure but due to accidental injury independent of all other causes.

Assuming arguendo that plaintiff's evidence in opposition to the motion for summary judgment raises an inference that the accidental fall contributed to the cause of death there is still no genuine issue for trial. Where death is caused by a pre-existing diseased condition in cooperation with an accident it is not an accidental bodily injury independent of all other causes. *Horne v. Insurance Co.*, 265 N.C. 157, 143 S.E. 2d 70 (1965).

Defendant's evidence that cause of death was due to heart failure was not contradicted by plaintiff in response to the motion for summary judgment. The motion was properly granted.

Affirmed.

Judges PARKER and HEDRICK concur.

EARL J. BYRD v. THE TRUSTEES OF WATTS HOSPITAL, INC. AND/OR WATTS HOSPITAL, INCORPORATED; DR. OCTAVIO POLANCO; AND DR. JAMES S. WILSON

No. 7515SC1072

(Filed 2 June 1976)

Rules of Civil Procedure § 4— summons and complaint unserved — action discontinued — service by publication — no revival of action

Where an original summons was issued and complaint filed in February 1969 but both were returned unserved as to defendant

Polanco, the action was discontinued as to him, since plaintiff failed to obtain service in some manner, or obtain an alias or pluries summons, or endorsement as provided by Rule 4(e)(1) or (2) within 90 days after the issuance of the original summons; and plaintiff's effort to serve process by publication which occurred in October 1974 did not revive the action.

APPEAL by plaintiff and defendant Dr. Octavio Polanco from *Barbee, Judge.* Order entered 4 November 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 13 April 1976.

In this action plaintiff seeks to recover damages for improper medical treatment allegedly rendered by defendant Polanco while serving as an employee of defendant hospital and under the supervision of defendant Wilson. The record discloses the following proceedings:

1. Summons was issued for all defendants, and order extending time for filing complaint was entered, on 24 January 1969.

2. The summons was returned showing personal service on defendants hospital and Wilson on 4 February 1969. As to defendant Polanco, the return stated that he was not to be found in Durham County.

3. Complaint was filed on 12 February 1969. Order to serve complaint was returned by the sheriff on 20 February 1969 reciting service on defendants hospital and Wilson. As to defendant Polanco, the return stated that he could not be found in Durham County and was in South America.

4. On 8 May 1972 Attorney Marshall T. Spears, Jr., representing defendant Wilson, filed a motion requesting a postponement of the trial of the action due to the necessity of having defendant Polanco present at the trial. The motion stated that defendant Polanco at that time was receiving specialized training at a hospital in London, England, and planned to return to the United States late in the summer of 1972.

5. On 23 October 1973 a summons was issued for defendant Polanco. It was returned by the Sheriff of Durham County on 26 October 1973 with notation that said defendant could not be found in said county. (While filed as a part of the record on appeal, this summons inadvertently was not printed as a part of the record.)

6. On 17 December 1974 a certificate and affidavit of publication were filed. They recited that a notice of service of process by publication to defendant Polanco, dated 16 October 1974 and requiring him to defend the action by 29 November 1974, was published in The Chapel Hill Newspaper in the issues of 16, 23, and 30 October 1974. The affidavit was accompanied by a certificate by plaintiff's attorney that a copy had been mailed to Attorney Spears.

7. On 2 December 1974 Attorney Spears, purporting to act for defendant Polanco for the sole purpose of moving that the claim as to said defendant be dismissed, filed a motion asking for dismissal on the ground that the attempted service was not sufficient and the court did not obtain jurisdiction over the person of said defendant.

8. On 25 August 1975 counsel for plaintiff filed a motion pursuant to G.S. 84-11 asking that Attorney Spears be required to produce and file with the court a document signed by defendant Polanco or someone else duly authorized, giving him power or authority to appear for said defendant.

9. On 18 September 1975 Judge Canaday entered an order requiring Attorney Spears to produce and file by 27 October 1975 a written authorization from defendant Polanco to appear as his attorney.

10. On 28 October 1975, at the request of plaintiff's counsel, an assistant clerk of the superior court entered a default against defendant Polanco.

11. On 30 October 1975 defendant hospital, through its Attorney F. Gordon Battle, filed a motion asking that the action as to defendant Polanco be dismissed for lack of proper service of process and that the purported service of process by publication be quashed.

12. On 3 November 1975 a paper writing signed by defendant Polanco, dated 30 October 1975, authorizing the firm of Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson to represent him in this action, was filed.

13. On 5 November 1975 an order dated 4 November 1975 was filed. It recites that a hearing was held on (1) the motions of defendant Polanco to dismiss the claim against him or, in the alternative, to quash the service of process, and (2) the

oral motion of plaintiff for judgment against defendant Polanco by default. The order further recites that after hearing argument of counsel and after due deliberation and consideration of the record proper, the court, in its discretion and in the interest of justice, allowed the law firm of Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson to adopt the motions previously filed on behalf of defendant Polanco to dismiss the claim asserted against him or, in lieu thereof, to quash the service of process.

The court "ORDERED, ADJUDGED and DECREED" that defendant Polanco's motion to dismiss or quash the service of process be denied, and that the entry of default against defendant Polanco be vacated and set aside.

Plaintiff and defendant Polanco appealed.

Cooper, Dodd and Hood, by William B. Garrison, Jr., for plaintiff appellee.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by E. C. Bryson, Jr., for defendant appellant.

BRITT, Judge.

DEFENDANT POLANCO'S APPEAL

Defendant Polanco excepted to, and assigns as error, that part of the order denying his motion to dismiss the action as to him, or, in the alternative, to quash the service of process by publication. We think the trial court erred in denying defendant Polanco's motion to quash the purported service of process by publication.

G.S. 1A-1, Rule 4(d) and (e), provide in pertinent part as follows:

> (d) *Summons — extension; endorsement, alias and pluries.*—When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:
>
> (1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as

the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

* * *

(e) *Summons—discontinuance.*—When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), *the action is discontinued as to any defendant not theretofore served with summons within the time allowed.* Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement. (Emphasis added.)

Defendant Polanco contends that at the time plaintiff sought to obtain service of process on him by publication, the action as to him had been discontinued, and that the *only* way the pending action could be revived as to him would have been by issuance of alias or pluries summons or by an extension endorsed by the clerk. In our view, defendant's contention is supported by Rule 4(d) and (e) quoted above and we find no other provision in Rule 4 or any other rule or statute that alters the contention.

The record discloses that original summons was issued and complaint filed in February 1969. Both were returned unserved as to defendant Polanco. When plaintiff failed to obtain service in some manner, or obtain an alias or pluries summons, or endorsement as provided by Rule 4(d)(1) or (2) within 90 days after the issuance of the original summons, the action was discontinued as to him. Assuming, *arguendo,* that the action was revived by issuance of the 23 October 1973 summons, the action was discontinued again 90 days after 23 October 1973. Plaintiff's effort to serve process by publication occurred in October 1974.

In *McCoy v. McCoy,* 29 N.C. App. 109, 223 S.E. 2d 513 (1976), this court held that issuance of a summons is not essen-

tial to validity of service of process by publication made pursuant to G.S. 1A-1, Rule 4 (j) (9) (c) upon a party to a civil action whose address, whereabouts, dwelling house, or usual place of abode is unknown and cannot with due diligence be ascertained. We find it easy to distinguish *McCoy* from the instant case. In *McCoy,* the defendant was served with process by publication immediately after the action was instituted; here, the action had abated at the time plaintiff attempted service by publication. Before plaintiff here could obtain service by publication he first had to revive the action, and that revival could be accomplished only by the issuance of alias or pluries summons or endorsement of the last valid summons.

G.S. 1A-1, Rule 3, requires that something be done in the clerk's office to *commence* an action—file the complaint or obtain a summons and order extending time to file the complaint. We think Rule 4(e) mandates that something be done in the clerk's office to *revive* a discontinued action—obtain an alias or pluries summons or an endorsement to the original summons.

In his brief, plaintiff argues with respect to tolling of the statute of limitations because of defendant Polanco's absence from the state. That question is not before us on this appeal. The provision of the order appealed from denying defendant Polanco's motion to quash the purported service of process by publication is reversed.

PLAINTIFF'S APPEAL

Plaintiff assigns as error the trial court's setting aside the entry of default against defendant Polanco. We find no merit in this assignment. While the action of the trial court is fully supported by several of the reasons stated in the order, the action is clearly justified by our holding on defendant Polanco's appeal.

Plaintiff contends the trial court erred in allowing the law firm of Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson to adopt the motions previously filed on behalf of defendant Polanco by Attorneys Spears and Battle. We find no merit in this contention.

In the first place the only exceptions by plaintiff to this action by the court are set forth in the record where plaintiff groups his exceptions and assignments of error. There is nothing in the record to indicate that at any point during the hearing

plaintiff objected to the appearance of defendants' present counsel or the granting of their request that their client be allowed to adopt the motions previously filed on his behalf.

In the second place, under the facts appearing, we think the matter rested in the sound discretion of the trial judge and that there was no abuse of discretion.

* * *

With respect to plaintiff's appeal, the order is affirmed.

With respect to defendant Polanco's appeal, the provision of the order denying his motion to quash the purported service of process by publication is reversed.

This cause is remanded for further proceedings not inconsistent with this opinion.

Judges VAUGHN and ARNOLD concur.

ROY ARNOLD v. RONALD W. HOWARD AND LINDA H. HOWARD, ORIGINAL DEFENDANTS AND JAMES F. CLARDY, THIRD PARTY DEFENDANT

No. 7626SC56

(Filed 2 June 1976)

Mortgages and Deeds of Trust § 15— conveyance "subject to" mortgage — no assumption of mortgage

In an action to recover upon a second mortgage executed by original defendants, summary judgment was properly entered in favor of the third party defendant in original defendant's cross-action against him where he presented evidence that property was conveyed to him "subject to" the second mortgage but that he did not assume the second mortgage, and original defendants failed to offer opposing evidence that the second mortgage had been assumed by the third party defendant.

APPEAL by original defendants from *Snepp, Judge.* Judgment entered 3 October 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 May 1976.

Action was brought by plaintiff against original defendants (Howard) to recover the unpaid balance of a $225,000 note executed by the Howards to plaintiff as consideration for the purchase of an apartment complex.

In their cross-action against third party defendant (Clardy) the Howards alleged that they conveyed the property to Clardy for $1,039,470.05, which sum included $220,299.44 owing on the second mortgage payable to plaintiff. It was alleged that Clardy had breached his contract with the Howards, and they prayed for judgment against Clardy for any recovery which plaintiff may have against them.

Clardy answered and denied that he assumed the second mortgage obligations to plaintiff. He alleged that he purchased the property subject to the second mortgage to plaintiff, and he prayed for dismissal of the original defendants' cross-action.

The Howards and Clardy entered into a written contract by which Clardy agreed to purchase the property from the Howards for a "contract price" of $1,039,470.05 which was "to consist" of the existing principal balance on the first mortgage in the amount of $786,170.61, the existing principal balance in plaintiff's second mortgage in the amount of $220,299.44, a $5,000 "binder," and $28,000 cash upon delivery of the deed. The contract also provided that the "[p]roperty shall be taken subject to" the first and second mortgages.

In the deed from the Howards to Clardy the property was conveyed "subject to" the two mortgages (which included the one payable to plaintiff). [For more details concerning the facts of this case see *Arnold v. Howard,* 24 N.C. App. 255, 210 S.E. 2d 492 (1974).]

Motion for summary judgment by third party defendant was granted and original defendants attempted to appeal. The appeal was dismissed [*Arnold v. Howard, supra*]. Thereafter a consent judgment was entered into by plaintiff and the original defendants, and the original defendants now appeal from the previous order granting summary judgment to third party defendants.

Haynes, Baucom, Chandler and Claytor, by Lloyd F. Baucom, and McDaniel, Melott and Fogel, by Bruce McDaniel, for defendant appellants.

Cansler, Lockhart, Parker and Young, P.A., by Thomas Ashe Lockhart and Joe C. Young, for third party defendant appellee.

ARNOLD, Judge.

In support of his motion for summary judgment Clardy offered the pleadings, including the written contract between Clardy and the Howards, and the deed from the Howards to Clardy, as well as an affidavit of K. Martin Waters. In the affidavit Waters avowed that he was the real estate agent who represented Clardy in the purchase of the property from the Howards, and that Clardy instructed him that he would take the property subject to the two mortgages, but he would not assume any personal obligation for the payment of either mortgage; that Waters prepared the contract which Clardy signed and which was then sent to Mr. Howard; that prior to signing the contract Howard telephoned Waters and asked if Clardy would assume Howard's personal obligations on the second mortgage [to plaintiff]; that Waters again told Howard that Clardy would not assume any of the mortgage debts or accept any language of assumption in the contract; and that following this telephone conversation the contract was consummated.

The original defendants offered no evidentiary material in response, and their only assignment of error challenges the entry of summary judgment for the third party defendant.

Rule 56(e) provides, *inter alia:* "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In the present case Clardy, the moving party, supported his motion for summary judgment as provided by Rule 56 when he presented the affidavit of Waters along with the pleadings. Upon this showing by the movant the Howards had the burden to respond by affidavit or other evidentiary matter to show that there was a genuine issue for trial. *Whitley v. Cubberly,* 24 N.C. App. 204, 210 S.E. 2d 289 (1974). Since the Howards, original defendants, failed to put forth any evidentiary matters in opposition to the motion the question is whether summary judgment was *appropriate. Kidd v. Early,* 289 N.C. 343, 222 S.E. 2d 392 (1976); *Savings and Loan Assoc. v. Trust Co.,* 282 N.C. 44, 191 S.E. 2d 683 (1972).

The written contract between Clardy and the Howards contained a provision that the "contract price" of $1,039,470.05 was to consist of, *inter alia,* the existing principal balance on plaintiff's second mortgage. It also provided that the property was "taken subject to" this second mortgage. Any confusion in the language of the contract was cleared up by the Waters affidavit concerning prior negotiations which was competent since it did not vary the terms of the written contract, but threw light on the proviso that the property was conveyed "subject to" the mortgage. See *Douglass v. Brooks,* 242 N.C. 178, 87 S.E. 2d 258 (1955), cited in 3 N. C. Index 2d, Evidence § 32, p. 650.

In addition to the "subject to" language of the written contract the deed from the Howards to Clardy provided that the property was conveyed "subject to" the second mortgage from the Howards to plaintiff. Summary judgment was appropriate.

The rule in North Carolina was stated in *Henry v. Heggie,* 163 N.C. 523, 79 S.E. 982 (1913), as follows:

> " 'Where a conveyance of land is made expressly subject to an existing mortgage, the effect, as between the grantor and the grantee, is to charge the encumbrance primarily on the land, so as to prevent the purchaser from claiming reimbursement or satisfaction from his vendor in case he loses the land by foreclosure or is compelled to pay the mortgage to save a foreclosure; in reality, it amounts simply to a conveyance of the equity of redemption.' " *Henry v. Heggie, supra,* pp. 524-525.

Rule 56 is to be used to prevent unnecessary trials where there are no genuine issues of fact, and to identify and separate such issues if they are present. *Kidd v. Early, supra.* The question in this case was whether the obligation was assumed, and the moving party, Clardy, offered competent evidentiary material that it was not assumed but taken "subject to." The opposing party failed to respond by affidavit or other evidentiary matter that the mortgage was not taken "subject to" or that it was assumed. Summary judgment was therefore properly entered.

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. STEPHEN DANIEL GREEN

No. 7526SC879

(Filed 2 June 1976)

1. **Criminal Law § 143— probation revocation — extrajudicial admission by defendant — no necessity for voir dire**

The trial court in a probation revocation hearing did not err in the admission of a probation officer's testimony that defendant had admitted using heroin without first conducting a *voir dire* examination to ascertain whether defendant's constitutional rights had been violated since a probation revocation hearing is not a criminal prosecution.

2. **Criminal Law § 143— probation revocation — probation officer's testimony as to violations of probation**

The trial court in a probation revocation hearing did not err in the admission of a probation officer's testimony that defendant had refused to obtain regular employment and had refused to pay certain monies in violation of his probation judgment.

3. **Criminal Law § 143— probation revocation — proof required**

The evidence necessary to order probation revoked is a showing by the State which reasonably satisfies the judge in the exercise of his sound discretion that defendant has violated one of the conditions of his probation.

4. **Criminal Law § 143— use of heroin — violation of probation condition — injurious habit**

The evidence supported the court's finding that defendant had used heroin which was in violation of a condition of his probation that he avoid injurious or vicious habits.

5. **Criminal Law § 143; Constitutional Law § 21— probation condition — payment of money by defendant to deceased's parents**

A probation condition requiring defendant to pay a sum of money to the parents of the person he was convicted of killing does not constitute use of the criminal process to enforce a civil obligation and is valid.

APPEAL by defendant from *Ervin, Judge*. Judgment entered 21 March 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 February 1976.

Defendant was indicted for murder and convicted of manslaughter at the 11 June 1971 Session of Mecklenburg Superior Court. In an order signed by the trial court, a twelve-year prison sentence was suspended and the defendant was placed on probation for a period of five years. Among the conditions of the probation were the following: (1) that defendant avoid injuri-

ous or vicious habits; (2) that defendant work faithfully at suitable, gainful employment as far as possible and save his earnings above his reasonably necessary expenses; and (3) that defendant pay into the office of the Clerk of Superior Court of Mecklenburg County the sum of $50.00 on or before the 21st of June, 1971, and a like amount on or before each Monday thereafter for a period of five years. The monies collected under the last provision were to be given to the mother and father of the deceased person whom defendant was convicted of killing.

In his report of defendant's conduct and activities, the probation officer informed the court that defendant had violated three conditions of his probation. The court conducted a hearing at which the probation officer testified that defendant admitted using heroin. Further, the probation officer testified that although defendant was able to work, he had refused to find regular employment and had fallen behind in his weekly payments.

The defendant offered testimony tending to show that he had stopped using drugs, that he had worked fairly regularly, and that he had stopped making the $50.00 payments because he was required by the army to travel at his own expense to Massachusetts to be fitted for a glass eye. During the two to three weeks that he was in Massachusetts, he was not employed. For failure to make the payments, he was taken before Judge Grist. From the record, it appears defendant was told by his probation officer to resume the payments in the Fall of 1973, but that there was some confusion as to whether the amount of the payments was to be reduced. Defendant testified that, "[m]y impression was that I shouldn't make any more payments until I was informed of what the exact amount would be. That is why I did not make any more payments."

The court made detailed findings of fact from which it concluded that defendant had violated the terms of probation in that (1) he was using heroin, (a violation of the conditions that he be of general good behavior and that he avoid injurious or vicious habits), (2) he had failed to secure regular employment although capable to do so, (a violation of the condition that he work faithfully at suitable employment as far as possible), and (3) he had wilfully failed to make the $50.00 weekly payments since December of 1973, (a violation of the condition that he pay into the clerk of court $50.00 per week). Therefore, in its

discretion, the court ordered defendant's probation revoked and his twelve-year prison sentence into immediate effect. Certiorari was allowed 10 July 1975.

Attorney General Edmisten, by Associate Attorney Elizabeth R. Cochrane, for the State.

Loflin and Loflin, by Thomas F. Loflin III, for defendant.

MARTIN, Judge.

[1] Defendant contends that the court erred in hearing testimony by defendant's probation officer concerning defendant's admitted use of heroin without first conducting a voir dire examination to ascertain whether the defendant's constitutional rights had been abridged. "The Sixth Amendment, which guarantees to the accused 'in all criminal prosecutions' a speedy and public trial 'by an impartial jury of the state and district wherein the crime shall have been committed,' is inapposite here." *State v. Braswell,* 283 N.C. 332, 196 S.E. 2d 185 (1973). Defendant's contention in the present case is without merit since "[a] hearing to determine whether the terms of a suspended sentence have been violated is not a 'criminal prosecution' . . . ." *State v. Braswell, supra.* See also *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484.

[2] Defendant next contends that the trial court erred in allowing into evidence and in refusing to strike testimony of the probation officer that defendant had refused to obtain regular employment and had refused to pay certain monies in violation of his probation judgment, in that such testimony amounted to a conclusion of law invading the province of the court. Upon a hearing of whether defendant wilfully breached a condition of suspension of sentence, the court is not bound by strict rules of evidence. *State v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850 (1942). As our Supreme Court noted in *State v. Hoggard,* 180 N.C. 678, 103 S.E. 891 (1920):

> " 'When judgment is suspended in a criminal action upon good behavior, or other conditions, the proceedings to ascertain whether the terms have been complied with are addressed to the reasonable discretion of the judge of the court, and do not come within the jury's province. The findings of the judge, and his judgment upon them, are not reviewable upon appeal unless there is a manifest abuse of such discretion.' (Citation omitted.)"

A careful perusal of the testimony leads to the conclusion that sufficient competent evidence was introduced by the State in this hearing to sustain the court's findings of fact.

[3] Defendant next contends the court erred in denying the motion to dismiss charges at the conclusion of the State's evidence. The evidence necessary to order probation revoked is a showing by the State which reasonably satisfies the judge in the exercise of his sound discretion that defendant has violated one of the conditions of his probation. *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476 (1967). This assignment of error is overruled.

Defendant also contends that the court erred in finding and concluding that the probationer had violated the conditions of probation that he be of good general behavior and avoid injurious or vicious habits.

[4] The court found as a fact that defendant has wilfully and without lawful execuse violated the terms of probation by using the drug heroin which is a violation of the condition of probation "that he be of general good behavior and that he avoid injurious or vicious habits." These findings of fact are supported in the testimony of Probation Officer Polk as follows: "That on December 20 1973 the defendant did admit to the supervising officer that he was using the drug heroin." The use of heroin constitutes an injurious habit not only because of the drug's harmful personal effects, but also because of its tendency to deaden one's control over his actions. Defendant's fourth assignment of error is without merit and is overruled.

Defendant's fifth assignment of error is without merit and is overruled.

[5] Defendant's sixth assignment of error relates to the court's finding that he wilfully violated the condition of his probation regarding making payments of sums of monies.

The court found as a fact the following:

> "That the said defendant was capable both physically and mentally of working at gainful employment but that due to his use of heroin and other controlled substances during his period of probation, he rendered himself unable to work from time to time and that he was unable to work for at least five weeks during his period of probation as a result

of his excessive use of various controlled substances, including heroin, and other controlled substances, and that this is in violation of his condition of probation that he work faithfully at suitable employment as far as possible.

That at the time the defendant was placed on probation he was instructed both orally and in writing to pay into the office of the Clerk of Superior Court the sum of $50 per week for a period of five years beginning June 21, 1971, and with a like payment on or before each Monday thereafter; that no payments have been made on this account since August 1, 1973; that the defendant receives a monthly disability check in the approximate amount of $200.00 and that the court finds that the defendant has had no justification for failing to make these payments during some of the period of time between August 1, 1973, and the present period of time in which he contends that he was making no payments as a result of the direction of a judge of the Superior Court; that he was directed by his probation officer to resume the making of these payments in late December, 1973, and that since that time he has wilfully failed to make any payments although he was financially able to do so; that this is in violation of his special condition of probation which states 'that he pay into the office of the Clerk of Superior Court of Mecklenburg County the sum of $50.00 on or before the 21st day of June, 1971, and a like amount on or before each Monday thereafter for a period of five years.' "

Defendant asserts that the condition which he has broken is invalid because it is unreasonable or is imposed for an unreasonable length of time. He cites *State v. Caudle,* 276 N.C. 550, 173 S.E. 2d 778 (1970).

The constitutional right defendant claims has been breached is the use of the criminal process to enforce a civil obligation. The court in *Caudle* recognized that a condition which did indeed use the criminal process for forced payment of civil debts was unconstitutional and therefore, *per se* unreasonable. The Court did, however, define the limits of its holding:

"To suspend a sentence of imprisonment for a criminal act, however just the sentence may be *per se,* on condition that the defendant pay obligations UNRELATED to such criminal act, however justly owing, is a use of the criminal process

to enforce the payment of a civil obligation . . . " (Emphasis supplied). *State v. Caudle, supra.*

In this case, defendant was ordered to pay a sum to the PARENTS of the person he was convicted of killing. This requirement does not extend into the area prohibited by *Caudle, supra,* because it is related to the criminal act committed by defendant. The parents are certainly persons injured by defendant's act.

Defendant's remaining assignment of error is without merit and is overruled.

In determining whether the evidence warrants the revocation of probation or a suspended sentence, the credibility of the witnesses and the evaluation and weight of their testimony are for the judge. *State v. Hewett, supra.* In the present case, there is enough competent evidence in the record to support the court's crucial findings that the defendant has wilfully violated each of the three valid conditions upon which his sentence was suspended. These findings of fact support the judgment revoking probation and putting the prison sentence into effect. The order of the court is

Affirmed.

Judges BRITT and HEDRICK concur.

RUTH KEITH v. S. S. KRESGE COMPANY AND K-MART ENTERPRISES OF NORTH CAROLINA, INC.

No. 7614SC92

(Filed 2 June 1976)

1. Negligence § 5.1— place of business — duty to customers

While defendants are not insurers of the safety of their customers, they do have a duty to exercise ordinary care to keep the premises in reasonably safe condition, and to give warning of unsafe conditions insofar as they are known or should be known by reasonable inspection.

2. Negligence § 57— box falling on customer — cause of accident not shown — summary judgment for store owner improper

In an action to recover for personal injuries sustained by plaintiff when a box fell from a display in defendants' store and struck her, the trial court erred in granting defendants' motion for summary

judgment where defendants failed to meet their burden of establishing that the accident was not caused by their failure to exercise reasonable care, and that reasonable care was exercised to prevent or to discover and remove the unsafe condition for plaintiff and others invited to shop in defendants' store.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 13 November 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 11 May 1976.

Plaintiff brought this action to recover for personal injuries she allegedly sustained while shopping at the K-Mart, a subsidiary of S. S. Kresge Company. She alleged that a box fell from a display of hammocks and injured her, and that the boxes of hammocks had been stacked in such a manner as to be precarious and dangerous to customers. She alleged that defendants knew or should have known of the danger and were negligent in allowing customers in the proximity of the dangerous condition.

Defendants moved for summary judgment and filed a deposition which had been taken of plaintiff, and an affidavit of the assistant manager of K-Mart. Plaintiff filed two affidavits in response to the motion.

It was disclosed by plaintiff's deposition that she was looking at other merchandise, and that her back was to the hammock display when the box fell. She was paying no attention to the hammocks, and had not touched them prior to their falling. There were few people in the store at the time the accident happened, and immediately after the accident plaintiff saw no other customers around the hammock display.

The assistant manager's affidavit stated that the rectangular flat boxes were stacked on top of each other in "a normal fashion," and due to their size and shape they were secure. Merchandise in the store was constantly inspected by K-Mart personnel, and prior to the accident neither the assistant manager nor any other employee had knowledge of any problem with the hammock display. When the assistant manager arrived at the scene he could determine no cause for the boxes falling other than a customer's knocking or disarranging the display. However, he saw no other customer when he arrived.

Plaintiff offered the affidavit of Sally Carden which stated that on the same day of the accident, but not at the time of the

accident, she was in the K-Mart and saw a hammock box fall, and that the boxes were stacked as high as her head.

Also introduced by plaintiff was an affidavit by plaintiff's daughter to the effect that she was with her mother at the time of the accident, and she noticed no other customers in the area when the box fell. The daughter also stated that it was impossible for a customer from another aisle to knock down the boxes because of the wide display between the hammocks and the next aisle. She further avowed that neither she nor plaintiff touched the boxes before the display fell.

Charles Darsie for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for defendant appellees.

ARNOLD, Judge.

[1] The record shows that plaintiff was a customer at defendants' store at the time she was injured. While defendants are not insurers of the safety of their customers they do have a duty to exercise ordinary care to keep the premises in reasonably safe condition, and to give warning of unsafe conditions insofar as they are known or should be known by reasonable inspection. *Routh v. Hudson-Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1 (1964); *Long v. Food Stores*, 262 N.C. 57, 136 S.E. 2d 275 (1964); *Mitchell v. K.W.D.S., Inc.*, 26 N.C. App. 409, 216 S.E. 2d 408 (1975).

[2] Defendants' position is that there is no material fact at issue since all the evidence filed shows there was nothing unusual about the way the display was created, or anything unusual about the display after the accident. Evidence indicated that the store manager inspected the display after the accident and determined no cause for the falling except for some other customer disarranging or pushing the boxes.

Moreover, defendants assert that plaintiff's evidence is totally lacking concerning the display being precarious or dangerous, or whether the defendants or another customer was responsible for creating the dangerous condition. They maintain there was no showing by plaintiff that the condition existed for a sufficient length of time to place defendants on notice of the condition.

"Irrespective of who has the burden of proof at trial upon issues raised by the pleadings, upon a motion for summary judgment the burden is on the movant to establish that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law." *Mitchell v. K.W.D.S., Inc., supra,* 411. In the instant case the plaintiff had no burden to offer evidence in support of her claim until defendants produced evidence of the necessary certitude to negate plaintiff's claim in its entirety and show they were entitled to judgment as a matter of law. *Sanders v. Davis,* 25 N.C. App. 186, 212 S.E. 2d 554 (1975); *Whitley v. Cubberly,* 24 N.C. App. 204, 210 S.E. 2d 289 (1974); *Tolbert v. Tea Co.,* 22 N.C. App. 491, 206 S.E. 2d 816 (1974).

In our opinion defendants failed to put on sufficient evidentiary material of necessary certitude to negate plaintiff's claim. Defendants did not meet their burden of establishing that the accident was not caused by their failure to exercise reasonable care, and that reasonable care was exercised to prevent or to discover and remove the unsafe condition for plaintiff and others invited to shop in the K-Mart. *Tolbert v. Tea Co., supra.*

The judgment appealed from is

Reversed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. KENNETH T. AARON

No. 765SC122

(Filed 2 June 1976)

1. **Searches and Seizures § 2— absence of voir dire on validity of search**

The trial court did not err in failing to conduct a *voir dire* to determine the validity of a search of defendant's automobile where the record clearly establishes that defendant freely, intelligently and without coercion consented to the search.

2. **Criminal Law § 75 —illegal arrest — admissibility of confession**

A confession following an illegal arrest is not *ipso facto* involuntary and inadmissible.

3. Criminal Law § 75— illegal arrest — admissibility of confession

Defendant's confession was not inadmissible on the ground his arrest was illegal where the trial court found upon competent *voir dire* evidence that defendant's confession was made freely and voluntarily after he was advised of his constitutional rights and expressly waived his right to an attorney.

4. Criminal Law § 83— information from defendant's wife — officer's testimony — no violation of husband-wife privilege

An officer's testimony that stolen goods were recovered as a result of information volunteered by the wives of defendant and an accomplice was not inadmissible hearsay and did not violate the statute providing that a husband or wife is incompetent as a witness against the other in a criminal proceeding. G.S. 8-57.

5. Criminal Law § 73— testimony not hearsay

An officer's testimony that he received a call that a store had been broken into and that another officer told him that defendant's accomplice wanted to talk to another accomplice alone was not inadmissible as hearsay since it was not offered to prove the truth of the matter asserted.

ON *certiorari* to review defendant's trial before *Cowper, Judge.* Judgment entered 30 May 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 May 1976.

Defendant was tried on indictments charging (1) breaking or entering a building occupied by the B. F. Goodrich Co., (2) larceny of personal property pursuant to the breaking or entering, (3) safecracking, and (4) larceny of a 1973 Chevy truck.

The State presented evidence at trial tending to establish that on 30 November 1974, defendant, together with Gonzales Jones and Sylvester Green [*State v. Green,* No. 755SC926, filed 7 April 1976], broke into a B. F. Goodrich store in Wilmington, broke open the safe and took money from it, loaded a quantity of merchandise on a truck, and drove away. The truck used by defendant to drive away the stolen merchandise developed mechanical troubles, so he and his companions returned to the store and got another truck. Sylvester Green drove the truck while Jones and defendant followed in defendant's Dodge automobile. Police stopped the car and arrested Jones and defendant. On the following day Jones confessed, implicating Green and the defendant, Aaron.

Defendant testified that he was in no way involved in this matter, and stated that he did not tell the investigating officers that he was involved in the criminal activities.

The jury returned guilty verdicts to each of the offenses charged. From a judgment imposing active sentences the defendant appeals to this Court.

Attorney General Edmisten, by Associate Attorney Patricia H. Wagner, for the State.

Harold P. Laing for defendant appellant.

ARNOLD, Judge.

[1] There is no basis for defendant's contention that the trial court committed prejudicial error in not conducting a voir dire examination to determine the validity of the search of his automobile. The record clearly establishes that defendant freely and intelligently and without coercion consented to the search. See *State v. Dooley*, 20 N.C. App. 85, 200 S.E. 2d 818 (1973). A search warrant is not necessary to validate a search of an automobile where the owner and operator consents to the search. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Lindquist*, 14 N.C. App. 361, 188 S.E. 2d 686 (1972).

[2, 3] Defendant next contends that his confession was improperly admitted into evidence because his arrest was illegal. We disagree. "The rule in North Carolina is that a confession following an illegal arrest is not *ipso facto* involuntary and inadmissible, but the circumstances surrounding such an arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible." *State v. McCloud*, 276 N.C. 518, 526, 173 S.E. 2d 753 (1970). In the instant case the trial judge properly conducted a voir dire examination outside the presence of the jury to determine whether defendant's confession was voluntary and admissible. Upon the evidence presented during the voir dire hearing, the trial judge concluded that the defendant's statement was made freely and voluntarily after he was advised of his constitutional rights, and after he expressly waived his right to an attorney. The evidence presented during the voir dire, and the trial judge's findings of fact, fully support his conclusion that defendant's statement was admissible.

[4] Officer Henderson testified that the stolen goods were recovered as a result of information volunteered by the wives of defendant and Jones. Defendant contends this testimony violated G.S. 8-57 and was inadmissible as hearsay.

G.S. 8-57 provides that a husband or wife is incompetent as a witness against the other in a criminal proceeding. However, G.S. 8-57 was not intended, and it does not, prohibit a husband or wife from making voluntary statements to police officers during the investigatory stage of a criminal proceeding. Moreover, the officer's testimony was not hearsay since it was not admitted to prove the truth of the matter asserted. *See State v. Brooks,* 15 N.C. App. 367, 190 S.E. 2d 338 (1972).

[5] Defendant also contends that the admission of various other statements was hearsay and inadmissible. Examples of defendant's contentions are statements by Officer Todd that he received a call that the B. F. Goodrich store had been broken into, and that Officer Henderson told him [Todd] that Sylvester Green wanted to talk to Jones alone. This testimony was not hearsay inasmuch as it was not admitted to prove the truth of the matter asserted. "[W]henever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay." Stansbury's N. C. Evidence, Brandis Revision, § 138, Hearsay Defined, and the Hearsay Rule Stated, pp. 459-460.

We have reviewed defendant's remaining assignments of error and hold that he received a fair trial without prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

MARGUERITE GUNKEL AND THE SUN JOURNAL, INC. v. CHARLES H. KIMBRELL, MAYOR; BEN B. HURST, TOM I. DAVIS, ELLA J. BENGEL, TIMOTHY A. MONTGOMERY AND GRAY INGRAM, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF ALDERMEN OF THE CITY OF NEW BERN, A MUNICIPAL CORPORATION; SAMUEL P. BRANCH, WILLIAM M. BRYAN, JOHN G. DUNN, HARRY L. VATZ AND CLIFTON L. McCOTTER, INDIVIDUALLY AND AS MEMBERS OF THE REDEVELOPMENT COMMISSION OF THE CITY OF NEW BERN; AND THE REDEVELOPMENT COMMISSION OF THE CITY OF NEW BERN

No. 753SC1016

(Filed 2 June 1976)

Appeal and Error § 6— denial of preliminary injunction — premature appeal

Purported appeal from an order denying a preliminary injunction restraining a municipal board of aldermen and a redevelopment commission from holding meetings in violation of the open meetings law is from an interlocutory order and must be dismissed where appellants have not shown that the order will deprive them of a substantial right if not corrected before a final hearing on their complaint. G.S. 1-277(a).

APPEAL by plaintiffs from *Rouse, Judge.* Orders entered 22 October 1975 and 6 November 1975 in Superior Court, CRAVEN County. Heard in the Court of Appeals 6 April 1976.

This is a civil action by the plaintiffs, Marguerite Gunkel and the Sun Journal, Inc., against the defendants, City of New Bern; Charles H. Kimbrell, Mayor of New Bern; the New Bern Board of Aldermen and certain members individually; and the New Bern Redevelopment Commission and certain members individually, seeking preliminary and permanent injunctions against defendants, enjoining them "from holding any official meetings in contravention of" North Carolina's open meetings law and a temporary and permanent injunction requiring that "advance notice be given to all media and the public at large of any official meeting."

Plaintiffs, in their complaint, allege in pertinent part the following:

> "10. That the plaintiffs are informed, believe and therefore allege that on or about the 4th day of August, 1975, at or about 1:00 p.m., in the Holiday Inn, New Bern, North Carolina, a majority of the Redevelopment Commission of the City of New Bern and the Board of Aldermen for the City of New Bern met in one room.

11. That the plaintiffs are informed, believe and therefore allege that during the aforesaid meeting the defendants, both individually and in their official capacities, transacted the public business within the jurisdiction, either real or apparent, of said bodies, and that said meeting constituted an official meeting within the definitional terms contained in General Statute § 143-318.2.

12. That the plaintiffs are informed, believe and therefore allege that some, but not all, of the acts made reference to in the next above paragraph included discussions concerning a modification of the master plan for the redevelopment site in downtown New Bern, North Carolina; the development of a five (5) acre park in the twenty-three (23) acre redevelopment area; and, discussions concerning a bid, either submitted or to be submitted, by Wachovia Bank & Trust Company, concerning certain real property located within the redevelopment area.

* * *

15. That the plaintiffs, and other members of the general public similarly situated, were excluded from the meeting made reference to above as no notice whatsoever to the public at large was given of said meeting, and if notice had been given the plaintiffs or other members of the public would have attended said meeting.

16. That the legal rights of the plaintiffs to attend meetings of the New Bern Board of Aldermen and the Redevelopment Commission of the City of New Bern as provided in Article 33B of Chapter 143 of the General Statutes of North Carolina are insecure; and, that a real controversy exists between the plaintiffs and the defendants, and that the plaintiffs' legal rights to attend meetings of the New Bern Board of Aldermen and the Redevelopment Commission of the City of New Bern will remain uncertain unless declared by this Court.

17. That unless the New Bern Board of Aldermen and the Redevelopment Commission of the City of New Bern are restrained and enjoined from conducting further similar meetings in violation of Article 33B of Chapter 143 of the General Statutes of the State of North Carolina, the plaintiffs and others similarly situated and the public will suffer immediate, pressing and irreparable damage and injury."

The defendants answered, admitting that an informal luncheon was held on 4 August 1975 in the Holiday Inn and that the individually named defendants were present. They also admitted that no notice of the luncheon was given to the public and that those present "discussed the possibility of modifying the master plan for the redevelopment site in downtown New Bern, North Carolina, by the development of a five-acre park and, among other things, the problems which might be encountered by Wachovia Bank & Trust Company in providing means of ingress and egress to its customers, should it be the successful bidder for a plot of ground in the redevelopment area." They specifically denied, however, that any official meeting took place "or that any hearings, deliberations or actions, such as are contemplated by . . . [the open meetings law] were held, taken or made." They also denied that the legal rights of plaintiffs to attend public meetings held by defendants were "insecure."

Affidavits were presented by plaintiffs and defendants in support and in opposition to the request for a preliminary injunction. After a hearing held 26 September 1975, Judge Rouse entered an order, filed 22 October 1975, denying plaintiffs' request for a preliminary injunction. Plaintiffs moved pursuant to Rule 52(b) for amendments to the findings of the October order. On 6 November 1975, the court entered an order denying plaintiffs' 52(b) motion. From the 22 October order denying the preliminary injunction and the 6 November order denying the 52(b) motion, plaintiffs appealed.

Ward, Tucker, Ward and Smith by Michael P. Flanagan for plaintiff appellants.

Lee, Hancock and Lasitter by C. E. Hancock, Jr., for defendant appellees, Redevelopment Commission and named individual members.

A. D. Ward for defendant appellees, Board of Aldermen and named individual members, City of New Bern and Charles H. Kimbrell.

HEDRICK, Judge.

G.S. 1-277 in pertinent part provides:

> "(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference,

whether made in or out of session, 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."

An order granting or refusing a preliminary injunction is an interlocutory order governed by the requirements of G.S. 1-277. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975).

Plaintiffs have not shown that the order denying the preliminary injunction will deprive them of a substantial right if not corrected before a final hearing on plaintiffs' complaint. Accordingly, the appeal from the order denying the preliminary injunction is dismissed. *See Pruitt v. Williams, supra.* It follows that the appeal from the order denying plaintiffs' 52(b) motion must also be dismissed under G.S. 1-277.

Appeal dismissed.

Judges MORRIS and ARNOLD concur.

IN THE MATTER OF THE ESTATE OF JAMES L. MOORE, DECEASED

No. 7519SC999

(Filed 2 June 1976)

Executors and Administrators § 37— nominated executor seeking letters testamentary — costs of proceeding not taxed against estate

A proceeding by one nominated to be executor under a will for the issuance to him of letters testamentary for which respondent seeks reimbursement of expenses including an attorney's fee does not come within the provisions of G.S. 6-21(2), since such a proceeding is not one involving the rights and duties of any party under the will.

APPEAL by petitioner from *Collier, Judge.* Order entered 13 November 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 18 March 1976.

This is a civil action wherein the petitioner, Jack E. Klass, administrator c.t.a. of the estate of James L. Moore, is appealing an award to the respondent, Robert A. McClary, of $206.05 "court expenses" and $8,000.00 attorney's fee to be paid out

of the estate as part of the costs in a prior action, where respondent sought and was denied letters testamentary under the will of testator.

Testator died 19 December 1973, leaving a purported will dated 10 October 1965. His widow, Eloise T. Moore, filed a petition to have the purported will admitted to probate. In the petition the widow alleged that respondent, named as executor in the will, should not be allowed to serve as executor because of a conflict of interest. The paper writing was admitted to probate, and respondent filed an answer alleging that he was not subject to any conflict of interest. He also made formal application for issuance of letters testamentary. The Clerk found no conflict of interest, but the superior court reversed the Clerk's order, holding that the facts found by the Clerk established a conflict of interest and respondent should not be allowed to serve as executor. This court affirmed the decision of the superior court. *In re Moore,* 25 N.C. App. 36, 212 S.E. 2d 184 (1975), *cert. denied* 287 N.C. 259, 214 S.E. 2d 430 (1975).

Respondent then moved that $206.05 "court expenses" expended by respondent and a reasonable attorney's fee for respondent's attorney "be taxed as a part of the bill of costs" pursuant to G.S. 6-21. In support of his motion, he submitted an affidavit of his attorney listing the various types of services provided for respondent and stating that more than one hundred hours had been spent working on the case. The court allowed the $206.05 court expenses and an attorney's fee of $8,000.00 to be taxed as part of the costs. Petitioner appealed.

Jordan, Wright, Nichols, Caffrey and Hill by Welch Jordan and G. Marlin Evans and Walser, Brinkley, Walser and McGirt by Gaither S. Walser for petitioner appellant.

Williams, Williford, Boger and Grady by John Hugh Williams for respondent appellee.

HEDRICK, Judge.

In the order appealed from Judge Collier purported to act pursuant to the provisions of G.S. 6-21 in taxing the costs of the action. G.S. 6-21 in pertinent part provides:

> *"Costs allowed either party or apportioned in discretion of court.*—Costs in the following matters shall be

taxed against either party, or apportioned among the parties, in the discretion of the court:

* * *

(2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, however, that in any caveat proceeding under this subdivision, if the court finds that the proceeding is without substantial merit, the court may disallow attorneys' fees for the attorneys for the caveators.

* * *

The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow; * * * "

Petitioner contends that a proceeding by one nominated to be executor under a will for the issuance to him of letters testamentary for which respondent seeks reimbursement of expenses including an attorney's fee does not come within the provisions of G.S. 6-21(2). We agree. Such an action is clearly not a caveat proceeding nor one requiring the construction of any will. Respondent contends, however, that it is a proceeding to "fix the rights and duties of parties thereunder."

Neither party has cited, nor are we able to find, any cases decided in North Carolina dealing directly with this question. The majority of other jurisdictions which have considered the question of taxing costs against the estate in a proceeding such as this have held that "no allowance will be made out of the estate for costs and attorneys' fees incurred in procuring letters of administration or in litigating the right to administer on the estate . . . . " Annot., 90 A.L.R. 101, 104 (1934). The reasoning behind such a rule—that an administration contest does not generally affect any interest of the estate but involves the personal interest of the executor in qualifying for and receiving the executor's commission, 90 A.L.R., supra at 102—offers guidance in determining whether G.S. 6-21(2) was meant to include a proceeding to contest appointment of an executor.

A person named under the will as executor has no duty to qualify as the executor. G.S. Chap. 28, Art. 3 (Repealed by Session Laws 1973, c. 1329, s. 1, effective 1 October 1975).

Respondent cannot be said to be litigating the rights and duties of executor as a party under the will in the very proceeding in which he is seeking to become the executor. Since the determination of the action will not affect the estate or any interest in the administration thereof but will only benefit respondent personally, it is not an action or proceeding involving the rights and duties of any party under the will. This is not a proceeding within the statutory language of G.S. 6-21.

In North Carolina, costs may be taxed solely on the basis of statutory authority. *City of Charlotte v. McNeely,* 281 N.C. 684, 190 S.E. 2d 179 (1972). Attorney's fees may be taxed as part of the costs only in actions as enumerated by statute. G.S. 6-21, 6-21.1, and 6-21.2; *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326 (1963); *Perkins v. Insurance Co.,* 4 N.C. App. 466, 167 S.E. 2d 93 (1969). Since the superior court acted without statutory authority, it was error to include an attorney's fee in the costs of the action.

With regard to the $206.05 "court expenses" incurred by respondent and taxed by the court as costs, although G.S. 6-20 allows the court in a proceeding such as this to tax costs in the discretion of the court, there is nothing in the order of the superior court indicating the nature of the court expenses which were allowed as costs. Without some finding as to the nature of the expenses, we are unable to review their validity. Accordingly, that portion of the order must also be vacated.

The order appealed from is vacated.

Vacated.

Judges MORRIS and ARNOLD concur.

SCM CORPORATION, GLIDDEN-DURKEE DIVISION v. FEDERAL CONSTRUCTION COMPANY AND GREAT AMERICAN INSURANCE COMPANY

No. 7617DC58

(Filed 2 June 1976)

1. Principal and Surety § 9— public construction bond — housing authority as municipal corporation

A housing authority is a "municipal corporation" within the meaning of former G.S. 44-14 which allows only one action on a bond given

for construction of a municipal building and requires such action to be brought in the county in which the building is located.

2. **Principal and Surety § 9— materialman's action against contractor — action on account — inapplicability of public construction bond statute**

An action to recover for materials furnished a general contractor for use in constructing a building for a housing authority is a suit on an account and not a suit on the contractor's bond; therefore, former G.S. 44-14 is inapplicable to such suit.

APPEAL by plaintiff from *Clark, Judge.* Order entered 13 October 1975 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 6 May 1976.

In its complaint, filed 18 April 1975 in Rockingham County, plaintiff sued defendant Federal Construction Company (hereinafter "Federal") for funds due and owing on a building materials and supplies account, and also sued defendant Great American Insurance Company (hereinafter "Great American") for its "guarantee" under a performance and payment bond.

In May 1975, defendants, in separately drawn but parallel motions, moved for dismissal, alleging, inter alia, that Great American had issued its bond pursuant to former G.S. 44-14, which, they argue, " . . . requires that only one action may be brought on a bond for a municipal construction project and that that action must be brought in the county in which the municipal corporation is located." Averring further that the sponsoring housing authority " . . . of the town of Marshall is a municipal corporation existing in Madison County, North Carolina . . . " , defendants noted that on " . . . or about November 29, 1973, an action was instituted in Superior Court for Madison County; said action being entitled CHARLIE NANCE v. FEDERAL CONSTRUCTION COMPANY, et al. Pursuant to the requirements of N.C.G.S. 44-14 the Plaintiff in the action denominated CHARLIE NANCE v. FEDERAL CONSTRUCTION COMPANY, et al gave the required public notice to all creditors making a claim under the bond attached to Plaintiff's Complaint and thereafter several claimants joined in the said action." Thus, defendants, pointing out "[t]hat the six months allowed for intervention in the Charlie Nance action ha[d] expired . . . [and] ha[d] in fact been dismissed . . . " , sought dismissal under Rule 12(b) (1) and (6) " . . . for the reason that N.C.G.S. 44-14 allows for only one action against . . . [these defendants] . . . and that said action has already been prosecuted and concluded . . . in Madison County, North Carolina. . . . " Thus,

defendants asserted their respective defenses on both lack of jurisdiction and improper venue grounds.

Defendants attached to their motions a copy of the complaint in *Charlie Nance v. Federal Construction Company, et al,* and further attached a copy of a notice published pursuant to the "Charlie Nance" action. The record further contained the corporate charter for the Marshall Housing Authority, issued 23 October 1967, which established said Authority as "a public body and a body corporate and politic."

From an order dismissing the action against both defendants, plaintiff appeals.

C. Orville Light for plaintiff appellant.

Powe, Porter, Alphin & Whichard, P.A., by Edward L. Embree III, for defendant appellees.

BRITT, Judge.

[1] Plaintiff appellant, maintaining that former G.S. 44-14 is inapplicable to this case, contends that the trial court erred in granting defendants' respective motions for dismissal in that the particular housing authority overseeing this development project is not a "municipal corporation." We agree with the trial court's order as to defendant Great American, but disagree with the order as to defendant Federal.

As plaintiff's contention intimates, the narrow dispositive question is simply whether the particular housing authority is a "municipal corporation" under former G.S. 44-14. Before reaching this question, however, it first should be pointed out that notwithstanding repeal by 1973 Session Laws, Chapter 1194, § 6, this case is still governed by former G.S. 44-14 in that the relevant contractual arrangements, accounts and bonds were executed prior to the repealing act's effective date of 1 September 1974. See 1973 Session Laws, Chapter 1194, § 7. It also should be noted that our Supreme Court, interpreting the jurisdictional breadth of this statute, has stated that "[t]his statute applie[s] only to bonds given to a county, city, town or other municipal corporation. . . . " *Trust Co. v. Highway Commission,* 190 N.C. 680, 683, 130 S.E. 547 (1925).

G.S. 44-14 provided in pertinent part:

> " . . . Only one action or suit may be brought upon such bond, which said suit or action shall be brought in the

county in which the building, road, or street is located, and not elsewhere. In all suits instituted under the provisions of this statute, the plaintiff or plaintiffs shall give notice to all persons, informing them of the pendency of the suit, the name of the parties, with a brief recital of the purposes of the action, which said notice shall be published at least once a week for four successive weeks in some newspaper published and circulating in the county in which the action is brought, and if there be no newspaper, then by posting at the courthouse door and three other public places in such county for thirty days. Proof of such service shall be made by affidavit as provided in case of the service of summons by publication. All persons entitled to bring and prosecute an action on the bond shall have the right to intervene in said action, set up their respective claims, provided that such intervention shall be made within six months from the bringing of the action, and not later. . . . "

Though not related to this statute, our Supreme Court in *Wells v. Housing Authority,* 213 N.C. 744, 748, 197 S.E. 693 (1938), broadly and definitively opined that a housing authority represents " . . . a proper exercise of governmental authority . . . [and] differs in [but] one particular from the usual type of municipality—the ownership of the instrumentalities by which the public purpose is to be served. But we cannot see that such ownership detracts from the public or municipal character of the agency employed." Thus, our Supreme Court for many years has considered housing authorities, at least those enjoying public corporate status, to be "municipal corporations" where such description is relevant and necessary to the effective discharge of their detailed duties. We, therefore, reject plaintiff's contention with respect to defendant Great American.

[2] We conclude, however, that plaintiff effectively has raised a meritorious argument regarding defendant Federal. Simply stated, plaintiff's cause of action against the contractor Federal is a suit on an account and is not a suit upon a bond. Thus, former G.S. 44-14 is inapplicable with respect to defendant Federal.

For the reason as stated, we affirm as to defendant Great American and reverse as to defendant Federal.

Judges PARKER and MARTIN concur.

GLORIA GRADY HEMBY v. PAUL C. HEMBY III

No. 758DC1044

(Filed 2 June 1976)

1. **Divorce and Alimony § 23— reduction of child support — change in circumstances — increased expenses caused by remarriage**

The trial court erred in considering defendant's additional living expenses caused by his remarriage in finding a change of circumstances justifying a reduction in the amount of child support payments defendant was required to make under a consent judgment.

2. **Divorce and Alimony § 21; Judgments § 10— child support — consent judgment — absence of summons and pleadings — estoppel to attack**

Defendant is estopped to attack a child custody and support consent judgment on the ground no summons was issued and no complaint and answer were filed by failing to object in apt time and by acquiescing in the judgment after rendition.

ON *writ of certiorari* to review the order of *Exum, Judge.* Order entered 18 July 1975 in District Court, LENOIR County. Heard in the Court of Appeals 8 April 1976.

Plaintiff appeals from order modifying a consent judgment providing for child support payments to be made by defendant. The record discloses:

In August 1973 plaintiff and defendant consented to a judgment relating to custody and support of their three children. It was agreed that plaintiff and the children would be entitled to possession of the home and that plaintiff and defendant would convey title to the home to trustees; the conveyance was made. Defendant agreed to make the payments on, and pay for all necessary repairs to, the house; to make child support payments of $200 per month, increasing to $220 per month after six months; and also pay certain medical, dental, and other specified bills for the children.

On 21 April 1975 defendant moved for a reduction in the amount he was having to pay for child support, alleging a change of conditions including a reduction in his income and an increase in plaintiff's income.

At the hearing on the motion, defendant offered evidence tending to show that since 1973 plaintiff's net income had risen from $51 per week to $423 per month; that his net income had dropped from $964.86 to $949.90 per month; that his expenses

for the support of the children had risen from $539.13 to $941.41 per month, primarily because plaintiff had demanded that he make expensive repairs on the family home; and that his personal living expenses had risen from $378.37 to $935.29 per month. The evidence showed that defendant had remarried and in computing his monthly living expense he included the expenses of his present wife and her child by an earlier marriage.

Plaintiff testified in detail concerning her living expenses for herself and the children. Her testimony tended to show that the children's expenses amounted to approximately $500 per month.

The court held that there had been a substantial change in the financial circumstances of the parties, and that defendant should be relieved of the obligation to make mortgage payments on the home and to pay for repairs to the home. Plaintiff gave notice of appeal, and because of her failure to perfect the appeal within the required time, we allowed her petition for writ of certiorari.

Turner and Harrison, by Fred W. Harrison, for plaintiff appellant.

White, Allen, Hooten & Hines, P.A., by John R. Hooten, for defendant appellee.

BRITT, Judge.

[1] Plaintiff contends that the trial court erred in finding and concluding that there had been a substantial change in conditions and relieving defendant of the obligation of making mortgage payments on, and repairs to, the home. We think the contention has merit.

Since the trial court's findings indicated only a slight change in defendant's income, it appears that the court was influenced by the considerable increase in defendant's living expenses. For example, the court found that in 1973 defendant's monthly expense for food was $90; in 1975 it was $250. In 1973 defendant's monthly expense for utilities was $19; in 1975 it was $70. Obviously, a large part of the increase in defendant's living expense was due to the additional expense of his new wife and her child.

In *Sayland v. Sayland,* 267 N.C. 378, 383, 148 S.E. 2d 218, 222 (1968), we find: "Payment of alimony may not be avoided

merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations. (Citations.) . . . . " The principles declared in *Sayland* would apply with equal force to a motion seeking to vacate or modify an order for child support. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967). *See also* 2 R. Lee, North Carolina Family Law, § 156.

The order appealed from is vacated and this cause is remanded for further proceedings. Upon a further determination of defendant's motion for a modification of the consent judgment, the trial court will not consider defendant's additional living expenses caused by his remarriage.

[2] Although defendant did not appeal from the order under review, he contends that the consent judgment is a nullity for the reason that no summons was issued and no pleadings were filed in the action. We find no merit in this contention.

The record on appeal is contradictory on the point raised by defendant. While the first page of the record indicates that no summons was issued and no complaint or answer was filed, the order appealed from contains a finding of fact that the action was instituted on 29 August 1973 "by the issuance of a summons."

Assuming, *arguendo,* that no summons was issued or no complaint or answer filed, we think defendant is still bound by the consent judgment. While jurisdiction may not be conferred upon a court by waiver or consent of the parties, where the court has jurisdiction of the subject of the action and the parties are before the court, objections as to the manner in which the court obtained jurisdiction of the person or to mere informalities in the procedure or judgment may be waived, and a party may be estopped to attack the judgment on such grounds by failure to object in apt time and by acquiescence in the judgment after rendition. *Pulley v. Pulley,* 255 N.C. 423, 121 S.E. 2d 876 (1961). We think the instant case is governed by the stated principle of law.

Order vacated and cause remanded.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. HENRY LEWIS CHERRY

No. 7519SC946

(Filed 2 June 1976)

1. **Robbery § 2— indictment charging robbery — evidence showing attempt to rob — variance not material**

Where an indictment charged that defendant actually took money from his victim with the unlawful use of a handgun, but the evidence tended to show that defendant merely attempted to take the money with the use of a handgun, such variance was not material, and the trial court properly denied defendant's motion to dismiss at the end of all the evidence. G.S. 14-87.

2. **Robbery § 5— attempted armed robbery — improper jury instruction — subsequent correct instruction — no prejudice**

Defendant was not prejudiced by the trial court's instruction that the "defendant has been accused of attempted robbery with a firearm which is attempting to rob or endangering or threatening that other person with a firearm," since the court immediately thereafter gave a complete instruction on the elements of attempted armed robbery, and the jury could not have misunderstood the court's language.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 25 June 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 10 March 1976.

Defendant was tried under a bill of indictment charging him with the armed robbery of one Cathy Griffith Benfield, a violation of G.S. 14-87.

The State offered evidence tending to show that on 5 May 1975, in the Bear Poplar community of Rowan County, Cathy Benfield was managing her father's grocery store. Around 1:45 p.m., Cathy was at the back of the store and Mr. London, an elderly gentleman, was dozing in a chair near the front. Three males entered the store whereupon Cathy walked to the front. The three headed towards the cold drink coolers at the rear of the store and presently, one of them approached the counter at the middle front of the store where Cathy stood. He placed a six pack of beer and a bottle of wine on the counter. After telling Cathy that his friend would pay for the beer and wine, he asked her to change a dollar for him. As she turned to hand him his change she realized that he was pointing a small, silver-colored gun at her. He ordered her to put the money in a bag. Cathy placed over $100.00 out of the cash drawer and around $200.00 out of a billfold containing gas money in a bag

and put it on the counter. She noticed that the man wore a toboggan pushed back on his head and recognized him as "Brother Cherry," a young man who occasionally patronized the store.

The three men discussed what to do and one told Cherry to lock Cathy in the bathroom. Cathy entered the bathroom and pushed the door closed. She heard a loud noise followed by the sound of running feet. She pushed the bathroom door open and found Mr. London standing in the store with blood on his face. She called the sheriff and found the bag of money on the counter.

Defendant offered evidence tending to show that on 5 May 1975 he was in his sister's house until 3:45 p.m. He placed a call to his mother at 12:31 p.m. that day from his sister's trailer. He spoke with some relatives who stopped by the trailer at approximately 2:00 p.m. He left the trailer with his sister at 3:45 p.m.

Defendant admitted having traded at the store in the past, but denied participating in the robbery.

The jury returned a verdict finding defendant guilty of attempted robbery with a dangerous weapon. From judgment of imprisonment entered upon the verdict, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Elizabeth R. Cochrane, for the State.

Davis, Ford & Weinhold, by Robert M. Davis, for defendant.

MARTIN, Judge.

[1] Defendant contends the court erred in refusing to grant his motion to dismiss at the end of all the evidence.

The indictment charged that defendant, with the unlawful use of a handgun whereby the life of Cathy Benfield was endangered, did take, steal and carry away $455.14. However, the evidence presented tended to show, and the court in fact charged on attempted robbery with a firearm. Defendant contends there is a fatal variance between the indictment and proof in that a taking was charged and an attempt to take was the subject of the evidence.

"By the terms of G.S. 14-87 an attempt to rob another of personal property, made with the use of a dangerous weapon, whereby the life of a person is endangered or threatened, is, itself, a completed crime and is punishable to the same extent as if the property had been taken as intended. (Citation omitted.) Such attempt occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person. (Citation omitted.)" *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866 (1971).

G.S. 14-87 was enacted to cover situations where there was an attempt to take as well as those where there was an actual taking. The attempt now is on equal level with the taking: each offense is of equal gravity. *State v. Sanders,* 280 N.C. 81, 185 S.E. 2d 158 (1971).

Admittedly, there is variance between the allegations and the proof offered, but the variance is not material. The indictment charged all the essential elements of the crime of armed robbery. The offense was complete when the defendant attempted to take the money from the presence of Cathy Griffith Benfield by the means condemned in G.S. 14-87. Proof was offered to support the material allegations. The trial court correctly denied motion for dismissal.

[2] Next, defendant assigns as error that portion of the charge which reads as follows:

> "Now, as I have said, the defendant has been accused of attempted robbery with a firearm which is attempting to rob or endangering or threatening that other person with a firearm."

Defendant argues that this is a prejudicial instruction for it would allow the jury to convict him if it found only that he had endangered Cathy Benfield with a firearm.

Immediately following the portion in question, the court gave a complete instruction on the elements of attempted armed robbery. The jury was fully apprised of its duty and that body was not confused. The mistake was merely inserting "or" for "by." In view of the charge as a whole, it is apparent that the jury could not have misunderstood the court's language. See *State v. Sanders, supra.*

Defendant received a trial free of prejudicial error.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. HENRY WHITAKER

No. 751SC1042

(Filed 2 June 1976)

Assault and Battery § 15— felonious assault — failure to submit simple assault — whether instruments were deadly weapons

In a prosecution of defendant for assault with a deadly weapon with intent to kill a fellow prison inmate and a prison guard, the trial court erred in failing to submit issues of simple assault in both cases where it was for the jury to determine whether a knife, nail clippers, and a broom handle used in the assault were deadly weapons.

APPEAL by defendant from *Webb, Judge.* Judgment entered 21 August 1975 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 6 April 1976.

Defendant was indicted on two charges for assault with a deadly weapon with intent to kill Donald Dowdy and William Burney. He entered a plea of not guilty.

The evidence for the State tended to show that on 13 May 1975, Burney and defendant were inmates at Maple Prison Unit and Dowdy was a prison guard at that unit. Defendant, in response to a comment by Burney about defendant's running to breakfast, stabbed Burney with a knife on his left side causing a wound one-half inch wide and hit him on top of the head with a broken broom handle. Officer Dowdy attempted to break up the fight and was hit on the front part of his forehead with the broom handle by the defendant. As a result of the blow to his forehead, Officer Dowdy blacked out for a while and developed a large knot on his forehead.

At the close of the State's evidence, the court granted defendant's motion to dismiss as to the charge of assault with a deadly weapon with intent to kill Officer Dowdy, and allowed the jury to determine whether or not defendant was guilty of assault with a deadly weapon on Officer Dowdy.

Defendant testified that Burney attacked him with a razor, and he responded by scratching Burney with his nail clippers. Burney then attacked defendant with a broom whereupon defendant attempted to hit Burney with a broken broom handle. In doing so, defendant mistakenly hit Officer Dowdy. Another inmate corroborated defendant's testimony.

The jury returned a verdict of guilty of assault with a deadly weapon in each case. From judgment imposed thereon, defendant appealed.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

Wilton F. Walker, Jr., for defendant.

MARTIN, Judge.

Defendant's two assignments of error relate to the failure of the court to submit to the jury the issue of simple assault in each case.

The defendant contends that an additional issue of simple assault upon Donald Dowdy and William Burney should have been submitted to the jury by the judge in his charge in that he left it to the jury to determine whether the broom handle and the knife were deadly weapons. The jury could have determined that the broom handle and knife were not deadly weapons, in which case they should have been able to find defendant guilty of simple assault.

"An instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. (Citation omitted.) But where it may or may not be likely to produce such results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. . . . 'If its character as being deadly or not depended upon the facts and circumstances it became a question for the jury with proper instructions from the court. (Citations omitted.)'" *State v. Perry,* 226 N.C. 530, 39 S.E. 2d 460 (1946).

In the instant case, whether the broom handle, nail clippers, and knife were deadly weapons were questions for the jury.

"When there is evidence tending to support a milder verdict than the one charged in the bill of indictment the defendant is entitled to have different views presented to the jury under a proper charge, and an error in this respect is not cured by a verdict convicting him of the crime as charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree if the different views, arising on the evidence had been correctly presented by the trial court. (Citations omitted.)" *State v. Burnette,* 213 N.C. 153, 195 S.E. 356 (1938).

Having submitted the question as to the deadly character of the weapons to the jury for their determination, it was incumbent upon the court to also submit to the jury the lesser degree of the crimes charged arising upon the evidence.

The failure of the court to charge the jury as to its right to return a verdict of guilty of simple assault, and to explain the law in respect thereto, deprived defendant of a substantial right, entitling him to a new trial.

New trial.

Chief Judge BROCK and Judge VAUGHN concur.

HILDA S. PINKSTON, ADMINISTRATRIX OF THE ESTATE OF ROBERT M. PINKSTON, DECEASED v. BALDWIN, LIMA, HAMILTON COMPANY, A CORPORATION; CLARK EQUIPMENT COMPANY, A CORPORATION; ARMOUR & COMPANY, A CORPORATION; AND F. W. ALTMAN T/A F. W. ALTMAN COMPANY; AND ROBERSON CONSTRUCTION COMPANY, INC.

No. 7526SC1049

(Filed 2 June 1976)

Death § 4; Limitation of Actions § 4— wrongful death — defective product —statute of limitations

A cause of action for wrongful death alleged to have resulted from a hidden defect in a crane accrues at the time of decedent's death rather than at the time the crane was sold and is governed by the two-year statute of limitations of G.S. 1-53(4), not the ten-year statute of limitations of G.S. 1-15(b).

Pinkston v. Baldwin, Lima, Hamilton Co.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 16 October 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 April 1976.

This is an action for wrongful death instituted pursuant to G.S. 28-173 (now G.S. 28A-18.2). On 14 June 1972 plaintiff's intestate was employed by F. D. McDonald Steel Erectors as a heavy equipment operating engineer on a construction project at Redmon Industries in Fayetteville, North Carolina. He was operating a 50-ton crane manufactured by defendant Baldwin, Lima Hamilton Co. (BLH), in 1961. The crane, a model 65-t, was being used to lift structural steel into place. While intestate was attempting to lift material within the crane's load limit, the rear roller bracket assembly failed and the crane collapsed, crashing down on intestate crushing him to death.

Plaintiff qualified as administratrix of the estate and instituted this action for wrongful death on 11 January 1973. She alleged that the crane was manufactured and sold by defendant BLH in 1961; that the crane was negligently designed and defective materials were used in its construction; that subsequent to 1961 defendant Armour purchased or merged with the Lima Division of defendant BLH and assumed its liabilities; that defendant Clark is a subsidiary or successor to defendant Armour; that the crane at various times was owned by certain other defendants and in 1969 was purchased by McDonald.

Plaintiff sought discovery through interrogatories which remained unanswered and on 11 June 1975 moved for sanctions against defendant BLH for failure to respond to the interrogatories. On 18 August 1975 defendants BLH, Clark, and Armour moved for summary judgment under Rule 56, their motion being based on their pleas of the 10-years statute of limitations set forth in their answers.

On 16 October 1975 the trial court entered an order allowing the motions for summary judgment and plaintiff appealed. By an amendment to the order, the trial court determined that there was no just reason for delay.

Newitt & Bruny, by Roger H. Bruny and John C. Newitt, Jr., for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding and C. Byron Holden, for defendant appellees.

BRITT, Judge.

By its assignments of error, plaintiff contends the trial court erred (1) in entering summary judgment and (2) in failing to rule on plaintiff's motion for sanctions based on defendants' failure to respond to interrogatories. The assignments have merit.

On the question of summary judgment, we think the facts presented in the instant case are very similar to those presented in *Raftery v. Vick Construction Company, et al.* (No. 7511SC932, heard in this court on 11 March 1976, opinion filed 19 May 1976), and that the same principles of law apply. In *Raftery* this court concluded that it was bound by the decision of our Supreme Court in *Causey v. Railway Company*, 166 N.C. 5, 87 S.E. 917 (1914), holding that the cause of action accrued at the death of the intestate. While the *Causey* decision has been criticized, we hold that it is binding on us, therefore, we reverse the order granting appellees' motion for summary judgment. *See also Arrowood v. General Motors, Corp.*, No. 74-2148 (4th Cir., 3 March 1976).

With respect to plaintiff's motion for sanctions, this motion is still before the trial court and subject to its consideration.

For the reasons stated, the order appealed from is reversed and this cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN HENRY NORMAN

No. 7630SC45

(Filed 2 June 1976)

1. Rape § 5— sufficiency of evidence

Evidence was sufficient for the jury in a rape prosecution where it tended to show that defendant gave his victim a ride home from a party, before releasing her he had intercourse with her against her will, the victim was examined by doctors the day after the alleged

rape and bruises were found on her body, and the victim's torn clothing and bloody underwear were introduced into evidence.

2. **Criminal Law § 114— jury instructions — more time given to State's evidence — no expression of opinion**

The fact that the trial court consumed more time in stating to the jury the evidence for the State than in stating that of the defendant did not constitute an expression of opinion on the evidence.

ON *writ of certiorari* to review the judgment of *Wood, Judge,* entered 8 August 1975 in Superior Court, JACKSON County. Heard in the Court of Appeals 5 May 1976.

By bill of indictment proper in form, defendant was charged with raping Betty Louise Bryson on 24 April 1975. He pled not guilty, a jury found him guilty of second-degree rape, and from judgment imposing prison sentence of not less than 25 nor more than 30 years, he appealed. Upon failure of defendant to docket his appeal within the time allowed by the rules, we granted certiorari.

Attorney General Edmisten, by Associate Attorney Jesse C. Brake, for the State.

Creighton W. Sossomon for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the trial court erred in denying his motions for nonsuit and to set aside the verdict. We find no merit in the assignment.

Evidence presented by the State is summarized in pertinent part as follows:

On the evening of 24 April 1975 Miss Bryson, a 20-year-old white student at Western Carolina University, went to a party at the home of a girl friend in the Sylva-Cullowhee area. During the evening a sizable group of young men and women attended the party, drank considerable beer, some whiskey, and smoked marijuana. At the party Miss Bryson met defendant for the first time; he was the only black person there. Around 11:30 p.m. she tripped over a man's foot and hit her eye on a chair. She began suffering with a headache and inquired if someone would take her home. Defendant volunteered to carry her in his car and she accepted his invitation.

After leaving the party defendant drove to a friend's house and also stopped at another place purportedly to get something for Miss Bryson's headache. Thereafter, he drove the car a short distance, got out, and then returned from behind the car with no clothes on. He twisted Miss Bryson's arm behind her, forced her down across a console, and ripped her clothes off. He then pulled a knife and forced her onto the backseat of the car where he had intercourse with her against her will and tore at her with his hands. Thereafter, she put her clothes back on and defendant carried her to a point about a half mile from her home where he released her.

The victim was examined by doctors the next day and bruises were found on her arms, legs, lower back, and breasts. Her torn clothing and bloody underwear were introduced into evidence.

Defendant testified in his own behalf, stating that Miss Bryson asked him for a ride home, that she willingly had intercourse with him, and that he had no knife. He did not know what caused her bruises.

We hold that the evidence was more than sufficient to survive the motion for nonsuit. As to the denial of defendant's motion to set the verdict aside as being against the greater weight of the evidence, that motion was addressed to the sound discretion of the trial judge, *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972), and we perceive no abuse of that discretion.

[2] In his second assignment of error, defendant contends the court violated G.S. 1-180 in its charge to the jury by placing more stress on the State's evidence than on the defendant's. This contention has no merit.

The State presented six witnesses, three of whom were recalled to the stand a second time. Defendant presented four witnesses, two of whom were character witnesses. The State's testimony consumes some sixteen pages of the record while defendant's evidence consumes only seven pages. Thus it was necessary that the court devote more time in stating the State's evidence than in stating the defendant's evidence. It has been held many times that the fact that the court necessarily consumes more time in stating the evidence for the State than in stating that of the defendant does not constitute an expression of opinion on the evidence. *State v. Jessup,* 219 N.C. 620, 14

S.E. 2d 668 (1941), *State v. Murray*, 21 N.C. App. 573, 205 S.E. 2d 587 (1974).

Defendant's remaining assignments of error relate to the trial court's instructions to the jury. Suffice it to say, we have carefully reviewed the jury charge, with particular reference to defendant's assignments, and conclude that the charge is free from prejudicial error.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

NINA RIDGE v. EDWARD D. WRIGHT

GRADY RIDGE v. EDWARD D. WRIGHT, AND ROGER REVELS

No. 7522SC1020

(Filed 2 June 1976)

Process § 16; Appeal and Error § 63— service of process on nonresident motorist — absence of affidavits from record — remand for rehearing

Service of process on nonresident motorists through the Commissioner of Motor Vehicles was defective without affidavits of compliance and other documents required by G.S. 1-105(3); however, the ends of justice require that the cause be remanded for a rehearing on defendants' motions to dismiss or quash the service of process where plaintiffs attempted to present the affidavits and documents as an addendum to the record on appeal, prepared by defendant appellants, and contended that they had been considered by the trial court at the hearing on the motions, the affidavits bore the date of the hearing but were not filed in the superior court until after the record on appeal was filed in the Court of Appeals, and the affidavits were ordered stricken from the record.

APPEAL by defendants from *Crissman, Judge*. Orders entered 30 September 1975 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 4 May 1976.

Plaintiff Nina Ridge filed a complaint on 6 August 1973 seeking damages for personal injuries allegedly received in a

collision which occurred in Buncombe County, North Carolina, between a car in which she was a passenger and a car owned by defendant Revels and driven by defendant Wright. She attempted to obtain service on defendants through the Commissioner of Motor Vehicles pursuant to G.S. 1-105. On 31 July 1974 she took a voluntary dismissal without prejudice as to defendant Revels.

On 30 July 1974 plaintiff Grady Ridge instituted an action against defendants Wright and Revels seeking recovery for personal injury and property damage resulting from the same collision. He also attempted to obtain service of process on defendants through the Commissioner of Motor Vehicles pursuant to G.S. 1-105.

Defendants filed motions in each action asking (1) that the actions be dismissed because of defective service of process or, in the alternative, that the purported service of process be quashed; (2) that paragraph 11 of the complaints relating to, and that part of the prayers for relief asking for, punitive damages be stricken; and (3) that if the motions to dismiss or quash service of process are denied, that the causes be removed to Buncombe County for trial.

Following a hearing on the motions the trial court entered orders denying defendants' motions to dismiss or quash the service of process, denying their motions for change of venue, and allowing their motions to strike portions of the complaints relating to punitive damages.

Defendants appealed.

Wilson & Biesecker, by Roger S. Tripp, and Cockman, Aldridge & Davis, by John E. Aldridge, Jr., for plaintiff appellees.

Uzzell and Dumont, by Larry Leake, for defendant appellants.

BRITT, Judge.

Each defendant assigns as error the refusal of the trial court to grant his motion(s) to dismiss the action(s) as to him because of defective service of process or, in the alternative, to quash the purported service of process as to him.

One of the reasons argued by defendants that the purported service of process was defective is that plaintiffs failed to file

affidavits and other documents required by G.S. 1-105(3). In an addendum to the record, filed 8 January 1976, plaintiffs attempted to present the affidavits and other documents to this court, contending they were considered by the trial court at the hearing on the motions but were inadvertently omitted from the record on appeal. The affidavits indicate that while they bear the date of 29 September 1975 (the date of the hearing) they were not filed in superior court until 6 January 1976. The record on appeal, prepared by defendant appellants, was filed in this court on 5 December 1975. On 2 April 1976 this court ordered the affidavits stricken from the record.

Without the affidavits of compliance and other documents required by G.S. 1-105(3), clearly the service of process was defective. We think the ends of justice require that in our discretion we vacate the portions of the orders appealed from denying defendants' motions to dismiss or, in the alternative, to quash the service of process, and remand the causes to the superior court for another hearing on defendants' motions asking for that relief. It is so ordered. *Watkins v. Grier,* 224 N.C. 334, 30 S.E. 2d 219 (1944); *In re Will of Herring,* 19 N.C. App. 357, 198 S.E. 2d 737 (1973).

Remanded.

Judges VAUGHN and ARNOLD concur.

LEWIS ALFRED EVANS, INCOMPETENT, BY HIS GUARDIAN AD LITEM LORENZO EVANS v. JESSE EDWARD CARNEY

No. 763SC43

(Filed 2 June 1976)

Automobiles § 62— striking pedestrian — pedestrian moving from safe place into path of auto

In an action to recover for personal injuries sustained by plaintiff's ward when he was struck by defendant's automobile, the trial court properly granted defendant's motion for directed verdict where the evidence tended to show that plaintiff's ward left a position of safety on the median of the highway and suddenly ran onto the highway into the path of defendant's vehicle, and there was no evidence that defendant's speed was excessive, that he failed to maintain a reasonable lookout or proper control, or that he violated any other rules of the road.

APPEAL by plaintiff from *Lanier, Judge.* Judgment entered 9 September 1975, Superior Court, PITT County. Heard in the Court of Appeals 3 May 1976.

Plaintiff brought this action in which he alleged that his ward was struck by an automobile being driven by defendant. Plaintiff further alleged that the accident was caused by defendant's negligence and that plaintiff's ward had suffered severe injuries as a result. Defendant answered denying negligence and alleged that plaintiff's ward had been contributorily negligent.

For the plaintiff Leatrice Miller testified that she was driving at a speed of 50 m.p.h in the outside southbound lane of Highway No. 31, a four-lane highway separated by a median, and that defendant's car was following her; she saw plaintiff's ward run from the median across the inside lane, stop in front of her car, then turn and run back toward the median, but was struck by defendant's car in the inside lane.

Plaintiff introduced defendant's deposition which tended to show that his car was even with Miller's back bumper; that suddenly plaintiff's ward ran in front of his car; that he swerved to the right but could not avoid hitting him. When the plaintiff's ward first ran into the road, he was about 18 feet in front of defendant's car.

At the conclusion of the plaintiff's evidence, plaintiff moved to amend his complaint to conform the pleadings to the evidence, and assert the doctrine of last clear chance, but the motion was denied. The court then granted defendant's motion for a directed verdict, and plaintiff appeals.

James, Hite, Cavendish & Blount by Robert D. Rouse III for plaintiff appellant.

Everett & Cheatham by James T. Cheatham and Edward J. Harper II for defendant appellee.

CLARK, Judge.

The principal issue is whether the trial court erred in granting defendant's G.S. 1A-1, Rule 50(a) motion for directed verdict. This motion is directed to the sufficiency of the evidence to justify a verdict for the plaintiff when considered in the light most favorable to him. *Kelly v. Harvester Co.*, 278 N.C. 153,

179 S.E. 2d 396 (1971); *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971). The granting of this motion resulted in a judgment on the merits since the plaintiff, apparently having determined that he could not strengthen his case on retrial, made no attempt to preserve his rights by dismissal under Rule 41.

The plaintiff's ward left a position of safety on the median and suddenly ran onto the highway across the inside lane to the outside lane in front of the Miller car; there he apparently realized his peril and stopped so close that Mrs. Miller thought she could not avoid hitting him. At this time the front of defendant's car in the inside lane was beside the rear wheels of the Miller car, both traveling at a speed of about 50 miles per hour. Plaintiff's ward turned and darted back toward the median but was struck by defendant's car. Both cars were moving at a speed of about 73 feet per second. Though both Mrs. Miller and defendant should have seen and did see plaintiff's ward on the median a substantial distance away, neither could anticipate that he would suddenly run into the highway, and defendant's failure to do so was not negligence. Considering the evidence in the light most favorable to the plaintiff, there was no evidence of excessive speed, or failure to maintain a reasonable lookout or proper control, or the violation of any other rules of the road.

In a recent case, *Hartsell v. Strickland*, 26 N.C. App. 68, 214 S.E. 2d 598 (1975), the factual circumstances were somewhat similar in that a worker suddenly jumped onto the highway in front of defendant's oncoming car when he was startled by an explosion. The court affirmed a directed verdict for defendant on the ground that plaintiff failed to show primary negligence of the defendant.

There are many other cases with substantially similar circumstances wherein the North Carolina Supreme Court and this Court have found that plaintiff's evidence was not sufficient to justify a verdict in his favor. See 1 Strong, N. C. Index 2d, Automobiles, § 62.

Since we find that plaintiff's evidence of negligence was insufficient, plaintiff's claim of error in the denial of his motion to assert the doctrine of last clear chance and in the exclusion of his evidence offered of his ward's mental incapacity, both relating to the issue of contributory negligence, are irrelevant.

The judgment for defendant is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

RICHARD DENNIS BROOKS v. MICHAEL CLAYTON MATTHEWS

No. 7519SC1040

(Filed 2 June 1976)

Appeal and Error § 14— time for taking appeal

Where an appeal is taken more than ten days after the entry of the judgment appealed from and the time within which an appeal can be taken is not otherwise tolled as provided by G.S. 1-279 and App. R. 3, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 17 September 1975 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 8 April 1976.

This is a civil action wherein plaintiff, Richard Dennis Brooks, seeks damages for personal injury allegedly resulting from an automobile collision with defendant, Michael Clayton Matthews, on 20 February 1972. On 7 May 1975 plaintiff took a voluntary dismissal of his action and on 21 August 1975 commenced the action again by filing another complaint. On 29 August 1975 defendant moved to dismiss the action for plaintiff's failure to pay the costs in the action dismissed on 7 May. From judgment entered on 17 September dismissing the action, plaintiff appealed.

Ottway Burton and Millicent Gibson for plaintiff appellant.

Coltrane and Gavin by W. E. Gavin for defendant appellee.

HEDRICK, Judge.

G.S. 1-279 and Rule 3(c) of the Rules of Appellate Procedure provide that an appeal in a civil action when taken by written notice "must be taken within 10 days after its entry." The record before us discloses that the judgment from which plaintiff purported to appeal was entered on 17 September and

appeal was not taken until 29 September. Where the appeal is taken more than ten days after the "entry" of judgment and the time within which appeal can be taken is not otherwise tolled as provided in G.S. 1-279 and App. R. 3, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. *See Teague v. Teague,* 266 N.C. 320, 146 S.E. 2d 87 (1966); *Aycock v. Richardson,* 247 N.C. 233, 100 S.E. 2d 379 (1957); *Moore v. John Doe,* 19 N.C. App. 131, 198 S.E. 2d 236 (1973).

Appeal dismissed.

Chief Judge BROCK and Judge CLARK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 MAY 1976

BROWN v. OIL CO. No. 7521SC1035	Forsyth (74CVS2330)	No Error
DUKE POWER v. KIRKMAN No. 7518SC1024	Guilford (73SP835)	No Error
IN RE DOWELL No. 7517DC1007	Surry (72J22)	Affirmed
LANE v. HODGIN No. 768DC117	Wayne (74CVM3289)	New Trial
LILES v. LILES No. 7526DC951	Mecklenburg (73CVD12503)	Affirmed
MOORE v. MOORE No. 7521DC1021	Forsyth (75CVD314)	Affirmed
STATE v. BYRD & HANSLEY No. 765SC78	New Hanover (75CR7973) (75CR7974) (75CR7975) (75CR7976)	No Error
STATE v. CURRY & ATKINSON No. 768SC64	Wayne (74CR10985) (74CR10986)	No Error
STATE v. DALTON No. 7525SC1074	Burke (75CR2474)	No Error

STATE v. HUBERT No. 7626SC103	Mecklenburg (75CR19050)	No Error
STATE v. JOHNSON & GOODS No. 756SC945	Halifax (75CR1423) (75CR1426)	No Error
STATE v. MARTIN No. 7614SC89	Durham (75CR21746)	No Error
STATE v. MELVIN No. 7612SC86	Cumberland (74CR39105)	No Error
STATE v. PARNELL No. 7627SC112	Gaston (75CR2178)	No Error
STATE v. PAYLOR No. 759SC1048	Person (75CR2078)	No Error
STATE v. RHUE No. 753SC1034	Carteret (74CRS6242)	Judgment Arrested
STATE v. ROGERS No. 768SC57	Lenoir (75CR329)	No Error
STATE v. RUNNELS No. 764SC110	Onslow (75CR4132)	No Error
STATE v. WATKINS No. 7630SC85	Swain (73CR790)	No Error
STATE v. WEEKS No. 754SC1077	Sampson (75CR6079) (75CR3662) (75CR3663) (75CR3664) (75CR3665) (75CR3667)	No Error
STATE v. WHITE No. 764SC40	Onslow (75CR12351)	No Error

FILED 2 JUNE 1976

CUNNINGHAM v. CUNNINGHAM No. 7519DC763	Rowan (74CVD1121)	No Error
FORD INC. v. HEDRICK No. 7622DC37	Iredell (74CVD2772)	New Trial
HODGES v. JOHNSON No. 7511DC1037	Harnett (71CVD5595) (71CVS1167)	Affirmed
LeMAY v. TOXAWAY CO. No. 7629SC146	Transylvania (74CVS429)	Cert. Dismissed

STATE v. ALLEN No. 7620SC98	Union (75CR2158)	No Error
STATE v. NORMAN No. 7622SC25	Davidson (75CR759)	No Error
STATE v. ORMOND No. 762SC115	Beaufort (75CR4241)	No Error
STATE v. ROGERS No. 7510SC978	Wake (75CR25877) (75CR25878)	No Error
STATE v. SCOTT No. 7616SC99	Robeson (75CR682)	No Error
STATE v. WILLIAMS No. 7621SC145	Forsyth (75CR3852) (75CR3853)	No Error
STATE v. WILLIAMS No. 768SC136	Wayne (74CR9737)	No Error

BETTY CROTTS FAGAN v. ARTHUR S. HAZZARD

No. 7618SC65

(Filed 16 June 1976)

1. **Judgments § 24; Pleadings § 9— failure to file timely answer — no excusable neglect**

The court's determination that defendant's failure to file a timely answer was not the result of excusable neglect was supported by the record where the court found upon supporting evidence that, although defendant had lost the tip of a finger in a work-related accident, he had returned to work and was able to function both mentally and physically to an extent sufficient to attend to his ordinary business affairs at the time the summons and complaint were served, and that the summons and complaint were left with defendant's wife at his residence by the sheriff who found her to be a person of suitable age and discretion. G.S. 1A-1, Rule 6(b).

2. **Rules of Civil Procedure § 55— notice of application for judgment**

The notice provisions of G.S. 1A-1, Rule 55(b), were inapplicable where no entry of default or judgment by default was sought or entered.

3. **Trover and Conversion § 2; Rules of Civil Procedure § 8— action for conversion — absence of timely answer — trial on issue of damages**

Where defendant did not timely file an answer, allegations of the complaint with respect to defendant's conversion of piano parts were admitted, plaintiff was entitled to judgment for the conversion of the parts provided she was able to show that the parts had some value, and only the issue of actual and punitive damages remained to be tried. G.S. 1A-1, Rule 8(d).

4. **Jury § 1— waiver of right to jury trial — absence of timely answer or request**

Defendant waived his right to a jury trial on the issue of damages by failing timely to file an answer and timely to make a demand for a jury trial on the issue of damages.

5. **Trover and Conversion § 2— conversion — measure of damages**

The measure of damages for wrongful conversion is the fair market value of the chattel at the time and place of conversion.

6. **Trover and Conversion § 2— damages for conversion — insufficiency of findings**

The trial court erred in awarding $950.00 actual damages and $1900.00 punitive damages for conversion of the player portion of a piano where the court failed to resolve the conflict in evidence as to the value of the player mechanism by making appropriate findings of fact as to its value.

APPEAL by defendant from *Albright, Judge.* Judgment entered 28 October 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 May 1976.

This is a civil action wherein plaintiff, Betty Crotts Fagan, seeks to recover both actual and exemplary damages from the defendant, Arthur S. Hazzard, because of defendant's alleged conversion of the player portion of a Gulbransen player piano.

In her complaint, plaintiff alleged in pertinent part the following:

Plaintiff was the owner of an antique Gulbransen player piano which had a fair market value of $2,000.00. In March 1973, she engaged the defendant to repair the mechanical player portion of the piano. The defendant removed the parts to the player mechanism and took them to his shop for repair. Over a year later, plaintiff requested that defendant either repair or return the parts. This request was made several times over the following year until finally, on 11 May 1975, defendant delivered some parts to the plaintiff. The parts delivered, however, were not the same parts defendant had taken, and they were "totally unserviceable in plaintiff's player piano." Plaintiff has made repeated demands for the return of the parts which defendant took from her, "but defendant has willfully failed and refused to return same."

> "The parts which defendant has failed to return have a fair-market value of approximately $1,800.00; and the subject piano is rendered totally worthless without said parts. Plaintiff therefore alleges that she has been damaged in the sum of at least $2,000.00 by reason of defendant's wrongful conversion of said piano parts.
>
> The defendant's conversion of said parts was wilful, wanton and malicious; and plaintiff alleges that she is therefore entitled to recover punitive damages of $5,000.00 from the defendant."

The complaint and summons were served on the defendant on 24 June 1975. On 12 August 1975, the defendant without obtaining leave of court, filed an answer and counterclaim. The plaintiff moved to strike the answer and counterclaim. On 29 August 1975, in response to plaintiff's motion to strike the answer and counterclaim, the defendant filed a verified motion to be allowed to leave to file his answer and counterclaim.

In his motion, defendant stated that he had lost a finger in a work-related accident in April 1975. As a result of the accident, he had been disabled and unable to see to his business and legal affairs. The complaint had been served on a third person and was not shown to defendant until a few days before defendant's answer was filed. When he received actual notice of the complaint, he exercised proper diligence in preparing and filing an answer.

On 24 September 1975, after a hearing, the court found the following pertinent facts.

Defendant lost the tip of his middle finger in a work-related accident. The physician who treated defendant certified to the North Carolina Industrial Commission that any disability resulting from the accident ended on 2 June 1975. Since 2 June the defendant had engaged in the duties of his occupation and "was able to function both mentally and physically to an extent sufficient to attend to the ordinary affairs of his business." The complaint and summons were left with his wife at his residence by the sheriff who found her to be "a person of suitable age and discretion and who resided in defendant's dwelling house." Based upon the findings, the court concluded that "[n]o excusable neglect [had] been shown" by the defendant in failing to timely file answer to the complaint and entered an order striking the answer and counterclaim and denying defendant's motion for leave to file an answer and counterclaim.

On 27 October 1975, the matter came on for trial on the issue of actual and punitive damages and both plaintiff and defendant appeared and offered evidence.

Plaintiff's evidence tended to show the following:

In January or February 1973, plaintiff purchased a Gulbransen player piano for $150.00. The piano was in excellent condition except for the player mechanism which did not work. She called the defendant who inspected the broken player portion of the piano in March 1973 and stated to plaintiff that he thought it could be fixed. He removed the "tubing works and the player portion of the piano" and carried them to his shop to work on them. Plaintiff told him there was no hurry to fix the piano.

Plaintiff called defendant about six months later but he had not begun working on it. She called him a year later and

he still had not begun repairing the parts. She called several more times, then finally called telling defendant to get the parts together so she could pick them up. On 11 May 1975 she went to his house to pick up the parts but some of them were missing. One of the parts which defendant gave her was not the same one he had taken from the piano. When plaintiff inquired where the rest of the parts to her piano were, the defendant replied that they "must have been the ones he sent to the American Piano Company and that they had thrown the parts away." Plaintiff called American Piano Company, and they told her that defendant had not done any business with them since 1972.

When the defendant removed the player mechanism from the piano, the rubber tubing appeared to plaintiff to be almost new. Norman Easter, who sold the piano to plaintiff, had replaced the tubing to the player mechanism with rubber tubing purchased from an automotive parts store. During the seven years he owned it, the player portion had never worked; but he used to get it to play by hooking a vacuum cleaner to the bellows.

Plaintiff's opinion as to the value of the piano with the broken player portion was at least $1,000.00 and without the broken player portion about $50.00. A working replacement for the player mechanism costs $1,600.00.

Harrison A. Munns testified for plaintiff as an expert witness in the field of piano and player piano rebuilding and repair. Although he had not seen plaintiff's piano or the player mechanism, in his opinion, the player portion of a Gulbransen piano could be repaired at a cost of about $450.00 to $550.00. He had repaired one Gulbransen piano in the past but could not remember when.

The defendant offered evidence tending to show the following:

Defendant repairs and rebuilds player pianos as a hobby. He has worked on three Gulbransens in an attempt to repair them because he had always been told they could not be repaired, and he considered it a challenge to try. He has never successfully repaired one. Defendant agreed to attempt to repair plaintiff's piano but told her when he removed the player part that he might not be able to repair it. They agreed at the time that

defendant could destroy the player part if he could not fix it since plaintiff was primarily interested in having a piano she could learn to play manually.

Defendant attempted to repair the player part but could not. He inquired of several different companies as to the possibility of repairing the player part and even mailed a small piece of it to American Piano Company to see if they could fix it. Finally, he gave up and around Christmas of 1974, when cleaning out his work shop, he burned most of the parts from plaintiff's piano. Two weeks later, plaintiff called and he informed her that he had not been able to fix the piano and had burned most of the parts. Plaintiff called several more times demanding the return of her piano parts. He told her each time that he had destroyed them, but he did agree to try to find a replacement. Finally, she picked up all that he had been able to collect. Subsequently, defendant found another piano for $100.00 and offered to buy it for plaintiff, but she refused to take it "because she did not know what would become of the lawsuit."

Ralph Starling, whose business for the past ten years was rebuilding and repairing player pianos, testified as an expert witness for the defendant. The defendant had come to him three times with plaintiff's player mechanism and had consulted with him to try to find a way to repair it. In his opinion, the player portion of a Gulbransen piano could not be repaired. During the time he had been working on player pianos, he had acquired Gulbransens. When he got one, he took the player portion out and threw it away. He had a stack of them sitting outside behind his business. In his opinion, the value of a Gulbransen player part was "not one nickel."

After hearing the evidence the court made a finding and conclusion that "[p]laintiff has been damaged in the amount of $950.00 by reason of defendant's wrongful conversion of plaintiff's piano parts . . . . " The court further concluded that plaintiff was entitled to recover $1,900.00 exemplary damages. From a judgment that plaintiff have and recover $2,850.00, defendant appealed.

Schoch, Schoch, Schoch and Schoch by Arch Schoch, Jr., for plaintiff appellee.

Stephen E. Lawing for defendant appellant.

HEDRICK, Judge.

By exceptions one, two, and three, defendant contends the court erred "in refusing as a matter of law to set aside entry of default and allow filing of answer on the grounds that no excusable neglect has been shown."

[1] First, we point out that there was no "entry of default" nor was there a default judgment under G.S. 1A-1, Rule 55(b). The record discloses that the defendant filed his answer and counterclaim more than thirty days after summons and complaint had been properly served as provided by G.S. 1A-1, Rule 4, without having obtained leave to do so. G.S. 1A-1, Rule 6(b) in pertinent part provides:

> "When by these rules . . . an act is required or allowed to be done at or within a specified time * * * [u]pon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. * * * "

While the defendant undertook to show excusable neglect in his failure to timely file the answer, the court's finding and conclusion that there had not been a showing of excusable neglect is supported by the record.

[2] Citing G.S. 1A-1, Rule 55(b), defendant contends that Judge Albright "erred in rendering judgment by default against the defendant when no written notice of application for judgment was served upon the defendant at any time prior to the hearing on such application." We do not agree. Rule 55 has no application here since as pointed out before, no entry of default or judgment by default was ever sought or entered on this case. See *Whitaker v. Whitaker,* 16 N.C. App. 432, 192 S.E. 2d 80 (1972).

[3, 4] Defendant contends the court erred in not granting him a trial by jury. This contention appears to be based on an exception to the judgment. Such an exception raises the question of whether the facts found or admitted support the conclusions of law and whether the judgment is in proper form. On 15 August 1975, the defendant made a demand for a trial by jury, but the record does not indicate that the court ever ruled on the demand. Since the court obviously undertook to determine the issue of damages without a jury, we consider the defendant's

contention, even though it is not, in our opinion, properly raised. G.S. 1A-1, Rule 8(d) provides:

> "*Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

Since the defendant did not timely file an answer, the averments of the complaint with respect to the defendant's conversion of the piano parts were admitted; and the plaintiff was entitled to judgment for the conversion of the property provided she was able to show that the property converted had some value. The issue of damages, actual and exemplary, remained to be tried. By failing to timely file an answer, and timely make a demand for a jury trial on the issue of damages, the defendant waived his right to have the jury determine the issue of damages. G.S. 1A-1, Rule 38(d).

[5] Defendant contends the evidence and findings of fact do not support the conclusion that plaintiff is entitled to recover actual damages in the amount of $950.00 and exemplary damages in the amount of $1,900.00. The measure of damages for a wrongful conversion is the fair market value of the chattel at the time and place of conversion. *Crouch v. Trucking Company,* 262 N.C. 85, 136 S.E. 2d 246 (1964); *Seymour v. Sales Co.,* 257 N.C. 603, 127 S.E. 2d 265 (1962); *Peed v. Burleson's Inc.,* 244 N.C. 437, 94 S.E. 2d 351 (1956). The court made no findings regarding the fair market value of the player portion of the piano converted by the defendant. The finding by the court that plaintiff had suffered actual damages in the amount of $950.00 is really a conclusion and is not supported by appropriate findings of fact.

The description of the property converted is meager. Plaintiff gave her opinion as to the fair market value of the *piano* before and after the player portion was removed by the defendant for the purpose of being repaired. Plaintiff's description of the part converted by the defendant was merely that it did not function and that some of the tubing looked brand new. However, the man from whom plaintiff purchased the piano for $150.00 testified that the player portion had never worked during the seven years he owned it and that he had replaced

some of the tubing himself with material he had purchased at an automotive parts store. The two experts, Mr. Munns who testified for plaintiff and Mr. Starling who testified for defendant, were in disagreement as to whether the player portion of a Gulbransen piano could be repaired. Mr. Munns testified in general about Gulbransen player pianos but he had not even seen plaintiff's piano or any part thereof. Mr. Starling testified that the player portion of Gulbransen pianos could not be repaired, and he testified that the defendant brought parts of plaintiff's piano to him for consultation. Mr. Starling provided the court with the only direct evidence as to the value of the player portion of the piano allegedly converted by defendant. With respect thereto he testified "the value of the player part of a Gulbransen piano is not one nickel."

[6] The conflict in the evidence with respect to the value of the player portion of the piano should have been resolved by appropriate findings of fact. Because the court failed to make findings of fact as to the value of the property converted by the defendant, the judgment awarding actual damages in the amount of $950.00 must be vacated. Likewise the judgment awarding exemplary damages in the amount of $1,900.00 must be vacated since " '[p]unitive damages may not be awarded unless otherwise a cause of action exists and at least nominal damages are recoverable by the plaintiff.' *Worthy v. Knight,* 210 N.C. 498, 187 S.E. 771." *Clemmons v. Insurance Co.,* 274 N.C. 416, 424-25, 163 S.E. 2d 761, 766 (1968).

The result is: The order dated 24 September 1975 striking defendant's answer and counterclaim and denying defendant's motion to be allowed to file an answer and counterclaim is affirmed; that portion of the judgment entered 28 October 1975 declaring that the only issue for trial is that of actual and exemplary damages is affirmed. G.S. 1A-1, Rule 8(d). That portion of the judgment entered 28 October declaring that plaintiff is entitled to recover $950.00 actual damages and $1,900.00 exemplary damages is vacated and the cause is remanded to the superior court for a new trial on the issue of actual and punitive damages.

Affirmed in part; Vacated and remanded in part.

Chief Judge BROCK and Judge CLARK concur.

Blount v. Taft

MARVIN K. BLOUNT, SR., FLORENCE TAFT BLOUNT, NELSON BLOUNT CRISP, MARVIN K. BLOUNT, JR. AND WILLIAM G. BLOUNT v. E. H. TAFT, JR., HELEN F. TAFT, E. H. TAFT III, THOMAS F. TAFT, RUTH J. TAFT, THOMAS F. TAFT, TRUSTEE FOR MELANIE ANN TAFT, THOMAS F. TAFT, TRUSTEE FOR EDMUND HOOVER TAFT IV, AND FORD McGOWAN

No. 753SC1014

(Filed 16 June 1976)

1. **Corporations § 4— shareholders' agreement — definition**

A shareholders' agreement is a contract between shareholders which may apply broadly to the rights of the shareholders in conducting the business of the corporation, so long as their purposes are legal and not contrary to public policy, and, under G.S. 55-73(b), the agreement is not invalid, though in violation of other statutes, solely on the grounds that it attempts to treat the corporation as if a partnership; moreover, a shareholders' agreement may not be altered or terminated except as provided by the agreement, or by all the parties, or by operation of law.

2. **Corporations § 4— by-laws — shareholders' agreement — distinction**

By providing for a shareholders' agreement to be incorporated into the by-laws of the corporation, G.S. 55-73(b) recognizes a distinction between the two and also implies that a shareholders' agreement exist before it is embodied in the by-laws.

3. **Corporations § 4— stockholders' agreement — requirements**

To meet the requirements of G.S. 55-73(b) for establishing a valid shareholders' agreement in a close corporation, there must be an agreement in writing of all shareholders; but the writing may consist of a written provision in the charter or by-laws of the corporation which may be based on an oral agreement which has been embodied therein.

4. **Corporations § 4— amendment of by-laws — no stockholders' agreement**

The trial court erred in concluding that Article III, Section 7, of the by-laws of a close corporation adopted on 20 August 1971 was a shareholders' agreement pursuant to G.S. 55-73(b) and not a by-law which could be amended, as could other by-laws, by the corporate directors, since here was no evidence that any shareholders expressed to any other shareholders at the 20 August 1971 meeting, or at any other time, any desire or intention that the so-called amendment be embodied in the by-laws as a shareholders' agreement.

5. **Appeal and Error § 7— audit of corporation — payment not charged to defendants — defendants not aggrieved party**

Defendants were not aggrieved by the trial court's order requiring a certified audit of the corporation in which they were shareholders, since neither defendants nor the corporation was charged with payment for the audit.

Blount v. Taft

APPEAL by defendants from *James, Judge.* Judgment entered 15 July 1975, Superior Court, PITT County. Heard in the Court of Appeals 5 April 1976.

This is an action between shareholders of Eastern Lumber and Supply Company, a corporation. The plaintiffs, consisting of Marvin K. Blount and members of his family, own 41% of the corporate stock; the defendants, consisting of E. H. Taft, Jr., and members of his family own 41%; and defendant Ford McGowen, who was the manager of the corporation, owned the remaining 18% of the stock.

A special meeting of directors and shareholders was called for 20 August 1971, and all were present. The meeting was recorded by a reporter and the transcript was received in evidence as plaintiffs' exhibit. The transcript reveals that the purpose of the called meeting was to apply for a bank loan of $250,000 to be secured by a deed of trust on the corporate property. In the course of the meeting it was agreed that new by-laws would be presented for adoption and that directors and officers would be elected. The proposed by-laws, prepared before the meeting, were read in full and many were discussed, some altered, and finally adopted unanimously. The adopted by-laws relevant to this action are as follows:

"ARTICLE III. BOARD OF DIRECTORS

* * * *

SECTION 7. Executive Committee. The Board of Directors may, by the vote of a majority of the entire board, designate three or more directors to constitute and serve as an Executive Committee, which committee to the extent provided in such resolution, shall have and may exercise all of the authority of the Board of Directors in the management of the corporation. Such committee shall consist of one member from the family of M. K. Blount, Sr., one member from the family of E. H. Taft, Jr., and one member from the family of Ford McGowan. Minutes of all such meetings shall be kept and a copy mailed to each member of the Board of Directors and action of the committee shall be submitted to the Board of Directors at its next meeting for ratification.

The Executive Committee shall have the exclusive authority to employ all persons who shall work for the cor-

poration and that the employment of each individual shall be only after the unanimous consent of the committee and after interview.

* * * *

ARTICLE VIII. GENERAL PROVISIONS

* * * *

SECTION 4. Amendments. Except as otherwise herein provided, these bylaws may be amended or repealed and new bylaws may be adopted by the affirmative vote of a majority of the directors then holding office at any regular or special meeting of the Board of Directors."

As provided by Article III, Section 7, the Executive Committee, consisting of E. H. Taft, Jr., President, and Ford McGowan, Manager, and Nelson Blount Crisp, Secretary, was appointed. The Executive Committee met regularly thereafter and served pursuant to the by-laws until 20 June 1974. On that date a meeting of the Board of Directors was held on call of President Taft after due notice to all directors. Marvin K. Blount was absent because of illness. At this meeting a majority of the directors, but none of the plaintiffs, voted to amend the by-laws, including that portion of Article III, Section 7, which required the unanimous consent of the Executive Committee before anyone could be employed by the corporation.

Plaintiffs allege that Article III, Section 7, was a shareholders' agreement, incorporated in the by-laws, which the Directors had no authority to amend under Article VIII, Section 4, of the By-Laws, and that defendants have employed persons to work for the corporation without the consent of the representative of the plaintiffs and have otherwise breached the shareholders' agreement.

Plaintiffs pray for enforcement of the shareholders' agreement, incorporated in the By-Laws as Article III, Section 7, in the meeting of 20 August 1971, and that the purported by-laws which defendants attempted to adopt on 20 June 1974 be declared null and void.

At trial, with Judge James sitting as judge and jury, the evidence offered consisted primarily of the testimony of some of the parties-plaintiff and parties-defendant and numerous exhibits. Other facts are stated in the opinion.

From judgment for the plaintiffs, defendants appeal.

Haywood, Denny and Miller by Egbert L. Haywood and John C. Martin for plaintiff appellees.

Manning, Fulton & Skinner by Howard E. Manning and Dan J. McLamb for defendant appellants.

CLARK, Judge.

This appeal presents one issue: Did the trial court err in concluding that Article III, Section 7, of the by-laws adopted on 20 August 1971, was a shareholders' agreement pursuant to G.S. 55-73(b) and not a by-law which could be amended, as could other by-laws, by the corporate directors?

The shareholders' agreement is recognized and approved by the North Carolina Business Corporation Act of 1955, G.S. 55-73(b) providing as follows:

> "(b) Except in cases where the shares of the corporation are at the time or subsequently become generally traded in the markets maintained by securities dealers or brokers, no written agreement to which all of the shareholders have actually assented, whether embodied in the charter or bylaws or in any side agreement in writing and signed by all the parties thereto, and which relates to any phase of the affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners. Notwithstanding any other provision of this section or of this Chapter, the provisions of G.S. 55-59(a) shall not apply to such an agreement. A transferee of shares covered by such agreement who acquires them with knowledge thereof is bound by its provisions."

This statute enables the shareholders of a close corporation by agreement in writing assented to by all to provide for the management and operation of the corporation in a manner similar to a partnership. The statute is phrased in the negative, declaring that such agreement is not invalid as between the parties on grounds that it attempts to treat the corporation as if

it were a partnership. It provides for flexibility in judicial treatment; a court may pronounce the shareholders' agreement invalid for other reasons.

With the Business Corporation Act of 1955, North Carolina was recognized as the first state to draft legislation effectively dealing with the unique qualities of close corporations. For discussion of the Act relating to close corporations and shareholders' agreements, see Latty, "Close Corporations and the New North Carolina Business Corporation Act," 34 N.C.L.R. 432 (1956); 1 O'Neal, Close Corporations, §§ 1.14(a) and 5.16 (1971); 6 Cavitch, Business Organizations, §§ 114.01, et seq., (1976). The States of Delaware, Florida, Maryland, Pennsylvania, and South Carolina have enacted statutes identical or similar to G.S. 55-73(b).

We find no cases in North Carolina, or in the other five states which have enacted an identical or a similar statute, that deal directly with G.S. 55-73(b). In *Wilson v. McClenny,* 262 N.C. 121, 136 S.E. 2d 569 (1964), and *Stein v. Outdoor Advertising,* 273 N.C. 77, 159 S.E. 2d 351 (1968), our Supreme Court ruled on matters involving companion provisions of G.S. 55-73(a) and (c).

[1] A shareholders' agreement is a contract between shareholders which may apply broadly to the rights of the shareholders in conducting the business of the corporation, so long as their purposes are legal and not contrary to public policy. Under G.S. 55-73(b) the agreement is not invalid, though in violation of other statutes, solely on the grounds that it attempts to treat the corporation as if a partnership. A shareholders' agreement may not be altered or terminated except as provided by the agreement, or by all the parties, or by operation of law. See 3 Oieck, Modern Corporation Law, §§ 1384-1400 (1958).

[2] By providing for a shareholders' agreement to be incorporated into the by-laws of the corporation, G.S. 55-73(b) recognizes a distinction between the two and also implies that a shareholders' agreement exist before it is embodied in the by-laws. Those parts of the Business Corporation Act dealing with by-laws and their amendment, primarily G.S. 55-16, G.S. 55-66, and G.S. 55-28(d), provide for the amendment of by-laws by a majority of the board of directors then holding office, though initially adopted by the shareholders at its organization meet-

ing. There is no provision in the Business Corporation Act that the by-laws of a corporation, or any one or more of the by-laws, become a shareholders' agreement solely because of unanimous adoption thereof by the shareholders. By inference these statutes negate this result.

[3] We find that to meet the requirements of G.S. 55-73(b) for establishing a valid shareholders' agreement in a close corporation, there must be an agreement in writing of all shareholders; but the writing may consist of a written provision in the charter or by-laws of the corporation which may be based on an oral agreement which has been embodied therein. We are aware that G.S. 55-73(b) was intended to supply a legal framework within which partner-like arrangements having a reasonable business purpose could be worked out with substantial assurance of legal validity. While recognizing this intent and the need for judicial flexibility in determining the validity of such agreements, we consider it appropriate to point out that those who have the burden of proving a valid shareholders' agreement could ease this burden by offering an agreement in writing signed by all shareholders, or if embodied in the charter or by-laws explicit designation therein of a shareholders' agreement and provision for alteration of the agreement if different from the alteration or amendment provisions applicable to the charter or by-law provisions which are not within the agreement.

[4] In applying G.S. 55-73(b) to the evidence and the issue presented by this appeal, we rely primarily on the transcript (plaintiffs' Exhibit 3) of the meeting of the shareholders held on 20 August 1971, when the new by-laws of the corporation were adopted by unanimous vote. The transcript is voluminous, and we do not consider verbatim reproduction appropriate in this opinion. It appears from this transcript that the meeting was called primarily to approve a loan in the sum of $250,000 from a bank to the corporation; that since the old by-laws could not be found, new by-laws were prepared prior to meeting in contemplation of a need for them in obtaining the loan and to guide the corporation in its expansion program; that the proposed by-laws were read and suggested changes were made in various sections as needed. When Article III, Section 7, was read, Nelson B. Crisp, daughter of M. K. Blount, Sr., suggested that the Executive Committee consist of one member from each of the Blount, Taft and McGowan families. This was followed

by a discussion relating to the power of the Executive Committee, which resulted in apparent agreement on the requirement that the committee report its minutes to the directors and submit actions for ratification to the directors at the next meeting of the board. Thereupon, the reading of the by-laws was resumed. When the reading was completed, Nelson B. Crisp seconded the motion of E. H. Taft, Jr., to adopt the by-laws, but then at the suggestion of M. K. Blount, Sr., offered an amendment to Article III, Section 7, relating to approval of full-time employees by the Executive Committee. After discussion which resulted in apparent approval, the last sentence was added to said Section 7 requiring that the Executive Committee unanimously approve the employment of each individual after interview. The by-laws were then adopted by unanimous vote of the shareholders.

At trial Nelson B. Crisp, W. G. Blount, and Marvin K. Blount, Jr., testified for plaintiffs. None recalled any statement made by them or anyone else present at the shareholders' meeting of 20 August 1971 that any section of the by-laws was a shareholders' agreement. But Marvin K. Blount, Jr., testified that, though he made no statement at the meeting indicating a shareholders' agreement, it was his "understanding that the only provision that cannot be changed is Section 7 of Article III which gives to the Executive Committee the exclusive authority to hire and set salaries of employees of the Company." However, this interpretation was not expressed by Mr. Blount to other shareholders at the 20 August 1971 meeting or at any subsequent time before the institution of this action.

The minute book of the corporation, a plaintiffs' exhibit, reveals that the Blount family had disapproved of the employment of the son of E. H. Taft, Jr., in the late Sixties and had objected to the proposed employment of the son of Ford McGowan. The issue of nepotism reached an impasse in 1969. Neither son was employed by the corporation at the time of the meeting of 20 August 1971. Though it does not appear that the nepotism issue was mentioned by the shareholders at this meeting in discussing Article III, Section 7, it is probable that this issue motivated the Blount family in proposing as an amendment the last sentence of this section, which would give them some control over employment practices. However, assuming that they attach considerable importance to this part of said Section 7, it does not appear that they expressed to other share-

holders at the meeting, or at any other time, any desire or intention that the so-called amendment be embodied in the by-laws as a shareholders' agreement.

We find that there is no competent evidence to support the conclusions of the trial court that Article III, Section 7, of the by-laws adopted on 20 August 1971 was a valid shareholders' agreement, which could not be amended as provided by Article VIII, Section 4, of said by-laws or the conclusion that said Section 7 was not validly amended, as were other by-laws, at the meeting of the board of directors on 20 June 1974. The trial court erred in denying the defendants' motion to dismiss.

[5] There remains for disposition defendants' exception and appeal from the trial court's order of 2 July 1975, granting plaintiffs' oral motion, made immediately after trial, for a certified audit of the corporation. Since the order did not provide for payment of the audit by defendants or by the corporation (which was not a party to this action), the defendants are not aggrieved. The appeal from this order is dismissed.

The judgment appealed from is vacated. This cause is remanded for hearing and ruling on the matter relating to the certified audit of the corporation and payment therefor, and for entry of judgment dismissing the action.

Vacated and remanded.

Judges BRITT and PARKER concur.

DOROTHY SALTER HARDING (CREW) v. HARRY HARDING

No. 766DC105

(Filed 16 June 1976)

1. Parent and Child § 7— child over 18 — no legal duty to support — contractual duty to support

Where an order of the court for support entered prior to 5 July 1971 provides for support of the children until the age of majority, maturity or emancipation, it has been interpreted in light of G.S. 48A-2 to impose the legal obligation of support only to the child's eighteenth birthday, but a parent can by contract assume an obligation to his child greater than the law otherwise imposes, and by contract bind himself to support his child after emancipation and past majority.

2. Parent and Child § 7— children over 18 — agreement to support through college

Having agreed to support his children through college in an original agreement which provided for child support and alimony and not having appealed orders entered by the trial court after 5 July 1971 which were for the specific purpose of clarifying defendant's obligation to support his children, defendant obligated himself to continue support of his children past their eighteenth birthdays.

3. Divorce and Alimony § 23— increase in child support — evidence of changed circumstances

The trial court did not err in increasing the amount of child support payments for two of defendant's children including the additional support required for the expense of one of the children's college education where the evidence tended to show that defendant's net worth had increased since the date of entry of the last support order, his available income had increased, he had refused to supply the court with copies of his latest financial reports, defendant was able to pay the college expenses of his oldest sons while they attended school, and his obligation to support them had ceased, plaintiff was no longer working and therefore had no income, defendant's two youngest children resided with plaintiff, the needs of the two children had increased, one of the children was a freshman at UNC, and her education required $3000 per year.

4. Divorce and Alimony § 23— child support arrearages — amount on which execution allowed changed — no prejudice

Defendant who was $1700 in arrears in child support payments was not prejudiced where the court orally stated on the day of the hearing that it would allow execution for only $1216.71 and then increased the amount to $1700 after the hearing in response to a private communication from plaintiff's attorney, since defendant's attorney was given a copy of the letter, and defendant had an opportunity to rebut the contentions stated in the letter but failed to do so.

APPEAL by defendant from *Gay, Judge.* Order entered 10 December 1975 in District Court, HALIFAX County. Heard in the Court of Appeals 13 May 1976.

This is a civil action wherein the plaintiff, Dorothy Salter Harding, has filed a motion in the cause in a divorce proceeding against the defendant, father, Harry Harding, seeking an order increasing support payments for her children and an order directing execution against the defendant for failure to pay $1,700.00 support as provided by an earlier order of the court.

On 12 September 1968 plaintiff began this action by filing a complaint for alimony without divorce, custody of the children of the marriage between plaintiff and defendant, support for the children and an attorney's fee. Defendant answered,

denying the material allegations in the complaint. He also counterclaimed for absolute divorce based on more than one year's separation of the parties.

On 9 June 1969 the court entered an order finding "[t]hat the parties [had] agreed to a property settlement and other matters arising out of . . . [the] separation" and that their agreement would be in the best interests of the children. Included in the order and agreement were provisions for alimony and support for the plaintiff and the children. The order and agreement with respect to alimony and support provided in part the following:

> "*Alimony and Child Support*—That defendant shall pay to plaintiff wife and mother of said minor children on the first day of each month hereafter the following:
>
> A. Guaranteed minimum monthly:
>
> 1. The sum of $500.00 for each month of 1969, making a total of $6,000.00 for the year.
>
> 2. The sum of $550.00 during each month of 1970, making a total of $6,600.00 for the year.
>
> 3. The sum of $600.00 during each month of 1971, making a total of $7,200.00 for the year.
>
> 4. The sum of $600.00 during each month of each year thereafter, making a total of $7,200.00 per calendar year.
>
> B. The above guaranteed amounts are divided as between alimony or support for the wife and as between child support for the children as follows:
>
> 1. $50.00 per month per child living in the home with the mother shall be considered child support. When a child enters college or private school, his or her support shall be the responsibility of the father and in that event, the mother shall be entitled to only one-third (1/3) of said monthly support for said child, and said father shall be entitled to retain two-thirds (⅔) of said monthly support for said child, except that for three and one-half (3½) months during the summer, said mother shall be entitled to all of the support for said child if the child is living with the mother.

When a child gets married or finishes his or her fourth year in college or stops going to school (whichever shall first occur), then the duty of the father to provide support for said child shall terminate and the guaranteed payments hereunder shall be reduced proportionately.

2. The remaining guaranteed amount shall be considered alimony or support for the wife."

On 1 July 1969 judgment was entered on defendant's counterclaim granting an absolute divorce. Included in the judgment was a provision that: "It is further ordered, that the terms and provisions of the consent order between the parties dated June 9, 1969 be and remain in full force and effect. . . ."

Subsequent to the divorce decree, defendant made a motion in the cause asking for custody of the children or in the alternative more liberal visitation rights. He also sought a reduction in alimony and support alleging changed circumstances in his business operation. Plaintiff replied to defendant's motion and also moved that defendant show cause why he should not be held in contempt for failure to pay alimony and support as required in the earlier order. The matter came on for hearing before Judge Gay who entered an order on 22 July 1971 wherein he concluded:

"That a reduction in the amount of support and alimony and a clarification as it relates to the obligation to send the children to college should be made by the court; . . . ."

Included in the order were the following pertinent provisions:

"1. That the custody of the four children born of the plaintiff and defendant shall remain with the plaintiff but the son, Steve Harding, may continue to live in the home of the defendant.

2. That the defendant shall pay all expenses incurred by Steve Harding in attending East Carolina University including but not limited to clothes, room and board, tuition and fees. It being the intent of this provision that the expenses of said child shall be paid by the defendant.

3. That the plaintiff shall pay all of the expenses of Jim Harding in attending the University of North Carolina including but not limited to clothes, room and board, tuition

and fees. It being the intent of this provision that the expenses of said child shall be paid by the plaintiff.

4. That the defendant shall pay the sum of $500.00 upon the entrance of this order, $300.00 on March 1, 1972, for credit upon the amount now in arrears and judgment for the sum of $1,700.00 for the use and benefit of the children is hereby given to the plaintiff against the defendant for the balance that he is in arrears but execution shall not issue except upon motion and order of this court.

5. That the defendant shall pay into the office of the Clerk of Superior Court starting August, 1971, the sum of $200.00 for the use and benefit of his three children, namely, Jim, Pattie and Jeffrey Harding and he shall pay the further sum of $150.00 into the office of this court as alimony to the plaintiff; that the child support shall continue until the children are emancipated, married or otherwise self-supporting and the alimony payments shall continue until the plaintiff should remarry or die, subject to further orders of this court. Upon remarriage support payments for children shall be increased to $250.00 per month.

* * *

7. The motion of the plaintiff that the defendant be held in contempt of court for failure to make payments is denied."

On 8 December 1971 Judge Gay found "that the word 'emancipated' as used in the . . . [22 July order was] misleading as it was the intention of the court and the parties that the child support should continue beyond the 18th birthday of said children, unless otherwise ordered by the court . . . . " Judge Gay entered an order amending Item 5 of the 22 July order to read as follows:

"That the defendant shall pay into the office of the clerk of this court the sum of $200.00 per month for the use and benefit of his three children, namely, Jim, Pattie and Jeffrey Harding. He shall in addition thereto pay the further sum of $150.00 per month into the office of the clerk of this court as alimony to the plaintiff. The child support payments herein provided for shall continue until each of said older children, to-wit: Jim and Pattie become

twenty-one years of age, or married, or is less than a full-time student in high school or college or is otherwise self-supporting, whichever occurs first, then as to that child, a pro-rata reduction in the support payments shall occur automatically. The identical provisions shall apply for the younger child, Jeff Harding with the exception that said provisions for support shall continue beyond his twenty-first birthday and through his fourth year in college, provided he is enrolled as a fulltime student in a duly accredited college. The alimony payments called for herein shall continue until the plaintiff shall remarry or die, whichever occurs first. Upon remarriage, support payments for each child then being supported by the defendant shall be increased by $16.67 per month."

There was no appeal from this order or from the prior order entered by the court in this cause.

On 26 August 1975, plaintiff filed the present motion seeking delinquent payments and an increase in support from defendant for Jeff and Pattie Harding, the remaining children entitled to support under the prior orders of the court. Defendant answered plaintiff's motion denying the allegations contained therein. He also alleged that he had "no legal obligation to support those children who are eighteen years of age or older nor to furnish them with a college education and that the court's order in attempting to require him to do so [was] void in accordance with Chapter 48A of the General Statutes of this State." Defendant moved that the court enter an order terminating all support payments, including support for education, for all of the children who were eighteen years old or older. There was a hearing on the matter after which the court made findings and conclusions and entered an order summarized and quoted as follows:

1. Defendant is required to pay for the support and education of his daughter Pattie "until she has completed her four years of college, her twenty-first year of age, or is married, or is less than a full-time student in college or is otherwise self-supporting, whichever occurs first."

2. Defendant is required to pay for the support of his son Jeff "until he has completed his fourth year in college, provided he is enrolled as a full-time student in a duly accredited college."

3. Defendant is responsible for the college education of Jeff.

4. * * *

5. "That plaintiff may now request the clerk of the court to levy execution on the defendant on the $1,700.00 judgment heretofore entered in this matter . . . . "

6. Defendant's motion to terminate support for all children more than eighteen years of age is denied.

The amount of support which defendant was required to pay for his son Jeff, fifteen years old, and his daughter, Pattie, eighteen years old, in addition to payments for Pattie's education, was an increase of $25.00 from the July and December 1971 orders of the court. Defendant appealed.

W. Lunsford Crew for plaintiff appellee.

Roland C. Braswell for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends the court erred in denying his motion "that all support for all the children more than eighteen years of age be discontinued." On 5 July 1971, after entry of the original consent decree but before entry of any of the subsequent orders, G.S. 48A-2 became effective. It provides that "[a] minor is any person who has not reached the age of 18 years." In light of this statute, the authority of the court to require support for a normal child as a ward of the court ceases when the child becomes eighteen. *Shoaf v. Shoaf,* 282 N.C. 287, 192 S.E. 2d 299 (1972); *Nolan v. Nolan,* 20 N.C. App. 550, 202 S.E. 2d 344 (1974), *cert. denied* 285 N.C. 234, 204 S.E. 2d 24 (1974). Thus, nothing else showing, where an order of the court for support entered prior to 5 July 1971 provides for support of the children until the age of majority, maturity, or emancipation, it has been interpreted, in light of G.S. 48A-2, to impose the legal obligation of support only to the child's eighteenth birthday. Shoaf, *supra; Ramsey v. Todd,* 25 N.C. App. 605, 214 S.E. 2d 307 (1975). But, a parent can by contract assume an obligation to his child greater than the law otherwise imposes, and by contract bind himself to support his child after emancipation and past majority. *Carpenter v. Carpenter,* 25 N.C. App. 235, 212 S.E. 2d 911 (1975), *cert. denied*

287 N.C. 465, 215 S.E. 2d 623 (1975). It follows, too, that the court has the power to enforce the *contract* between the parties, to give effect to their intentions. Carpenter, *supra,* and cases cited therein.

In the present case, two orders were entered after 5 July 1971 in order to clarify defendant's obligation to support his children past their eighteenth birthdays. The 8 December 1971 order, from which there was no appeal, provides that "child support payments herein provided for shall continue until each of said older children, to-wit: Jim and Pattie, become twenty-one years of age. . . . The identical provisions shall apply for the younger child, Jeff Harding, with the exception that said provisions for support shall continue beyond his twenty-first birthday. . . ."

The original order of support provided that:

> "When a child gets married or finishes his or her fourth year in college or stops going to school (whichever shall first occur), then the duty of the father to provide support for said child shall terminate . . . . "

[2] It is clear from the original order and the subsequent December 1971 order that defendant had agreed to support his children beyond their eighteenth birthday. Indeed, nothing in the original consent agreement even refers to the age of majority, maturity, or emancipation. Having consented to support his children through college in the original agreement and not having appealed the orders entered after 5 July 1971, which were for the specific purpose of clarifying defendant's obligation to support his children, defendant obligated himself to continue support of his children past their eighteenth birthdays. Defendant's argument is without merit and is overruled.

[3] Defendant also contends the court erred in increasing support payments for Jeff and Pattie including the additional support required for the expense of Pattie's education. He argues that there was not evidence or findings sufficient to warrant any increase in the amount of support he was then paying.

In order to justify an increase in support, there must be evidence and findings of changed circumstances necessitating the additional payments. *Waller v. Waller,* 20 N.C. App. 710, 202 S.E. 2d 791 (1974). The ultimate object "is to secure support commensurate with the needs of the child and the ability

of the father to meet the needs." *Crosby v. Crosby,* 272 N.C. 235, 237, 158 S.E. 2d 77, 79 (1967).

With regard to the defendant's ability to meet the needs of the children, the court found that his net worth had increased since 1971; that his available income had increased; that he had refused to supply the court with copies of his latest financial reports; that he was able to pay the college expenses of his oldest sons, Steve and Jim, while they attended school; and that his obligation to support Steve and Jim had ceased. With regard to the needs of the children, the court found that plaintiff, who had been earning $7,200.00 per year, was no longer working; that Pattie and Jeff were residing with the plaintiff; "[t]hat the needs of said two children [had] increased . . . " ; that Pattie is a freshman at the University of North Carolina; that Pattie's college education requires $3,000.00 per year, $1,486.64 of which had already been expended by plaintiff; and that defendant was presently paying $167.67 per month for the support of Pattie and Jeff.

The findings with respect to the ability of defendant to support his children are fully supported by his own testimony at the hearing. With respect to the expenses for Pattie's education, the evidence that she is in fact attending college supports a change in circumstances. Plaintiff's affidavit that expenses were $3,000.00 per year is evidence of the amount needed to meet the change in circumstances. Also, in the affidavit was a statement of increased cost of living expenses for the children which required an increase in support to $150.00 per month. Although more extensive findings could have been made with respect to the children's needs, defendant offered no evidence to contradict any of plaintiff's evidence. We hold that the evidence supports the findings and the findings support the order allowing $3,000.00 for college expenses and an increase in the amount of support by $25.00 per month. This assignment of error is overruled.

[4] Finally defendant contends the court erred in allowing execution on the $1,700.00 judgment. He argues that the court orally stated on the day of the hearing that it would allow execution for only $1,216.71 and then increase the amount to $1,700.00 after the hearing in response to a private communication from plaintiff's attorney. The record discloses, however, that defendant's attorney was given a copy of the letter. He had

an opportunity to rebut the contentions stated in the letter, and he failed to do so.

The evidence supports the full amount. We can perceive no prejudice to defendant because of a miscalculation made at the time of the hearing. This assignment of error has no merit.

The order appealed from is

Affirmed.

Judges PARKER and ARNOLD concur.

NYBOR CORPORATION v. RAY'S RESTAURANTS, INCORPORATED, RAY GOAD AND WIFE GENEVA GOAD v. GEM OIL COMPANY

No. 7521SC806

(Filed 16 June 1976)

1. **Trial § 58— violation of parol evidence rule — nonjury trial — harmless error**

Assuming that a corporate officer's testimony that the corporation did not assume a sublease when it purchased certain property violated the parol evidence rule, the admission of such testimony was harmless error where the case was heard by the court without a jury and the court based its adjudication of the rights of the parties entirely upon its judicial interpretation of the written instruments in question.

2. **Landlord and Tenant § 11— sublease conveying more than lessee's estate — sale "subject to" leases — obligations of purchaser**

A purchaser of property whose deed was made "subject to" specified leases of record was not obligated under those provisions of a sublease so specified which purported to convey an estate of greater size and duration than the lessee possessed under its primary lease.

3. **Landlord and Tenant § 11— sublease conveying more than lessee's estate — breach of contract by lessee**

A lessee of property was liable to the sublessee for breach of contract both as to the tenure of the sublease and as to the area conveyed where the sublease contained a warranty by the lessee that it had a right to lease the property in accordance with the terms therein, and the sublease purportedly granted to the sublessees the right to occupy a greater area and option rights for a longer term than the lessee had under its primary lease.

APPEALS by original defendants and by third-party defendant from *Walker, Judge.* Judgment entered 26 June 1975 in

Superior Court, FORSYTH County. Heard in the Court of Appeals 9 February 1976.

Action for a declaratory judgment. The following facts are established by the pleadings and stipulations of the parties.

In 1961 Alma Grubb, plaintiff's predecessor in title, owned a tract of land in Winston-Salem fronting on the east side of old U. S. Highway 52 and having a depth of several hundred feet. By instrument dated 15 May 1961, recorded in the Office of the Register of Deeds of Forsyth County in Deed of Trust Book 824, page 154, she leased a particularly described portion of her land, being a tract fronting on the highway and having a depth of 125 feet, to Gem Oil Company, a North Carolina Corporation, for a term running to and including 30 April 1976, at a rental of $220.00 per month. The lease provided that Gem should have "the right to sub-let all, or any part, of the said premises without the consent or approval" of Alma Grubb.

By instrument dated 7 July 1965 recorded in Deed of Trust Book 965, page 110, Gem Oil Company executed a sublease to Ray Goad, Incorporated and to Ray Goad and wife, Geneva Goad. (The rights of all of these sublessees were later consolidated, by assignment, in the defendant, Ray's Restaurants, Incorporated, and the Sublessees will hereinafter be referred to as "Ray's.") The sublease contract particularly described the property covered thereby as a tract fronting on the highway and having a depth of 150 feet (25 feet greater than had been granted by the 15 May 1961 lease from Grubb to Gem). The term of the sublease commenced on 1 October 1965 and continued for a period of ten years thereafter at a rental of $500.00 per month. Paragraph 17 of the sublease provided that the sublessees should have an option to renew for an additional period of ten years at a rental of $650.00 per month by giving written notice of intention to renew at least six months prior to the end of the first term.

When the 15 May 1961 lease from Grubb to Gem and when the 7 July 1965 sublease from Gem to Ray's were executed, Alma Grubb was the president, a director, and owner of 10 percent of the stock in Gem. Gem's execution of both instruments was accomplished by Grubb, in her capacity as president, signing in the name of Gem and by the attestation of the corporate secretary of Gem.

By deed dated 29 October 1971 Alma Grubb sold and conveyed in fee simple her entire property fronting on the east side of old U. S. Highway 52 to Nybor Corporation, the plaintiff in this action. Immediately after the description of the property conveyed, this deed contains the following:

> "This conveyance is made subject to leases of record as recorded in Deed of Trust Book 824, Page 154 and Deed of Trust Book 965, Page 110, Office of the Register of Deeds of Forsyth County, N. C. Grantors do also hereby sell, convey, and assign all of their right, title and interest in the lease between Alma Grubb and Gem Oil Company, recorded in said Deed of Trust Book 824, Page 154, to the Grantee herein."

Both the habendum and warranty in the deed were made "subject to leases hereinbefore referred to."

Plaintiff brought this action on 18 January 1974 against the original defendants, seeking a determination of the rights of the parties under the foregoing instruments. Plaintiff alleged that Ray's had no right to continue to use the rear or easternmost 25 feet of the property described in the sublease from Gem to Ray's and that the option contained in paragraph 17 of the sublease was invalid as against the plaintiff. The original defendants answered, alleging they were entitled to continue to occupy the entire property described in the sublease, including the rear 25 feet, and that the option contained in paragraph 17 of the sublease was valid. (Ray's later gave timely written notice both to plaintiff and to Gem of exercise of its option rights under paragraph 17.)

The original defendants also joined Gem as third party defendant, in their third party complaint praying that in event the court should determine the principal action in favor of plaintiff, the court then determine Ray's rights against Gem. Gem answered the third party complaint and joined in the prayer that the court construe the documents set forth in the original complaint. Gem prayed that the court adjudge that the original defendants have all of the rights set out in the sublease dated 7 July 1965.

The case was heard by the court without a jury upon the pleadings, stipulations, exhibits, and oral testimony. Defendants introduced depositions which tended to show that before

plaintiff Nybor purchased this property from Alma Grubb, all parties concerned were aware that the land subleased to Ray's exceeded the land originally leased to Gem by 25 feet. Frank Holton, Jr., attorney for Alma Grubb, testified on deposition that he believed, but was not certain, that "some discussion was made that the purchase price was lower because of that [the discrepancy in the two leases]." Plaintiff offered evidence that an amendment to the lease from Alma Grubb to Gem was prepared on 29 September 1966 in which the property leased to Gem would be made identical with the property subleased to Ray's, but Alma Grubb never signed this amendment. James C. Bethune, Jr., an officer of Nybor, testified that plaintiff never agreed to assume the sublease.

The court entered judgment that the original defendants had no rights in the 25 feet which was in excess of the land described in the lease from Alma Grubb to Gem or with respect to the option contained in the sublease. Plaintiff, Nybor Corporation, was relieved of all obligations under both the lease and sublease from and after 30 April 1976. The third-party defendant, Gem Oil Company, was held legally obligated to Ray's for breach of its obligation set forth in the sublease to the extent as may be determined in further proceedings.

From this judgment the original defendants and the third-party defendant appealed.

Blackwell, Blackwell, Canady, Eller & Jones by Jack F. Canady and Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster and C. P. Craver, Jr. for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr. for defendant appellants.

Grubb and Penry by Robert L. Grubb for third-party defendant appellant.

PARKER, Judge.

[1] Appellants first assign as error that the court overruled their objections to the testimony of James C. Bethune, Jr., an officer of plaintiff Nybor Corporation, to the effect that Nybor, in buying the property and accepting the deed from Grubb, did not agree to assume the sublease. Appellants contend admission of this evidence violated the parol evidence rule. This case was heard by the court without a jury. The trial court made no find-

ing of fact based upon the challenged evidence, but based its adjudication of the rights of the parties entirely upon its judicial interpretation of the legal effect of the written instruments here involved and not on any testimony outside of those instruments as to what any of the parties may have intended. Thus, the error complained of in appellants' first assignment of error did not affect the judgment appealed from, and if error occurred, appellants suffered no harm.

[2] Appellants' second assignment of error challenges the court's conclusion of law and its adjudication that plaintiff, Nybor, is not bound to honor any rights purportedly granted to the sublessees in the 7 July 1965 sublease from Gem to Ray's which were in excess of the rights held by Gem under the 15 May 1961 lease from Grubb to Gem. Appellants contend that the language in the 29 October 1971 deed by which Nybor acquired title, which made that conveyance "subject to" the specified leases of record, so qualified the fee granted as to make it subordinate to all rights purportedly granted by Gem to its subleases, including the rights to occupy an area greater and option rights for a term longer than Gem, as lessee, had under its lease from Grubb. We do not agree.

Looking at the language of the deed and finding it to be clear and unambiguous, we hold the trial court was correct in its determination that plaintiff, Nybor was not obligated to defendant Ray's under those provisions of defendants' sublease from Gem which purported to convey an estate of greater size and duration than Gem possessed under its primary lease from Grubb. Ray's gained no additional rights under the invalid portions of its sublease. "In general, the rights of a subtenant are measured by those of his sublessor. A sublessee can in no event have any greater rights against the lessor than were given by the original lease to the lessee." 51C C.J.S., Landlord & Tenant, § 48(1), p. 140. The words "subject to leases of record," as found in the deed accepted by Nybor, cannot be construed to give validity to rights purportedly granted to defendants which their sublessor, Gem, had no power to convey. "[T]he rights of an earlier grantee to which a later grant is expressed to be subject to are neither abridged nor enlarged by the later grant." 23 Am. Jur. 2d, Deeds, § 217, p. 262. The words "subject to" imposed upon Nybor the burden of recognizing only those rights under the lease and sublease which were already valid and

enforceable and did not by implication or otherwise grant to the sublessees rights which they did not then hold.

[3] In addition, the third-party defendant, Gem, contends the judgment of the trial court was in error in its holding that Gem was liable to the original defendants for breach of its contract and obligation both as to tenure of the sublease and as to the area conveyed. We find no error in the court's adjudication in this regard. The following language appears in the sublease from Gem to Ray's:

> "16A. The LANDLORD warrants that it has a right to lease the premises described herein in accordance with the terms and options set forth herein."

This contract language is, in and of itself, sufficient to support the judgment in favor of the original defendants as against the third-party defendant.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. DARRYL KEITH GIBBS

No. 7528SC960

(Filed 16 June 1976)

1. **Constitutional Law §§ 20, 30; Criminal Law § 40— former trial — denial of free transcript — alternative available**

The trial court did not err in denying the indigent defendant's motion for a free transcript of his first trial which ended in a mistrial, since the first trial took place only one month before the second trial, the same court reporter who took evidence at the first trial also was assigned to the second trial, and defense counsel's memory and availability of the court reporter to testify served as an alternative substantially equivalent to a transcript.

2. **Criminal Law § 26; Robbery § 2— robbery of two people in one store — two distinct offenses**

The trial court did not err in ruling that the acts of defendant in robbing two people in a store constituted two separate and distinct offenses of armed robbery, since there were two victims, one of

whom was robbed of her purse and the other who was forced to turn over the corporation's money.

3. **Criminal Law § 66— in-court identification of defendant — no taint from out-of-court confrontation**

Where both witnesses to an armed robbery knew the defendant prior to the commission of the crime and had concluded prior to the questioned identification procedures that the defendant was one of the perpetrators of the crime, the subsequent in-court identification of defendant was not tainted by the out-of-court confrontation between the witnesses and defendant.

4. **Criminal Law § 75— confession — voluntariness**

The trial court in an armed robbery case properly allowed into evidence defendant's statements and confessions where the court concluded on voir dire that there was no offer or hope of reward or inducement to defendant to make a statement, defendant was not threatened, his statement was voluntary, and defendant voluntarily waived his rights.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 21 August 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 15 March 1976.

The defendant was charged in a bill of indictment, proper in form, with armed robbery.

Evidence for the State tended to show the following. On 6 May 1975, William Hamlin and Gail Martin were employed at the Ice Service Store in Asheville. At 11:05 that night defendant and another man carrying a gun came to the door of the store and motioned to be let in. Miss Martin let them in, and the man with the gun forced Hamlin to lie on the floor. Defendant threatened Miss Martin with a knife and forced her to go to a back room at which point he took her pocketbook. He forced her to tell him where the money could be found and they returned to the front of the store. The robbers left with Miss Martin's purse and approximately $325.00 in cash. After defendant was arrested, he confessed that he took part in the robbery.

Defendant offered evidence tending to show that at the time of the robbery he was at the home of Ann Lewis.

The jury returned a verdict of guilty of robbery with a dangerous weapon and defendant appeals from judgment entered upon the verdict imposing a sentence of imprisonment.

Attorney General Edmisten, by Associate Attorney James Wallace, Jr., for the State.

J. Robert Hufstader, for defendant.

MARTIN, Judge.

[1] Defendant was first tried on these charges at the July 1975 Criminal Session of the Superior Court of Buncombe County. This trial resulted in a mistrial due to the inability of the jurors to agree upon a verdict. After this mistrial the defendant, an indigent, filed a motion requesting that he be provided, at public expense, a transcript of the evidence presented at the earlier trial. Defendant contends that he should have been provided with a free transcript of his first trial so that it could be used to impeach witnesses at the present trial by calling attention to conflicts in their testimony at the two trials. Defendant further contends that the transcript was essential to the preparation and defense in the retrial and that the testimony of William Hamlin and Gail Martin is important due to possible changes and embellishments in their testimony. We disagree with defendant's contentions.

In *Britt v. North Carolina,* 404 U.S. 226, 30 L.Ed. 2d 400, 92 S.Ct. 431 (1971), *aff'g State v. Britt,* 8 N.C. App. 262, 174 S.E. 2d 69 (1970), the United States Supreme Court upheld this Court's decision denying a defendant's request for a free transcript. In *Britt,* the Court decided that in those particular circumstances an adequate alternative to the transcript was available. Such alternatives existed in the instant case. Accordingly, the transcript was not needed for an effective defense.

In his brief counsel for defendant acknowledged that the court reporter who took the evidence at the first trial was regularly assigned to that court and was assigned to report the second trial. The reporter was available to defendant as a witness. Any suspected inconsistencies in the prosecution's evidence could have been developed by counsel's calling the reporter as a witness and having him read testimony from the earlier trial.

While the trials were not heard by the same judge, defendant was represented by the same counsel at both trials. Further, the two trials were less than a month apart. It would appear that the memory of defendant and his counsel, combined with

the availability of the court reporter as a witness, furnished an adequate substitute for a transcript. See *Britt, supra.* Also see *State v. Keel,* 5 N.C. App. 330, 168 S.E. 2d 465 (1969) (defendant's request for a free transcript was denied where the record indicated that both the judge and court reporter were different in each trial.)

The record does not disclose discrepancies in the testimony of either Hamlin or Miss Martin which defendant sought to contradict. The witnesses admitted testifying in the first trial. We find no instances nor do counsel suggest in their brief any instances when the witnesses were questioned as to any discrepancy of testimony material to the defense. It appears from the questioning that counsel's memory from and notes taken at the former trial served as an alternative substantially equivalent to a transcript. This assignment of error is overruled.

[2] In his second assignment of error defendant contends that the court erred in ruling that the acts of defendant constituted two separate and distinct offenses of armed robbery. This contention is without merit. In the case at bar there were two distinct victims and property was taken from two separate owners. Miss Martin was robbed of her purse, and Mr. Hamlin was forced to turn over the corporation's money. Following the law and reasoning set forth in *State v. Johnson,* 23 N.C. App. 52, 208 S.E. 2d 206 (1974), it is clear that the acts constituted two separate offenses of armed robbery. It is noted that defendant concedes that the cases were consolidated for judgment and the punishment did not exceed that for one offense of armed robbery.

[3] In his third assignment of error defendant contends that his in-court identification by Hamlin and Martin was based on unnecessarily suggestive pretrial identification procedures which violated due process. He argues that the identification testimony of these witnesses was erroneously admitted.

It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974).

In the instant case, upon objection and motion to suppress the identification testimony, the trial judge excused the jury

and conducted a voir dire hearing. At the conclusion of the hearing the judge found the facts, based on competent evidence, from which he concluded:

> "That the in-court identification of the defendant Gibbs is of independent origin based solely on what the witness saw and heard at the time of the alleged crime and does not result from any out-of-court confrontation or from any photograph or from any pretrial identification procedures suggestive or conducive to mistaken identification.
>
> 5. The confrontation was not so unnecessarily suggestive or conducive to lead to irreparable mistaken identification to the extent that the defendant would be denied due process of law."

The court therefore denied the defendant's motion to suppress the evidence and testimony of said Martin and Hamlin.

In *State v. Tuggle,* 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974), the Court stated the rule governing voir dire hearings when identification testimony is challenged, to wit:

> "When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the test of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. (Citations omitted.)"

The evidence at the voir dire shows that both witnesses knew the defendant prior to the commission of the crime and had concluded prior to the question identification procedures that the defendant was one of the perpetrators of the crime. Accordingly, the in-court identification of defendant was not tainted by the out-of-court confrontation and the trial judge correctly overruled defendant's objection and motion to suppress.

[4] Defendant's fourth assignment of error relates to the action of the court in overruling defendant's motion to suppress defendant's statements and confessions.

Defendant was arrested on 8 May 1975 and at 1:55 p.m. he was advised of his constitutional rights by deputy Jerry Jones. Jones then stated to defendant that there would be two armed robbery charges against him, one for robbing the store of $325 and one for robbing Miss Martin of her pocketbook. Jones stated that "if the defendant gave him information regarding the pocketbook, such as its whereabouts, the second warrant might not be issued." Defendant made no statement at this time. At 2:42 p.m. two warrants were served on defendant and a few minutes later he said that he wanted to make a statement and that his bond was too high. Jones told him that an attorney would be appointed for him and could seek a bond reduction. Defendant "asked about the two charges of armed robbery" and Jones told him, "it would be up to the district attorney and judges and his lawyer to confer regarding any lesser charges." Defendant then made his confession.

On voir dire the court made extensive findings on competent evidence from which it concluded:

"1. That there was no offer or hope of reward or inducement to the defendant to make a statement.

2. That there was no threat or suggested violence or show of violence to persuade or induce the defendant to make a statement.

3. That any statement made by the defendant to Jerry Jones on May 8, 1975, was made voluntarily, knowingly, and independently.

4. That the defendant was in full understanding of his constitutional rights to remain silent and rights to counsel and all other rights.

5. That he purposely, freely, knowingly, and voluntarily waived each of those rights, specifically the right to the advice and assistance of counsel, and thereupon thereafter made a statement to Deputy Sheriff Jerry Jones which was reduced to writing, State's Exhibit No. 3.

Therefore, the Court rules that State's Exhibit No. 3, the statement of the defendant, was voluntary and is therefore admissible on the trial of this cause. Therefore, the defendant's motion to suppress the voluntary statement is denied."

This assignment of error is overruled.

Defendant's remaining assignments of error are without merit and are overruled.

Defendant had a fair trial free of prejudicial error.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. TIMITHY RAY GAINEY

No. 7619SC81

(Filed 16 June 1976)

1. **Automobiles § 46— opinion testimony as to speed**

While the period of time during which two witnesses observed defendant's automobile as it approached an intersection where the collision in question occurred was brief, it was of sufficient duration to permit the witnesses to state opinions that defendant's speed exceeded 35 mph as he entered the intersection.

2. **Automobiles § 113— intersection accident — involuntary manslaughter**

The evidence was sufficient for the jury in a prosecution for involuntary manslaughter arising out of an intersection collision where it tended to show that defendant failed to heed a stop sign at the intersection, defendant was traveling in excess of 35 mph as he entered the intersection, and the brakes on defendant's car were working properly contrary to defendant's contention that he had pumped the brake pedal repeatedly but that the brakes would not function.

3. **Automobiles § 114— involuntary manslaughter — exceeding safe speed — insufficiency of evidence**

In a prosecution for involuntary manslaughter growing out of an intersection collision, the trial court erred in submitting the case to the jury on the theory that defendant was driving faster than reasonable and prudent under existing conditions in violation of G.S. 20-141(a) where there was no evidence of the posted speed limit and the court properly charged that the jury would have to assume the legal limit was 55 mph, the evidence tended to show that defendant was traveling approximately 35 mph when he entered the intersection, and there was no evidence as to road conditions other than defendant's testimony as to the course of the road he was traveling.

4. **Automobiles § 114— involuntary manslaughter — failure to stop for stop sign — instructions**

The trial court erred in instructing the jury that a mere failure to stop for a stop sign in violation of G.S. 20-158, proximately causing death, would warrant a conviction of involuntary manslaughter.

Judge VAUGHN dissenting.

APPEAL by defendant from *Collier, Judge.* Judgment entered 4 December 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 10 May 1976.

Defendant was tried on a bill of indictment charging him with manslaughter in the death of Mrs. Carrie Freeze on 7 October 1973. He pled not guilty and the evidence presented by the State tended to show:

At around 8:00 p.m. on said date, Julia Ann Freeze was driving a pickup truck with a camper attached, at approximately 30 m.p.h., in a westerly direction on West C Street in Kannapolis. Her mother, Mrs. Carrie Freeze, was riding in the camper. As they approached the point where Winona Street entered C Street in a "T" intersection, defendant failed to heed a stop sign on Winona Street and drove into the intersection from their right, resulting in a collision between the pickup and his vehicle. Mrs. Carrie Freeze died some three weeks later from injuries she received in the collision.

Just prior to the collision Vickie and Wayne Dunn were riding in a vehicle traveling west on C Street immediately behind the vehicle occupied by the Freezes. They observed for a few moments the lights of the vehicle operated by defendant as it approached the intersection and, in their opinions, defendant's speed exceeded 35 m.p.h. as he entered the intersection.

The highway patrolman who investigated the accident observed that defendant had a moderate odor of alcohol on his breath but gave no testimony tending to show that defendant was under the influence of intoxicants. He examined the brakes on defendant's vehicle by depressing the brake pedal; it had "a full brake pedal" and did not go to the floor.

Defendant testified that when he approached the intersection, he pushed the brake pedal but the brakes would not work; that he pumped the pedal repeatedly but still the brakes would not function. He admitted drinking some beer that afternoon

and also admitted that he had been convicted of numerous traffic violations.

The jury found defendant guilty of involuntary manslaughter and from judgment imposing prison sentence, he appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, and Associate Attorney Jo Anne Sanford Routh, for the State.

Davis, Ford and Weinhold, by Robert M. Davis, for defendant appellant.

BRITT, Judge.

[1] Defendant contends the trial court erred in permitting the witnesses Vickie and Wayne Dunn to state opinions as to the speed of defendant's automobile as it approached the intersection where the collision occurred. We find no merit in this contention. While the period of time that they observed defendant's approaching automobile was brief, we think it was of sufficient duration for them to form opinions as to speed. *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557 (1968). Furthermore, when the opinions of the witnesses that defendant was "exceeding" 35 m.p.h. is considered along with defendant's testimony that he "was running around 35 miles per hour," we can perceive no prejudice to defendant.

[2] Defendant contends the trial court erred in denying his motions for nonsuit. We consider only the motion interposed at the conclusion of all the evidence, 3 Strong, N. C. Index 2d, Criminal Law § 176, and hold that the evidence was sufficient to survive the motion.

To survive the motion for nonsuit, the State had the burden of showing culpable negligence on the part of defendant, and that such negligence proximately caused the death of Mrs. Freeze. Defendant raises no question regarding proximate cause but strenuously argues the absence of proof of culpable negligence. The established law in this jurisdiction with respect to culpable negligence is well summarized in 1 Strong, N. C. Index 2d, Automobiles § 110, as follows:

> "Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting

in injury or death, as is incompatible with a proper regard for the safety or rights of others.

"The violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, wilful, or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which death or injury to others might have been reasonably anticipated. But the inadvertent or unintentional violation of a safety statute, *standing alone,* does not constitute culpable negligence." (Emphasis added.)

When the evidence presented in the instant case is considered in the light most favorable to the State, we think it was sufficient to take the case to the jury.

Defendant contends the trial court erred in its instructions to the jury. We think this contention has merit and that the errors were sufficient to entitle defendant to a new trial.

In its instructions the court charged on the theory that the evidence established *prima facie* that defendant (1) was driving faster than was reasonable and prudent under existing conditions, a violation of G.S. 20-141(a), and (2) drove into the intersection without stopping in obedience to a duly erected stop sign, in violation of G.S. 20-158. While we agree that the evidence tended to show a stop sign violation, we do not think the evidence was sufficient to show a violation of G.S. 20-141(a).

[3] The record reveals that on the night in question Winona Street, for approximately three-tenths of a mile before it intersected with C Street, was comparatively straight and flat and that the night was clear and dry with a temperature of about 70 degrees. There were no traffic or streetlights at the intersection. Most of the evidence regarding Winona Street was provided by defendant who testified that he entered that street at a point more than five-tenths of a mile from the intersection; that he traversed a series of curves within the first two-tenths of a mile traveled; but thereafter the road straightened and ran true for more than three-tenths of a mile before intersecting with C Street. There was no evidence as to the posted speed limit and His Honor properly charged that the jury would have to assume the legal limit was 55 m.p.h. Defendant testified, as did witnesses for the State, that his speed just prior to impact

was approximately 35 m.p.h. There was no other evidence as to speed or road conditions and the investigating officer indicated a lack of familiarity with the area. This evidence affords no sound basis for instructions on violation of G.S. 20-141(a). *State v. Weston,* 273 N.C. 275, 159 S.E. 2d 883 (1968). It was error to submit a case to the jury on a theory not supported by the evidence. *State v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235 (1964).

The trial court's mandate to the jury included the following:

> "So I charge that if you find from the evidence beyond a reasonable doubt that on or about October 7, 1973, at about 7:55 p.m., Timithy Ray Gainey intentionally or recklessly drove his motor vehicle at a speed that was greater than reasonable and prudent under the conditions then and there existing, *or* drove his vehicle through a stop sign without braking his vehicle to a stop, thereby proximately causing the death of Carrie Freeze, and that the violation or violations did not result from brake failure on the defendant's car, it would be your duty to return a verdict of guilty of involuntary manslaughter." (Emphasis ours.)

[4] In addition to the reason stated above, we think the quoted instruction was erroneous for the additional reason that it could have left the impression with the jury that a mere violation of G.S. 20-158, proximately causing death, would warrant a conviction of involuntary manslaughter. Clearly this is not the law. *See State v. Sealy,* 253 N.C. 802, 804, 117 S.E. 2d 793, 795 (1961), holding that there must be "[a]n intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb which proximately results in injury or death . . ." to constitute culpable negligence.

For the reasons stated, defendant is awarded a

New trial.

Judge ARNOLD concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I vote to affirm the judgment. Evidence that defendant, in the nighttime, approached and entered the intersection at a speed in excess of 35 miles per hour is, in my opinion, some evidence of driving at a speed greater than reasonable and prudent under the circumstances. I also believe the judge made it clear to the jury that to find defendant guilty they must find that his conduct was intentional rather than unintentional, inadvertent or accidental.

JACK E. KLASS, ADMINISTRATOR, C.T.A. OF THE ESTATE OF JAMES L. MOORE, DECEASED v. ROBERT G. HAYES AND KANNAPOLIS PUBLISHING COMPANY

No. 7522SC988

(Filed 16 June 1976)

1. **Appeal and Error § 6; Venue § 9— ruling on change of venue as matter of right — right to appeal**

   Appeal from a ruling on a motion for a change of venue as a matter of right is not premature.

2. **Venue § 5— action to rescind sale of stock — no removal to county where stock located**

   An administrator's action to rescind a contract of sale of stock on grounds of mental incapacity of decedent and breach of fiduciary obligation by the individual defendant, or in the alternative to recover damages for breach of the fiduciary duty, is not removable as a matter of right under G.S. 1-76(4) to the county where the stock certificates are located since the primary relief sought is rescission of the contract of sale and recovery of the stock certificates is only incidental thereto.

3. **Venue § 2— action by administrator**

   Under G.S. 1-82 an action by an administrator is properly brought in the county where the administrator resides rather than in the county where the decedent lived or in which the administrator qualified.

APPEAL by defendants from *Crissman, Judge.* Order entered 27 October 1975 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 17 March 1976.

This is an appeal from an order denying a motion for change of venue.

James L. Moore, a resident of Cabarrus County, died 19 December 1973. The executor named in his will was disqualified. *In re Moore,* 25 N.C. App. 36, 212 S.E. 2d 184 (1975). Plaintiff, a resident of Davidson County, was appointed by the Clerk of Superior Court of Cabarrus County as Administrator c.t.a. of the estate of James L. Moore, deceased. As such, plaintiff brought this action in the Superior Court of Davidson County against Robert G. Hayes, a resident of Cabarrus County, and against Kannapolis Publishing Company, a North Carolina corporation having its principal place of business in Cabarrus County.

In his complaint plaintiff alleged that on 24 August 1973 the individual defendant, acting for himself and as agent for the corporate defendant, acquired from James L. Moore 1040 shares of the common capital stock of the corporate defendant for $928,000.00; that at the time of such acquisition said stock had a fair value of $2,275,000.00; and that because of age and excessive use of medication James L. Moore was not mentally competent; and that plaintiff had offered to return the consideration paid for the stock plus interest, but the offer was not accepted by defendants. In his first claim for relief plaintiff alleged that because of the lack of mental capacity of James L. Moore, "plaintiff is entitled to have the purported sale rescinded and set aside and recover from the defendants 1,040 shares, or their current equivalent, of the common capital stock of Kannapolis Publishing Company and to hold the defendants liable for all dividends or other gains, plus interest, received by them as a result of the acquisition of the stock of James L. Moore."

As a second claim for relief, plaintiff alleged that Robert G. Hayes occupied a fiduciary relationship toward James L. Moore, which relationship he breached by acquiring the stock for a grossly inadequate consideration, and for that reason plaintiff is entitled to have the sale rescinded and set aside. In the alternative, and as a third claim, plaintiff alleged that because of the breach of the fiduciary obligation owed by Hayes to Moore, plaintiff is entitled to recover damages in the amount of $1,347,000.00 plus interest.

In his prayer for relief, plaintiff prayed:

> "(1) That the sale to the defendants be rescinded and set aside and that the plaintiff recover from the defendants

1,040 shares, or their current equivalent, of the common capital stock of Kannapolis Publishing Company:

(2) That the plaintiff recover of the defendants all dividends and other gains, plus interest, received by the defendants from said stock."

In addition, plaintiff asked for an injunction *pendente lite* restraining defendants from disposing of the 1,040 shares acquired from James L. Moore pending the final determination of this action. In the alternative, plaintiff prayed to recover of the defendants the sum of $1,347,000.00.

In apt time pursuant to G.S. 1A-1, Rule 12(b) (3), defendants filed a motion for a change of venue from Davidson County to Cabarrus County as a matter of right. In support of this motion defendants filed an affidavit of an officer of the Cabarrus Bank and Trust Company that on 24 August 1973 Moore, Hayes, and the Bank entered into an escrow agreement under which 1,040 shares of common stock of Kannapolis Publishing Company were placed in escrow with the Bank, that the escrow agreement remained in effect, and that the certificates for 1,040 shares of said stock are now in possession of the escrow agent.

The court denied the motion, and defendants appealed.

Walser, Brinkley, Walser & McGirt by Gaither S. Walser and Jordan, Wright, Nichols, Caffrey & Hill by Welch Jordan and G. Marlin Evans for plaintiff appellee.

E. T. Bost, Jr., and Williams, Willeford, Boger & Grady by John Hugh Williams for defendants appellants.

PARKER, Judge.

[1] Defendants, contending that G.S. 1-76 applies, made their motion as a matter of right. Appeal from a ruling on a motion for a change of venue as a matter of right is not premature. *Coats v. Hospital,* 264 N.C. 332, 141 S.E. 2d 490 (1965); *Cedar Works v. Lumber Co.,* 161 N.C. 603, 77 S.E. 770 (1913).

Insofar as pertinent to this appeal, G.S. 1-76 provides:

"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:

* * *

(4) Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded."

Defendants contend that this is an action for recovery of personal property in which recovery of the property itself is the primary relief demanded, that the property is situated in Cabarrus County, and that under G.S. 1-76(4) they are entitled to have the action removed to Cabarrus County. We do not agree.

In *Davis v. Smith,* 23 N.C. App. 657, 209 S.E. 2d 852 (1974), we held that an action for specific performance of a contract to sell plaintiff certain corporate stock was not removable as a matter of right under G.S. 1-76(4) to the county where the stock certificates were located, since the primary relief sought was specific performance of contract rights and recovery of the stock certificates was only incidental to that relief. We find that decision controlling on the present appeal.

[2] Analysis of plaintiff's complaint reveals that this is primarily an action for rescission of a contract, brought on the grounds of mental incapacity of one of the parties and breach of fiduciary obligation on the part of the other. In the alternative, plaintiff seeks damages for breach of the fiduciary duty. The subject of this action, therefore, is a contract which plaintiff seeks to set aside, or, in the alternative, it is a fiduciary relationship which plaintiff alleges existed and was breached and for which he seeks monetary damages. Primarily, plaintiff seeks rescission of the contract, with all that rescission entails by way of placing the parties back into the position they would occupy had the contract never been made. Only if plaintiff establishes his right to rescission will he be entitled to have the estate which he represents restored to a position as stockholder in the defendant corporation, and only then will he be entitled, as an incident to the primary relief sought, to recover shares of stock in defendant corporation and to receive the physical certificates evidencing those shares. Thus, recovery of personal property is neither the sole nor is it the primary relief demanded, and G.S. 1-76(4) is not here controlling.

[3] Venue in this case is controlled by G.S. 1-82 which provides, in pertinent part: "In all other cases the action must be

tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement. . . " Under this statute an action by an administrator is properly brought in the county where the administrator resides rather than in the county where the decedent lived or in which the administrator qualified. *Trust Co. v. Finch,* 232 N.C. 485, 61 S.E. 2d 377 (1950).

The order appealed from is

Affirmed.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. JAMES ALFRED SANDERS

No. 7526SC797

(Filed 16 June 1976)

1. **Criminal Law § 86— prior offense — cross-examination outside jury's presence — no prejudice**

Defendant was not prejudiced by the district attorney's question on *voir dire* as to whether he had on 23 December 1974 "snatched the purse of Alicia Wakefield, an old lady," since it was proper for the prosecutor to ask, for purposes of impeachment, about defendant's criminal and degrading conduct, and since the question was asked out of the presence of the jury.

2. **Criminal Law § 75— tape recorded confession — admissibility of transcript and testimony therefrom**

It was not error for the trial court to allow the interrogating officer to read to the jury the transcription made from a tape recording of defendant's confession, nor was it error to allow the transcription to be introduced into evidence.

3. **Robbery § 5— attempted armed robbery — assault on a female — no lesser included offense**

In a prosecution for attempted armed robbery, the trial court did not err in failing to instruct the jury that they should consider an issue as to defendant's guilt or innocence of the offense of assault on a female, since that offense was not a lesser included offense of the crime charged, as it included an element, that the victim be female, which was not included in the greater offense. Nor was it error for the court to fail to instruct the jury on the lesser offenses of assault with a deadly weapon or simple assault, since there was no evidence from which the jury could find that such lesser offenses were committed.

4. **Criminal Law § 114— jury instructions — greater time spent on State's evidence — no expression of opinion**

The trial court did not express an opinion in violation of G.S. 1-180 by devoting a greater portion of the charge to the evidence of the State rather than of the defendant, since the greater part of the evidence was presented by the State.

5. **Criminal Law § 163— error in instructions — necessity for calling attention of trial court to**

A slight inaccuracy in the statement of the evidence must be called to the court's attention in time to afford opportunity for correction.

APPEAL by defendant from *Gavin, Judge.* Judgment entered 24 April 1976. Heard in the Court of Appeals 23 January 1976.

Defendant was indicted for attempted armed robbery. He pled not guilty.

Luanne Galanty testified that at about 1:30 p.m. on 7 January 1975 she was standing in front of her place of employment when defendant drove into the parking lot. He got out of his car, walked toward her, and inquired concerning employment possibilities. She directed him to the office. As she was walking away, he grabbed her, pulled out a knife, which "looked like an ordinary steak knife with serrated edge," and dragged her to his car. She screamed and struggled, but did not remember defendant saying anything during the struggle other than telling her to "shut up." Defendant tried to push her into his car, but she managed to free herself and ran to the office. She was able to identify defendant's car as a "goldish color" Oldsmobile bearing license number BKE-407, and this information was promptly reported to the police. During the struggle Luanne Galanty received cuts on a finger and on both feet, for which she was treated at the hospital emergency room.

In the early afternoon of 7 January 1975 defendant was arrested when police found him sitting in the driver's seat of a "brownish-gold" Oldsmobile bearing license BKE-407. A steak knife with a serrated edge was found on the seat of the car. Defendant was taken to the Law Enforcement Center, where he was advised as to his constitutional rights. About 2:25 p.m. he signed a written waiver of his rights. After interrogation, defendant signed a written statement, which was transcribed from his prior tape recorded statement, in which he admitted that he grabbed Miss Galanty, pulled out his knife and dragged her toward his car, in order "to scare her into giving [him] some money."

Defendant presented four witnesses, his wife, mother, aunt, and a friend, who testified to his good character. Defendant testified and admitted he signed the statement, but testified he was coerced into doing so by the police. On cross-examination he testified that the knife introduced in evidence was not the one he had in his car.

Defendant was found guilty of attempt to commit armed robbery. From judgment imposing a prison sentence, he appeals.

Attorney General Edmisten by Associate Attorney Jesse C. Brake for the State.

James L. Roberts for defendant appellant.

PARKER, Judge.

[1] Defendant contends the court erred in failing to sustain his objection to a question asked by the district attorney, during cross-examination of defendant on the voir dire examination held to determine the admissibility of his confession, concerning whether defendant on 23 December 1974 had "snatched the purse of Alicia Wakefield, an old lady." While admitting that the opinion in *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), recognized that it is still permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct, defendant points out that such questions must be asked in good faith. He contends that the use of the phrase "old lady" by the prosecutor was "obviously designed to inflame the jury to the prejudice of the defendant," and that "[t]his action clearly illustrates the lack of good faith on the part of the prosecutor." The contention has no merit. Use of the phrase could not possibly prejudice defendant in the manner he asserts, since it occurred on voir dire in the absence of the jury. Defendant has failed to show bad faith on the part of the district attorney in asking the question.

[2] After the voir dire examination, the court made findings of fact from which it concluded that defendant's confession was voluntarily made while he was in full understanding of all of his Constitutional rights and after he had freely, knowingly, and voluntarily waived his Constitutional rights. On this appeal defendant raises no question concerning the Court's findings

and conclusions, and it is apparent from the record that these findings are fully supported by the evidence and that the findings, in turn, fully support the court's conclusions. Defendant contends, nevertheless, that the court erred in permitting the interrogating officer to read to the jury defendant's confession, which was transcribed from a tape recording made while defendant was being interrogated, and in permitting the written confession, signed by defendant, to be placed into evidence. He points to the possibility of errors in transcribing the statement as grounds for excluding the transcription. We find no error. Officer Hartness, who interrogated defendant, testified that he compared the recording with defendant's statement to determine if it was correct, allowed defendant to hear the entire tape, and allowed defendant to read the entire typed transcript to see if it was, in fact, what he had said. Officer Hartness testified that defendant "listened to the tape, the tape was transcribed, then he was given the statement and asked if it was true and accurate and if so, to sign it and he did." After the transcription was typed and signed, the tape recording was erased.

In this case it was defendant's confession, not the contents of the tape recording as such, which the State was seeking to prove. That a recording was made of an oral confession does not prevent one who heard the confession from testifying as to what was said. *State v. Davis* and *State v. Fish*, 284 N.C. 701, 202 S.E. 2d 770 (1974). Moreover, defendant admitted on cross-examination at his trial that his signature appears "on each and every sheet" of his transcribed confession, and neither at trial nor on this appeal does he point out any respect in which he contends the transcription failed to conform to his oral confession as given to the interrogating officer. There was no error in permitting the officer to read to the jury the transcription made from the recording or in allowing the transcription to be introduced into evidence.

[3] Defendant contends the court erred in failing to instruct the jury that they should consider an issue as to defendant's guilt or innocence of the offense of assault on a female. That offense was not a lesser included offense of the crime charged in the indictment on which defendant was tried, since it includes an element, that the victim be a female, which is not included in the greater offense. Only when all essentials of the lesser offense are included among the essentials of the greater offense should the less serious charge be considered as a "lesser

included offense." *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1971). Nor was the court in error in this case in failing to instruct the jury on the offenses of an assault with a deadly weapon or simple assault, which are lesser included offenses of the crime charged in the indictment. "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. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). Here, the State's evidence showed all elements of the crime charged and there was no conflicting evidence relating to any of the elements. "Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks, supra,* p. 160.

[4] Defendant contends the court violated G.S. 1-180 by giving unequal stress to the State's evidence and contentions. We do not agree. Considered as a whole, the court's charge to the jury fairly and accurately recapitulated the evidence and contentions of both the State and the defendant. That a greater portion of the charge related to the State's evidence was a natural result from the fact that the greater part of the evidence in this case was presented by the State. Defendant's evidence consisted solely of the testimony of four witnesses concerning his good character and his own testimony that his confession was coerced. The court fairly and accurately summarized defendant's evidence and correctly instructed the jury on the law arising thereon.

[5] Finally, defendant contends the court erred in its charge by stating, while summarizing defendant's testimony, that "[o]n cross-examination he said he couldn't recall robbing anyone before." Apparently this had reference to defendant's answer, given in response to a question asked by the district attorney during cross-examination, in which defendant stated, "I don't know or can't recall if I robbed Miss Alicia Wakefield on Central Avenue on December 23." A slight inaccuracy in the statement of the evidence must be called to the court's attention in time to afford opportunity for correction, else an exception thereto will not be considered on appeal. 7 Strong, N. C. Index 2nd, Trial, § 33, p. 333. Here, defendant failed to call the trial judge's attention to the slight inaccuracy in his summary of defendant's testimony. Moreover, in view of the overwhelm-

ing evidence presented by the State to establish defendant's guilt, it is not conceivable that a different verdict could have resulted had the error complained of not occurred. We find defendant's trial to be free from prejudicial error.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

CAROLINA BUILDERS CORPORATION v. PALMS CONSTRUCTION COMPANY, NOW KNOWN AS SICASH BUILDERS, INCORPORATED, A VIRGINIA CORPORATION

No. 7610SC97

(Filed 16 June 1976)

Principal and Agent § 4— acts outside authority of agents — evidence properly excluded

In an action against defendant contractor to recover a sum for sheetrock and other items furnished one of defendant's subcontractors, the trial court did not err in excluding testimony concerning statements allegedly made and actions allegedly taken by defendant's superintendents, since plaintiff's evidence showed that the acts forming the basis of this action were not within the authority of the agents.

ON *writ of certiorari* to review judgment entered by *Smith, Judge*. Judgment entered 8 August 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 12 May 1976.

In this action plaintiff seeks to recover $12,418.07 plus interest allegedly due it by defendant for sheetrock and related building materials sold and delivered. Allegations of the complaint are summarized in pertinent part as follows:

In 1969 defendant was a general contractor engaged in building the Sans Souci Apartments in Raleigh and the Boulevard Apartments in Greensboro. Charles E. Swaney, trading as Guilford Plastering and Drywall Company (Swaney), was a subcontractor of defendant in the construction of both projects. Plaintiff had previously sold building materials to defendant but had had no previous business dealings with Swaney.

Defendant wanted Swaney to purchase from plaintiff building materials to be used by him in the construction of said

projects. Before plaintiff sold and delivered any materials to Swaney, defendant agreed that if plaintiff would sell materials to Swaney, defendant would be primarily liable for payment and would pay for the materials if Swaney failed to pay for them.

Pursuant to defendant's promise and in reliance thereon, plaintiff sold and delivered materials to Swaney. The balance due plaintiff for said materials, used in connection with the Greensboro project, is $12,418.07. Although plaintiff has made demand on defendant to pay said balance, it refuses to do so.

In its answer, defendant admitted that Swaney was the subcontractor on said projects but denied making any promise that would render it responsible for the balance due plaintiff by Swaney. As a plea in bar, defendant pled the statute of frauds. In a further answer it averred that if any of its employees promised that defendant would be responsible to plaintiff for materials sold Swaney, the employees were without authority to make such promises.

The parties waived jury trial.

Plaintiff called as its first witness Claude G. Harris who testified that in 1969 he was a director and vice-president of defendant; that Maurie Portefe was employed by defendant in 1969 as superintendent or foreman in the construction of the Raleigh project; that Bob Willis was employed as superintendent or foreman of the Greensboro project; and that during that year Bill Gilmore was not an officer of defendant. On cross-examination he testified that at no time did Portefe, Nichols, Willis or Gilmore have authority to direct plaintiff to make cash advances to Swaney. On redirect examination he testified that defendant had a policy not to guarantee any supplier's account; "we never have and we never will . . ."; Gilmore had authority to execute purchase orders on behalf of defendant up to $100.

By answers to interrogatories, plaintiff established that R. A. Clary, Jr., was employed by defendant as a superintendent on the Greensboro project in 1969-70.

Plaintiff presented further evidence tending to show: When Swaney could not establish credit with plaintiff, he signed letters to defendant requesting that all checks issued to him by defendant include plaintiff's name as a payee. Defendant complied with the request and when Swaney would receive a check on the Raleigh project, Portefe would arrange with plaintiff to

pay Swaney a part of the check to provide Swaney with funds to pay his labor. Through this arrangement plaintiff collected for all materials supplied Swaney on the Raleigh project.

Portefe worked with defendant for a while on the Greensboro project and continued the practice he had followed in Raleigh regarding plaintiff and Swaney. Clary succeeded Portefe in Greensboro and continued the arrangement. Sometime later Portefe warned plaintiff that the Greensboro project was "in trouble" and plaintiff insisted on a written guarantee from defendant. Upon assurances from Nichols and/or Gilmore that a written guarantee from defendant's main office in Virginia would be forthcoming, plaintiff continued to supply Swaney with materials. The amount sued for is the balance due.

At the conclusion of plaintiff's evidence, defendant moved for involuntary dismissal pursuant to Rule 41(b) on the ground that upon the facts and the law plaintiff had shown no right to relief. The court allowed the motion.

In its judgment the court recited that in addition to allowing defendant's motion, as trier of the facts, it had also determined that judgment should be rendered for defendant on the merits and found facts summarized as follows:

During 1969 plaintiff sold drywall materials to Swaney who, under contract with defendant, did drywall work for defendant on the Sans Souci Apartments in Raleigh and on the Boulevard Apartments in Greensboro. Plaintiff received and credited to the account of Swaney checks from defendant made payable to plaintiff and Swaney in amounts that exceeded the amount of materials which plaintiff furnished Swaney. No employee of defendant with whom plaintiff communicated, with exception of C. G. Harris, had authority to guarantee the payment of any account of Swaney's or to direct disbursements of any funds from checks received by plaintiff from defendant. Defendant did not guarantee, orally or in writing, Swaney's account or to reimburse plaintiff for any funds disbursed by it to Swaney, and defendant is not indebted to plaintiff.

From the judgment adjudging that plaintiff recover nothing of defendant, plaintiff appealed.

Joslin, Culbertson & Sedberry, by William Joslin, for plaintiff appellant.

Ragsdale & Kirschbaum, P.A., by William L. Ragsdale, for defendant appellee.

BRITT, Judge.

Plaintiff states the questions presented on this appeal as follows:

> (1) Did the Court err in excluding testimony of the statements made by defendant's job superintendents, purchasing agent and other employees contemporaneous with and explanatory of their actions in the performance of their duties?
>
> (2) Did the Court err in failing to make any findings relating to the apparent authority of the defendant's agents (a) to promise that defendant would guarantee payment for sheetrock, if plaintiff would ship it to defendant's subcontractor, and (b) to direct disbursement of defendant's checks made payable jointly to the plaintiff and to Charles E. Swaney?
>
> (3) Did the Court err in excluding testimony and in failing to find that the defendant, by inducing the plaintiff to ship sheetrock to defendant's subcontractor, had ratified its employee's promises that defendant would guarantee payment of the account?

Due to the interrelation of the questions and principles of law involved, we will not discuss the questions separately. It appears that plaintiff's theory is that Portefe and Clary had actual authority or apparent authority from defendant to carry out the arrangement between plaintiff and Swaney whereby plaintiff would refund certain portions of defendant's checks in order that Swaney could pay his labor, or that defendant ratified the arrangement; and that Nichols and Gilmore, as officials of defendant, had actual or apparent authority to authorize plaintiff to continue furnishing materials to Swaney in Greensboro after plaintiff learned that the Greensboro project was in trouble. By reason of that theory, plaintiff argues that statements and declarations made by Portefe, Clary, Nichols and Gilmore to plaintiff's representatives were erroneously excluded as evidence.

In 6 Strong, N. C. Index 2d, Principal and Agent § 4, p. 408, we find: "In the absence of proof of agency and that the act forming the basis of the action was within the scope of the agent's authority, evidence of acts, representations, or warranties made by the agent are incompetent as against the alleged principal." *See also Edgewood Knoll Apartments v. Braswell,* 239 N.C. 560, 80 S.E. 2d 653 (1954), *reh. den.,* 240 N.C. 760, 83 S.E. 2d 797 (1954).

Plaintiff's evidence not only failed to show that the acts forming the basis of the action were within the scope of the authority of defendant's Raleigh and Greensboro agents, the testimony of plaintiff's witness Harris positively showed that the acts were *not* within the authority of the agents. For that reason, as well as others unnecessary to state, the trial court properly excluded the proffered testimony.

In *Fleming v. Insurance Co.,* 269 N.C. 558, 561, 153 S.E. 2d 60 (1967), our Supreme Court quoted with approval from 3 Am. Jur. 2d, Agency § 78, as follows:

> "A third person dealing with a known agent may not act negligently with regard to the extent of the agent's authority or blindly trust the agent's statements in such respect. Rather, he must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of his powers. The mere opinion of an agent as to the extent of his powers, or his mere assumption of authority without foundation, will not bind the principal; and a third person dealing with a known agent must bear the burden of determining for himself, by the exercise of reasonable diligence and prudence, the existence or nonexistence of the agent's authority to act in the premises."

The evidence in the instant case showed that defendant's main office was located in Virginia Beach, Virginia, and that its officers worked from that point. When defendant included plaintiff's name on its checks payable to Swaney, the burden was then on plaintiff to make a proper judgment as to the portion of the funds it could refund to Swaney and the portion it must retain to insure payment of its account. While plaintiff evidently relied heavily on Portefe and Clary to assist in making that judgment, the ultimate decisions were still on plaintiff.

The record indicates that Portefe cooperated with plaintiff very satisfactorily and that as long as he was the job superintendent Swaney's account stayed current. When Portefe warned plaintiff that the Greensboro project was in trouble, plaintiff was put on notice that it had to use great care in protecting itself. Plaintiff acted at its peril in relying on statements by Gilmore or Nichols that a written guarantee of the Swaney account would be obtained from the home office. The mere fact that the guarantee had to come from the home office indicated that neither Gilmore nor Nichols had authority to bind the defendant with respect to the account.

Finally, it is noted that the trial court not only granted defendant's Rule 41(b) motion for involuntary dismissal, but went further and made a determination on the merits of the case. The court found facts in favor of defendant and the findings of fact are fully supported by the evidence.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

LOUISE KING SWEETEN AND HUSBAND, CALVIN W. SWEETEN, SR. v. N. A. KING AND WIFE, BESS KING; MARY ANN STANLEY AND HUSBAND, WILLIAM D. STANLEY; WILLIAM KING AND WIFE, BETTY KING; RUSSELL KING AND WIFE, RUTH KING; MYRTLE KING PEARSON AND HUSBAND, BARNARD B. PEARSON; BESSIE KING ADKINS AND HUSBAND, ANDERSON ADKINS; MARVIN KING AND WIFE, WILLARD KING; DOROTHY KING SHREVE AND HUSBAND, ALVAH R. SHREVE; DAVID KING AND WIFE, JACKIE KING

No. 7517SC1038

(Filed 16 June 1976)

1. Betterments § 1— partition proceeding — color of title — claim for betterments

Where respondent's grandfather devised to each of his children a life estate in particular tracts of land, a 153-acre tract was devised to respondent's mother and another child for life with remainder in their children, in 1908 the life tenants under the will sought partition of the lands and alleged they were seized of the lands in fee, respondent's mother was alloted an 88-acre tract in the partition proceed-

ing, respondent's mother believed she was seized of the 88-acre tract in fee and made permanent improvements thereon, respondent's mother purported to devise to respondent 15 acres of the 88-acre tract and the improvements thereon, the 1908 division was thereafter found to be fair and equitable to the reversioners and remaindermen and the court declared that the 88-acre tract allotted to respondent's mother is now owned by all of her children as tenants in common, and respondent has had judgment rendered against him for the partition sale of the entire 88-acre tract and equal division of the net proceeds, it was *held* that the allotment of the 88-acre tract to respondent's mother constituted color of title, and that respondent, as claimant of title to the 15 acres through his mother, is entitled to betterments under G.S. 1-340 for the improvements thereon.

2. **Betterments § 1— good faith**

The good faith which will entitle a claimant to compensation for betterments means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy.

APPEAL by some of the respondents from *Wood, Judge.* Judgment entered 17 September 1975 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 8 April 1976.

Annie King is survived by eight of her nine children. The eight surviving children (and their spouses) are parties to this proceeding. The two children (and their spouses) of the one deceased child of Annie King are also parties to this proceeding. The proceeding was instituted for the purpose of obtaining a sale and division of the net proceeds among the parties as tenants in common. Respondents Russell King, Dorothy King Shreve, Marvin King, and David King (and their respective spouses) filed a joint answer in which they alleged that respondent David King was entitled to be compensated for betterments to the property.

The theory of the claim by David King for betterments is as follows: The 88-acre tract involved was allotted to Annie King in a 1908 partition of a 153-acre tract devised to her and John W. Jones in her father's will; the 1908 partition constitutes a muniment of title in Annie King; Annie King held the 88-acre tract of land under a color of title which she believed to be good; Annie King made valuable permanent improvements on the 88-acre tract; Annie King died 9 March 1972, leaving a will dated 29 September 1971 in which she purported to devise to David King that portion of the 88-acre tract upon which she made the permanent improvements; David King claims title to

15 acres containing the improvements by virtue of Annie King's will; and, since superior title has been shown in petitioners and respondents, David King is entitled to betterments under the provisions of G.S. 1-340.

The pertinent history of the title to the 88-acre tract is as follows: Robert M. Jones died testate on 12 September 1907. At the time of his death Robert M. Jones was seized in fee of several tracts of land, including a 153-acre tract of land known as the "John Jones Place." Annie King and John W. Jones were two of the seven children of Robert M. Jones. By his will Robert M. Jones divided his land among his widow and children, devising to each a life estate in particular tracts. Included in the will of Robert M. Jones was a devise of the 153-acre "John Jones Place" to Annie King and John W. Jones, each to share equally in said land during their life and at their death, to their children, *per stirpes*. In the early part of 1908 all of the life tenants under the will of Robert M. Jones joined in a partition proceeding, alleging that they were seized in fee of the lands and seeking an actual partition. None of the reversioners or remaindermen were made parties to the proceeding. By means of an actual partition, each life tenant was allotted a distinct tract of land in severalty. The 153-acre "John Jones Place" was divided between Annie King and John W. Jones, and Annie King was allotted the 88-acre tract involved in this proceeding. The report of the Commissioners' division was approved by the court on 21 September 1908.

Annie King and her husband, Numa King, went into possession of the 88-acre tract after the 1908 partition proceeding and made improvements thereon while believing that Annie King held a fee simple title to the 88-acre tract. Annie King died testate on 9 March 1972. By her will Annie King purported to devise to David King "my home house where I am now living together with fifteen (15) acres of land. . . . " Thereafter her will purports to direct her executor to sell the rest of the 88-acre tract and divide the proceeds equally among her eight surviving children, including David King.

On 23 March 1973 an action was instituted to set aside the 1908 partition proceedings on the grounds that none of the reversioners or remaindermen were parties thereto. By judgment filed in Superior Court, Rockingham County, on 6 December 1973, the 1908 partition proceedings were declared null and

void with respect to the interests of all the reversioners and remaindermen; however, the divisions set forth in the 1908 proceedings were adopted as fair and equitable divisions of the land. By the judgment filed 6 December 1973 it was decreed that the devise by Robert M. Jones to Annie King and John W. Jones created a life estate as tenants in common in Annie King and John W. Jones. After adopting the 1908 division as fair and equitable to the reversioners and remaindermen, it was decreed that the present owners of the 88-acre tract allotted to Annie King are her children as tenants in common in fee simple, *per stirpes.*

As stated earlier, the present proceeding was instituted for the purpose of obtaining a sale of the entire 88-acre tract and a division of the net proceeds among the eight surviving children and the children of the one deceased child of Annie King. Recognizing that the superior title is in petitioners and respondents, David King asserted his claim for betterments. The trial court concluded: "The improvements made upon the property by Annie Jones King and those who claim under her were not made while holding the premises under a color of title believed to be good and therefore the respondent David King is not entitled to a claim of betterment pursuant to N.C.G.S. 1-340."

The trial court further ordered a sale of the entire 88-acre tract and provided for division of the net proceeds *per stirpes* among the petitioners and respondents.

Respondents Russell King, David King, Dorothy King Shreve, and Marvin King (and their respective spouses) appealed.

Bethea, Robinson, Moore & Sands, by D. Leon Moore, for the petitioners.

Griffin, Post, Deaton & Horsley, by Hugh P. Griffin, Jr., for the respondents-appellees.

Ralph E. Goodale, for the respondents-appellants.

BROCK, Chief Judge.

General Statute 1-340 provides:

> "Petition by claimant; execution suspended; issues found.—A defendant against whom a judgment is rendered for land may, at any time before execution, present a

petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause."

David King, having claimed title in fee under Annie King's will to 15 acres containing the homeplace and having had judgment rendered against him for the partition sale of the entire tract and equal division of the net proceeds, is a "defendant against whom a judgment is rendered for land" within the purview of the above statute. In addition it was incumbent upon David King to satisfy the trial judge of the "probable truth" of his allegations that (1) he claims under Annie King, (2) who, while holding the premises (3) under a color of title (4) believed to be good, (5) made permanent improvements thereon.

[1] It is clear from his findings of fact that the trial judge was satisfied of the probable truth of David King's assertion that he claims under the will of Annie King, who believed she owned the 88-acre tract in fee, and who, while holding the premises, made permanent improvements thereon. In short, the findings of fact by the trial judge show that he was satisfied of the probable truth of (1), (2), (4), and (5) above. Therefore, it is apparent from the conclusion of law that the trial judge was not satisfied of the probable truth of the allegation that Annie King held the premises "under color of title." Indeed, this is the point upon which appellees' arguments center. Appellees urge that the allotment of the 88-acre tract to Annie King in the 1908 partition proceeding does not constitute color of title for two reasons: (1) The will of Robert M. Jones, under which Annie King claimed, clearly devised only a life estate; and (2) Annie King was not relying upon her allotment in the 1908 partition proceeding as an allotment of fee simple title because she alleged in the 1908 petition for partition that she and the other devisees were seized in fee. Thus appellees argue, and apparently convinced the trial judge, that since Annie King

claimed fee simple title to her interest prior to the 1908 partition proceeding, the allotment to her of the 88-acre tract "did not establish color of title or title whereby Annie Jones King could have a reasonable belief that she owned the property in fee simple."

The fact that an analysis of her source of title (her father's will) would disclose as a matter of law that Annie King was devised a life estate instead of a fee simple title does not in itself defeat David King's claim of betterments. "By the weight of authority it is held that constructive notice from the record, of the existence of a paramount title or interest, does not deprive an occupying claimant of the right to be reimbursed for his improvements on being ejected from the premises." 68 A.L.R. 288. North Carolina is in accord with this weight of authority. "The right to betterments is based upon the obvious principle of justice that the owner of land has no just claim to anything but the land itself, and fair compensation for damage and loss of rent. If the claimant, acting under an erroneous but honest and reasonable belief that he is the owner, makes valuable and permanent improvements, the true owner should not take them without compensation. The statute undertakes to declare and establish the equities between them." *Pritchard v. Williams,* 176 N.C. 108, 96 S.E. 733 (1918); *accord R. R. v. McCaskill,* 98 N.C. 526, 4 S.E. 468 (1887). "The beneficent provisions of the statute would be defeated by a construction which charges the *bona fide* claimant under a deed in form and purpose purporting to convey a perfect title with a knowledge of imperfections which might be met with in the deduction of his own title." *Justice v. Baxter,* 93 N.C. 405 (1885).

The record of the 1908 partition proceeding wherein Annie King was allotted the 88-acre tract by an adequate description is a public record of the superior court which constitutes color of title. *Johnson v. McLamb,* 247 N.C. 534, 101 S.E. 2d 311 (1958); *Burns v. Stewart,* 162 N.C. 360, 78 S.E. 321 (1913); *Bynum v. Thompson,* 25 N.C. 578 (1843). The trial judge was in error in concluding that the 1908 partition proceeding did not constitute color of title.

Appellees also argue, and apparently convinced the trial judge as well, that because the petition in the 1908 partition proceeding alleged that the petitioners were seized in fee of the lands described therein, Annie King could not have been relying

upon the allotment of the 88-acre tract to her in the 1908 proceeding as color of title. We are not convinced of the validity of this argument. Nowhere is there any indication that Annie King claimed fee simple title to the particular 88-acre tract except by virtue of the partition proceeding. She never relied upon any source of title to the particular 88-acre tract except that of the 1908 partition proceeding. She did not make permanent improvements until she was allotted the 88-acre tract in the 1908 partition proceeding. In the absence of a showing of fraud, of which there is no suggestion in this case, it is immaterial what title Annie King claimed as a tenant in common in the 153-acre "John Jones Place," for her claim to a fee simple title in severalty in the particular 88-acre tract stems solely from the 1908 partition proceeding. Annie King's belief that she was seized in fee of a one-half undivided interest in the 153-acre tract seems to strengthen the reasonableness of her belief that she held fee simple title to the 88-acre tract allotted to her.

[2] The good faith which will entitle a claimant to compensation for betterments means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy. *Pritchard v. Williams*, 176 N.C. 108, 96 S.E. 733 (1918). "But there must be shown not only an honest and *bona fide* belief in petitioner's title, but he must satisfy the jury, also, that he had good reason for such belief; and it is for the jury to judge of the reasonableness of such belief, based upon the entire evidence." *Pritchard v. Williams, supra.*

Execution of the order of sale appealed from should be suspended pending the determination by a jury of damages to the holders of the fee and the allowance to David King for the improvements. The issues suggested for jury determination in *Pritchard v. Williams, supra* at 110, appear to be easily adaptable to this case.

Execution of the order of sale of the 88-acre tract entered in this cause of 17 September 1975 is hereby suspended pending a determination of David King's claim for betterments.

Error and remanded.

Judges HEDRICK and CLARK concur.

CLYDE RUDD & ASSOCIATES, INC. v. ROBERT LEE TAYLOR II

No. 7518SC967

(Filed 16 June 1976)

1. **Master and Servant § 11— covenant not to compete — new contract and consideration required**

When the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration.

2. **Master and Servant § 11— covenant not to compete — promotion and change in compensation as new consideration**

New consideration was given for defendant's covenant not to compete with plaintiff where promises moving to defendant included (1) the promotion of defendant from trainee to sales representative, which was an advancement in employment, and (2) the change in compensation from a salary to commissions and a weekly draw.

3. **Master and Servant § 11— breach of covenant not to compete — right of employer to secret profits**

The general rule in regard to secret profits garnered by an employee, not disclosed to his employer, in breach of his fiduciary relationship with his employer, is that the earnings of the employee in the course of, or in connection with, his services belong to the employer, so that the employer in a proper action may recover the profits of the agent's transaction and the employee is accountable therefor.

4. **Master and Servant § 11— breach of covenant not to compete — damages determinable**

In an action for breach of contract where defendant allegedly violated covenants not to compete, the trial court erred in concluding that the evidence with respect to damages was too speculative for the court to award damages, since both parties stipulated as to the various commissions earned by defendant when he worked for competitors of plaintiff prior to institution of this action.

5. **Master and Servant § 11— covenant not to compete — reasonableness of territory**

Among the facts to be considered in determining whether the territory embraced within a covenant not to compete is reasonable are (1) the area or scope of the restriction, (2) the area assigned to the employee, (3) the area in which the employee actually worked or was subject to work, (4) the area in which the employer operated, (5) the nature of the business involved, and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

6. **Master and Servant § 11— covenant not to compete — reasonableness of territory — insufficiency of evidence**

Finding of fact that defendant was a sales representative who was assigned to, and worked solely in, a ten county area in N. C.

was insufficient to permit the determination that the parties' covenant not to compete which embraced a four state area was unreasonable.

ON *certiorari* to review order of *Winner, Judge.* Order entered 23 May 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 March 1976.

Plaintiff alleged in its complaint that it employed defendant as a salesman and entered into a written employment contract with him on 24 March 1969. The contract provided that defendant would devote all his working time to plaintiff's business and would not compete with plaintiff in "North Carolina, South Carolina, Virginia in or west of Charlottesville, and Tennessee in or east of Oak Ridge" for two years after leaving plaintiff's employment. Defendant breached the contract by selling a competitor's products while in plaintiff's employment and selling another competitor's products within the prohibited four state area after leaving plaintiff's employment.

Defendant denied that the agreement of 24 March 1969 was an enforceable contract.

The case was heard by the judge without a jury. Plaintiff offered evidence tending to show it employed defendant on 17 February 1969, and he was paid a weekly salary as a trainee until 28 April 1969, when he began receiving commissions as a sales representative. Plaintiff's products are sold throughout the four state area where the contract prohibits defendant from competing. Defendant was assigned a territory consisting of ten counties in midwestern North Carolina, but he could have been transferred at any time to another territory in the four state area. The employee whom defendant replaced had been transferred to another territory.

In 1974 plaintiff learned that defendant had been selling the products of Data Forms and Systems of Hickory, Inc., a competitor of plaintiff. Defendant agreed not to do this anymore. Since then he has been selling the products of Data Products and Supplies, Inc., a company formed by defendant and the owner of Data Forms and Systems of Hickory, Inc., and a competitor of plaintiff within the prohibited four state area. Before leaving plaintiff's employment, defendant received commissions of $11,974.39 from Data Forms and Systems of Hickory, Inc. for selling its products.

Defendant offered evidence tending to show that he had been working for plaintiff at a weekly salary for a month when he signed the employment contract, and he continued receiving a salary rather than commissions for four or five weeks after signing the contract. He contends that he did not compete with plaintiff when he sold products of Data Forms and Systems of Hickory, Inc., because he sold these products to customers who had no credit with plaintiff or found plaintiff's prices too high.

The court held that the employment contract was valid and binding on defendant; that defendant had breached it by selling products for Data Forms and Systems of Hickory, Inc. while still employed by plaintiff; that plaintiff was entitled to nominal damages for this breach; and that plaintiff was not entitled to an injunction enforcing the covenant not to compete because the covenant was unreasonable as to territory. Both plaintiff and defendant appealed.

Edwards, Greeson & Toumaras, by Elton Edwards, for plaintiff.

Gaither and Gorham, by James M. Gaither, Jr., for defendant.

MARTIN, Judge.

Appeal of defendant Robert Lee Taylor II.

[1] Defendant contends, in his only assignment of error, that the employment contract was void. He argues that there was a lack of consideration, mutuality and definiteness. Defendant states that the requisite consideration was absent in the instant case, since the relationship of employer and employee antedated the existence of the retrictive covenants and since the subsequent covenants not to compete were not based upon new considerations. We recognize that when the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration. *Greene Co. v. Kelley,* 261 N.C. 166, 134 S.E. 2d 166 (1964), *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543 (1944).

[2] In the instant case, new consideration was present. Promises moving to defendant included (1) the promotion of defendant from trainee to sales representative, which was an advance-

ment in employment, see *Greene Co. v. Arnold,* 266 N.C. 85, 145 S.E. 2d 304 (1965), and (2) the change in compensation from a salary to commissions and a weekly draw. In return, defendant promised his service to plaintiff on a full time basis and promised not to compete with plaintiff. That the employment contract could be terminated by either party upon thirty days written notice does not mean that the promise of employment was not valuable consideration. *Wilmar, Inc. v. Corsillo,* 24 N.C. App. 271, 210 S.E. 2d 427 (1974).

It is our view that the contract meets the consideration requirement and defendant's assignment of error is overruled.

Appeal of plaintiff Clyde Rudd & Associates, Inc.

Plaintiff contends in its first two assignments of error that the court erred in failing to find facts as to its damages, and in holding that the damages were too speculative to permit an award of more than nominal damages. It argues that defendant, in selling the goods of a competitor, violated his fiduciary duty to his employer and should be required to account to plaintiff for all commissions he has received.

[3] The general rule in regard to secret profits garnered by employees, not disclosed to their employers, in breach of their fiduciary relationship with their employer, is that the earnings of the employee in the course of, or in connection with, his services belong to the employer, so that the employer in a proper action may recover the profits of the agent's transaction and the employee is accountable therefor. *Samples v. Maxson-Betts Co.,* 18 N.C. App. 359, 197 S.E. 2d 71 (1973). The contract provided: "The employee agrees . . . to devote his entire time, skill, labor and attention to said employment during the term of his employment." The court found as a fact on competent evidence that "beginning in 1973 the defendant while under the employment of the plaintiff sold items in competition with the plaintiff" and from such facts concluded as a matter of law that "during the time of his employment, defendant wilfully breached the said contract provision 5(a) by selling items of other companies."

In *Perfecting Service Co. v. Product Development and Sales Co.,* 259 N.C. 400, at 417, 131 S.E. 2d 9, 22 (1963), the Court

quotes with approval *Tillis v. Cotton Mills,* 251 N.C. 359, 111 S.E. 2d 606 (1959):

> "Absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion."

In accord is *Norwood v. Carter,* 242 N.C. 152, 156, 87 S.E. 2d 2, 5 (1955), in which Justice Devin quoted with approval 25 C.J.S. Damages, § 28, page 496:

> "However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered."

[4] It was stipulated by the parties that:

> " . . . during the period of time that defendant was employed by the plaintiff, he made sales also for a company named Data Forms and Systems of Hickory, Inc., upon which he earned commissions over the three year period immediately prior to the institution of this action, in the amount of $11,974.39, and that this figure equaled 70% of gross commissions earned by Data Forms and Systems of Hickory, Inc., on said sales, and that in March, 1975, defendant made sales for that company in the amount of $9,460.32 on which the gross profit was $1,944.27 and his net commission was $1,166.56; that in April, 1975, he made sales for that company of $3,421.86 on which the gross profit was $483.60 and his net commission was $290.14. It was stipulated by the parties that in February of 1975, the defendant made sales for Data Products and Supplies, Inc., in the amount of $832.40, resulting in a gross profit of $416.60, and that in April of 1975, the defendant made sales for Data Products and Supplies, Inc., in the amount of $1,096.60, resulting in a gross profit of $278.26."

We hold that the court erred in concluding that the evidence with respect to damages was too speculative for the court to award damages.

Finally, the plaintiff contends in its third and fourth assignments of error that the court erred in holding the covenant

not to compete unreasonable. Plaintiff argues that the findings of the court are insufficient to support the conclusion of law that "the restrictive covenant of employment . . . is unreasonable as to territory . . . and is therefore void and unenforceable." We agree.

[5] The territory embraced by the restrictive covenant shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer. *Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E. 2d 316 (1970). In deciding what is "reasonable," the court looks to the facts and circumstances of the particular case. *Seaboard Industries, Inc. v. Blair*, 10 N.C. App. 323, 178 S.E. 2d 781 (1971). Among the facts to be considered are (1) the area, or scope, of the restriction, (2) the area assigned to employee, (3) the area in which the employee actually worked or was subject to work, (4) the area in which the employer operated, (5) the nature of the business involved, and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

[6] Here, the findings of fact were that defendant was a sales representative who was assigned to, and worked solely in, a ten county area in North Carolina. These findings are insufficient to permit the determination that the restrictive covenant of territory is unreasonable.

The result of the foregoing is this: As to the appeal of defendant Robert Lee Taylor II the judgment is affirmed; as to the appeal of plaintiff Clyde Rudd & Associates, Inc. the judgment is reversed and remanded with directions that the matter be heard as to the amount of actual damages, if any, the plaintiff is entitled to recover, and to determine from a proper finding of fact whether the restrictive covenant of territory is reasonable.

Affirmed in part and reversed in part.

Chief Judge BROCK and Judge VAUGHN concur.

PAUL D. WYCHE v. CAROL D. WYCHE

No. 7526DC1030

(Filed 16 June 1976)

1. **Divorce and Alimony § 24— child custody — award to mother — no abuse of discretion**

The trial court in a child custody proceeding did not abuse its discretion in awarding custody to defendant mother, though there was evidence that defendant had had emotional problems, since evidence was sufficient to support the trial court's finding that both plaintiff and defendant could ably care for and nurture the minor child, and the trial court understood the psychological complexities involved in this action and in fact conditioned its award by requiring intensive counseling for the parties.

2. **Divorce and Alimony § 24— child custody — attorney fees awarded — no abuse of discretion**

The trial court in a child custody action did not err in awarding defendant $2000 in attorney fees where the evidence indicated that neither party enjoyed financial security, but defendant mother filed her motion in the cause after plaintiff father seized the child from her actual custody in violation of their separation agreement, defendant brought this action in good faith and carefully illustrated her inability to defray the cost of litigation, and plaintiff did draw a good salary and enjoyed a relatively comfortable standard of living.

APPEAL by plaintiff from *Hicks, Judge.* Judgment entered 19 August 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 7 April 1976.

On 30 April 1974, the parties were divorced, but the judgment was silent with respect to the custody and support of Michael David Wyche, minor child of the parties. Prior to the divorce, the parties had entered into a separation agreement which provided that defendant was to have sole and exclusive custody of the child with plaintiff having visitation privileges at reasonable times. Subsequent to the divorce, and on 18 December 1974, the parties entered into an amendment to the separation agreement, which again provided that defendant would have the care, custody and control of the child and set out specific visitation times for plaintiff including certain weekends beginning on the first and third Friday of each calendar month from 4:00 p.m. on Friday until 6:00 p.m. on Sunday.

On 17 January 1974, plaintiff took the child for the specified weekend visit and failed and refused to return the child to defendant on Sunday night.

Defendant filed a motion in the cause requesting that the court grant her permanent care, custody, and control of the child and a reasonable sum for his support.

Plaintiff, citing defendant's alleged physiological, psychological and emotional problems, also moved for custody.

Prior to hearing evidence the trial court first advised plaintiff that the separation agreement's custody provisions created some difficulty in this matter and forced some "burden" of proof upon plaintiff in that he now sought to alter those earlier basic arrangements entered into and agreed upon by him.

Both parties presented extensive evidence. Defendant's evidence tended to show that she was a college graduate, working in a middle managerial position in a local bank, and well regarded by her superiors and associates. During the work period, the child received care and education in a licensed day care center.

Defendant, testifying on her own behalf, conceded that a suicidal episode has transpired but that affirmative steps had been taken by her to remedy the character and emotional problems stemming from the complicated disintegration of her marriage and family setting. She maintained that throughout her marriage to plaintiff she was under considerable pressure to be a perfect homemaker and that that experience had been emotionally devastating. Specifically, defendant testified that during the marriage she continually tried to provide for the child's needs as well as those of her husband, always feeling in the process that she was not living up to the plaintiff's highest standards and that her entire emotional well-being suffered as a result thereof. Defendant further testified that notwithstanding the considerable and continued process of adjustment to estrangement and divorce she was fully capable of caring for, loving and nurturing the minor child.

Plaintiff's evidence included the expert testimony of Dr. Michael Masterson, a psychologist who testified at length with respect to tests given Michael by him. Dr. Masterson finally testified that " . . . it would be in Michael's best interest if Michael's custody is granted to Paul Wyche."

Plaintiff, testifying on his own behalf, first recalled the incidents of basic child neglect allegedly committed by defendant and contrasted that with his impression of his new home

and family situation. He testified that he could provide a suitable and enjoyable environment for the child and underscored this conviction by reminding the court of the child's often stated desire to remain with his father and his father's new family.

Finally, the trial court solicited the psychological advice of Dr. Allison Grant, an expert in child psychiatry. Basically, Dr. Grant recommended that there were strong grounds for considering removal of custody from the biological mother in that the child required critical character development and that process could more easily be facilitated if a relationship with but one of the parents could be established.

Regarding defendant's motion for attorney's fees, the trial court heard plaintiff's testimony that he already had incurred significant expenses with respect to Michael and anticipated even more substantial expenditures. He further indicated in detail the actual dollar basis for his income and expenses. Defendant also testified as to her salary and expenses.

Based on the foregoing evidence, the trial court made the requisite findings of fact, stating that both plaintiff and defendant were fit and proper persons to have the care and custody of the child, but concluding that the child should remain in defendant's custody provided that the parties and child receive psychiatric and psychological treatment. The trial court further awarded defendant $2,000 in attorney fees.

Mraz, Aycock, Casstevens & Davis, by Nelson M. Casstevens, Jr., for plaintiff appellant.

Copeland & Troiano, by Alexander Copeland III, for defendant appellee.

MORRIS, Judge.

[1] Plaintiff appellant father, contending that the district court ignored critical evidence, maintains that the trial court abused its discretion in awarding custody to the defendant mother. We disagree.

When parents, rebounding from the emotional intensity of a broken marriage, fight custody rights in the courts, the evidence is often presented in " . . . sharp conflict . . . [and] [e]ach party vigorously maintain[s] that he [or she is] . . . the proper person to have custody of the minor children." *Beck v. Beck,*

22 N.C. App. 655, 657, 207 S.E. 2d 378 (1974). Thus, "[o]ur cases have long recognized that the trial judge is in the best position to resolve these conflicts of evidence and that the decision of the trial court will not be reviewed in an absence of abuse of discretion." Id. at 657.

Here, the record indicates that the evidence was in fact "sharply contradictory" and the trial court's findings of fact amply reflect the problematic nature of this case. The trial court, noting the depth of personal sentiment expressed by the parties and carefully documenting the evidence and contentions, first stated that both parents could ably care for and nurture this minor child, but went on, in its discretion, to award the custody to the mother. The court's findings of fact included a good portion of the expert testimony of the psychologists. There is no question but that the trial court understood the psychological complexities involved and in fact conditioned its award by requiring intensive counseling for the parties. This decision by the trial court indicated a careful understanding of this particular case, and it structured its decision accordingly. When so viewed, the record amply negates any validity to plaintiff's contention.

[2] Plaintiff further contends that the trial court abused its discretion by awarding defendant $2,000 in attorney fees. Specifically, plaintiff argues that "[u]nder the provisions of North Carolina General Statutes § 50-13.6, the General Assembly did not intend for the trial judge to award attorney's fees to one of the litigants because of her impoverishment if the adversary in the litigation were equally impoverished." We disagree.

Under G.S. 50-13.6, a district court may award attorney fees in a custody matter, and the trial court's determination is binding on this Court in the absence of abuse of discretion. *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E. 2d 132 (1969). The evidence indicates that neither party enjoys financial security, but the facts also indicate that defendant mother filed her motion in the cause after plaintiff father seized the child from her actual custody in violation of the separation agreement. She brought this action in good faith and carefully illustrated her inability to defray the cost of litigation. The facts indeed tend to show that plaintiff father has incurred significant expenses. However, he continues to draw a good salary and continues to enjoy a relatively comfortable standard of living.

Based on all the evidence presented, we do not consider the trial court's assessment of legal fees against plaintiff beyond his overall ability to pay, and we thus find no abuse of discretion.

Wherefore, the order is

Affirmed.

Judges HEDRICK and ARNOLD concur.

ALVIS BURNETTE v. HARRY CLAY PERDUE

No. 7518SC1053

(Filed 16 June 1976)

1. **Automobiles § 79— intersection accident — traffic signals — contributory negligence**

In an action arising out of a collision at an intersection controlled by a traffic signal, plaintiff's evidence did not disclose as a matter of law that his negligence, if any, was a proximate cause of the accident where plaintiff testified that he proceeded when the light turned green, he glanced briefly in the general direction of defendant's approaching car, and he was unable to see defendant until immediately prior to the impact.

2. **Rules of Civil Procedure § 50— granting alternative motion for new trial**

The trial court did not abuse its discretion in granting, in the alternative, defendant's motion for a new trial.

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 19 August 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 April 1976.

Plaintiff alleged in his complaint filed 30 November 1973, that on or about 4 September 1973, the defendant negligently entered an intersection against a red light, and collided with plaintiff's car; that he received injuries to his neck, shoulder and leg which caused him severe pain and suffering, and he prayed for $35,000 in damages.

Defendant's answer denied plaintiff's substantive allegations, averred that plaintiff was contributorily negligent and

counterclaimed that defendant's vehicle was damaged as a result of plaintiff's negligence.

At trial, plaintiff, testifying on his own behalf, stated that as he " . . . approached the intersection of East Friendly Avenue and Davie Street I observed that the light was red, and I slowed down to approximately ten miles per hour and got within a car or two car lengths of the intersection, and the light turned green, and so I looked and proceeded on. At the time I looked, after the bus cleared the intersection, I didn't see anything. I told the police officer that I was going approximately twenty miles per hour at the time of the collision, but before then I was going slower because I had slowed down for the light. As I approached the intersection I was going about ten miles per hour. When I was back half a block from the intersection I was going around twenty when I saw the bus clear the intersection. I was approximately one to two car lengths from the intersection at the same time that the light turned from red to green. I saw the 1965 Buick automobile driven by Mr. Perdue before it hit me only mometarily. I can't say exactly but I'd imagine it was about one car length or a car and a half or two, something like that, from me when I saw it."

Plaintiff further testified that he tried to stop his car before the impact but claimed the mishap occurred before he " . . . could hardly do anything [about it]." Plaintiff also asserted that the defendant " . . . admitted to the officer that he had run the red light, said he saw it was red before he entered the intersection but he thought he could make it."

On cross-examination the plaintiff stated that he did look to his

> " . . . left before I entered the intersection, I remember the question in my deposition: 'Did you look to your left onto Davie Street there before you actually entered the intersection?' And the answer: 'No, I didn't. I was looking where I was going ahead.' That takes in your point of view. When you drive ahead you view so much to the left and the right and in front of you. I do not remember looking to the left onto Davie Street to turn my head to look left, but I cut my eyes momentarily to see. I couldn't see anything on the left because there is obstructions there, a building and there were cars and the way the road is ele-

vated you have to get almost in the intersection before you can look down Davie Street.

The building there on the corner is set back a little bit from the edge of the curb on Davie Street. There is another building that sets out further next to the sidewalk. Before you get into the intersection, the building and the cars on the left, all of that obstructs your view. Those buildings are some distance back from the right hand curb line on Davie Street. I imagine four to five feet back. I am not positive. I didn't measure it. They would have to be with the sidewalk. I recall I stated in that deposition that I did not see Mr. Perdue's automobile until just an instant before the impact occurred. I was mashing on the gas to go ahead and when I saw him he was against me by the time I got my foot on the brake—by the time I tried to get my foot on the brake. I didn't see the other car in enough time to stop. As I approached the intersection traveling on Friendly Avenue I observed the light governing the flow of traffic there on the street where I was traveling to be continuous red. I saw a Duke Power Company bus go through the intersection. The rear of that bus cleared the intersection just as I got twenty to twenty-five feet from the edge of it. I saw the bus pass through. I did not see any other traffic going through the intersection in lanes on Davie Street farther to the west than the lane in which the bus was traveling. . . . "

Medical evidence indicated that plaintiff sustained a cut about the leg, a mild concussion and trauma to the neck and knee area. The evidence also tended to show that plaintiff was unable to work for several weeks and required a number of physical therapy sessions. Medical bills totalling several hundred dollars were admitted into evidence.

The parties stipulated that a traffic citation was given the defendant as a result of the accident which is the subject of this suit, and it was also stipulated that the defendant entered a guilty plea to the citation in the District Court of Greensboro. It was also stipulated that the traffic citation was for running a red light.

Defendant, testifying on his own behalf, recalled that he

" . . . was traveling north on Davie Street toward the Golden Gate Shopping Center. As we approached that area,

we heard a siren, and they always told me when you heard a siren if you could to pull over to your right. So, I pulled over to the right behind a Duke Power bus. Davie Street is a one way street going north.

I was in the second lane over from the right. When the siren went off, I knew it was right behind me. So, I pulled over and came to a stop—almost a stop. I would not say plumb stopped, because the officer in the police car came on by us, and the bus pulled on off, so I pulled on off. The police car went through the intersection. I saw the flashing green lights at the intersection. Both of the stop lights were on flashing green. And I have seen stop lights on flashing red but I hadn't seen them on flashing green. And so everybody else proceeded to go forward and I just went on forward. And as I approached the intersection there, the lights were on flashing green and the traffic was all moving, so I just moved on in there, and the bus stopped on the corner in front of me. As I entered the intersection, I was still in the second lane from the right curb on Davie Street. The bus was proceeding ahead of my car. Just the best I could remember, I would say the bus was maybe ten or fifteen feet ahead of me. I don't know why the bus stopped. It held up the traffic, it looked like, she slowed up. All of them come to about a stop there, and I was out there and I think I was in the third lane over, the best I remember and recall. At about that time bam. If I saw Mr. Burnette's car before the impact occurred, it was just a mere glance. I saw the traffic signal at the time I entered into the intersection itself. It was flashing green.

I proceeded across the intersection to the point where the impact occurred. I did not see the traffic signal red at any time before the actual impact, not to my knowledge. I observed the traffic signal immediately after the impact, it was red at that time. As to did I have time to put on my brakes on my car it was close, to tell you the truth. . . . "

Defendant denied that he ran the light and charged that he never so stated to the contrary.

Defendant's wife, a passenger in the defendant's car essentially corroborated defendant's version of the mishap.

Plaintiff, on rebuttal, testified that when he " . . . first had a conversation with Mr. Perdue, I was sitting in the front seat

of my car with the door open, turned as if to get out. He told me he saw the light was red before he entered the intersection but he thought he could make it, and he wanted to apologize for the accident and shake hands to let me know there were no hard feelings on my part. . . . "

From a jury verdict for plaintiff of $7,500, the defendant " . . . moved for judgment notwithstanding the verdict upon the grounds that the evidence established plaintiff's contributory negligence as a matter of law and, in the alternative, Defendant [further] moved for a new trial upon the grounds of insufficiency of the evidence to justify the verdict and that the verdict was contrary to law, the damages awarded by the jury were excessive and errors of law occurred at the trial." From the trial court's orders granting defendant's motions for judgment notwithstanding the verdict and for a conditional new trial, plaintiff appealed.

Other facts necessary for decision are set out below.

O'Connor & Speckhard, by Harry J. O'Connor, Jr., for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by William B. Rector, for defendant appellee.

MORRIS, Judge.

Plaintiff appellant first contends that the trial court erred in setting aside the jury's verdict and in entering judgment notwithstanding the verdict. We agree.

[1] Here, the plaintiff testified that he proceeded when the light turned green and that he in fact glanced briefly in the general direction of defendant's approaching car, but claimed he was unable to see the defendant until immediately prior to the impact. Under these circumstances, the evidence does not indicate, as a matter of law, that plaintiff's negligence, if any, was a proximate cause of this accident and the trial court erred in upsetting the jury's verdict.

[2] Plaintiff also argues that the trial court erred in granting, in the alternative, defendant's motion for a new trial. We disagree. The decision to grant a new trial lies within the discretion of the trial court and we find nothing in this record indicating abuse of this discretion. See: *Coppley v. Carter*, 10 N.C. App.

512, 179 S.E. 2d 118 (1971). Suffice it to say, that the trial court's decision to grant defendant a new trial was warranted and proper in view of all the circumstances of this case.

The judgment of the trial court is reversed in part and affirmed in part, and plaintiff is entitled to a

New trial.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. AMOS GRAINGER

No. 7513SC994

(Filed 16 June 1976)

1. **Constitutional Law § 30; Criminal Law § 63— indigent defendant — failure to provide psychiatrist at State expense — no error**

The trial court did not abuse its discretion in denying the indigent defendant's motion for the appointment of a psychiatrist at State's expense to interview him and testify in his behalf at trial, where defendant did not, as required by G.S. 15A-959(a), give notice of intention to raise the defense of insanity.

2. **Criminal Law § 75— drinking defendant — statement to officer prior to arrest — voluntariness — admissibility**

A statement by defendant to a law enforcement officer made before defendant was arrested was properly admitted in his trial for second degree murder, though defendant had apparently been drinking before he made the statement, where the officer testified that defendant did not appear to be sleepy or confused but appeared coherent, and the officer advised defendant of his rights, asked defendant if he understood them, and defendant replied in the affirmative.

APPEAL by defendant from *Lee, Judge.* Judgments entered 11 September 1975 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 18 March 1976.

By separate indictments defendant was charged with the murders in the first degree of Annie Lou Dykes and Elwood Matthews. Without objection the two cases were consolidated for trial, and the State elected to try defendant for murders in the second degree. It was stipulated that Dykes and Matthews died on 9 November 1974 as a result of gunshot wounds.

L. W. Davis, a highway patrolman, testified that he was called to the home of defendant's brother in the Town Creek Area of Brunswick County on the night of 9 November 1974. On arriving there at approximately 10:30 p.m., he found defendant present. On voir dire the officer testified that after he advised defendant of his rights, the defendant stated that he had shot his "wife" and her boyfrieind after he discovered them in an embrace on the bed in the bedroom of defendant's home. Davis testified that defendant appeared to have been drinking but that he was coherent at the time he made the statement. Defendant offered on voir dire the testimony of his sister-in-law and his brother who stated they observed him on the night in question after the shooting, that defendant had been drinking heavily, was "crying and jerking like someone who was having a convulsion," and that he did not appear to be in his right mind. Defendant testified on voir dire that the first thing he remembered about the incident was waking up at his home, sitting in a chair, bleeding from the forehead, in a very disoriented state, and that it took him three or four days to get back to normal. Trooper Davis was recalled on voir dire and testified that defendant was not under arrest at the time he made his statement. The court made findings of fact and allowed the testimony of Davis to be admitted before the jury.

Defendant testified before the jury in substance as follows: He was not married to Annie Lou Dykes, but he lived with her, loved her, and considered her as his wife. Early on 9 November 1974 Matthews came to his home and they drank whiskey and beer. Late in the day, he lay down on a day bed in his living room and went to sleep. When he woke up, he heard a noise in the bedroom. Upon investigating, he found Matthews and Dykes in the performance of an unnatural sex act. He turned to leave room and heard Annie Lou Dykes shout, "Get him. Get him." As he was leaving the room through the door and while his back was turned to the bed, he felt something hit him hard over the head and he saw a flash of light. His loaded shotgun was sitting beside the door through which he was walking. The next thing he remembers is waking up in his living room, sitting on the side of his day bed with blood dripping from his forehead. He was disoriented and everything appeared strange. He returned to the bedroom to find the two lying on the bed apparently dead. The shotgun was also lying on the bed. He then left for his brother's home to report what he had found.

Defendant's sister-in-law testified that when she saw defendant on the night in question he did not appear to have control of his normal faculties and in her opinion he was not sane.

The jury found defendant guilty of voluntary manslaughter in each case, and from judgments imposing prison sentences, defendant appealed.

Attorney General Edmisten by Associate Attorney Acie L. Ward for the State.

John R. Hughes for defendant appellant.

PARKER, Judge.

[1] Defendant first contends that in denying his timely motion, made on 15 April 1975, for the appointment of a psychiatrist at State expense to interview him and testify in his behalf at trial, the Court denied his Sixth Amendment right to confront his accusers. He asserts that, being indigent, he was entitled to be put on the same footing as all other defendants in criminal actions, and, since he could not afford to pay the psychiatrist, the State was responsible to provide one for him.

Every criminal defendant has the constitutional right to confront his accusers with other testimony, including "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." *State v. Hill,* 9 N.C. App. 279, 284, 176 S.E. 2d 41, 44 (1970), and cases cited therein; *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970). However, in *United States ex rel. Smith v. Baldi,* 344 U.S. 561, 97 L.Ed. 549, 73 S.Ct. 391 (1953), the United States Supreme Court held there was no constitutional mandate placed upon the States to appoint a psychiatrist to make a pretrial examination.

G.S. 7A-454 provides as follows:

"*Supporting services.*—The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State."

In appropriate circumstances our courts do have power to order a mental or physical examination at State expense, but

this procedure is left to the sound discretion of the court. The 15 April 1975 motion to the court submitted by defendant's counsel simply states, "That the defendant is an indigent person with Court appointed counsel, and, in the opinion of counsel, psychiatric evidence will be necessary and proper in behalf of the defense of the charges of murder against the Defendant, Amos Grainger." Without more, we see no abuse of the trial court's discretion in denying this motion. See, Annot., 34 A.L.R. 3d 1256, Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert (1970). We note that defendant did not, as required by G.S. 15A-959(a), give notice of intention to raise the defense of insanity, nor did anything occur at his trial which suggested the existence of any question as to his "incapacity to proceed" under G.S. 15A-1001.

[2] Defendant's second assignment of error presents his contention that his statement made to Trooper L. W. Davis on the night of 9 November 1974 should not have been admitted in evidence. He concedes that, as his confession was not made while he was in custody and was not the result of police interrogation, *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), is not applicable, but argues that his statement should not have been admitted because it was not knowingly, understandingly, and voluntarily made. Trooper Davis testified that he talked with the defendant on the night in question. Upon objection by defendant's attorney, the Court excused the jury in order to conduct a voir dire on the admissibility of any statement made by the defendant. On voir dire Trooper Davis stated that he interrupted defendant's conversation to advise him of his rights; that he asked defendant if he understood his rights and defendant replied in the affirmative; that although it was apparent defendant had been drinking, he did not appear to be sleepy or confused; and that defendant appeared coherent. Defendant offered testimony of two witnesses who testified that at this time he had been heavily drinking and did not appear to be in control of his faculties. The Court made findings of fact stating, in pertinent part, that any statement made by defendant to Trooper Davis on 9 November 1974 was made "voluntarily, knowingly, and independently." Such a finding by the Court, when based upon competent evidence, as it is in this case, is binding upon appellate review. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511

(1968). We find the statement made by defendant to Trooper Davis to have been properly admitted.

No error.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. GREGORY JOHNSON

No. 7626SC41

(Filed 16 June 1976)

Criminal Law § 84; Searches and Seizures § 1— search without warrant — admissibility of evidence seized

In a prosecution for possession of heroin with intent to sell, evidence that a reliable informer called a law enforcement officer and told him that defendant was at a certain location with heroin on his person, that defendant had offered it to him for sale, and that if the officer wanted to make an arrest he would have to get there soon together with the fact that the officer was five miles from defendant's location was sufficient to support the trial court's conclusion that under the exigent circumstances the officer's emergency search of defendant without a warrant did not violate Federal or State Constitutions, and the trial court properly denied defendant's motion to suppress evidence seized during the search.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 25 November 1975, Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 May 1976.

Defendant was charged with the felonious possession of three bags of heroin, a Schedule I controlled substance, with the intent to sell and deliver.

Evidence was presented by the State during a hearing on a motion to suppress evidence. Officer S. C. Cook testified that on 5 May 1975, he received a call while at the police garage from the police dispatcher to call a number, which he did, and received information from a reliable, confidential informant that defendant was standing in front of some apartments at the 1800 block of Edwin Street; that defendant had heroin on his person and that he was offering it for sale. This informant also gave Officer Cook a detailed description of defendant's appearance. Once he received the information, Officer Cook and another

officer took separate cars to the scene where Officer Cook advised the defendant that they were going to make an emergency search of his person, and at this time defendant put his hand in his pocket. Officer Mullis grabbed defendant's hand, pulled it out of his pocket and found in it three bags of heroin.

Neither officer went to a magistrate's office for a search warrant because in their opinion this would have taken about an hour and the informant told them that if they "wanted to make an arrest, [they] had to get there soon." The trial judge denied the motion to suppress evidence whereupon defendant pled guilty under G.S. 15A-979(b) to possession of heroin and from the judgment imposing imprisonment, defendant appeals.

Attorney General Edmisten by Associate Attorney James Wallace, Jr., for the State.

Lindsey, Schrimsher, Erwin, Bernhardt & Hewitt by Lawrence W. Hewitt for defendant appellant.

CLARK, Judge.

This appeal presents one issue: Did the trial court err in denying defendant's motion to suppress the admission in evidence of three bags of heroin taken from his person without a search warrant?

Before 1937 the North Carolina Supreme Court had ruled that evidence, though obtained as a result of an illegal search, was admissible. *State v. Fowler,* 172 N.C. 905, 90 S.E. 408 (1916). In Chapter 339 of the 1937 Public Laws of North Carolina the legislature adopted the exclusionary rule for searches conducted under an illegal search warrant, and in Chapter 644 of the 1951 Session Laws the rule was extended to apply the rule to searches unlawfully conducted without a warrant. Thus, the exclusionary rule was adopted in this State years before the landmark case, *Mapp v. Ohio,* 367 U.S. 643 (1961), which held that the constitutional prohibition against searches and seizures applied to all the states.

The above two statutes were amended in 1969, providing as follows:

> *"Exclusionary rule.*—(a) No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial.

(b) No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required." G.S. 15-27.

G.S. 15-27 was repealed and replaced by G.S. 15A-974, a part of the new Criminal Code which became effective 1 September 1975. G.S. 15A-974 provides:

"Exclusion or suppression of unlawfully obtained evidence.—Upon timely motion, evidence must be suppressed if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter."

This statute makes two departures from the repealed exclusionary rule statute. First, it abandons the automatic suppression of evidence found to have been obtained in an illegal search and provides for its exclusion only if required by authoritative case law. Second, instead of excepting from the exclusionary rule "technical deviations in a search warrant," as provided by repealed statute, G.S. 15A-974 excepts violations of the statute that are not "substantial" and lists four exceptions to be used in making that determination. For comment on the criteria, see Nakell, "Proposed Revisions of North Carolina's Search and Seizure Law," 52 N.C.L.R. 277 (1973).

These moderations of the exclusionary rules were undoubtedly proposed by the Criminal Code Commission because of (1) the general trend of easing Fourth Amendment restrictions on law enforcement officials by the "Burger Court," i.e., *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), admitting evi-

dence obtained by a consent search in a non-custodial setting without showing that a person knew he could withhold permission, and (2) the strong attack on the exclusionary rule as expressed by the dissenters in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), and in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971).

In the present case the defendant did not attack the reliability of the informer who told the law enforcement officer that defendant possessed heroin, had offered it to him for sale, and that if the officer wanted to make an arrest he would have to get there soon. This was sufficient to give the officer probable cause for a warrantless arrest and search of the defendant. *McCray v. Illinois,* 386 U.S. 300 (1967); *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967). However, the officer did not arrest defendant and make a search incident to the arrest. Instead, the officer, upon approaching defendant, informed him that he was going to make an emergency search for heroin. One exception to the rule that warrantless searches are *per se* unreasonable under the Fourth Amendment is a search incident to a lawful arrest; another exception is a search conducted under exigent circumstances. *Coolidge v. New Hampshire, supra.*

We find that the circumstances in this case fit the "exigent circumstances" or "emergency" exception. The "reliable" informant advised the officer by telephone that defendant was at a certain location 15 to 20 minutes before making the call when he saw defendant selling heroin, and that if he wanted to make an arrest he had to get there soon. The officer was five miles from defendant's location. These circumstances, plus the known mobility of the drug "pusher," justified the officer in proceeding directly to the defendant without first proceeding to a magistrate's office to obtain a search warrant which would have caused substantial delay in arriving at the scene and the probable absence of the purported drug violator.

In denying the motion to suppress, the trial judge made findings of fact and conclusions of law as required by G.S. 15A-977(f), correctly concluded that "under the exigent circumstances the search without a warrant" did not violate the Federal or State Constitutions, and we find that the questioned evidence should not have been excluded under the new search and seizure statute, G.S. 15A-974.

The judgment entered upon the plea of guilty under G.S. 15A-979(b) is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

ROGERT L. McKAUGHN, JR. v. MARGERY S. McKAUGHN

No. 7625DC95

(Filed 16 June 1976)

1. **Divorce and Alimony § 23; Husband and Wife § 11— separation agreement — modification of child support provisions**

While a separation agreement may be modified by increasing child support payments where the party with custody establishes that the separation agreement provisions do not adequately protect the interests of and provide for the welfare of the children, no principle of public policy intervenes to relieve a party from the obligations of a separation agreement requiring support payments in excess of or other payments in addition to that required by law.

2. **Husband and Wife § 11— modification of separation agreement**

A separation agreement is a contract between the parties and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where the rights of third parties have not intervened.

3. **Divorce and Alimony § 23; Husband and Wife § 11— separation agreement — child support — impossibility of performance — reasonable child support**

The trial court's findings, admittedly supported by evidence, rebut the presumption that child support provisions of a separation agreement are now just and reasonable and support the conclusion that plaintiff father is unable to comply with provisions of the separation agreement requiring him to pay $1,000 per month for child support and to maintain a $200,000 life insurance policy with the children as beneficiaries and a $50,000 policy with the wife as beneficiary, and the court did not err in ordering child support payments of $500 per month and the maintenance of a $100,000 life insurance policy, where the court found that plaintiff's income has decreased from $50,000 to $26,000 per year, his net worth has decreased from $1,000,000 to $61,000, plaintiff's living expenses are $27,312 per year, the children have needs based on expenditures for them by defendant of $18,925 per year (including $3,000 for a beach cottage for one month), and defendant wife has an independent estate in excess of $2,000,000 and an annual income of $25,000.

APPEAL by defendant from *Tate, Judge.* Judgment entered 31 October 1975, District Court, CATAWBA County. Heard in the Court of Appeals 12 May 1976.

Plaintiff alleges that he and defendant entered in a separation agreement on 19 January 1973, which provided in pertinent part that defendant have custody of their four children subject to his reasonable visitation right; that he pay $1,000 per month to defendant for their support; and that plaintiff maintain an insurance policy on his life in the face amount of $200,000 naming the four children as beneficiaries and a life policy in the sum of $50,000 naming defendant as beneficiary.

Plaintiff further alleges that he and defendant were divorced in February 1974; that he remarried in April 1974; that since the execution of the separation agreement there has been a substantial change in circumstances in that defendant has denied him the right to visit his children and in that his income has been substantially reduced; and that since 1 November 1974 he has reduced payments to defendant for the child support to the sum of $500 per month and reduced his life policy to $100,000. Plaintiff prays that the court inquire into child custody, visitation rights, and support.

Defendant answered admitting the allegations of the complaint except for the change of circumstances and denial of visitation rights and crossclaimed for $2,755.04 arrears in support payments and specific performance of the $200,000 life policy as provided in the separation agreement.

In his reply to defendant's cross action plaintiff pled financial inability to comply with the terms of the separation agreement, and that he was not liable to defendant under the agreement since defendant had breached the agreement by denying visitation rights to him.

It was admitted by the parties that the facts found by the trial court in its order were supported by the evidence. The facts found included the following: From time of the separation agreement (January 1973) until now, plaintiff's net worth had decreased from $1,000,000 to $61,000, and his income decreased from $50,000 to $26,000; defendant had an independent estate of $2,000,000 and net income of $25,000; plaintiff's living expenses amounted to $2,276 per month.

The trial court ordered that defendant recover of plaintiff the arrearage due for child support, that plaintiff pay child support in the sum of $500 per month, and all medical and dental expenses of the children, and maintain a life policy in the sum of $100,000, that defendant have primary custody of the children and plaintiff have reasonable visitation rights, and that defendant was not entitled to have specific performance of the two life policies. Defendant appealed.

Gaither & Gorham by James M. Gaither, Jr., for plaintiff appellee.

Sigmon, Clark & Mackie by William R. Sigmon for defendant appellant.

CLARK, Judge.

Plaintiff seeks relief from the provisions of the separation agreement requiring (1) child support payments of $1,000 per month, and (2) life insurance policies in the face amount of $200,000 with his children as beneficiaries and $50,000 with his wife as beneficiary. In doing so, plaintiff does not seek a modification of the separation agreement. Rather, he takes the position that a substantial decrease in income and net worth since the execution of the agreement, makes performance impossible, and he seeks to have the court determine, in the light of his present financial circumstances, what he should provide for child support.

It is settled that any separation agreement dealing with the custody and the support of the children of the parties cannot deprive the court of its inherent as well as statutory authority to protect the interests of and provide for the welfare of minors. 2 Lee, N. C. Family Law, § 190 (1963).

[1] A separation agreement is modified by increasing child support payments where the party with custody establishes that the separation agreement provisions do not adequately protect the interests of and provide for the welfare of the children. But no principle of public policy intervenes to relieve a party from the obligations of a separation agreement requiring support payments in excess of or other payments in addition to that required by law. See *Church v. Hancock,* 261 N.C. 764, 136 S.E. 2d 81 (1964); *Bailey v. Bailey,* 26 N.C. App. 444, 216 S.E. 2d 394 (1975).

[2] A separation agreement is a contract between the parties and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where rights of third parties have not intervened. *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73 (1966); *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963); *Turner v. Turner,* 242 N.C. 533, 89 S.E. 2d 245 (1955); 42 C.J.S., Husband and Wife, § 599, p. 183.

> "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." *Rabon v. Ledbetter,* 9 N.C. App. 376, 379, 176 S.E. 2d 372, 375 (1970).

[3] In the case before us the trial court found as a fact the decrease in plaintiff's income from $50,000 to about $26,000 per year, decrease in his net worth from $1,000,000 to $61,000, living expenses of the plaintiff in the sum of $27,312.00 per year, needs of the children based on expenditures for them by defendant in the sum of $18,925.32 (including $3,000 for a beach cottage for one month), and defendant's independent estate in excess of $2,000,000 and annual income of about $25,000. These and other findings of fact, admittedly supported by the evidence, rebut the presumption that the provisions mutually agreed upon are now just and reasonable and support the conclusions that plaintiff was unable to comply with the child support provision of the separation agreement, and otherwise support the other conclusions and the order of the court.

The defendant-wife has a substantial independent estate and income. The mutual duty of both the father and mother to provide support for the children is required by the following provisions of G.S. 50-13.4:

> "(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, 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. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or

the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case."

The trial court enforced the child support provisions of the separation agreement by awarding to the defendant-wife judgment for the arrearage due under the agreement. However, it approved the maintenance of a life insurance policy in the face amount of $100,000 by plaintiff with the children as beneficiaries and denied defendant's prayer for specific performance of the separation agreement provisions that he maintain life policies of $200,000 with the children as beneficiaries and $50,000 with defendant as beneficiary. We find that specific performance is not an appropriate remedy since defendant has failed to establish that she has no adequate remedy at law. And defendant sought no other remedy. The judgment in this case does not change plaintiff's *contractual* obligations under the separation agreement. The question before the court was what amount it would require in the exercise of its inherent and statutory authority to provide for the welfare of minors. We find no abuse of discretion by the court in ordering child support payments of $500 per month and the maintenance of a life insurance policy in the face amount of $100,000 with his children as beneficiaries.

The order of the trial court is

Affirmed.

Judges VAUGHN and MARTIN concur.

DAISY ARLENE STANCILL v. CITY OF WASHINGTON AND JACK H. WEBB

No. 762SC118

(Filed 16 June 1976)

Municipal Corporations § 14— stop sign obscured by overhanging foliage — negligence of city

In an action for damages allegedly resulting from an automobile accident caused by the negligence of defendants in failing to remove overhanging limbs and foliage which obscured a stop sign which directed traffic in plaintiff's lane of travel to stop, plaintiff's affidavit showed that there existed a genuine issue of material fact as to whether the city was in fact negligent in failing to inspect for and clear away overhanging foliage which obscured the stop sign and whether such failure was a proximate cause of plaintiff's injury. G.S. 160A-296.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 25 November 1975 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 24 May 1976.

This is a civil action wherein plaintiff, Daisy Arlene Stancill, is seeking damages allegedly resulting from an automobile accident caused by the negligence of the defendants, City of Washington and Jack H. Webb.

In her verified complaint plaintiff alleged in pertinent part the following:

On 14 July 1974 plaintiff was driving her automobile south along Respass Street in Washington, North Carolina. She approached the intersection of Respass Street and Fifteenth Street; and, seeing no traffic sign of any kind, she proceeded on into the intersection where her car was struck by another car which resulted in the injuries complained of. There is a stop sign on the northwest corner of Respass and Fifteenth Streets directing traffic moving south on Respass Street to stop. Plaintiff could not see the stop sign because overhanging limbs and foliage located near the intersection obscured the sign from plaintiff's vision as she approached the intersection. The City of Washington and Jack H. Webb, City Manager, and their agents and employees are responsible for maintaining the streets in Washington. Reasonable inspection by the defendants in the performance of their duty to maintain the streets would have revealed that limbs and foliage were obscuring the stop sign.

Defendants were negligent in allowing overhanging limbs and foliage to obscure the sign and in failing to correct this dangerous condition. Plaintiff's accident and resulting injuries are a direct and proximate result of defendants' failure to properly maintain the streets.

The defendants in their answer, verified by Jack Webb, denied that they were negligent in any respect. They specifically alleged in pertinent part the following:

Fifteenth Street is a public highway under the exclusive supervision of the Department of Transportation in North Carolina. By statute the Department of Transportation has exclusive jurisdiction to erect "traffic control devices and signs along and adjacent" to Fifteenth Street and all municipal streets entering Fifteenth Street. The stop sign on the northwest corner of Respass and Fifteenth Streets was erected by the Department of Transportation on the Fifteenth Street right-of-way and it is their responsibility to clear overhanging limbs and foliage to permit approaching vehicles to see the stop sign.

Defendants also alleged plaintiff's contributory negligence and governmental immunity in further defense against the claim.

After the conclusion of discovery, defendants moved for summary judgment.

From summary judgment in favor of defendants entered on 25 November 1975, plaintiff appealed.

Milton S. Brown and LeRoy Scott for plaintiff appellant.

Rodman, Rodman and Holscher by Edward N. Rodman and David G. Francisco for defendant appellees.

HEDRICK, Judge.

The only assignment of error brought forward and argued on appeal is whether the trial court erred in allowing defendants' motion for summary judgment and in dismissing the action. A party moving for summary judgment must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Summary judgment is appropriate in a negligence case only under exceptional circumstances, since, ordinarily, the rule of

the prudent man should be applied by the jury under appropriate instructions from the court. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972). It is only where "a motion for summary judgment is supported by evidentiary matter showing a total lack of negligence on movant's part and no evidence is offered in opposition thereto" that the defendant's motion for summary judgment should be allowed. *Caldwell v. Deese,* 288 N.C. 375, 381, 218 S.E. 2d 379, 383 (1975).

In support of their motion, defendants, through their verified answer and requests for admissions, offered evidence to show that the Department of Transportation by statute (G.S. 136-61.1) has the jurisdiction and the responsibility to maintain Fifteenth Street since it is a part of the State highway system. The stop sign was located in the right-of-way of Fifteenth Street, and the city has no duty and can incur no liability (G.S. 160A-297(a)) for failing to maintain the right-of-way of a street within the municipality which is a part of the State highway system. Since plaintiff does not deny that the stop sign was erected by the State and admits that it is located within the State's right-of-way, defendants argue that as a matter of law they cannot be negligent for failing to maintain the stop sign when they had no duty to maintain it.

Plaintiff, through the affidavit of Milton S. Brown, Jr., offered evidence to show that the overhanging limbs and foliage which obscured the stop sign on 14 July 1974 were located over the western right-of-way of Respass Street. In addition, they offered evidence to show that the city through its employees cut back limbs and foliage along the western right-of-way of Respass Street on 18 July 1974. Since defendants admit that Respass Street is part of the city's street system, plaintiff contends on appeal that G.S. 160A-296 is applicable to this case. It provides in pertinent part that:

> "A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and

bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:

* * *

(2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions;

* * *"

G.S. 160A-296 imposes upon the municipality the positive duty to maintain its streets in a reasonably safe condition for travel. *Hunt v. High Point,* 226 N.C. 74, 36 S.E. 2d 694 (1946); *Mosseller v. Asheville,* 267 N.C. 104, 147 S.E. 2d 558 (1966). Plaintiff's affidavit shows that there exists a genuine issue of material fact as to whether the city was in fact negligent in failing to inspect for and clear away overhanging foliage which obscured the stop sign and whether such failure was the proximate cause of plaintiff's injury. While the city is not an insurer of the condition of its streets, G.S. 160A-296 does subject the defendant to liability for the *negligent* failure to maintain its streets in a reasonably safe condition. *Mosseller v. Asheville, supra.* The trial court's judgment granting summary judgment for the defendant City of Washington must be reversed.

With regard to the defendant Jack H. Webb, the caption of the case indicates that he has been sued individually and not in his official capacity as City Manager of the City of Washington. We have examined the complaint and plaintiff's evidence offered in reply to defendants' motion for summary judgment and we can find no allegation of any negligence on the part of Jack Webb other than allegations of negligence with respect to him while serving in his official capacity with the City of Washington. Accordingly, summary judgment with regard to defendant Jack H. Webb is affirmed.

The result is: summary judgment for defendant Jack H. Webb is affirmed; summary judgment for defendant City of Washington is reversed.

Affirmed in part; reversed in part.

Judges PARKER and ARNOLD concur.

MARK WILLIS PATTERSON, BY HIS GUARDIAN AD LITEM, F. L. PATTERSON, PLAINTIFF v. W. H. WEATHERSPOON, DEFENDANT

No. 7610SC171

(Filed 16 June 1976)

1. **Parent and Child § 8— child striking another with golf putter — no negligence of father**

In an action for personal injury sustained by minor plaintiff when he was struck in the eye by a golf putter then in the hands of defendant's six-year-old son, there was no evidence to permit the jury to find that defendant should, by the exercise of due care, have reasonably foreseen that his child was likely to use a golf putter in such a manner as to cause injury and that he thereafter failed to exercise reasonable care to restrict or supervise the child's use thereof.

2. **Negligence § 5— golf putter no dangerous instrumentality**

A golf putter is not a dangerous instrumentality *per se*.

3. **Parent and Child § 8— child's playmates — parent not insurer of safety**

A parent is not an insurer of the safety of his child's playmates.

APPEAL by plaintiff from *Hobgood, Judge.* Judgment entered 20 November 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 28 May 1976.

On 21 June 1970, the minor plaintiff was injured when struck in the eye by a golf putter then in the hands of defendant's six-year-old son. Plaintiff was about five years old at the time he was injured. His left eye was surgically removed as a result of the accident.

At the close of plaintiff's evidence, defendant moved for a directed verdict. The motion was denied. Defendant offered no evidence. The jury found that plaintiff was not injured by the negligence of defendant. Plaintiff appealed assigning error to the judge's charge to the jury. Pursuant to Rule 10(d) of the Rules of Appellate Procedure, defendant cross-assigned as error the failure of the trial court to grant his motion for a directed verdict.

Reynolds & Howard, by E. Cader Howard, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by Samuel G. Thompson and Michael E. Weddington, for defendant appellee.

VAUGHN, Judge.

We will quote all of the testimony relevant to the question of negligence.

The minor plaintiff testified as follows:

"On that day I saw Will Weatherspoon and his father, W. H. Weatherspoon, hitting golf balls in a vacant lot in the neighborhood where we all lived. It was about 7:30 in the evening and still daylight.

I rode my bicycle onto the vacant lot and Mr. Weatherspoon saw me. I knew Mr. Weatherspoon and his son, Will, and I spoke to Will and rode my bicycle over to where he was. I got off my bicycle at a point ten or fifteen feet away from Will and walked over to him. Will at that time was hitting some golf balls and Mr. Weatherspoon was on the other side of the lot about forty feet away.

I walked up to Will and stood behind him. Will swung his putter back and hit me in the left eye. I screamed and Mr. Weatherspoon ran over to me and picked me up and took me to his house which was the second house away from the vacant lot."

Defendant was called as an adverse witness for plaintiff and testified as follows:

"I am the father of W. H. Weatherspoon, Jr. who was six years old on June 21, 1970. My son and Mark Patterson had occasionally played together prior to June 21, 1970.

Prior to June 21, 1970, my son had received no golf lessons from a professional or semi-professional, but had received instruction from me. I had instructed my son only in the use of a putter because in my judgment at his then age of six he was incapable of swinging any club longer than a putter. I had on occasion been with my son to a commercial 'putt-putt' course in Raleigh and at the beach and had shown him how to tap the ball into the hole and how to hold the putter. His training and experience was limited to that of a light stroke on the ball.

On June 21, 1970, I took my son to a vacant lot near our home so that we could be together as father and son

with him putting golf balls and me chipping golf balls with a nine iron. I handed my son a putter to use. We arrived at the lot at about 7:15 p.m. and it was still daylight. Mark Patterson came on the lot after we had arrived and begun putting and chipping. My son was putting balls on a clay surface where we had prepared a little depression that resembled a golf cup so that he might tap the balls into this depression. My son had putted two or three balls before Mark arrived. I was about 25 to 30 feet away from my son when Mark arrived. My son had the putter in his hands when Mark arrived. Mark rode his bicycle onto the lot and approached us and we both spoke to him. My son was under my supervision and control the entire time that we were on the lot with Mark that day.

I had reason to believe that my son would respond to any instructions I gave him. I considered my son to be a well-behaved child and I had had no problems with his discipline and had no reason to believe that he would not respond to any directions or instructions that I gave him.

I recall that Mark Patterson sustained an injury to his left eye on June 21, 1970. I did not see the accident occur. I heard Mark scream and I ran over to him and noticed immediately that there had been a very severe injury to the left eye. . . .

I was standing about 25 or 30 feet away from the boys when the accident occurred, at approximately the same location as when Mark first arrived at the lot. I did not take the putter from my son when Mark arrived at the lot.

When I first gave my son the putter on that date I showed him where to putt, how to choke up on the putter and tap the ball into the depression in the clay. I did not give my son any specific instructions on the use of the putter after Mark arrived at the lot. The putter was an adult sized putter—about like a yardstick. I did not give Mark any instructions as to where he should stand or what he should do while my son was stroking the ball with the putter.

CROSS EXAMINATION:

Prior to June 21, 1970, my son had had numerous exposures to a golf club. I am an occasional golfer and there

were golf clubs in my home. We had watched golf on television and on a number of occasions had putted together at commercial 'putt-putt' type courses both in Raleigh area and at the beach. My son was about four years old when I first exposed him to a golf putter. My son and I had played together on 'putt-putt' courses on a number of occasions and he had also played with his grandfather. On these occasions I had instructed my son on how to grip the club and tap the ball into the hole. My son understood that the kind of stroke to use with a putter was a short tapping stroke to roll the ball to the cup.

There were other people present at the 'putt-putt' courses at which we played.

I had further exposed my son to the use of a golf putter by putting with him in our house on the carpet. We putted into a device that would return the ball if the putt went into the hole. We had done this on numerous occasions and I had instructed him as to the correct method of putting, including the type of stroke and grip on the club. We normally putted a distance of seven or eight feet, using a short tapping stroke. We had also played together on the vacant lot prior to the date of the accident.

On June 21, 1970, we went to the lot after supper, about 7:15 or 7:30. My son had asked if we could play golf. We took a putter and a nine iron with us. We went to the area where my son had putted before and I stationed him three or four feet from the depression in the clay and gave him two or three golf balls and again showed him how to choke up or take a lower grip on the putter. At that time my son was about forty-six inches tall, which means he was about ten inches taller than the putter. I then walked about ten yards away and began chipping some balls.

I saw Mark ride his bicycle onto the lot and into the general area where I and my son were and we both spoke to him. He stopped his bicycle basically between my son and me, somewhat closer to my son, and stood astride the bicycle.

* * *

I was a Little League baseball coach and my son was on my team of five and six year olds. I instructed my team,

including my son, not to sling the bat after hitting the ball and to be careful of the people around when you swing a bat.

REDIRECT EXAMINATION:

I had not coached my son in organized golf sports. I did not give my son any particular instructions regarding the use of the golf putter on June 21, 1970, nor did I give Mark Patterson any instructions as to where he should stand or what he should do while my son was playing with the putter.

When I observed my son putting that day, he was using short strokes under my instructions. Because the object of putting is to tap the ball into the hole it never occurred to me to tell my son not to swing a putter as you would another club. I had never observed him try to swing it in the times that we had played prior to that. My son was inclined to imitate me."

If defendant's motion for a directed verdict should have been allowed, any questions about errors in the charge are purely academic.

[1] We hold that there was no evidence to permit the jury to find, under the circumstances shown at trial, that defendant should, by the exercise of due care, have reasonably foreseen that his child was likely to use the golf putter in such a manner as to cause injury and that he, thereafter, failed to exercise reasonable care to restrict or supervise the child's use thereof. Defendant's motion for a directed verdict should have been allowed.

In *Lane v. Chatham,* 251 N.C. 400, 111 S.E. 2d 598, the defendant parents gave their nine-year-old son an air rifle. The rifle was entrusted to his use from Christmas until the following Thanksgiving. On that day, the child stepped from behind a tree, pointed the rifle directly at plaintiff and shot him. The shot entered plaintiff's eye causing total loss thereof. There was evidence that the mother had knowledge of the child's prior misuse of the air rifle but no evidence that the father had any such knowledge. The Supreme Court stated the applicable rule as follows:

"Where parents entrust their nine-year-old son with the possession and use of an air rifle and injury to another is

inflicted by a shot intentionally or negligently discharged therefrom by their son, the parents are liable, based on their own negligence, if under the circumstances they could and should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof."

The Court held that the case was for the jury as to the mother but affirmed a judgment of nonsuit as to the father. The Court held that an air rifle is not a dangerous instrumentality *per se* and that, therefore, evidence that defendants gave the child the air rifle and permitted him to use it was not sufficient, standing alone, to support a finding of their liability for the child's wrongful act.

[2] If an air rifle is not a dangerous instrumentality, *per se,* then certainly a golf putter cannot be so described. The father in *Lane v. Chatham* surely knew that his son would use the rifle in the presence of others. There was no indication that he ever attempted to control the child's use of the weapon or warn him of the possible dangers involved in the use thereof. If the defendant in that case did not have reason to foresee any danger to others arising out of their son's possession and negligent use of the rifle, we fail to see how defendant in the case before us had the duty to foresee injury to another arising out of his child's negligent use (if indeed the evidence here discloses a negligent use) of a common golf putter.

[3] The minor plaintiff suffered a grievous injury. A parent, nevertheless, is not an insurer of the safety of his child's playmates. Injuries will occur no matter how careful the parent may be. Life is not lived in a vacuum. Children (as are adults) are injured daily by freakish occurrences arising out of the use of all kinds of instrumentalities which are not inherently dangerous. This child was hurt with a golf putter. It could just as easily have been a croquet mallet, a tennis racquet or a baseball bat, all of which are commonly used by children of all ages.

For the reasons stated, the verdict and judgment will not be disturbed.

No error.

Judges MARTIN and CLARK concur.

PAULETTE L. GOLDSTON, WIFE OF BOYCE GOLDSTON, DECEASED, EMPLOYEE, PLAINTIFF v. GOLDSTON CONCRETE WORKS, INCORPORATED, EMPLOYER, AND THE HOME INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 7519IC1050

(Filed 16 June 1976)

Master and Servant § 56— workmen's compensation — cutting top off barrel with acetylene torch — accident within scope of employment

Evidence was sufficient to support the Industrial Commission's conclusion that deceased's death resulted from an accident which arose out of and in the course of his employment where such evidence tended to show that the deceased employee was on his employer's premises at a time when he could reasonably be expected to be there, he was using his employer's acetylene torch to cut the top from a barrel, an activity in which he normally engaged in the furtherance of the employer's business, and he was killed by accident while engaged in that activity.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission filed 15 September 1975. Heard in the Court of Appeals 4 May 1976.

The employee, Boyce Goldston, was accidentally killed by an explosion on 8 July 1974. The only question presented is whether the accident arose out of and in the course of the employment.

A deputy commissioner made the following findings of fact.

"1. On July 8, 1974, the deceased, Boyce Goldston, was employed by the defendant employer Goldston Concrete Works, Inc. (hereinafter, Concrete Works). The Concrete Works had been incorporated in 1971 and continued operation on the premises where the business was operated by deceased's father prior to the father's death. The shareholders of the Concrete Works were the deceased's mother, the deceased, his three brothers and his sister. The mother was the president, the four brothers were vice presidents and the sister was secretary.

Each of the four sons, Joe, Larry, Boyce and Carnell were employed by the Concrete Works and had more or less equal responsibility although Carnell kept time records of hours on the job and certain of the brothers by practice assumed primary responsibility for certain tasks.

2. The Concrete Works primary function was working with concrete—making and installing septic tanks, driveways, etc. The corporation was authorized by its Articles of Incorporation, in very broad language, to maintain and repair dwelling houses, to 'perform personal services of any nature,' and, along with the usual catch-all 'to engage in any other lawful activity' including but not limited to '. . . constructing, producing, repairing and servicing any other structures. . . .'

The premises of the Concrete Works were enclosed within a fence. There was a small building on the premises in which certain equipment and records were kept. Each of the brothers had a key to the lock on the gate and the first one in would unlock the gate and the last one out would close and lock the gate. Each of the brothers would daily turn in their hours to Carnell and he, in turn, would provide the information to their sister, Mrs. Shirley Goldston White, who would total the hours, multiply it by the hourly rate and issue checks.

The four brothers worked long hours and occasionally seven days a week as necessary.

3. Mrs. White, and three brothers, Larry, Carnell and Boyce lived across the street from the Concrete Works. Their mother's house was just down the road and their mother's farm was just on the other side of the Concrete Works. Their mother also owned some tenant houses. The brothers did necessary work at all of these places but there is no evidence that their hours of employment for the Concrete Works included this time. The Concrete Works had installed septic tanks at some of these places.

4. A mobile home park (hereinafter 'park') was located about a quarter of a mile from the Concrete Works. The land on which the park was located was owned by the deceased's mother. Lots within the park were for rental and several had been rented prior to the death of Boyce Goldston. The park was in operation only a few months at the time of his death. The park had no separate office and its mail was received at the Concrete Works. Mrs. White also kept the books and records of the park. It was incorporated as Goldston Mobile Home Park, Inc. on August

24, 1974 and stock was issued at that time to the three surviving brothers, Mrs. White and their mother.

5. Prior to deceased's death, upkeep of the park was part of his special responsibilities. He collected the rental money from the park and did upkeep and maintenance work alone or with one of his brothers. He was paid by the Concrete Works for his time in this. Prior to July 8, 1974 the deceased and his brother, Larry, had installed septic tanks in all of the lots of the park. The Concrete Works has not been paid for this work although this is considered by Mrs. White, secretary of both corporations an outstanding bill of the park. The deceased and other Concrete Works employees dug the well for the park and ran pipe from the well to the lots. There is no evidence as to whether this work is considered an outstanding bill of the park. A connection for electricity was installed by a contractor and billed to the park; only part of this bill has been paid.

Prior to deceased's death, the park did not have a separate bank account although Mrs. White kept the records of money separate from the Concrete Works. Receipts from the park have evidently not been sufficient to meet expenses.

6. On July 8, 1974 the deceased, dressed in his work clothes, had been working for the Concrete Works. Shortly before his death, the deceased stopped by his mother's house to give her a check in payment for a pumping job just completed on a septic tank. The deceased's mother next saw him as she rode by the Concrete Works with her son, Larry, on the way to her farm. The deceased was still dressed in his work clothes and was within the fence of the Concrete Works with one Eddie Williams, a tenant of the park.

7. On July 8, 1974 at approximately 6:30 p.m. the deceased was on the premises of the Concrete Works with Eddie Williams. Williams had been living in the trailer park for several months and had asked the deceased previously to cut the top off a barrel so Williams could have a trash barrel at the park. The barrel had been on the Concrete Works premises for a while. Williams took it back to his mobile home and, on this day had taken it back to the Concrete Works so the deceased could cut off the top.

8. The deceased had cut the top off oil drum barrels acquired by the Concrete Works when the oil was gone to provide trash barrels for the Concrete Works.

Unfortunately, none of the witnesses knew of the deceased's practices—if any—regarding trash barrels at the park but Williams clearly considered that he was entitled to this service as part of the maintenance of the park.

This particular barrel, however was acquired by Williams and had a residue of gasoline in it. As the deceased applied the acetylene torch belonging to the Concrete Works to the barrel, it exploded causing his death.

9. The deceased's widow, Paulette Goldston, and their two minor children, Tyrone and Boyce, Jr., are entitled to compensation due, if any."

The deputy commissioner then concluded that the accident arose out of and in the course and scope of deceased's employment with defendant employer. An award was entered in plaintiff's favor.

On appeal, the full Commission made the following additional findings and conclusions:

" '10. At the time Boyce Goldston was using the acetylene torch on the barrel in question he had reasonable grounds to believe that to perform this service would be beneficial to his employer's interest, was incidental to his employment and would advance his employer's work. His injury by accident on the occasion complained of, therefore, arose out of and in the course of his employment.'

The Full Commission is of the view that at the time complained of the deceased employee was engaged in an activity in furtherance of his employer's interest and that said work was incidental to his employment and advanced his employer's work. Under these conditions, the tests for compensability are met."

The award of the Deputy Commissioner was affirmed with one commissioner dissenting.

Defendants appealed.

Turner, Rollins and Rollins, by Clyde T. Rollins, for plaintiff appellee.

Hedrick, McKnight, Parham, Helms, Kellam, Feerick & Connelly, by Philip R. Hedrick and J. A. Gardner III, for defendant appellant.

VAUGHN, Judge.

To be compensable under the Workmen's Compensation Act an injury must be one that arises out of and in the course of the employment.

> "The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place and circumstances under which it occurred . . . [t]here must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. . . .
>
> * * *
>
> An accident arising 'in the course of' the employment is one which occurs while 'the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing' . . . . " *Conrad v. Foundry Company,* 198 N.C. 723, 726, 727, 153 S.E. 266, 269.

Whether an injury by accident arises out of and in the course of the employment is a mixed question of law and a fact. *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862. The question before us is whether in any reasonable view of the evidence it is sufficient to support the critical findings necessary to permit an award of compensation. *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342. Whether compensation is recoverable depends largely upon the facts of each case as matters of fact and conclusions of law, and general definitions are unsatisfactory. *Harden v. Furniture Co.,* 199 N.C. 733, 155 S.E. 728.

We do not elect to review defendant's exception to the findings of fact. It is our view that, insofar as they are material to the critical issue, the findings of the Commission represent legitimate inferences that can be drawn from the evidence when it is considered in the light most favorable to plaintiff.

Defendant, for instance, excepts to the Commission's finding that the trailer park was not incorporated until the corporate stock was issued which was after the accident. Defendant contends that the incorporation was completed prior to the accident when the articles of incorporation were certified. We do not consider this finding critical. In either event, the evidence permits the inference that defendant Concrete Works, through the deceased and employees, performed certain services for the trailer park.

In short, the evidence, when considered in the light most favorable to plaintiff, shows the following. The employee was on his employer's premises at a time when he could reasonably be expected to be there. He was using his employer's acetylene torch to cut the top from a barrel, an activity in which he normally engaged in the furtherance of the employer's business. He was killed by accident while engaged in that activity. If the particular barrel on which he was working had been destined (as were the ones he had previously cut) for use at the Concrete Works, there would be no doubt about his having been killed when exposed to risk of his employment. That the barrel was to be used by a tenant at the trailer park, does not, under the circumstances of this case, alter the result. *Lee v. Henderson and Associates,* 17 N.C. App. 475, 195 S.E. 2d 48; 284 N.C. 126, 200 S.E. 2d 32.

The award of the Industrial Commission is affirmed.

Affirmed.

Judges BRITT and ARNOLD concur.

J. F. WILKERSON CONTRACTING COMPANY, INC. v. R. T. ROWLAND AND WIFE, IMA JEAN ROWLAND, J. H. PEARSON, TRUSTEE FOR THE NORTHWESTERN BANK AND THE NORTHWESTERN BANK

No. 7610SC53

(Filed 16 June 1976)

1. Pleadings § 38— judgment on pleadings — findings of fact

The court is not required to find facts in a judgment on the pleadings since the facts determining disposition are those alleged in the pleadings; and the court cannot select some of the alleged facts as a basis for granting judgment on the pleadings if other allegations, together with the selected facts, establish material issues of fact.

2. Contracts § 17; Laborers' and Materialmen's Liens § 2— breach of oral contract — delay of work — subsequent written contract — priority of lien for labor and materials

Where plaintiff's complaint shows that it elected to delay work under a June 1973 oral contract when defendant breached the oral contract by failing to execute with his wife a written contract and by failing to make periodic payments within a reasonable time, but that it did not terminate and abandon the contract, and that plaintiff completed the work after a written contract dated 27 November 1973 was executed on 1 January 1974, the trial court erred in concluding that the oral contract was a separate and independent contract from the written contract, that plaintiff's claim for labor and materials furnished under the oral contract was not filed within 120 days, that labor and materials furnished under the written contract of 27 November did not precede the date of a bank's deed of trust recorded on 2 October 1973, and that judgment on the pleadings should be rendered for defendant bank in plaintiff's action to have its claim for labor and materials given a priority from 27 June 1973, the date labor and materials were first furnished under the oral contract.

3. Husband and Wife § 3; Laborers' and Materialmen's Liens § 2— contract by husband — agency of husband for wife — ratification by written contract by both spouses

Plaintiff's complaint was sufficient to support an inference that the male defendant was the agent for his wife in making an oral contract with plaintiff where it alleged that a written contract was subsequently executed by both the male defendant and his wife.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 8 September 1975, Superior Court, WAKE County. Heard in the Court of Appeals 6 May 1976.

The trial court granted the motion for judgment on the pleadings under G.S. 1A-1, Rule 12(c) made by defendants J. H. Pearson, Trustee, and The Northwestern Bank, concluding that the deed of trust (Exhibit "B") executed by defendants Rowland, dated 2 October 1973 and recorded in Book 2194, page 67, Wake County Registry, has a priority over plaintiff's claim of lien for labor and materials furnished filed 14 May 1974, seeking to perfect such lien with priority from 27 June 1973.

In its complaint plaintiff alleges that plaintiff and defendant Rowland, who owned a tract of land near Cary in Wake County, entered into a written contract (Exhibit "A"), on 27 November 1973 whereby plaintiff agreed to install water and sewer systems on said defendants' land; that plaintiff began furnishing labor and materials on 27 June 1973 and completed the work on 17 January 1974, and that there is a balance due by defendants Rowland under the contract of $15,773.10.

Plaintiff prays for recovery of said sum and for judgment lien relating back to 27 June 1973, with priority over the aforesaid deed of trust filed on 2 October 1973.

In her answer defendant Ima Jean Rowland denied the execution of the contract (Exhibit "A") and admitted the execution of the recorded deed of trust (Exhibit "B").

Defendant R. T. Rowland filed answer and counterclaim, and defendants Trustee and Bank filed a joint answer and crossclaim. Both answers admitted the execution of the written contract (Exhibit "A") and the recorded deed of trust (Exhibit "B"). These answering defendants allege an abandonment of the original contract on 3 August 1973, followed by a new and independent contract. Since the judgment on the pleadings is based primarily on plaintiff's pleadings, we do not elect to further summarize these pleadings.

In his reply plaintiff admitted an oral agreement with defendant Rowland on 18 June 1973, that said defendant agreed to make periodic payments and to execute with his wife a written contract; that said defendant failed to make the periodic payments and to execute with his wife a written contract, and that plaintiff stopped work on the project until said defendant complied, and that when said defendant did comply by executing with his wife the written contract and by making the escrow deposit, the plaintiff resumed work, which was completed on 17 January 1974.

Plaintiff appeals from the judgment on the pleadings.

Manning, Fulton & Skinner by Lawrence W. Hill, Jr., for plaintiff appellant.

Poyner, Geraghty, Hartsfield & Townsend by John L. Shaw and Cecil W. Harrison, Jr., for defendant appellees, J. H. Pearson, Trustee for the Northwestern Bank and Northwestern Bank.

CLARK, Judge.

The judgment on the pleadings disposed of fewer than all the claims, but this appeal is not subject to dismissal under G.S. 1A-1, Rule 54(b) since the trial court in the judgment found "no just reason for delay."

[1] In its judgment on the pleadings the trial court made findings of fact and conclusions of law. The court is not required to find facts in a judgment on the pleadings since the facts determining disposition are those alleged in the pleadings; and the court cannot select some of the alleged facts as a basis for granting the motion on the pleadings if other allegations, together with the selected facts, establish material issues of fact. "A motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c) should not be granted unless 'the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.' " *Trust Co. v. Elzey,* 26 N.C. App. 29, 32, 214 S.E. 2d 800, 802 (1975). See *Ragsdale v. Kennedy,* 286 N.C. 130, 209 S.E. 2d 494 (1974).

The findings of fact and conclusions of law in the judgment appealed from do disclose the basis for the ruling of the court, which concluded in part as follows:

> "1. The June, 1973 oral contract was a separate and independent contract from the written contract dated November 27, 1973 and executed on January 1, 1974.
>
> 2. The June, 1973 oral contract was terminated upon breach of the contract in August, 1973."

Having so found, the trial court further concluded that plaintiff's claim of lien for labor and materials furnished under the oral contract was not filed within 120 days as required by G.S. 44A-12(b); and that the labor and materials furnished under the written contract of 27 November 1973 did not precede the date of the Bank deed of trust dated and recorded 2 October 1973.

[2] The movants take the position that though plaintiff attempts to allege the furnishing of work and materials under a single contract with defendants Rowland, its pleadings establish two distinct and separate contracts as a matter of law, in that (1) the first oral contract was terminated on 3 August when plaintiff stopped work upon its breach by defendant R. T. Rowland, and (2) since plaintiff does not allege that defendant R. T. Rowland was also the agent of his wife in making the oral contract, the written contract executed by both of said defendants was a substitution for and independent of the oral contract.

The plaintiff alleged that when defendant R. T. Rowland breached the oral contract by failing to execute with his wife

the written contract and by failing to make periodic payments within a reasonable time, it elected to delay the work until said defendant complied. If one or more installments provided for in a building contract are not paid, the builder will generally be privileged to suspend performance. 3A Corbin, Contracts, § 693 (Rev. Ed. 1960). "Although a builder may be privileged to suspend work, or even to renounce the contract, by reason of the non-payment of an installment, he is not required by the law to do either one." 3A Corbin, *supra*, § 692.

In the case before us plaintiff, as it had the right to do, elected to delay, but not abandon and terminate its work under the contract, and in so doing the contract was not terminated.

[3] The plaintiff does not specifically allege that in making the oral contract the defendant R. T. Rowland was also the agent for his wife Ima Jean Rowland, but we find the allegations sufficient to imply such agency. In *Marks v. McLeod,* 203 N.C. 257, 165 S.E. 693 (1932), the defendant-husband signed a contract to sell timber to plaintiff. Title to the timber was vested in his wife. Subsequently, both husband and wife executed a timber deed. It was held "that the husband was acting as agent of his wife in signing the contract or sale may be presumed from the subsequent ratification of the deed in accordance with the prior agreement."

Whether the written contract executed by defendants Rowland was a ratification of or a substitution for the oral contract made by defendant R. T. Rowland is a mixed question of fact and law which is not determined by the pleadings in this case.

Having carefully scrutinized the motion for judgment on the pleadings, we find that movants have failed to show that no material issue of fact exists and that they are clearly entitled to judgment.

The judgment is

Reversed and this cause remanded.

Chief Judge BROCK and Judge HEDRICK concur.

RECREATIVES, INCORPORATED v. TRAVEL-ON MOTORCYCLES CO., INC.

No. 7615DC13

(Filed 16 June 1976)

1. **Uniform Commercial Code § 13— "or return" consignment provision — engrafting onto paper writing by parol evidence improper**

Pursuant to the U.C.C. as adopted in N. C., parol evidence cannot be introduced to engraft an "or return" consignment provision onto a paper writing. G.S. 25-2-326(4).

2. **Uniform Commercial Code § 13— contract to purchase motorcycles — parol evidence changing contract inadmissible**

In an action to recover for alleged nonpayment for two motorcycles sold to defendant pursuant to a purported "contract of purchase," the trial court did not err in refusing to allow defendant's parol evidence indicating a consignment arrangement between the parties, since such testimony would change the basic meaning of this contract and produce an agreement wholly different, inconsistent with and opposite from that which was in fact reduced to writing.

3. **Uniform Commercial Code § 13— paper writing embodying entire agreement — parol evidence inadmissible**

Where the parties stated in their contract that "this instrument embodies the entire agreement and understanding of the parties," defendant could not introduce parol evidence at trial to vary the terms of the contract. G.S. 25-2-202(b).

4. **Rules of Civil Procedure § 8; Payment § 4— plea of payment — affirmative defense**

It is well settled that the plea of payment is an affirmative one and the general rule is that the burden of showing payment must be assumed by the party interposing it.

APPEAL by defendant from *Allen, Judge.* Judgment entered 29 August 1975 in District Court, ORANGE County. Heard in the Court of Appeals 14 April 1976.

Plaintiff, a corporate wholesale dealer for "Max All Terrain [motorcycle] vehicles and parts," sued the defendant retail dealer for alleged nonpayment for two motorcycles sold to defendant pursuant to a purported "contract of purchase." Plaintiff prayed for recovery of the unpaid balance.

Defendant, denying plaintiff's substantive allegations, answered, inter alia, that the sales arrangement was based on a consignment contract and that it, therefore, owed plaintiff nothing pending the retail sale of the vehicles.

Tried without a jury, plaintiff presented evidence and supporting documentation tending to show that the purchase was effected under a purportedly straight-forward contract of purchase. According to the purported contract, introduced as plaintiff's "Exhibit 1," the parties entered into a "PURCHASE ORDER" under which the vehicles were "SOLD TO" the defendant. The alleged "Contract" stated, inter alia, that

> "All units ordered today are subject to the following terms and prices.
>
> Suggested List Price $1595
> Dealer Price — Net 90 days $1196
>
> Dealer Price
> Cash Discounts
>
> If paid within 10 days of invoice date deduct $40— your price $1156
> If paid within 30 days of invoice date deduct $25— your price $1171
> If paid within 60 days of invoice date deduct $15— your price $1181
> If paid within 90 days of invoice date NET DUE— your price $1196
>
> Floor Plan
>
> Beyond the initial 90 day period a 90 day floor plan is available. Interest will be charged and is payable monthly at the rate of 1½ per cent per month (18 per cent annual percentage rate). This interest charge is calculated in full starting with the first day of each 30 day period of the floor plan.
>
> All vehicles must be paid in full by 180 days from date of invoice, or immediately upon retail sale or rental of vehicle, whichever shall occur first.
>
> (All prices f.o.b. Buffalo Factory and exclusive of sales tax)."

Moreover, the agreement established rights regarding title, parts and accessories, pre-delivery and warranty, and stated that "[t]his instrument embodies the entire agreement and understanding of the parties."

Defendant tried to introduce parol evidence indicating a consignment arrangement, but the testimony was excluded by the court.

From judgment for plaintiff, defendant appealed.

Other facts necessary for decision are set forth below.

George E. Hunt and John H. Snyder for plaintiff appellee.

Harris, Ruis & Mulligan, by Ronald H. Ruis, for defendant appellant.

MORRIS, Judge.

Defendant appellant, contending that the trial court erred in excluding its tendered parol evidence, essentially argues that the contract was a consignment sale agreement under a "sale or return" arrangement and further maintains that the proposed " . . . oral testimony sought to be introduced was not for the purpose of contradicting the paper writing but rather for the purpose of showing that the paper writing was NOT THE CONTRACT between the parties." We find no merit to defendant's contention.

[1] Pursuant to the Uniform Commercial Code, as adopted in North Carolina, parol evidence cannot be introduced to engraft an "or return" consignment provision onto a paper writing. See G.S. 25-2-326(4). As the North Carolina Comment to subsection (4) of G.S. 25-2-326 states

> ". . . any 'or return' provision is so definitely at odds with any ordinary contract for the sale of goods that where written agreements are involved the 'or return' provision must be contained in a written memorandum. It contradicts the 'sale' aspect of the contract within the parol evidence rule. While North Carolina did not have the statute of frauds as to contracts for the sale of personal property, it did have the parol evidence rule. Subsection (4) accords with the case of *Shoop Family Medicine Co. v. Davenport,* 163 N.C. 294, 79 S.E. 602 (1913) and *Shoop Medicine Co. v. J. A. Mizell & Co.,* 148 N.C. 384, 62 S.E. 511 (1908). Where there is a written contract of sale the buyer may not introduce parol agreement allowing return of the article purchased not contained in the written agreement. The UCC provision accords in result with prior North Carolina law."

[2] Here, the contract, when read completely, contextually and critically, indicates no ambiguity and clearly embodied the final and exclusive agreement. Thus, its meaning will not be altered or contradicted by parol evidence tending to distort the expressly stated written understandings of the parties. See G.S. 25-2-202; G.S. 25-1-205(1) through (4). This tendered oral testimony, if admitted, would change the basic meaning of this contract and produce an agreement wholly different, inconsistent with and opposite from that which was in fact reduced to writing. Such a result was not intended by the rules of parol evidence as embodied in the applicable provisions of the Uniform Commercial Code.

More specifically, a careful reading of G.S. 25-2-202 and 25-1-205 indicates that the rules regarding admissibility of parol evidence are grounded on the proposition that the particular tendered parol evidence will serve to explain, clarify and supplement the written considerations stipulated in the contract and that such oral statements will not be used to contradict the written provisions.

[3] Moreover, G.S. 25-2-202(b) provides that the explanatory or supplemental information is not to be admitted when the " . . . court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." Here, the parties so stated in their contract and the defendant is bound by its president's signature.

[4] Defendant further contends that the court erred in refusing to dismiss the action upon the ground that plaintiff had failed to prove nonpayment, and that the court failed to find as a fact that defendant had not paid. G.S. 1A-1, Rule 8(c), specifically provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . payment. . . . " The rule incorporates a long-standing rule of practice in North Carolina. " 'It is well settled that the plea of payment is an affirmative one and the general rule is that the burden of showing payment must be assumed by the party interposing it.' " (Citations omitted.) *Lett v. Markham,* 266 N.C. 318, 320, 145 S.E. 2d 907 (1966). Defendant did not plead payment as a defense, nor did he introduce evidence of payment. His argument that plaintiff introduced evidence with respect to payment is feckless. There was testimony by defendant's former president, testifying for plaintiff as an adverse witness, that he did

not know whether payment had been made on the vehicles. This is certainly not sufficient to place the burden on plaintiff of going forward with the evidence as to payment. The court in advising counsel what facts should be incorporated in the judgment, clearly stated to defendant that payment is an affirmative defense and no proof of payment had been made. In our view, defendant has no cause to complain.

We have reviewed all other contentions of defendant and find them to be without merit.

Affirmed.

Judges PARKER and MARTIN concur.

YEARGIN CONSTRUCTION COMPANY, INC. v. FUTREN DEVELOPMENT CORPORATION

Nos. 7526SC798 and 7526SC953

(Filed 16 June 1976)

1. **Attorney and Client § 7— attorneys' fees — no recovery by successful litigants**

The trial court did not err in denying plaintiff's motion for attorneys' fees in an amount representing ten percent of the principal amount of the jury verdict, as the contract of the parties provided, since attorneys' fees are not recoverable by successful litigants in this State, as such are not regarded as a part of the court costs. Ordinarily, attorneys' fees are recoverable only when expressly authorized by statute.

2. **Attorney and Client § 7— attorneys' fees — provision in contract for — no evidence of indebtedness**

In this action to recover sums due for breach of contract to build condominiums, recovery of attorneys' fees was not authorized by the provision of G.S. 6-21.2 that "obligation to pay attorneys' fees upon any note, conditional sale contract or *other evidence of indebtedness* . . . shall be valid and enforceable," since the parties' contract providing for recovery of 10 percent of any sum collected through litigation as attorneys' fees did not amount to an "evidence of indebtedness" within the meaning of the statute.

APPEAL by plaintiff and defendant from *Thornburg, Judge.* Judgment entered 18 June 1975, and order entered 23 June 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 May 1976.

In its complaint plaintiff alleges that it entered into a contract with defendant to construct condominiums on land owned by defendant; that defendant breached the contract by failing to make payments as agreed upon, by delaying construction so that plaintiff incurred additional costs, and by requiring plaintiff to perform extra work. Plaintiff prayed for judgment in amounts aggregating $470,506.

Defendant filed answer in which it admitted entering into the contract attached to the complaint but denied any breach of the contract. It further pleaded a counterclaim in which it alleged that plaintiff breached the contract by failing to construct the condominiums in accordance with the plans and specifications and by abandoning work on the project. Defendant prayed for judgment against plaintiff for amounts aggregating $589,410.

Issues were submitted to and answered by the jury as follows:

1. Did defendant Futren Development Corporation breach its construction contract with plaintiff Yeargin Construction Company, Inc.?

ANSWER: Yes.

2. If so, what amount was plaintiff Yeargin Construction Company, Inc., damaged by such breach?

ANSWER: $319,000 plus interest.

3. Did plaintiff Yeargin Construction Company, Inc. breach its construction contract with defendant Futren Development Corporation?

ANSWER: No.

4. If so, what amount was Futren Development Corporation damaged by such breach?

ANSWER:

The court entered judgment in favor of plaintiff for $319,000 plus interest and costs. Defendant appealed from the judgment. In a separate order the court denied plaintiff's motion for the recovery of attorneys' fees and plaintiff appealed from the order. The parties filed separate appeals but we have ordered the appeals consolidated.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and William P. Farthing, Jr., and Haynsworth, Perry, Bryant, Marion & Johnstone, by Charles T. Roy, Jr., for plaintiff appellant-appellee.

William H. Ashendorf and Perry, Patrick, Farmer & Michaux, by Roy H. Michaux, Jr., for defendant appellant-appellee.

BRITT, Judge.

PLAINTIFF'S APPEAL

[1] The sole question presented by plaintiff's appeal is whether the trial court erred in denying plaintiff's motion for attorneys' fees in amount of $31,900, representing ten percent of the principal amount of the verdict. We hold that the court did not err in denying the motion.

The contract between the parties contains the following provision:

> "In the event any Progress Payment or any final payment, or any part of either of same, shall not be paid when and as the same shall become due and payable as provided herein, such Progress Payment or final payment, or part thereof as shall be past due shall bear interest at the rate of ten percent (10%) per annum, and in the event of any such nonpayment, if same be placed in the hands of an attorney for collection or if collected through any bankruptcy proceedings or any other court action, Owner agrees to pay, in addition to all other sums due or to become due hereunder, an additional ten percent of any monies so unpaid as attorneys' fees."

Plaintiff argues that under the common law of our State, parties may contract for the payment of attorneys' fees in the event of litigation based on the contract. We do not find this argument persuasive.

The first expression of our Supreme Court on this question was in *Tinsley v. Hoskins,* 111 N.C. 340, 16 S.E. 325 (1892). There the court held that a stipulation in a promissory note "that in case this note is collected by legal process the usual collection fee shall be due and payable" is not consistent with public policy, therefore, the same is not enforceable.

In *Parker v. Realty Company,* 195 N.C. 644, 646, 143 S.E. 254, 256 (1928), the court stated with approval the general rule that " '[a]ttorneys' fees are not recoverable by successful litigants in this State, as such are not regarded as a part of the court costs'." The court further declared that "[t]his rule has been applied to suits on promissory notes, breach of contract, personal injury and injunctions."

It appears to be well established that ordinarily attorneys' fees are recoverable only when expressly authorized by statute. *Horner v. Chamber of Commerce,* 236 N.C. 96, 72 S.E. 2d 21 (1952). *See also Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326 (1963); *Wachovia Bank & Trust Company v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578 (1952); *Credit Corporation v. Wilson,* 12 N.C. App. 481, 183 S.E. 2d 859 (1971), *aff'd,* 281 N.C. 140, 187 S.E. 2d 752 (1972).

[2] Plaintiff next argues that assuming the common law does not allow recovery of attorneys' fees in this case, their recovery is authorized by G.S. 6-21.2 (enacted in 1967) which provides in pertinent part: "Obligations to pay attorneys' fees upon any note, conditional sale contract or *other evidence of indebtedness* . . . shall be valid and enforceable. . . ." (Emphasis added.) Plaintiff contends that the provision of the contract quoted above is an "evidence of indebtedness" in the contemplation of the statute. We reject this argument.

In *Brown v. Brown,* 213 N.C. 347, 196 S.E. 333 (1938), the Supreme Court held that while all questions of public policy are for the determination of the Legislature, a statute will not be construed to alter established principles of public policy founded on good morals unless that intent is clearly and unequivocally expressed in the statute. We think the rule of strict construction must be applied to G.S. 6-21.2 and that when the statute is strictly construed, the interpretation urged by plaintiff cannot be given.

For the reasons stated, the order from which plaintiff appeals is affirmed.

DEFENDANT'S APPEAL

Defendant's sole assignment of error relates to exceptions to three portions of the trial court's charge to the jury. Suffice it to say, we have carefully reviewed the entire charge, with

particular reference to defendant's exceptions, and conclude that defendant has failed to show prejudicial error.

On plaintiff's appeal — affirmed.

On defendant's appeal—no error.

Judges VAUGHN and ARNOLD concur.

LARRY H. STEWART, EMPLOYEE v. NORTH CAROLINA DEPARTMENT OF CORRECTIONS, EMPLOYER, SELF-INSURED

No. 7611IC82

(Filed 16 June 1976)

1. **Master and Servant § 56— accident arising out of course and scope of employment**

To be compensable under the Workmen's Compensation Act, an accident must arise out of the course and scope of employment, and where the fruit of certain labor accrues either directly or indirectly to the benefit of an employer, employees injured in the course of such work are entitled to compensation. G.S. 97-1 *et seq.*

2. **Master and Servant § 56— act outside normal duties — performance at direction of superior — compensability for injury**

When a superior directs a subordinate employee to go on an errand or to perform some duty beyond his normal duties, the scope of the Workmen's Compensation Act expands to encompass injuries sustained in the course of such labor; moreover, the order need not be couched in the imperative, but it is sufficient for compensation purposes that the suggestion, request or even the employee's mere perception of what is expected of him under his job classification, serves to motivate undertaking an injury producing activity.

3. **Master and Servant § 56— act outside normal duties — performance at direction of superior — compensability for injury**

The Industrial Commission correctly found that plaintiff's employer benefited from plaintiff's help in building a shed, the building was undertaken at the behest of plaintiff's superior officer, and plaintiff's injury sustained during that activity was compensable under the Workmen's Compensation Act, even though the activity took place during plaintiff's off hours and was not one of the regular duties of his employment.

APPEAL by defendant from opinion and award of the Industrial Commission. Order entered 6 November 1975. Heard in the Court of Appeals 11 May 1976.

Plaintiff filed this claim under the provisions of the Workmen's Compensation Act. The parties stipulated that they were bound by the act, that the employer-employee relationship existed between the parties, plaintiff's average weekly wage, his disability rating, and that the only issue is whether there was an injury by accident arising out of and in the course of plaintiff's employment with defendant on 20 October 1973.

The case was heard by a deputy commissioner who found and concluded that while plaintiff's injury by accident arose out of his employment, his injury did not arise in the course of his employment. Plaintiff appealed to the full commission.

Pertinent findings of fact made by the full commission, to which defendant made no exception, are summarized (unless quoted) as follows:

On 20 October 1973 plaintiff was employed by defendant as a correctional law officer at the Harnett County Youth Center. His general duties involved the supervising of inmates, either in dormitories or in fence-control towers. Plaintiff's immediate supervisor was a shift lieutenant who was answerable to the captain of the center, Otis Temple. While plaintiff did not work directly under the supervision of Captain Temple, the captain was one of his supervisors.

On 19 October 1973, just before plaintiff finished his 2:00-10:00 p.m. shift, Captain Temple asked plaintiff if he would come the following day during his off hours and help on a project involving the building of a shelter for a picnic area. Building the shelter was not one of the regular duties of plaintiff and no pressure was put on him by the captain; however, plaintiff agreed to help because he was asked to do so by his superior.

The project included tearing down a house which belonged to one William Byrd but had been given to the State. The material obtained was to be transported to State-owned land some one-half mile from the youth center and was to be used in building a shelter for a picnic area. Plaintiff did not originate the idea for the project but learned of it from Captain Temple, the organizer of the effort.

"The shelter was to be used for the benefit of both the employees of the Youth Center and the inmates. It was intended that both the employees and the inmates, some of whom were

entitled to work release privileges, would use the area for cookouts. It was anticipated that the morale of the employees and inmates would be improved thereby making the job of running the Youth Center easier. The State would therefore benefit indirectly by the completion of this project."

On 20 October 1973 plaintiff drove his own vehicle to the Byrd property. Other employees of the youth center were at the site, some of whom had arrived in State vehicles. At the time of his injury, plaintiff was on the roof of the house. A chimney collapsed over plaintiff, causing him to fall from the roof landing in the bed of a truck with bricks from the chimney falling on top of him.

The commission found as a fact and concluded as a matter of law that plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant. From an award in favor of plaintiff, defendant appealed.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert M. Clay, for plaintiff appellee.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for defendant appellant.

BRITT, Judge.

Defendant assigns as error the finding of fact and conclusion of law that the accident causing plaintiff's injury arose out of and in the course of his employment. We find no merit in the assignment.

[1] To be compensable an accident must arise out of the course and scope of employment. *Loflin v. Loflin,* 13 N.C. App. 574, 186 S.E. 2d 660 (1972), *cert. denied,* 281 N.C. 154, 187 S.E. 2d 585 (1972). Where the fruit of certain labor accrues either directly or indirectly to the benefit of an employer, employees injured in the course of such work are entitled to compensation under the Workmen's Compensation Act. G.S. 97-1 et seq. *Clark v. Burton Lines,* 272 N.C. 433, 158 S.E. 2d 569 (1968).

[2] This result obtains especially where an employee is called to action by some person superior in authority to him. Here, Captain Temple, four grades higher up the chain of command, suggested to plaintiff that he participate in tearing down the old house. It appears clear that when a superior directs a

subordinate employee to go on an errand or to perform some duty beyond his normal duties, the scope of the Workmen's Compensation Act expands to encompass injuries sustained in the course of such labor. Were the rule otherwise, employees would be compelled to determine in each instance and, no doubt at their peril, whether a requested activity was beyond the ambit of the act. *See* 1 A. Larson, Law of Workmen's Compensation § 27.40 (1972).

The order or request need not be couched in the imperative. It is sufficient for compensation purposes that the suggestion, request or even the employee's mere perception of what is expected of him under his job classification, serves to motivate undertaking an injury producing activity. So long as ordered to perform by a superior, acts beneficial to the employer which result in injury to performing employees are within the ambit of the act. *Aldridge v. Foil Mtr. Co.*, 262 N.C. 248, 136 S.E. 2d 591 (1964). *See e.g., Hales v. North Hills Construction Co.*, 5 N.C. App. 564, 169 S.E. 2d 24 (1969) (by implication), *cert. denied* (7 October 1969).

[3] We feel the full commission correctly found that the work benefited plaintiff's employer and was undertaken at the behest of plaintiff's superior officer. Our own analysis of the record supports the commission's findings and conclusions. Where the findings of the commission are supported by competent evidence, they are conclusive on appeal. G.S. 97-86, *McMahan v. Hickey's Supermarket*, 24 N.C. App. 113, 210 S.E. 2d 214 (1974).

For the reasons stated, the opinion and award of the commission is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

PAUL T. REEVES, T/A REEVES AUCTION COMPANY & REALTY
v. JACK POWELL JURNEY

No. 7523DC970

(Filed 16 June 1976)

1. **Parties § 2; Rules of Civil Procedure § 17— action on check — real estate agent — real party in interest**

A real estate agent could properly bring an action to recover on a check made payable to the agent on which payment had been stopped and which had been given to the agent as earnest money to apply on the purchase price of property the agent was selling for the owners thereof, notwithstanding the agent testified that he disclaimed any personal interest in proceeds of the check and that he considered the proceeds to be the property of the owners, since the action was not brought to recover on the contract of sale but was brought to recover on a check to which the agent was a party. G.S. 1A-1, Rule 17(a).

2. **Rules of Civil Procedure § 17— ratification of action after completion of trial**

The trial court erred in refusing to consider a ratification of a real estate agent's action filed by the owners of the property in question after completion of the trial but before judgment was entered.

APPEAL by plaintiff from *Osborne, Judge.* Judgment entered 15 September 1975 in District Court, ALLEGHANY County. Heard in the Court of Appeals 16 March 1976.

Civil action to recover $1,000.00, the amount of a check drawn by defendant payable to plaintiff on which payment was stopped. The case was tried by the court without a jury.

Plaintiff testified he was a real estate agent with whom Elmer and Ruth Osborne listed their farm for sale. He showed the farm to defendant. On 12 June 1974 defendant signed a written offer to purchase and gave plaintiff the check as earnest money to apply on the purchase price. On 12 June 1974 Mr. and Mrs. Osborne signed acceptance of the offer. Plaintiff deposited the check in his escrow account, but it was returned to him by the bank with notation that payment was stopped. The written contract of sale signed by defendant and the Osbornes, which was introduced in evidence by plaintiff, provided that the "earnest money shall be forfeited as liquidated damages" if the purchaser failed to comply with the terms of his contract.

Defendant admitted signing and delivering the check and the offer to purchase, but testified he did so under an oral understanding with plaintiff that the entire transaction was to be subject to the condition that his brother approve the purchase after viewing the property. He testified that on the next day, 13 June 1974, he stopped payment on the check when he realized the weak position he had put himself in by not requiring the condition to be put in the instrument.

After close of defendant's evidence, plaintiff was recalled by the court. During the course of his testimony he stated that he considered the $1,000.00 to be Mr. and Mrs. Osborne's money, that if he recovered it the attorney's fee would be paid and "every penny of the balance will go to Mr. and Mrs. Osborne," and that he would not receive a cent of it for acting as their agent.

The trial occurred at the 8 September 1975 session of District Court. Before judgment was entered and on 10 September 1975, Elmer and Ruth Osborne signed a ratification of the action under Rule 17(a) of the Rules of Civil Procedure. In this they ratified commencement of the action, authorized plaintiff to proceed with the cause as their agent as if they had been parties from the outset, and consented to become parties of record and to be bound as fully as if they had been original plaintiffs.

On 15 September 1975 the court entered judgment making findings of fact from which it concluded that defendant breached the contract with Mr. and Mrs. Osborne by failing to purchase the property and by stopping payment on the check, but that plaintiff is not the real party in interest with respect to the contract except as to any commissions he might receive, which commissions were not proven. The court ruled that the ratification filed after completion of the trial should not be allowed or considered, and adjudged that plaintiff recover nothing of defendant. Plaintiff appealed.

Edmund I. Adams for plaintiff appellant.

Arnold L. Young for defendant appellee.

PARKER, Judge.

[1] The court erred in ruling that plaintiff lacks interest to prosecute this action. Under the pleadings this action was not

brought to enforce or to recover on the contract of sale as to which plaintiff was not a party. It was brought to recover on the check payable to plaintiff on which payment was stopped. "A check is a contract within itself. By the act of drawing and delivering it to the payee, the drawer commits himself to pay the amount of the check in event the drawee refuses payment upon presentment." *Kirk Co. v. Styles, Inc.*, 261 N.C. 156, 159, 134 S.E. 2d 134, 136 (1964). By acting in apt time, the drawer of a check may stop its payment, G.S. 25-4-403, but "his revocation of the bank's authority to pay the check does not discharge his liability to the payee or holder." *Kirk Co. v. Styles, Inc. supra,* p. 159. Plaintiff's disclaimer of any personal interest in proceeds of the check and his testimony that he considered such proceeds to be the property of the Osbornes did not deprive him of the right to maintain this action. G.S. 1A-1, Rule 17(a) includes provision that "a party with whom or in whose name a contract has been made for the benefit of another . . . . may sue in his own name without joining with him the party for whose benefit the action is brought."

[2] The court also erred in refusing to consider the ratification filed by the Osbornes. Rule 17(a) provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

The judgment appealed from is reversed and this cause is remanded for further proceedings consistent herewith.

Reversed and remanded.

Judges BRITT and CLARK concur.

BRENDA JOYCE W. DAVIS, ADMINISTRATRIX OF THE ESTATE OF JAMES WAINWRIGHT v. GRACE BOOTH

No. 763SC42

(Filed 16 June 1976)

Automobiles § 72— sudden emergency — contributing to emergency — jury question

The trial court did not err in instructing the jury with respect to the doctrine of sudden emergency where the evidence tended to show that defendant looked into her rear view mirror and saw a black youth, whom she had agreed to give a lift in her automobile, sliding across the back seat and coming toward her with his hands, and it was for the jury, not the court, to say whether defendant had contributed to the creation of the sudden emergency by placing the black youth in the back seat of her car.

APPEAL by plaintiff from *Browning*, Judge. Judgment entered 16 September 1975 in Superior Court, PITT County. Heard in the Court of Appeals 3 May 1976.

This is a civil action wherein the plaintiff, Brenda Joyce W. Davis, Administratrix of the estate of James Wainwright, is seeking damages from the defendant, Grace Booth, allegedly arising from the death of deceased due to the negligence of defendant in the operation of an automobile.

At trial before a jury, plaintiff offered evidence tending to show the following:

On 17 July 1974, the defendant, a forty-five year old white female, had been shopping at Harris' Super Market in Greenville, North Carolina. When she came out of the store, Sylvester Joyner, a sixteen year old black male, asked her for a ride out to the Stantonsburg Highway. She agreed, and he got into the car, sitting in the right rear seat. The defendant had a small dog which sat alternately on her left side or on her shoulder as she drove. As she proceeded out of town on N. C. 43, the defendant passed the turnoff to the Stantonsburg Highway without turning. Joyner yelled, "Whoa." The dog started barking and the defendant looked back and started yelling at Joyner. She lost control of the car and pressed the accelerator. She ran off the road, over a small drainage ditch, and into the yard of James Wainwright, the deceased.

Defendant's car traveled 240 feet from the paved portion of the highway before coming to a stop after hitting deceased

and two trees. The deceased, who had been sitting in a chair in his yard, was killed when defendant's car pinned him against one of the trees.

When the car came to a stop, Joyner asked defendant if she was all right. He then became frightened because of what people would think of him riding with a white woman, so he ran.

Defendant's testimony tended to show the following: She was giving Joyner a ride out N. C. 43. She knew he wanted to go past the hospital but she did not know where he wanted to get out of the car. Her dog was riding in the seat, sitting on her right side. As they passed the hospital, she glanced in the rear-view mirror and saw Joyner sliding across the seat. She turned around and Joyner was behind her with his hands up, coming toward her; the defendant screamed and lunged forward. She lost control of the car, hitting deceased. Joyner never said anything to the defendant. When the car stopped, he got out and ran.

From judgment entered on the jury verdict that Wainwright's death was not "a direct and proximate result of the negligence of the defendant, Grace Booth," plaintiff appealed.

James, Hite, Cavendish, and Blount by Robert D. Rouse, III, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey and Clay by Ronald C. Dilthey and Robert W. Sumner for defendant appellee.

HEDRICK, Judge.

By her first three assignments of error, plaintiff contends the court erred in its instruction to the jury with respect to the "doctrine of sudden emergency." In her brief, plaintiff states:

> "Plaintiff contends that the trial judge gave erroneous instructions to the jury on the law of who had the burden of proof in establishing the affirmative defense of the sudden emergency doctrine, by placing this burden on the plaintiff rather than the defendant."

The sudden emergency rule is a mere application of the rule of the prudent man. It raises no separate issue with reference to the burden of proof. *Foy v. Bremson,* 286 N.C. 108, 209 S.E. 2d 439 (1974). We have carefully considered the exceptions

upon which plaintiff bases the contention set out above and find them to be without merit. The court's instructions to the jury with respect to the burden of proof as to the issue of defendant's negligence were entirely correct.

Next plaintiff contends the court erred in instructing the jury with respect to the "doctrine of sudden emergency" since all of the evidence showed that defendant contributed to the creation of the sudden emergency "by placing the black youth in the back seat of her car." In *Bremson, supra,* at 120, Chief Justice Bobbitt wrote:

> "Instructions with reference to the rule applicable when a motorist is confronted by a sudden emergency should be given whenever the evidence discloses a factual situation appropriate for such instructions."

The evidence in the present case was clearly sufficient to raise an inference that the defendant was confronted by a "sudden emergency" when she looked into the mirror and saw the youth sliding across the seat and coming toward her with his hands, and that her reaction was not negligence when viewed in light of the rule of the prudent man. It was for the jury, not the court, to say whether defendant had contributed to the creation of the sudden emergency. We hold the court correctly, fairly and adequately declared and explained the law arising on the evidence given in the case with respect to the defendant's negligence. These assignments of error are overruled.

Plaintiff's other assignments of error are formal in nature and raise no new question. We hold the plaintiff had a fair trial free from prejudicial error.

No error.

Chief Justice BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. GARY CARLON SWINK

No. 7622SC180

(Filed 16 June 1976)

Criminal Law § 102— jury argument — statement that defendant is "professional criminal"

In a prosecution for breaking and entering and larceny, the district attorney's statement in his jury argument that defendant is a "professional criminal" constituted prejudicial error.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 23 October 1975 in Superior Court, IREDELL County. Heard in the Court of Appeals 7 June 1976.

The defendant, Gary Carlon Swink, was charged in a bill of indictment, proper in form, with breaking or entering Houston L. Johnston's home, and larceny of personal property belonging to Houston Johnston having a total value of $2,000.00. Defendant pleaded not guilty to each charge and the State offered evidence tending to show the following:

Houston Johnston left home for work at about 8:15 a.m. on 11 April 1975. He returned home approximately one hour and fifteen minutes later and found that someone had entered his home by breaking out a window and knocking out a screen in the basement. A coin collection valued at approximately $1,800.00 and a "Winchester Commemorative Rifle" valued at $250.00 were missing.

Ronnie Saintsing testified that he, along with Gary Swink, Larry Jessup and Buddy Whitaker went to Johnston's house the morning of 11 April 1975. While Jessup and Whitaker waited outside, he and the defendant broke out a basement window and entered Johnston's house. Once inside, they took a steel tackle box containing a coin collection and a Winchester rifle and left through the same window. They saw the police approaching so they ran into the woods near Johnston's house and hid the stolen articles. Jessup and Saintsing were apprehended and the stolen property was recovered. Saintsing also testified that it was the defendant's plan to rob the house and he had led them to the house on the morning of 11 April 1975.

The defendant did not testify and offered no evidence.

The jury returned verdicts of guilty as to each charge. From judgment entered that defendant be imprisoned for four

to six years for breaking or entering and from judgment entered that he be imprisoned for three years for larceny, suspended on certain conditions, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray and Assistant Attorney General Ann Reid for the State.

Pope, McMillan and Bender by Harold J. Bender for defendant appellant.

HEDRICK, Judge.

The defendant contends "the trial court committed reversible error in allowing the . . . [district attorney] to make prejudicial and improper remarks to the jury." In his closing argument, the district attorney made the following statements:

> "You know, we read a lot in the paper about coddling criminals, but now it is your chance to stand up and be counted. By convicting this man, you are saying that we will not have this go on here in Iredell County."
>
> "This man (indicating the defendant) is a professional criminal. I know it and Mr. Bender (defendant's attorney) knows it too."

There was an objection by defendant but no ruling was made from the bench.

In *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967), the Supreme Court held it to be prejudicial error for the solicitor to refer to defendants as "habitual storebreakers." In *State v. Foster*, 2 N.C. App. 109, 162 S.E. 2d 583 (1968), the use of the term "professional crook" was held to be prejudicial error. We believe the remarks made in this case fall within the prohibition of the above cited cases and entitle defendant to a new trial.

We do not discuss defendant's other assignments of error since they are not likely to occur at a new trial.

New trial.

Judges PARKER and ARNOLD concur.

RUBY PARKER, T/A THE GREEN DOOR HEALTH CLUB v. WADE STEWART, SHERIFF OF HARNETT COUNTY, AND BOARD OF COUNTY COMMISSIONERS OF HARNETT COUNTY, JACK BROCK, COUNTY MANAGER

No. 7611SC134

(Filed 16 June 1976)

Obscenity; Constitutional Law § 12— massage parlor ordinance — revocation of license by sheriff — unconstitutionality

Provisions of a "Massage Parlor" ordinance which permit the sheriff to revoke licenses after conducting hearings on alleged violations of the ordinance do not afford the licensee the opportunity to be heard or defend in a regular proceeding before a competent tribunal in violation of Article I, § 19 of the N. C. Constitution; furthermore, the whole ordinance must be declared invalid since it is clear that the ordinance would not have been enacted without the revocation provisions.

APPEAL by defendants from *Brewer, Judge.* Judgment entered 27 October 1975 in Superior Court, HARNETT County. Heard in the Court of Appeals 25 May 1976.

On 4 August 1975, the Board of County Commissioners of Harnett County adopted an "ordinance Regulating the Business of Massage and Massage Parlors." Plaintiff is the operator of a "Massage Parlor" within the meaning of the ordinance.

Plaintiff brought this action to restrain enforcement of the ordinance. It was agreed that the judge should decide the case without a jury. Judge Brewer held that the ordinance was unconstitutional and enjoined defendants from enforcing the ordinance or any part thereof. Defendants appealed.

Neill McK. Ross, for plaintiff appellee.

Woodall & McCormick, by Edward H. McCormick, for defendant appellants.

VAUGHN, Judge.

Although defendants bring forward several arguments, they primarily contend that Judge Brewer erred when he concluded that Section 10 of the ordinance is invalid because it violates Article 1, Section 19 of the North Carolina Constitution. That section of the Constitution provides that no person may be deprived of his property except by the law of the land or ex-

pressed another way, except by due process of law. A license to engage in an occupation is a property right. The government may not revoke an occupational license except by due process of law. Among other things "the law of the land" or "due process of law" imports both notice and the opportunity to be heard before a competent tribunal.

Section 10, the revocation section, of the ordinance is as follows:

> "10. *Revocation.* (a) The Sheriff shall revoke the license of any licensee who has violated this ordinance.
>
> (b) Such revocation may be made only after written notice of the grounds for revocation has been given to the licensee and he has had an opportunity to answer the charges."

The office of the Sheriff is a constitutional office. The Sheriff is the chief law enforcement officer of the county and his duties are generally prescribed by the General Statutes of the State. In the ordinance before us, the County Commissioners have attempted to commission the Sheriff as a special tribunal to conduct hearings on alleged violations of the ordinance. Without further comment on the authority of the Commissioners, we simply hold that the provisions for revocation of licenses after a hearing before the Sheriff do not afford the constitutionally required "opportunity to be heard or defend in a regular proceeding before a competent tribunal." *Smith v. Keator,* 285 N.C. 530, 535, 206 S.E. 2d 203. We hold that the trial judge correctly concluded that the clause violated the Constitution of the State of North Carolina in that it would allow licenses to be revoked without due process of law and contrary to the law of the land.

The record on appeal includes an affidavit from a deputy sheriff wherein he states that, as a matter of departmental policy, the Sheriff will revoke only the licenses of those who have been *convicted* of violating the ordinance and whose time for appeal has lapsed. This, however, is not what the ordinance provides and is not the position advanced by defendants on this appeal. They argue that the Sheriff can "constitutionally conduct the required due process hearing" and argue that it is common practice to consolidate "licensing, investigative and revocation authority in one unit or official who may acquire sufficient familiarity with the area to effectively regulate it."

Defendants also argue that even if Section 10 of the ordinance is unconstitutional, the court erred in striking down the entire ordinance. The trial judge based his conclusion on the absence of a severability clause. The trial judge did not pass on whether the standards for issuance and revocation of the permit were definite, adequate and reasonable. Although those questions, therefore, are not before us, it appears that the ordinance is sufficient to pass constitutional muster in those respects. We hold, nevertheless, that the court did not err in its judgment. We do not rely entirely on the absence of a severability clause.

> "Where a part of a statute is invalid, the remainder, if valid, will be enforced, provided it is complete in itself and capable of being executed in accordance with the apparent legislative intent; but if the void clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole of it must fall. . . . 'Even in a case where legal provisions may be severed in order to save, the rule applies only when it is plain that the Legislature would have enacted the legislation with the unconstitutional provisions eliminated.' " *Commissioners v. Boring,* 175 N.C. 105, 95 S.E. 43.

We do not believe the defendant Board of Commissioners would have enacted the licensing ordinance with the revocation provisions eliminated.

The judgment from which defendants appealed is affirmed.

Affirmed.

Judges MARTIN and CLARK concur.

IN THE MATTER OF THE BUILDING PERMIT AND ZONING RELATING TO PERRY GREENE AND WATAUGA READY-MIX

No. 7624SC152

(Filed 16 June 1976)

1. Municipal Corporations § 31— nonconforming use — building permit — failure of board to revoke

A zoning board of adjustment did not, as a matter of law, err in failing to revoke a building permit issued for modernization of a

concrete plant operated as a nonconforming use after the work authorized by the permit had been completed.

2. **Municipal Corporations § 31— building permit — appeal within reasonable time**

Appeal from the issuance of a building permit was not taken within a reasonable time within the meaning of a zoning ordinance where work under the permit began on 12 January 1971 and petitioners made their initial appearance before the board of adjustment on 29 March 1972.

APPEAL by petitioners from *Friday, Judge.* Order entered 6 November 1975 in Superior Court, WATAUGA County. Heard in the Court of Appeals 26 May 1976.

Respondents own a tract of land upon which they operate a concrete plant. After the plant had been in operation for several years the area within which it is located was annexed to the Town of Boone. The area was subsequently rezoned as a R-1, single family residential district. Respondents thereafter continued operation of the plant as a nonconforming use. Respondents applied to the Building Inspector for a building permit to "modernize existing plant, to include dust control, concrete paving and new batch plant." The cost of the project was estimated to be $50,000.00. One of the purposes of the proposed changes was to comply with applicable regulations dealing with air pollution. The Building Inspector issued the permit on 29 December 1970. No one appealed from the issuance of the permit. From 12 January 1971 until 18 January 1972, respondents incurred obligations of about $50,500.00 for repairs and improvement to the premises. The project was completed on 2 May 1972 at a total cost of $72,637.30.

On 29 March 1972, fifteen months after the permit was issued and after most of the work authorized by the permit had been completed, petitioners appeared before the Board of Adjustment. Petitioners are citizens and property owners who reside near respondents' plant. Through counsel, petitioners requested that the Board revoke the building permit issued on 29 December 1970. The Board voted to deny the request. Petitioners sought and obtained judicial review.

The matter was twice remanded to the Board for additional findings. Finally, on 6 November 1975, Judge Friday entered a judgment wherein he affirmed the Board's action in declining to revoke the permit. Petitioners appealed.

McElwee, Hall & McElwee, by William H. McElwee III, for plaintiff appellants.

Eggers & Eggers, by Steve C. Eggers III and Steve C. Eggers, Jr.; Holshouser & Lamm, by Charles C. Lamm, Jr., and J. E. Holshouser, Sr., attorneys for respondent appellee.

VAUGHN, Judge.

There are no assignments of error suggesting lack of evidence to support the findings of fact or suggesting that there was error in failing to find other facts. The assignments of error are directed simply to the entry of the orders of the Board and the judgment of the Superior Court. The only question before us, therefore, is whether, on the facts found, the Board erred as a matter of law in failing to revoke the permit.

[1] We have carefully reviewed the facts found by the Board and find no reason to say, as a matter of law, that the Board must be compelled to revoke the building permit. Moreover, we have some question about what petitioners would have accomplished had they succeeded in persuading the Board to "revoke" the permit. The permit was issued on 29 December 1970. A permit is a license or grant of authority to do a thing. The things authorized by the permit were completed prior to the Board's final action on petitioners' request that the permit be revoked. Respondents were not then seeking to do anything under the authority of the permit.

[2] The ordinance in question provides for appeal from the Building Inspector to the Board of Adjustment. It further provides that the appeal must be taken within a reasonable time by filing written notice with the Inspector and the Board specifying the grounds for the appeal. These petitioners have never given written notice of any appeal from the decision of the Building Inspector to grant the permit. Respondents began work under the authority of the permit on 12 January 1971. Even if petitioners' informal appearance before the Board on 29 March 1972 is to be considered as an appeal, on the facts of this case, we must agree with the Board's conclusion that the "appeal" was not taken within a reasonable time.

Finally, the substance of petitioners' argument appears to be that the permit was illegally issued and is "a nullity-void ab initio." We say only that the record before us does not support that conclusion.

"The writ of *certiorari*, as permitted by the zoning ordinance statute, is a writ to bring the matter before the court, upon the evidence presented by the record itself, for review of alleged errors of law. It does not lie to review questions of fact to be determined by evidence outside the record." *In Re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E. 2d 1.

The Board did not find, nor was it requested to find, that the project authorized by the building permit allowed construction not permitted by the applicable ordinance.

The judgment from which petitioners appealed is affirmed.

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. ANDREW NEAL WRIGHT

No. 7621SC104

(Filed 16 June 1976)

1. **Criminal Law § 89— State's eyewitness — psychiatric history — refusal to allow cross-examination erroneous**

The trial court in a second degree burglary case erred in refusing to permit defense counsel to cross-examine the State's only eyewitness with regard to his psychiatric history as a juvenile.

2. **Criminal Law § 53— psychiatric history of witness — expert medical testimony improperly excluded**

The exclusion of evidence, in the form of testimony and psychiatric reports, as to psychological evaluation and psychiatric treatment of the State's eyewitness was error, since a properly qualified medical expert is allowed to tender his opinion concerning a witness based upon personal observation and other information contained in the patient's official hospital record.

APPEAL by defendant from *Seay, Judge*. Judgment entered 30 October 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 May 1976.

Defendant was indicted for the second degree burglary of the home of Mr. and Mrs. Tony Eugene Hamby on 11 May

1975. From a verdict of guilty, defendant was sentenced to seven years in prison as a committed youthful offender.

Attorney General Edmisten by Associate Attorney General Joan H. Byers for the State.

Randolph and Randolph by Clyde C. Randolph, Jr., for defendant appellant.

PARKER, Judge.

[1] Defendant contends the trial judge erred in refusing to permit defense counsel to cross-examine state's witness, Steve Lynn Kelly, with regard to Kelly's psychiatric history as a juvenile. During a voir dire hearing, defense counsel questioned Kelly whether he had ever been treated by a psychiatrist and ever been examined at the Child Guidance Clinic, the Juvenile Evaluation Center, the Forsyth County Mental Health Clinic, or the Cameron-Morrison Training School. The court held this testimony to be inadmissible before the jury. We hold the exclusion to have been error. In *State v. Armstrong,* 232 N.C. 727, 62 S.E. 2d 50 (1950), Chief Justice Stacy held it was reversible error to deny the defense the opportunity to impeach the mentality or intellectual grasp of a witness. The testimony of this particular witness, Kelly, was of significant consequence as he was the only eyewitness to testify concerning the alleged criminal activity of the defendant. "The denial of any impeachment of the State's only eyewitness to the [crime] necessitates another hearing. It is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution who testify against him." *State v. Armstrong, supra,* at p. 728.

[2] In accord with the above, we also hold the exclusion of evidence, in the form of testimony and psychiatric reports, as to psychological evaluation and psychiatric treatment of Kelly to be error. A properly qualified medical expert is allowed to tender his opinion concerning a witness based upon personal observation and other information contained in the patient's official hospital record. *State v. DeGregory,* 285 N.C. 122, 203 S.E. 2d 794 (1974). Upon the laying of a proper foundation, hospital records may be admissible as primary evidence as coming within one of the well recognized exceptions to the hearsay rule—entries made in the regular course of business. *Sims v. Insurance Co.,* 257 N.C. 32, 125 S.E. 2d 326 (1962) ; See Annot., 69 A.L.R. 3rd 22, Admissibility Under Business Entry Statutes

of Hospital Records in Criminal Case. We note that no objections to this evidence based upon doctor-patient privilege have been raised.

For the errors noted above, the defendant is entitled to a

New trial.

Judges HEDRICK and ARNOLD concur.

TED REID v. FLETA KERLEY REID

No. 7625DC148

(Filed 16 June 1976)

Rules of Civil Procedure § 54— judgment adjudicating fewer than all claims — appeal premature

Defendant's appeal from a judgment adjudicating fewer than all the claims of the parties is dismissed since the trial court failed to find that there was "no just reason for delay."

APPEAL by defendant from *Vernon, Judge.* Judgment entered 17 November 1975 in District Court, CALDWELL County. Heard in the Court of Appeals 26 May 1976.

This is a civil action wherein the plaintiff, Ted Reid, is seeking a divorce from bed and board from his wife, the defendant, Fleta Kerley Reid. In his complaint, plaintiff alleged that his wife "offered such indignities to the person of the plaintiff as to render his condition intolerable" and "constructively abandoned" him. The defendant answered denying the material allegations of the complaint. She also counterclaimed for both permanent and *pendente lite* alimony and an attorney's fee, claiming that plaintiff had abandoned and deserted her.

On 16 October 1975, plaintiff moved for summary judgment on defendant's counterclaim, alleging that defendant is not a "dependent spouse" as required by G.S. 50-16.2. After the filing of interrogatories by ~~both parties and an affida~~vit of defendant, all tending to show the income and assets of the respective parties, plaintiff renewed his motion for summary judgment. On 17 November 1975, the matter came on for a hearing before Judge Vernon who granted plaintiff's motion for summary judgment on defendant's counterclaim. On 19 November 1975, defendant moved to set aside summary judgment

on the grounds that plaintiff's sworn answers to defendant's interrogatories regarding his income were substantially incorrect. This matter came on for hearing wherein both parties offered evidence. Following the hearing, Judge Vernon entered an order on 20 November 1975 denying defendant's motion. Defendant appealed.

West, Groome and Baumberger by Carroll N. Tuttle for plaintiff appellee.

Randy Duncan for defendant appellant.

HEDRICK, Judge.

The judgment and order from which defendant appeals adjudicate fewer than all the claims of the parties. Since they are interlocutory and the judge below failed to find there was "no just reason for delay" in appealing the judgment, they are not now subject to review. G.S. 1A-1, Rule 54(b); *Leasing, Inc. v. Dan-Cleve Corp.*, 25 N.C. App. 18, 212 S.E. 2d 41 (1975), *cert. denied* 288 N.C. 241, 216 S.E. 2d 910 (1975).

Appeal dismissed.

Judges PARKER and ARNOLD concur.

CAROLINAS CHAPTER NECA, INC., ORIGINAL PLAINTIFF; AND L. G. EAKES AND ELECTRICAL CONTRACTING AND ENGINEERING CO., INC., A CORPORATION, ADDITIONAL PLAINTIFFS v. HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, N. C., DEFENDANT

No. 7626SC90

(Filed 16 June 1976)

Municipal Corporations §§ 4, 22— housing authority — no "municipality" within meaning of bid statute

Although a municipal housing authority is a municipal corporation organized for a special purpose, it is not a "municipality" subject to the provisions of G.S. 143-128 requiring separate bids on different branches of work to be performed in the construction of public buildings exceeding a certain cost.

APPEAL by plaintiffs from *Snepp, Judge.* Judgment entered 2 September 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 May 1976.

Harkey, Faggart, Coira & Fletcher, by Charles F. Coira, Jr., for plaintiff appellants.

Fleming, Robinson & Bradshaw, P.A., by Robert C. Sink, for defendant appellee.

VAUGHN, Judge.

This appeal presents the sole question of whether defendant is subject to the provisions of G.S. 143-128. That statute requires, in connection with "contracts for the erection, construction or altering of buildings for the State, or for any county or *municipality*" (when the cost exceeds a stated sum] that separate contracts be awarded for the named branches of the work to be performed. Formerly G.S. 160-280 required separate bids on contracts let by a "county or city." In 1963 that statute was repealed and the words "or for any county or municipality" were inserted in G.S. 143-128 following the word "State."

Defendant, Housing Authority of the City of Charlotte, was created pursuant to the provisions of Chapter 157 of the General Statutes, the Housing Authorities Law. It advertised for and accepted bids for construction under a single general contract that would be improper if it is subject to G.S. 143-128. It is our opinion that the trial judge was correct when he ruled that the statute did not apply to contracts let by defendant.

The question is not really whether a "Housing Authority" is a "municipal corporation" as has been held in *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693; *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252 and other cases. Defendant exists by reason of the Housing Authority Law. We will not attempt to summarize the powers granted local authorities under that act except to say that, once created, they are practically autonomous entities and are authorized to act without many of the restrictions imposed on other public bodies, particularly those having the power to levy and collect taxes. The act expressly provides that "[n]o provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state."

We hold that although defendant is a municipal corporation organized for a special purpose, it is not a "municipality" subject to the provisions of G.S. 143-128 requiring separate bids

on different branches of work to be performed on contracts it lets for construction of housing. The judgment is affirmed.

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. JAMES C. THOMAS, SR.

No. 7512SC803

(Filed 18 June 1976)

1. **Assault and Battery § 11; Indictment and Warrant § 8— assault with deadly weapon on police officer — one crime only charged**

The trial court did not err in refusing to strike the words "deadly weapon" from the bill of indictment charging defendant with assaulting ". . . a deputy sheriff . . . with a deadly weapon, to wit: a shotgun while [he was] engaged in his official duties as a deputy sheriff," since the indictment clearly charged defendant only with a violation of G.S. 14-34.2, assault with a firearm on a police officer while such officer was in the performance of his duties, and not in addition with a violation of G.S. 14-33(b)(1), assault with a deadly weapon.

2. **Assault and Battery § 11— assault with firearm on police officer in performance of his duties — sufficiency of indictment**

In a prosecution for assault with a firearm on a police officer while he was engaged in the performance of his duties, the indictment specified adequately the official duty being performed by the officer where it stated that he was answering a call at a given address concerning a domestic problem.

3. **Criminal Law §§ 102, 138— punishment provision of statute — reading to jury proper**

Defendant is entitled to a new trial where the court permitted defense counsel to read to the jury only the first portion of G.S. 14-34.2, which specifies the elements of the offense charged, but refused to permit him to read to the jury the portion of the statute fixing the punishment.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 19 June 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 January 1976.

Defendant was indicted for assault with a firearm upon a law-enforcement officer while such officer was in the performance of his duties, a violation of G.S. 14-34.2.

The State presented the testimony of John F. Conerly, a deputy sheriff of Cumberland County, who testified that on 12 April 1975 he was called during the course of his duties to defendant's home on a domestic problem. He did not have a warrant. Upon arrival, defendant's wife invited him into the house. Defendant asked the officer if he had a warrant and, upon being informed that he did not, told the officer to leave the house. Conerly complied and explained to defendant's wife that if she wanted to talk to him she would have to accompany him outside. As the officer was opening the door to leave, he felt an object in his back. He turned around slowly and observed defendant pointing a shotgun at him. Defendant told the officer "to get out of his house or he was going to kill [him]." Conerly backed out of the house, reached his patrol car, and radioed for assistance. Defendant's wife went with the officer to the magistrate's office, where Conerly obtained a warrant against defendant.

Defendant testified that he was cleaning his son's shotgun on the day in question but denied pointing the gun at the officer or threatening to kill him. Defendant's wife testified that her husband did not point a gun at the officer and stated that she did not see a gun in her husband's hand at any time while the officer was there.

The jury found defendant guilty, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Roy A. Giles, Jr., for the State.

Seavy A. Carroll for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the court's refusal to strike the words "deadly weapon" from the bill of indictment. Defendant maintains his motion to delete "deadly weapon" amounted to a motion to quash for duplicity, contending the indictment charged two offenses in one count, to wit: (1) assault with a deadly weapon, a violation of G.S. 14-33(b)(1), and (2) assault with a firearm on a police officer while such officer was in the performance of his duties, a violation of G.S. 14-34.2. We find no error in the court's ruling in this regard. The indictment in essence charges that defendant did "assault . . . a deputy sheriff . . . with a deadly weapon, to wit: a shotgun while [he was] engaged in his official duties as a deputy sheriff." This

clearly charges the defendant only with a violation of G.S. 14-34.2. See, *State v. Norton,* 14 N.C. App. 136, 187 S.E. 2d 364 (1972). G.S. 14-33(b) expressly provides that it applies "[u]nless [defendant's] conduct is covered under some other provision of law providing greater punishment." G.S. 14-34.2 does provide greater punishment.

[2] Defendant also assigns error to denial of his motion to quash the indictment for its failure to specify adequately the official duty being performed by Officer Conerly. Again, we detect no error, finding sufficient particularity in the language of the indictment which states that the officer was "engaged in his official duties as a deputy sheriff, to wit: answering a call at 309 Richmond Drive, Fayetteville, North Carolina, concerning a domestic problem."

[3] During his jury argument, defense counsel attempted to read G.S. 14-34.2 to the jury. The court permitted him to read only the first portion of the statute, which specifies the elements of the offense, and refused to permit him to read to the jury the portion of the statute fixing the punishment. In this there was error. "Counsel may, in his argument to the jury, *in any case,* read or state to the jury a statute or other rule of law relevant to such case, *including the statutory provision fixing the punishment for the offense charged.*" (Emphasis added.) *State v. Britt,* 285 N.C. 256, 273, 204 S.E. 2d 817, 829 (1974). However, "[t]his does not mean that a defendant should be permitted to argue that because of the severity of the statutory punishment the jury ought to acquit, to question the wisdom or appropriateness of the punishment, or to state the punishment provisions incorrectly. *State v. Britt, supra; State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974). Nor should either the state or the defendant be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons." *State v. McMorris,* 290 N.C. 286, 225 S.E. 2d 553 (filed 17 June 1976).

For the error in the court's refusing to permit defense counsel to read the punishment provision in the statute to the jury, defendant is entitled to a

New trial.

Chief Judge BROCK and Judge ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

BROWER v. BROWER No. 7615DC193	Chatham (69CVD127)	Reversed
REEVES v. MUSGROVE No. 7523DC966	Alleghany (73CVD362)	Vacated and Remanded
STATE v. HICKMAN No. 763SC156	Craven (75CR9530)	No Error
STATE v. MOODY No. 767SC183	Nash (75CR7569)	New Trial
STATE v. QUEEN No. 7627SC185	Lincoln (75CR4299)	No Error
STATE v. RAYMER No. 765SC73	New Hanover (75CR13425)	Affirmed
STEELMAN v. STEELMAN No. 7521DC1063	Forsyth (75CVD1546)	Affirmed

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ACCOUNTANTS

Evidence was sufficient to support trial court's findings that there was no oral contract between plaintiff and defendant to investigate employee dishonesty in plaintiff's business. *Associates, Inc. v. Myerly*, 85.

Evidence was sufficient to support trial court's determination that defendant was employed by plaintiff to prepare an unaudited financial statement and determine the net worth of the corporation, and that defendant was entitled to what those services were reasonably worth. *Ibid.*

ADMINISTRATIVE LAW

§ 5. Appeal and Review as to Administrative Orders

When the judge of superior court reviews the decision of an administrative agency, the judge is not required to make findings of fact, nor is the judge required to entertain a motion pursuant to Rule 52 to have the court amend its findings, make additional findings or amend its decision and order. *Markham v. Swails*, 205.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Defendant's appeal from the trial court's interlocutory order is subject to dismissal. *Bridges v. Bridges*, 209.

Order striking defendant's entire answer is appealable. *Earles v. Earles*, 348.

Appeal from judgment adjudicating fewer than all the claims of the parties is premature. *McRae v. Moore*, 507.

Trial court's order that the parties and their child submit to a psychiatric examination prior to final determination on the question of child custody was interlocutory and not appealable. *Williams v. Williams*, 509.

Purported appeal from an order denying a preliminary injunction was premature. *Gunkel v. Kimbrell*, 586.

Appeal from a ruling on a motion for change of venue as a matter of right is not premature. *Klass v. Hayes*, 658.

§ 7. Party Aggrieved

Defendants were not aggrieved by the trial court's order requiring a certified audit of the corporation in which they were shareholders since neither defendants nor the corporation was charged with payment for the audit. *Blount v. Taft*, 626.

§ 14. Appeal and Appeal Entries

The Court of Appeals did not obtain jurisdiction where the appeal was not taken within 10 days of entry of the order appealed from. *Markham v. Swails*, 205; *Brooks v. Matthews*, 614.

§ 15. Withdrawal of Appeal

Plaintiff's post-trial motion for voluntary dismissal and the proceedings thereon constituted an abandonment of plaintiff's appeal from the directed verdict for defendant, and trial court then had authority to grant plaintiff's motion for voluntary dismissal. *Bowen v. Motor Co.*, 463.

APPEAL AND ERROR — Continued

§ 17. Stay Bonds

The surety on a stay bond voluntarily made itself a party to an action and submitted itself to the jurisdiction of the court by executing the bond and participating in the hearing on a motion for judgment on the bond. *Koehring Co. v. Marine Corp.*, 498.

Trial court did not err in entering judgment against a surety on a stay bond prior to execution against defendant. *Ibid.*

§ 30. Motions to Strike

Motion to strike testimony previously admitted without objection is addressed to the discretion of the court. *Financial Services v. Elks*, 512.

§ 44. Effect of Failure to File Brief

Appeal is dismissed for failure of appellant to file a brief. *In re Church*, 511.

§ 63. Remand

The ends of justice require the cause to be remanded for a rehearing on defendants' motions to dismiss or quash the service of process. *Ridge v. Wright*, 609.

§ 68. Law of the Case and Subsequent Proceedings

Prior Supreme Court opinion did not constitute the law of the case as to the sufficiency of plaintiff's evidence where plaintiff amended its complaint prior to the second trial. *Tent Co. v. Winston-Salem*, 297.

ASSAULT AND BATTERY

§ 8. Defense of Self

In a prosecution for assault on a police officer with a firearm, trial court erred in refusing to instruct the jury on self-defense. *S. v. Polk*, 360.

§ 11. Indictment and Warrant

Indictment charging defendant with assault with a deadly weapon upon a police officer while he was engaged in his official duties charged defendant with only one crime and specified adequately the official duty being performed. *S. v. Thomas*, 757.

§ 14. Sufficiency of Evidence and Nonsuit

Evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill, though defendant's gun misfired. *S. v. Reives*, 11.

Evidence was sufficient for the jury in a prosecution for assault on a police officer with a firearm. *S. v. Polk*, 360.

Evidence that defendant put his hand on a gun and threatened the victim was sufficient for the jury in an assault case. *S. v. Sawyer*, 505.

§ 15. Instructions

In a prosecution for assault with a deadly weapon with intent to kill, the trial court erred in placing the burden on defendant to prove self-defense. *S. v. Turner*, 33.

Trial court's instructions were proper in a prosecution for assault with a deadly weapon with intent to kill. *S. v. Collins*, 120.

ASSAULT AND BATTERY — Continued

Trial court did not err in instructing the jury that serious injury "is any physical injury that causes great pain and suffering." *S. v. Williams*, 24.

Trial court in an assault case properly refused to instruct on self-defense where defendant was at fault in bringing on the affray and never abandoned the fight. *S. v. Plemmons*, 159.

Trial court's instructions on self-defense were proper. *S. v. Pollard*, 557.

Trial court properly limited the jury's consideration of the assault victim's prior conviction for manslaughter to the question of the victim's credibility. *Ibid.*

Trial court in a felonious assault case should have submitted issue of simple assault since it was for the jury to determine whether a knife, nail clippers, and a broom handle used in the assault were deadly weapons. *S. v. Whitaker*, 602.

ATTORNEY AND CLIENT

§ 7. Fees

The parties' contract providing for recovery of 10 percent of any sum collected through litigation as attorneys' fees did not amount to an "evidence of indebtedness" within the meaning of G.S. 6-21, and recovery of attorneys' fees was therefore not authorized. *Construction Co. v. Development Corp.*, 731.

AUTOMOBILES

§ 2. Grounds and Procedures for Suspension or Revocation of License

In an action to have defendant determined a habitual offender, a certified abstract of the conviction record of George William Salter was competent evidence that the defendant George William Salter was the same person named in the abstract. *S. v. Salter*, 372.

§ 45. Relevancy and Competency of Evidence

Evidence concerning a blood alcohol test, though improperly admitted, was not prejudicial to defendant. *Gwaltney v. Keaton*, 91.

§ 46. Opinion Testimony as to Speed

Witnesses' observations of defendant's automobile were of sufficient duration to permit witnesses to state opinion as to defendant's speed. *S. v. Gainey*, 653.

§ 60. Skidding

In a personal injury action by an automobile passenger, the trial court properly directed verdict for defendant driver where the evidence showed defendant skidded on water on the highway. *Farmer v. Chaney*, 544.

§ 62. Striking Pedestrians

Defendant's motion for directed verdict was properly granted in an action for personal injuries where the evidence tended to show that a pedestrian moved from a safe place into the path of defendant's automobile. *Evans v. Carney*, 611.

AUTOMOBILES — Continued

§ 63. Striking Children

In an action for wrongful death of a child hit by defendant's automobile, plaintiff was not entitled to a directed verdict or judgment n.o.v. on the ground that defendant's own testimony indicated that she failed to sound her horn upon observing children by the road. *Anderson v. Smith*, 72.

Trial court in a wrongful death action properly instructed the jury with respect to a child darting from a place of concealment into the path of a motorist. *Ibid.*

§ 72. Sudden Emergencies

Trial court did not err in instructing the jury with respect to the doctrine of sudden emergency where defendant driver saw her passenger sliding across the back seat of the car and coming toward her with his hands. *Davis v. Booth*, 742.

§ 79. Contributory Negligence in Intersectional Accidents

Plaintiff's evidence did not disclose as a matter of law that his negligence, if any, was a proximate cause of the accident at an intersection controlled by a traffic signal. *Burnette v. Perdue*, 689.

§ 83. Pedestrian's Contributory Negligence

Issue of contributory negligence of a pedestrian in crossing a street was properly submitted to the jury. *Maness v. Ingram*, 26.

§ 94. Contributory Negligence of Passenger

Trial court did not err in failing to submit to the jury the issue of contributory negligence of plaintiff who was a passenger on a motorcycle. *Gwaltney v. Keaton*, 91.

§ 99. Liability Under Respondeat Superior

In an action to recover damages sustained when defendant's car struck the motorcycle upon which plaintiff was a passenger, defendant was not prejudiced by the trial court's failure to submit to the jury the negligence of the owner of the motorcycle who was a person other than the driver of the motorcycle. *Gwaltney v. Keaton*, 91.

§ 109. Imputation of Driver's Negligence

Summary judgment was properly entered for defendant in a personal injury action where the automobile driver's negligence was imputed to the plaintiff passenger-owner. *Siders v. Gibbs*, 540.

§ 113. Sufficiency of Evidence

State's evidence was sufficient for the jury on the issue of defendant's guilt of involuntary manslaughter in the death of a bicyclist. *S. v. McKenzie*, 524; in the death of a passenger arising out of an intersection collision, *S. v. Gainey*, 653.

§ 114. Instructions in Manslaughter Case

Although defendant was acquitted of the offense of driving under the influence in violation of G.S. 20-138(a), the court properly charged that a violation of G.S. 20-138(a) could be a basis for a jury finding of defendant's guilt of involuntary manslaughter. *S. v. McKenzie*, 524.

AUTOMOBILES — Continued

Trial court erred in submitting involuntary manslaughter to the jury on the theory that defendant was driving faster than reasonable and prudent under existing conditions. *S. v. Gainey*, 653.

Trial court erred in instructing the jury that a mere failure to stop for a stop sign, proximately causing death, would warrant a conviction of involuntary manslaughter, *Ibid.*

§ 121. "Driving" Within Purview of G.S. 20-138

In a prosecution for driving under the influence and driving while his license was revoked, State's evidence that defendant was seated behind the steering wheel of a car which had the motor running was sufficient to prove that defendant was driving the vehicle. *S. v. Turner*, 163.

§ 122. "Highway" Within Purview of G.S. 20-138

Trial court in a prosecution for driving under the influence erred in instructing the jury that a driveway to an abandoned building was a public vehicular area. *S. v. Lesley*, 169.

§ 127. Sufficiency of Evidence in Prosecutions Under G.S. 20-138

Evidence was sufficient for the jury in a prosecution for driving under the influence where it tended to show an officer observed there were no vehicles in a driveway leading from a public highway to an abandoned building and thereafter saw defendant's automobile in the driveway, saw it move forward, and found defendant under the wheel, and defendant's breathalyzer test registered .23. *S. v. Lesley*, 169.

§ 129. Instructions in Prosecutions Under G.S. 20-138

Trial court in a prosecution for driving under the influence did not err in failing to instruct on reckless driving. *S. v. Pate*, 35.

§ 134. Unlawful Taking of Vehicle

Evidence was sufficient for the jury in a prosecution for possession of a vehicle knowing it to be stolen, and felonious intent by defendant was not required. *S. v. Abrams*, 144.

BETTERMENTS

§ 1. Nature and Requisites of Claim

Allotment of a tract of land to respondent's mother in a 1908 partition proceeding constituted color of title, and respondent, as claimant to a portion of the tract through his mother, is entitled to betterments for the improvements thereon. *Sweeten v. King*, 672.

BOATING

Evidence of defendant's negligence was sufficient for the jury where it tended to show that he ran into the rear of plaintiff's boat. *Pierce v. Jones*, 334.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

In a prosecution for breaking and entering, larceny and possession of burglary tools, trial court properly admitted into evidence items found

BURGLARY AND UNLAWFUL BREAKINGS — Continued

in the automobile in which defendants were riding when they were arrested. *S. v. Raines,* 303.

Trial court properly allowed evidence that through analysis of paint and markings on a door, crowbar found in defendant's automobile was the instrument used to break into a store. *Ibid.*

§ 5. Sufficiency of Evidence

Evidence that defendant was in a vehicle containing stolen items, without any evidence that any of the items were under the actual control of defendant, was insufficient to carry the question of defendant's guilt to the jury. *S. v. Millsaps,* 176.

There was no fatal variance where the indictment alleged breaking and entering of a building owned by a corporation and the evidence was conflicting as to whether the owner of the building was a corporation. *S. v. Crawford,* 117.

The fact that cuff links found in defendant's possession were not listed in the indictment charging him with breaking or entering a home and larceny of other articles of personal property therefrom did not render inapplicable the doctrine of possession of recently stolen goods. *S. v. Fair,* 147.

§ 6. Instructions

Defendant was not prejudiced by the trial court's jury instruction that breaking "simply means the opening or removal of anything blocking entry." *S. v. Raines,* 303.

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 19. Deficiency and Personal Liability

Where a secured creditor disposes of collateral without giving the debtor proper notice and in a manner that is not commercially reasonable, the debt is to be credited with the amount which should have been obtained through a sale conducted in a reasonably commercial manner. *Hodges v. Norton,* 193.

COMPROMISE AND SETTLEMENT

§ 1. Nature and Effect

In an action to recover damages for injuries sustained in an automobile collision, plaintiff's pleading of a settlement and release signed by defendant as a bar to defendant's counterclaim constituted a ratification of the settlement and barred plaintiff's action. *Johnson v. Austin,* 415.

CONSTITUTIONAL LAW

§ 12. Regulations of Trades and Professions

Massage parlor ordinance permitting the sheriff to revoke licenses after conducting hearings on alleged violations of the ordinance is unconstitutional. *Parker v. Stewart,* 747.

§ 24. Requisites of Due Process

In an action for alimony on the ground of abandonment, subjecting the nonresident defendant to personal jurisdiction by serving summons

CONSTITUTIONAL LAW — Continued

and complaint on him by registered mail complied with due process. *Sherwood v. Sherwood,* 112.

It would violate due process to subject a foreign corporation to the in personam jurisdiction of the N. C. courts in an action for breach of contract which arose in another state while plaintiff was living there and is unrelated to defendant's nominal contacts with this State. *Dillon v. Funding Corp.,* 513.

§ 30. Due Process in Trial

Trial court did not err in failing to provide defendant with a psychiatrist at State expense. *S. v. Grainger,* 694.

Trial court did not err in denying indigent defendant's motion for a free transcript of his first trial which ended in a mistrial. *S. v. Gibbs,* 647.

§ 31. Right of Confrontation and Access to Evidence

Trial court did not err in refusing to require disclosure of the identity of a confidential informer. *S. v. Brown,* 391.

Erroneous admission of the extrajudicial statements of three nontestifying defendants which implicated each other and the fourth defendant was harmless beyond a reasonable doubt. *S. v. Johnson,* 534.

CONTEMPT OF COURT

§ 3. Civil Contempt

Void order awarding alimony pendente lite could not serve as the basis of a proceeding in contempt. *Bridges v. Bridges,* 209.

CONTRACTS

§ 17. Term and Duration of Agreement

Plaintiff did not terminate and abandon an oral contract by stopping work after defendant breached the contract by refusing to sign a written contract and failing to make periodic payments, and work performed after a written contract was thereafter signed was performed pursuant to the original contract. *Contracting Co. v. Rowland,* 722.

§ 26. Competency and Relevancy of Evidence

In an action to recover a sum of money allegedly due on a lease agreement, trial court erred in allowing parol evidence to vary the terms of the parties' contract. *Furniture Leasing v. Horne,* 400.

§ 27. Sufficiency of Evidence

Evidence was sufficient to support trial court's finding that there was no oral contract between plaintiff and defendant to investigate employee dishonesty in plaintiff's business. *Associates, Inc. v. Myerly,* 85.

The evidence supported the court's findings that defendant contractor did not breach its contract in installing a roof on a building constructed for plaintiff. *Industries, Inc. v. Construction Co.,* 270.

§ 29. Measure of Damages for Breach of Contract

Trial court erred in allowing the jury to consider loss of future profits in determining damages for breach of a marketing contract. *Weyerhaeuser Co. v. Supply Co.,* 235.

CONTRACTS — Continued

Trial court in an action to recover lost profits did not err in limiting plaintiff's recovery to nominal damages. *Gouger & Veno, Inc. v. Diamondhead Corp.*, 366.

CORPORATIONS

§ 4. Authority of Stockholders and Directors

Trial court erred in concluding that a certain article of the by-laws of a corporation was a shareholders' agreement pursuant to G.S. 55-73(b) and not a by-law which could be amended. *Blount v. Taft*, 626.

COUNTIES

§ 4. County Officers and Boards

An employee of the county ABC Board was not an employee of the county so as to make the county liable for torts committed within the scope of his employment by the Board. *Brewer v. Catawba County*, 417.

COURTS

§ 13. Terms of Court of Inferior Courts

A session of district court will be deemed to have terminated on the date the words "Court expires" were recorded in the court minutes. *Bowen v. Motor Co.*, 463.

§ 21. Law of What State Governs

The law of the state in which a wrong occurs rather than the law of the state of the parties' residence applies in determining whether a wife can sue her husband in tort. *Henry v. Henry*, 174.

CRIMINAL LAW

§ 7. Entrapment

In a prosecution for possession with intent to sell and sale of MDA, the evidence did not disclose as a matter of law that defendant was entrapped by law enforcement officers. *S. v. Board*, 440.

§ 15. Venue

Trial court properly denied defendant's motion for a change of venue in an armed robbery trial because of pre-trial publicity. *S. v. Padgett*, 277.

§ 22. Arraignment and Pleas

Defendant was entitled to a continuance as a matter of right following the court's refusal to accept his negotiated plea and defendant's withdrawal thereof. *S. v. Williams*, 408.

§ 26. Former Jeopardy

A defendant, having been convicted of armed robbery, cannot be convicted of the lesser offense of assault with a deadly weapon where both offenses arise out of the same act. *S. v. Graham*, 234.

The acts of defendant in robbing two people in a store constituted two separate and distinct offenses. *S. v. Gibbs*, 647.

CRIMINAL LAW — Continued

§ 40. Record at Former Trial

Trial court did not err in denying indigent defendant's motion for a free transcript of his first trial which ended in a mistrial. *S. v. Gibbs*, 647.

§ 42. Articles and Clothing Connected With the Crime

In a prosecution for breaking and entering, larceny and possession of burglary tools, trial court properly admitted into evidence items found in the automobile in which defendants were riding when they were arrested. *S. v. Raines*, 303.

§ 43. Photographs

A photograph taken of defendant when he was arrested on an unrelated misdemeanor charge was not illegal. *S. v. Fowler*, 529.

§ 49. Attempt by Defendant to Procure False Testimony

Trial court properly allowed evidence of defendant's attempt to procure false testimony. *S. v. Neagle*, 308.

§ 51. Qualification of Experts

In overruling objections to questions asked a witness about lottery tickets, the trial judge in effect ruled that the witness was qualified to answer. *S. v. Roberson*, 152.

Trial court properly ruled that a toxicologist was qualified to express his opinion that a substance was marijuana. *S. v. Hayes*, 356.

§ 53. Medical Expert Testimony

State's evidence tending to show assault on a child by defendant provided a proper foundation for a neurosurgeon's testimony pertaining to injuries sustained by the child. *S. v. Hensley*, 8.

The exclusion of testimony and psychiatric reports as to psychological evaluation and psychiatric treatment of the State's eyewitness was error. *S. v. Wright*, 752.

§ 62. Lie Detector Tests

Results of a polygraph test are inadmissible when offered to prove the guilt or innocence of defendant and when offered for the limited purpose of corroboration. *S. v. Fowler*, 529.

§ 63. Evidence of Sanity of Defendant

Trial court did not err in failing to provide defendant with a psychiatrist at State expense. *S. v. Grainger*, 694.

§ 66. Evidence of Identity by Sight

Defendant was not prejudiced when trial court permitted a witness to identify defendant prior to conducting a voir dire examination, *S. v. Martin*, 17; *S. v. Neagle*, 308; or a second witness to identify defendant without a second voir dire examination, *S. v. Fowler*, 529.

Robbery victim's in-court identification of defendant was not tainted by out-of-court identification when officers brought defendant to the store where the victim worked. *S. v. Johnson*, 141.

Trial court properly determined that a rape and kidnapping victim's in-court identification of defendant was based on her observations of him at the crime scene and not at a pretrial lineup. *S. v. Williams*, 319.

CRIMINAL LAW — Continued

Admission of the victim's testimony tending to identify defendants without a voir dire hearing after defendants objected generally thereto did not constitute prejudicial error. *S. v. Sharratt,* 199.

Evidence of a hospital showup identification was properly admitted in a crime against nature and rape prosecution. *Ibid.*

In-court identification of defendant was not tainted by any improper pre-trial photographic identification. *S. v. Fowler,* 529.

Trial court in a first degree murder prosecution did not err in allowing an eyewitness's in-court identification of defendant. *S. v. Collins,* 478.

An in-court identification of defendant by two witnesses was not tainted by an out of court confrontation. *S. v. Gibbs,* 647.

§ 75. Tests of Voluntariness of Confessions; Admissibility

Trial court properly allowed a police dispatcher who was visiting a friend in jail to testify as to incriminating statements made by defendant although the dispatcher did not advise defendant of his rights. *S. v. Johnson,* 141.

In a hearing alleging that respondent was a delinquent child in that he murdered a named person, written and oral statements made by respondent to police officers were admissible. *In re Stokes,* 283.

Defendant's confession was not inadmissible on the ground his arrest was illegal. *S. v. Aaron,* 582.

Trial court properly allowed into evidence confessions in an armed robbery trial. *S. v. Gibbs,* 647.

Trial court did not err in allowing the interrogating officer to read to the jury the transcription made from a tape recording of defendant's confession. *S. v. Sanders,* 662.

Trial court properly admitted defendant's statement made to an officer prior to his arrest though defendant had been drinking prior to making the statement. *S. v. Grainger,* 694.

§ 77. Admissions and Declarations

Trial court erred in excluding testimony of defendant which would have explained an incriminating declaration made by him at the crime scene. *S. v. Mitchell,* 4.

§ 80. Records and Private Writings

Trial court did not err in allowing the State to introduce a duly certified copy of defendant's automobile registration card into evidence though defendant's counsel had been notified that the original card would be introduced in evidence. *S. v. Williams,* 319.

Trial court properly allowed into evidence an airline reservation computer printout. *S. v. Stapleton,* 363.

§ 83. Competency of Husband or Wife to Testify For or Against Spouse

Officer's testimony that stolen goods were recovered as a result of information volunteered by defendant's wife did not violate the husband-wife privilege. *S. v. Aaron,* 582.

CRIMINAL LAW — Continued

§ 84. Evidence Obtained by Unlawful Means

Officers lawfully searched defendant's apartment where another occupant gave them written permission for the search. *S. v. Crawford,* 117.

An officer's search of defendant without a warrant did not violate Federal and State Constitutions. *S. v. Johnson,* 698.

§ 86. Credibility of Defendant

Trial court properly refused to permit defense counsel to impeach the prosecutrix by cross-examination relating to a controlled substance charge which had been dismissed. *S. v. Sharratt,* 199.

Defendant was not prejudiced where the trial court admitted evidence of defendant's prior convictions without first making a determination that defendant was represented by counsel when he was convicted of prior offenses since such determination was made after the evidence was allowed. *S. v. Fowler,* 529.

Defendant was not prejudiced by the district attorney's question on voir dire as to whether he had committed a prior offense. *S. v. Sanders,* 662.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

The trial court should, upon timely request, instruct the jury with respect to corroborative evidence at the time the evidence is admitted. *S. v. Parker,* 413.

Trial court erred in allowing the State to impeach a defense witness by introducing evidence of prior misconduct of the witness. *S. v. Brown,* 391.

Questions to defendant's alibi witness as to whether the witness had participated in a school riot and beat up an officer were proper for the purpose of impeachment. *S. v. Crawford,* 487.

Trial court erred in refusing to permit defense counsel to cross-examine the State's only eyewitness with regard to his psychiatric history as a juvenile. *S. v. Wright,* 752.

§ 91. Time of Trial and Continuance

Trial court erred in denying defendant's motion for continuance made when his case was called immediately after the judge had made comments on a guilty plea in a narcotics trial. *S. v. Brown,* 391.

Defendant was entitled to a continuance as a matter of right following the court's refusal to accept his negotiated plea and defendant's withdrawal thereof. *S. v. Williams,* 408.

Trial court did not err in extending the time of the extradited defendant's trial beyond the 120 days after defendant arrived in the State from N. Y. *S. v. Collins,* 478.

§ 92. Consolidation of Counts

Trial court properly consolidated for trial charges against defendant and his wife for possession of LSD although the offenses committed by the wife occurred on a different day than those committed by the husband. *S. v. Sousa,* 473.

CRIMINAL LAW — Continued

§ 95. Admission of Evidence Competent for Restricted Purpose

Failure to include instructions as to the purposes for which the evidence was received is not ground for exception unless counsel has requested such an instruction. *S. v. Collins,* 120.

Erroneous admission of the extrajudicial statements of three nontestifying defendants which implicated each other and the fourth defendant was harmless beyond a reasonable doubt. *S. v. Johnson,* 534.

§ 99. Conduct of the Court

Defendant was not prejudiced by the trial court's comment in sustaining an objection to repetitious questions asked the prosecutrix concerning her admission that she had engaged in prostitution. *S. v. Sharratt,* 199.

§ 102. Argument and Conduct of Counsel or District Attorney

District attorney's reference to the fact a codefendant had previously been convicted of the same charge for which defendant was on trial was not prejudicial. *S. v. Plemmons,* 159.

Defendant was not prejudiced by the district attorney's use in his jury argument of a photograph of defendant not introduced in evidence for the purpose of contradicting defendant's testimony. *S. v. Crawford,* 487.

District attorney's jury argument that defendant is a "professional criminal" constituted prejudicial error. *S. v. Swink,* 745.

Defendant is entitled to a new trial where the court refused to allow defendant's counsel to inform the jury of the statutory punishment for the crime charged. *S. v. Thomas,* 757.

§ 114. Expression of Opinion by Court on Evidence in the Charge

The fact that the trial court consumed more time in stating the evidence for the State than in stating that of defendant did not constitute an expression of opinion. *S. v. Norman,* 606; *S. v. Sanders,* 662.

Trial court expressed an opinion in instructing that a person such as the State's witness who "in good faith carried out the instructions of the police officer and who acts for the exclusive purpose of assisting in law enforcement does not violate the law." *S. v. Board,* 440.

§ 121. Instructions on Defense of Entrapment

Trial court was not required to submit defense of entrapment to jury where the informant told police that a store would be robbed and the informant took part in the robbery with another person. *S. v. Padgett,* 277.

§ 122. Additional Instructions after Initial Retirement of Jury

Trial court did not coerce a verdict in instructing the jury to deliberate further. *S. v. Sousa,* 473.

§ 126. Unanimity of Verdict, Polling the Jury and Acceptance of the Verdict

Trial court did not err in instructing the jury to deliberate further when one juror, while the jury was being polled, stated that he had some doubt about defendant's mental capacity. *S. v. Sellers,* 22.

Trial court's instruction on the unanimity of the verdict was misleading. *S. v. Parker,* 413.

CRIMINAL LAW — Continued

The trial court's response during the polling of the jury to idle questions of one juror was not prejudicial. *S. v. Asbury*, 291.

§ 143. Revocation of Suspension of Judgment or Sentence

Evidence was sufficient to support trial court's findings that defendant wilfully violated the terms and conditions of his probation. *S. v. Clark*, 213.

Probation officer's testimony that defendant had admitted using heroin was competent in a probation revocation hearing without a voir dire to determine whether defendant's constitutional rights had been violated. *S. v. Green*, 574.

Use of heroin was a violation of a probation condition that defendant avoid injurious or vicious habits. *Ibid.*

§ 149. Right of State to Appeal

The State may not appeal from an order of superior court directing a verdict for defendant in a criminal case. *S. v. Brown*, 180.

§ 169. Harmless and Prejudicial Error in Admission of Evidence

Defendant was not prejudiced by testimony that an accomplice who was tried separately from defendant had "confessed." *S. v. Green*, 178.

Defendant was not prejudiced by evidence admitted over his objections where similar subsequent testimony was admitted without objection. *S. v. Davis*, 383.

DAMAGES

§ 15. Sufficiency of Evidence as to Damages

Trial court in an action to recover lost profits did not err in limiting plaintiff's recovery to nominal damages. *Gouger & Veno, Inc. v. Diamondhead Corp.*, 366.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death

A viable unborn child is not a person within the meaning of the wrongful death act. *Yow v. Nance*, 419.

§ 4. Time Within Which Action for Wrongful Death Must be Instituted

A cause of action for wrongful death alleged to have resulted from a hidden defect in a crane accrues at the time of decedent's death rather than at the time the crane was sold and is governed by the two-year statute of limitations. *Raftery v. Construction Co.*, 495; *Pinkston v. Baldwin, Lima, Hamilton Co.*, 604.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

Defendant could contest a part of a will in a declaratory judgment proceeding. *Palmer v. Ketner*, 187.

DEEDS

§ 7. Delivery, Acceptance and Registration

Plaintiff's evidence would support a jury finding that there was no valid delivery of deeds where an attorney who prepared the deeds kept them until the grantor's death and then delivered them to the grantees. *Penninger v. Barrier,* 312.

§ 9. Deeds of Gift

Plaintiff's evidence was sufficient for the jury on the issue of whether deeds were deeds of gift and void because not recorded within two years after their execution. *Penninger v. Barrier,* 312.

§ 15. Estates Upon Special Limitations

Provisions in a deed for the reverter of title to the grantor are invalid where they appear only at the end of the description. *Whetsell v. Jernigan,* 136.

§ 20. Restrictive Covenants as Applied to Subdivision Developments

Restrictive covenants placed in a deed to a subdivision lot by the grantor could not be enforced by the owners of other lots in the subdivision. *Club, Inc. v. Lawrence,* 547.

DIVORCE AND ALIMONY

§ 2. Process and Pleadings

Trial court in an alimony case could not obtain personal jurisdiction over nonresident defendant by registered mail under the domicile section of G.S. 1-75.4 but could obtain jurisdiction upon a claim of injury to person or property under the statute. *Sherwood v. Sherwood,* 112.

§ 13. Separation for Statutory Period

Order awarding the wife alimony pendente lite and exclusive possession of the home constituted a legal separation such that the one-year separation in the husband's action for absolute divorce began to run on the date of the order. *Earles v. Earles,* 348.

§ 18. Alimony Pendente Lite

The trial court's order attempting to award plaintiff alimony pendente lite was void since the court had specifically concluded that plaintiff was not entitled to alimony pendente lite, and the order therefore could not serve as the basis of a proceeding in contempt. *Bridges v. Bridges,* 209.

Findings were insufficient to support trial court's award of alimony pendente lite. *Hampton v. Hampton,* 342.

§ 19. Modification of Decrees

Evidence was insufficient to support the trial court's order decreasing alimony which was based on a change of circumstances. *Gill v. Gill,* 20.

Trial court properly received into evidence a letter from plaintiff to the judge and properly decreased the amount of alimony due her on the basis of information contained in the letter. *Strother v. Strother,* 223.

§ 21. Enforcing Payment

Defendant was estopped to attack a child custody and support consent judgment on the ground no summons was issued and no complaint and answer were filed. *Hemby v. Hemby,* 596.

DIVORCE AND ALIMONY — Continued

§ 22. Jurisdiction in Child Custody Action

In a divorce action where plaintiff also sought custody of the minor children, the district court in which that action was brought retained jurisdiction of the child custody issue. *Surratt v. Kennedy*, 406; *Kennedy v. Surratt*, 404.

§ 23. Child Support

Child support order is set aside where it was based on capacity to earn rather than on present earnings. *Holt v. Holt*, 124.

Findings were insufficient to support trial court's order requiring defendant to make child support payments. *Hampton v. Hampton*, 342.

Trial court erred in considering defendant's additional living expenses caused by his remarriage in finding a change of circumstances justifying a reduction in child support. *Hemby v. Hemby*, 596.

Court's findings rebut presumption that child support provisions of a separation agreement are now just and reasonable and support the court's conclusion that plaintiff father is unable to comply with the provisions of the agreement. *McKaughn v. McKaughn*, 702.

Trial court did not err in increasing the amount of child support payments based on a finding of changed circumstances. *Harding v. Harding*, 633.

§ 24. Child Custody

Defendant's evidence showed a substantial change in circumstances which support the court's order increasing the amount plaintiff is to pay for child support from $250 per month provided in a separation agreement to $700 per month. *Soper v. Soper*, 95.

Trial court properly awarded child custody to the mother though there is evidence she had had emotional problems. *Wyche v. Wyche*, 685.

Trial court in a child custody action did not err in awarding attorney fees to defendant mother. *Ibid.*

§ 25. Validity of and Attack on Foreign Decree

Trial court properly admitted Tennessee divorce decree in an action for alimony and properly gave full faith and credit to the decree. *Downey v. Downey*, 375.

ELECTRICITY

§ 3. Control and Regulation of Rates

Fossil fuel adjustment clause for an electric utility is valid. *Utilities Comm. v. Edmisten*, 258.

The Utilities Commission had authority to modify an order allowing an interim rate increase by granting an additional interim rate increase without basing such further order on new evidence competent to support a final order in a general rate case. *Utilities Comm. v. Edmisten*, 428.

The Utilities Commission did not err in failing to order a power company to refund revenues collected subject to refund during the pendency of a general rate hearing. *Ibid.*

Evidence supported the Utilities Commission's judgment that 8.24 percent was a fair rate of return to be allowed on a power company's fair

ELECTRICITY — Continued

value rate base as determined by the Commission and that 10.44 percent was a fair rate of return on the company's fair value equity. *Ibid.*

The Commission did not err in approving elimination of previously established textile mill, high load factor, and military service customer classifications in a power company's rate structure. *Ibid.*

ESTOPPEL

§ 4. Equitable Estoppel

By her acceptance of benefits of a consent judgment over a period of 35 years, a wife was estopped to deny that a deed signed only by her husband conveyed a remainder in entirety property to her children. *Redevelopment Comm. v. Hannaford,* 1.

EVIDENCE

§ 11. Transactions with Decedent

The dead man's statute operated to exclude evidence by caveator as to unfulfilled promises by decedent to convey additional lands to caveator in return for caveator's release of his share in decedent's estate. *In re Will of Edgerton,* 60.

§ 29. Accounts

A verified itemized statement of an account was properly admitted in evidence. *Service Co. v. Curry,* 166.

§ 32. Parol Evidence Affecting Writings

In an action to recover a sum of money allegedly due on a lease agreement, trial court erred in allowing parol evidence to vary the terms of the parties' contract. *Furniture Leasing v. Horne,* 400.

§ 41. Nonexpert Opinion Evidence as Invasion of Province of Jury

Testimony by defendant's vice-president that defendant had paid a contractor all monies owed it constituted an opinion on a question of law. *Paint Co. v. Zalewski,* 149.

EXECUTORS AND ADMINISTRATORS

§ 24. Right of Action for Personal Services Rendered Decedent

Evidence was sufficient for the jury in an action to recover under quantum meruit for services rendered by plaintiff to her mother-in-law. *Williford v. Jackson,* 128.

§ 37. Costs, Commissions and Attorneys' Fees

A proceeding by one nominated to be executor under a will for the issuance to him of letters testamentary for which respondent seeks reimbursement of expenses including attorney's fee does not come within the provisions of G.S. 6-21(2). *In re Moore,* 589.

FORGERY

§ 2. Prosecution

Trial court's omission of the element of intent in its instruction on forgery was corrected by a subsequent definition of forgery. *S. v. Stapleton*, 363.

Evidence was sufficient for the jury in a prosecution for accessory before the fact of forgery and uttering a forged check. *S. v. Sauls*, 457.

FRAUD

§ 12. Sufficiency of Evidence

Evidence was sufficient for the jury in an action to recover damages sustained by plaintiffs when they bought defendants' home in reliance on representations made by defendants that the basement of the home was dry. *Gunther v. Parker*, 264.

Evidence that defendant builder falsely represented in an affidavit to obtain release of home construction loan funds that all bills for materials had been paid when a bill for carpet had not been paid was insufficient for the jury in an action for fraud brought by the homeowners and the carpet supplier. *Griffin v. Canada*, 226.

GAMBLING

§ 3. Lotteries

State's evidence was sufficient for the jury in a prosecution for possession of lottery tickets. *S. v. Roberson*, 152.

Trial court sufficiently explained to the jury the meaning of the term "lottery ticket." *Ibid.*

GUARANTY

Defendants were personally obligated on a guaranty of a corporation's note signed by defendants in a representative capacity. *Bank v. Pocock*, 52.

Trial court erred in directing verdict for plaintiff in an action on a guaranty of credit extended to a corporation where defendant did not admit the debt or the amount thereof. *Lowe's v. Curry*, 229.

HOMICIDE

§ 28. Instructions on Defenses

In a prosecution for voluntary manslaughter the trial court's instructions on accident and misadventure were proper, and it was not error for the court to fail to define the word "accident." *S. v. Reives*, 11.

Trial court in a second degree murder prosecution did not err in failing to charge the jury on self-defense. *S. v. Neagle*, 308.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Trial court in a prosecution for second degree murder of defendant's husband erred in failing to submit manslaughter as a possible verdict. *S. v. Christopher*, 231.

HUSBAND AND WIFE

§ 3. Wife's Separate Estate, Contracts and Conveyances

Plaintiff's complaint was sufficient to support an inference that male defendant was the agent for his wife in making an oral contract. *Contracting Co. v. Rowland,* 722.

§ 7. Right of Spouse to Maintain Action in Tort Against Other Spouse

A nonresident wife may maintain in this State an action against her nonresident husband to recover for injuries received in an automobile accident in this State. *Henry v. Henry,* 174.

§ 11. Construction and Operation of Separation Agreements

Trial court properly refused to allow defendant's evidence concerning his intention at the time of the making of a separation agreement. *Grady v. Grady,* 402.

Court's findings rebut presumption that child support provisions of a separation agreement are now just and reasonable and support the court's conclusion that plaintiff father is unable to comply with the provisions of the agreement. *McKaughn v. McKaughn,* 702.

INDICTMENT AND WARRANT

§ 8. Joinder of Counts and Duplicity

Indictment charging defendant with assault with a deadly weapon upon a police officer while he was engaged in his official duties charged defendant with only one crime. *S. v. Thomas,* 757.

§ 9. Charge of Crime

Warrant which alleged a violation of the Durham City Code failed on its face to charge the commission of a crime since it did not charge defendant with the doing of acts therein specified within the city. *S. v. Barnes,* 502.

§ 17. Variance Between Averment and Proof

In an armed robbery prosecution wherein the indictment referred to the armed robbery of a grocery store stock clerk, defendant was not prejudiced by the court's instruction that defendant would be guilty if the jury found defendant robbed the stock clerk or a female store employee. *S. v. Martin,* 17.

INFANTS

§ 8. Jurisdiction to Award Custody of Minor

Trial court properly exercised jurisdiction in a child custody action though defendant and the minors were in Tennessee and though a Tennessee court had granted temporary custody to defendant. *Johnston v. Johnston,* 345.

§ 9. Hearing and Grounds for Awarding Custody of Minor

Trial court's findings of fact with respect to the fitness of the mother were insufficient to support an award of the child's custody. *Hunt v. Hunt,* 380.

Trial court in a child custody proceeding erred in refusing to allow plaintiff's evidence of defendant's purported adultery. *Ibid.*

INFANTS — Continued

§ 10. Commitment of Minors for Delinquency

Evidence in a juvenile hearing was sufficient to show that respondent was a child less than 16, that he possessed the required intent to commit murder, and that he participated in a murder which occurred during the course of a robbery in which respondent was an active participant. *In re Stokes*, 283.

INSURANCE

§ 2. Brokers and Agents

An agent who promises to procure insurance has the duty to use diligence and is liable to the proposed insured for loss caused by his negligent failure to do so. *Leggett v. Cotton*, 331.

§ 45. Instructions on Accident Insurance

Trial court's instructions on death by accidental means were proper. *Mozingo v. Insurance Co.*, 352.

§ 67. Actions on Accident Policies

In an action to recover on a policy of insurance which insured plaintiff's husband against loss of life effected by accidental means, evidence defendant was killed in an automobile accident was sufficient for the jury. *Mozingo v. Insurance Co.*, 352.

Death caused by a pre-existing diseased condition in cooperation with an accident is not an accidental bodily injury independent of all other causes within the terms of an accident policy. *Hicks v. Insurance Co.*, 561.

§ 79.1. Automobile Liability Insurance Rates

The Commissioner of Insurance had no authority to disapprove an automobile liability insurance rate filing without first conducting a public hearing. *Comr. of Insurance v. Automobile Rate Office*, 182.

§ 114. Contracts to Procure Fire Insurance

In an action to recover damages allegedly sustained as a result of the negligent failure of defendant to procure insurance on plaintiff's house, evidence of defendant's negligence was sufficient for the jury. *Leggett v. Cotton*, 331.

§ 116. Fire Insurance Rates

The proper remedy for the Fire Insurance Rating Bureau to prohibit the Comr. of Insurance from taking action on a decrease in extended coverage rates pending appeal is to seek a writ of supersedeas in the Court of Appeals rather than seeking an injunction in Wake Superior Court. *Rating Bureau v. Ingram*, 338.

Commissioner of Insurance was required to hold a public hearing before acting on a proposal for a reduction in extended coverage and windstorm insurance. *Comr. of Insurance v. Rating Bureau*, 237.

Fire Insurance Rating Bureau may withdraw a rate filing at any time prior to the setting of a public hearing thereon. *Ibid.*

§ 140. Actions on Lightning Policies

Plaintiffs' evidence was sufficient for the jury on the issue of whether their dwelling was damaged by lightning within the coverage of a lightning clause in an insurance policy. *Potter v. Insurance Co.*, 138.

JUDGMENTS

§ 6. Modification and Correction of Judgments in Trial Court

Superior court judge had no authority after expiration of both the term of court and his commission to amend an order by reversing its provisions as to court costs and bond forfeiture. *Snell v. Board of Education.* 31.

§ 10. Construction and Operation of Consent Judgment

Defendant was estopped to attack a child custody and support consent judgment on the ground no summons was issued and no complaint and answer were filed. *Hemby v. Hemby,* 596.

§ 24. Setting Aside of Judgment—Excusable Neglect

Defendant's failure to file a timely answer was not the result of excusable neglect where defendant had returned to work after a work related accident. *Fagan v. Hazzard,* 618.

Evidence was sufficient to support trial court's order setting aside entry of judgment by default on the ground of excusable neglect since the neglect of defendant's attorney to file answer within apt time was both excusable and was not to be imputed to defendant, and defendant had a meritorious defense to plaintiff's claim. *Electric Co. v. Carras,* 105.

§ 51. Foreign Judgments

In an action to enforce a judgment entered by a S. C. court, the trial court erred in entering summary judgment for plaintiff where there was a genuine issue of fact as to whether the S. C. court had in personam jurisdiction over the defendant. *Prather, Thomas, Campbell, Pridgeon, Inc. v. Properties, Inc.,* 316.

JURY

§ 1. Right to Trial by Jury

Defendant waived his right to a jury trial on the issue of damages by failing timely to file an answer and timely to make a demand for a jury trial. *Fagan v. Hazzard,* 618.

§ 5. Selection

Defendant was not prejudiced by the fact that jury selection occurred while defendant was not in court. *S. v. Hayes,* 356.

KIDNAPPING

§ 1. Elements of the Offense and Prosecution

Trial court's definition of kidnapping which did not include the words "against the will of the victims" was nevertheless sufficient. *S. v. Poole,* 411.

LABORERS' AND MATERIALMEN'S LIENS

§ 1. Nature and Grounds of Lien of Contractor Dealing Directly with Owner

Plaintiff's professional services as a planning consultant were not the proper subject of a laborer's lien. *Smith and Associates v. Properties, Inc.,* 447; *Bryan v. Projects, Inc.,* 453.

LABORERS' AND MATERIALMEN'S LIENS — Continued

Trial court erred in concluding that an oral contract was a separate and independent contract from a written contract and that plaintiff's claim for labor and materials furnished after execution of the written contract did not precede the date of a bank's deed of trust. *Contracting Co. v. Rowland,* 722.

§ 3. Lien of Subcontractor or Material Furnisher

In an action to recover for the value of wallpaper furnished by plaintiff to defendant subcontractor and to grant plaintiff all liens to which it was entitled under the statute on materialmen's liens, trial court erred in granting summary judgment for defendant contractor on the basis of an affidavit by the contractor's vice-president which amounted to an expression of opinion on a question of law. *Paint Co. v. Zalewski,* 149.

LANDLORD AND TENANT

§ 11. Assignment and Subletting

Purchaser of property "subject to" specified leases of record was not obligated under provisions of a sublease which purported to convey an estate of greater size and duration than the lessee possessed under its primary lease. *Nybor Corp. v. Restaurants, Inc.,* 642.

LARCENY

§ 5. Presumptions and Burden of Proof

The fact that cuff links found in defendant's possession were not listed in the indictment charging him with breaking or entering a home and larceny of other articles of personal property therefrom did not render inapplicable the doctrine of possession of recently stolen goods. *S. v. Fair,* 147.

§ 7. Sufficiency of Evidence and Nonsuit

Evidence that defendant was in a vehicle containing stolen items, without any evidence that any of the items were under the actual control of defendant, was insufficient to carry the question of defendant's guilt to the jury. *S. v. Millsaps,* 176.

There was no fatal variance where the indictment alleged larceny of property owned by a corporation and the evidence was conflicting as to whether the property was owned by a corporation. *S. v. Crawford,* 117.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time From Which Statute Begins to Run

In an action to recover under installment sales contracts, the 10-year limitation period of G.S. 1-47(2) did not apply to permit defendants to file a counterclaim for damages under the Federal Truth-Lending Act after the one-year limitation of that Federal Act. *Enterprises, Inc. v. Neal,* 78.

A cause of action for wrongful death alleged to have resulted from a hidden defect in a crane accrues at the time of decedent's death rather than at the time the crane was sold, and is governed by the two-year statute of limitations. *Raftery v. Construction Co.,* 495; *Pinkston v. Baldwin, Lima, Hamilton Co.,* 604.

LIMITATION OF ACTIONS — Continued

§ 10. Absence from the State

The statute of limitations was tolled in a wrongful death action by defendant's absence from the State for one year. *Travis v. McLaughlin*, 389.

MASTER AND SERVANT

§ 10. Duration of Employment

Plaintiff's complaint failed to state a claim for relief for breach of contract to employ plaintiff. *Tatum v. Brown*, 504.

§ 11. Agreements Not to Compete

New consideration was given for defendant's covenant not to compete with plaintiff, and evidence was insufficient to permit the determination that the covenant not to compete which embraced a four state area was unreasonable. *Associates, Inc. v. Taylor*, 679.

Trial court erred in concluding the evidence was too speculative for the court to award damages for breach of a covenant not to compete. *Ibid.*

§ 50. Workmen's Compensation — Independent Contractors

Evidence was sufficient to support the Industrial Commission's conclusion that plaintiff surveyor was an independent contractor. *Millard v. Hoffman, Butler & Assoc.*, 327.

§ 56. Causal Relation Between Employment and Injury

Industrial Commission properly found that plaintiff's injury was compensable under the Workmen's Compensation Act, even though it occurred during plaintiff's off hours in an activity which was not one of the regular duties of his employment. *Stewart v. Dept. of Corrections*, 735.

Industrial Commission properly found that deceased's death resulted from an accident arising out of and in the course of his employment where deceased was killed while cutting the top from a barrel with an acetylene torch. *Goldston v. Concrete Works*, 717.

§ 62. Injuries on the Way to or From Work

In an action to recover death benefits under the Workmen's Compensation Act there was no evidence which would support a finding that deceased school teacher was performing one of the duties of her employment at the time of her accident. *Franklin v. Board of Education*, 491.

§ 65. Back Injury

Evidence was sufficient to support the Industrial Commission's conclusion that plaintiff's back injury was not the result of an accident. *Hewett v. Supply Co.*, 395.

Evidence was sufficient to support the Industrial Commission's determination that plaintiff was temporarily totally disabled and was due compensation. *Willis v. Drapery Plant*, 386.

§ 66. Accidents Followed by Diseases; Pre-existing Disease

Evidence was sufficient to support the Industrial Commission's finding that plaintiff's injury by accident did not materially aggravate or accelerate a preexisting disease or infirmity and did not proximately contribute to the loss of plaintiff's foot. *Hardin v. Trucking Co.*, 216.

MONEY RECEIVED

§ 2. Particular Situations and Applications

Plaintiff trustee of a pension plan was entitled to recover amount erroneously paid to defendant under a mistake of fact. *Bank v. McManus*, 65.

MORTGAGES AND DEEDS OF TRUST

§ 13. Duties of Parties to the Instrument

In an action to have foreclosure sales set aside, defendant was not entitled to summary judgment since there was an issue of fact as to whether he acted in good faith and exercised the judgment of a reasonable and prudent person in determining that there had been a default under the deed of trust. *Furst v. Loftin*, 248.

§ 15. Transfer of Property Mortgaged

Purchaser of property did not assume mortgage where property was conveyed "subject to" the mortgage. *Arnold v. Howard*, 570.

§ 25. Foreclosure by Exercise of Power of Sale in Instrument

Defendants, holders of a note, could declare it in default for failure of plaintiffs to maintain insurance on the subject property since the deed of trust securing the note provided that the amount of insurance would be an amount satisfactory to the holder of the note, not to exceed the unpaid balance thereon. *Furst v. Loftin*, 248.

§ 26. Notice of Sale

The holders of a note properly foreclosed on the note where they followed the provisions set out in the deed of trust securing the note. *Furst v. Loftin*, 248.

§ 40. Suits to Set Aside Foreclosure

Summary judgment was improper in an action to have a foreclosure sale set aside. *Furst v. Loftin*, 248.

MUNICIPAL CORPORATIONS

§ 14. Injuries in Connection With Streets

Plaintiff's affidavit showed the existence of a genuine issue of fact as to whether the city was negligent in failing to clear away overhanging foliage which obscured a stop sign and whether such failure was a proximate cause of plaintiff's injury. *Stancill v. Washington*, 707.

§ 20. Injuries in Connection With Drains and Culverts

Defendant city was not negligent in replacing a culvert with a larger culvert so that larger debris passed through the replacement and blocked plaintiff's smaller culvert. *Tent Co. v. Winston-Salem*, 297.

§ 22. Contracts

A municipal housing authority is not a "municipality" subject to the statute requiring separate bids on different branches of work in the construction of public buildings. *NECA, Inc. v. Housing Authority*, 755.

MUNICIPAL CORPORATIONS — Continued

§ 29. Nature and Extent of Municipal Police Power

Warrant which alleged a violation of the Durham City Code failed on its face to charge the commission of a crime since it did not charge defendant with the doing of acts therein specified within the city. *S. v. Barnes*, 502.

§ 31. Review of Orders of Municipal Zoning Boards

A zoning board of adjustment did not err in failing to revoke a building permit issued to a concrete plant operated as a nonconforming use after work authorized by the permit had been completed. *In re Greene*, 749.

NARCOTICS

§ 2. Indictment

Indictment in a prosecution for attempting to acquire a drug by using forged prescriptions was sufficient without incorporating the forged prescriptions in the bill. *S. v. Booze*, 397.

§ 3. Competency and Relevancy of Evidence

The trial court in a prosecution for possession of marijuana did not err in admitting the search warrant into evidence on *voir dire*, though the magistrate was not present to testify that he signed it, since the affiant identified the warrant and testified that he and the magistrate signed the affidavit and that the magistrate signed the warrant. *S. v. Oldfield*, 131.

§ 4. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for felonious possession of marijuana. *S. v. Mitchell*, 4.

Evidence was sufficient for the jury in a prosecution for possession of marijuana though defendant was absent when marijuana was found in his apartment. *S. v. Finney*, 378.

In a prosecution for possession with intent to sell and sale of MDA, the evidence did not disclose as a matter of law that defendant was entrapped by law enforcement officers. *S. v. Board*, 440.

§ 4.5. Instructions

Trial court's instruction concerning constructive possession was proper. *S. v. Finney*, 378.

NEGLIGENCE

§ 5. Dangerous Instrumentalities

A golf putter is not a dangerous instrumentality per se. *Patterson v. Weatherspoon*, 711.

§ 8. Proximate Cause

There was no causal connection between the death of a high school football player in a collision with an ineligible player on the opposing team and defendants' negligence in the preparation of an eligibility list and in allowing an ineligible player to participate in the game. *Barrett v. Phillips*, 220.

NEGLIGENCE — Continued

§ 35. Nonsuit for Contributory Negligence

Employee of a shingling subcontractor was contributorily negligent in an action to recover for injuries received when a scaffold furnished by defendant general contractor collapsed. *Bullard v. Constructon Co.*, 483.

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitees

Trial court erred in granting summary judgment for defendant store owner where the cause of an accident resulting in injuries to a customer was not shown. *Keith v. Kresge Co.*, 579.

OBSCENITY

Massage parlor ordinance permitting the sheriff to revoke licenses after conducting hearings on alleged violations of the ordinance is unconstitutional. *Parker v. Stewart*, 747.

PARENT AND CHILD

§ 7. Duty to Support

Defendant obligated himself to support his children past their 18th birthdays in a child support and alimony agreement. *Harding v. Harding*, 633.

§ 8. Liability of Parent for Torts of Child

Evidence was insufficient to show negligence of the father where his child struck another child in the eye with a golf putter. *Patterson v. Weatherspoon*, 711.

PARTIES

§ 2. Parties Plaintiff

A real estate agent can properly bring an action to recover on a check made payable to the agent and which had been given to the agent as earnest money to apply on the purchase price of property the agent was selling for another. *Reeves v. Jurney*, 739.

PAYMENT

§ 4. Evidence and Proof of Payment

The plea of payment is an affirmative one and the burden of showing payment must be assumed by the party interposing it. *Recreatives, Inc. v. Motorcycles, Co.*, 727.

PENSIONS

Plaintiff trustee of a pension plan was entitled to recover amount erroneously paid to defendant under a mistake of fact. *Bank v. McManus*, 65.

PLEADINGS

§ 9. Filing and Time for Filing Answer

Defendant's failure to file a timely answer was not the result of excusable neglect where defendant had returned to work after a work related accident. *Fagan v. Hazzard*, 618.

§ 11. Counterclaims

Defendants who are sued on evidences of debt may not assert potential liability of the creditor under the Federal Truth-in-Lending Act as a counterclaim or defense in such action. *Enterprises, Inc. v. Neal*, 78.

§ 38. Motion for Judgment on the Pleadings

The court is not required to find facts in a judgment on the pleadings. *Contracting Co. v. Rowland*, 722.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

In an action against defendant contractor to recover a sum for materials furnished one of defendant's subcontractors, trial court did not err in excluding testimony concerning statements allegedly made by defendant's superintendents since plaintiff's evidence showed that the acts forming the basis of this action were not within the authority of the agents. *Builders Corp. v. Construction Co.*, 667.

PRINCIPAL AND SURETY

§ 9. Public Construction Bonds

A housing authority is a municipal corporation within the meaning of the statute which allows only one action on a public construction bond and requires that such action be brought in the county in which the construction occurs. *SCM Corp. v. Construction Co.*, 592.

PROCESS

§ 9. Personal Service on Nonresident Individual in Another State

Trial court in an alimony case could not obtain personal jurisdiction over nonresident defendant by registered mail under the domicile section of G.S. 1-75.4 but could obtain jurisdiction upon a claim of injury to person or property under the statute. *Sherwood v. Sherwood*, 112.

§ 10. Service by Publication

Issuance of a summons is not essential to the validity of service of process by publication upon a party to a civil action whose address, whereabouts, or usual place of abode is unknown. *McCoy v. McCoy*, 109.

§ 14. Service of Process on Foreign Corporation

It would violate due process to subject a foreign corporation to the in personam jurisdiction of the N. C. courts in an action for breach of contract which arose in another state while plaintiff was living there and is unrelated to defendant's nominal contacts with this State. *Dillon v. Funding Corp.*, 513.

PROCESS — Continued

§ 16. Service on Nonresidents in Action to Recover for Negligent Operation of Automobile in This State

Service of process on nonresident motorist through the Comr. of Motor Vehicles was defective without affidavits of compliance and other documents required by statute, but the ends of justice require that the cause be remanded for a rehearing on defendants' motions to dismiss or quash the service of process. *Ridge v. Wright*, 609.

RAPE

§ 5. Sufficiency of Evidence

Evidence was sufficient for the jury in a rape prosecution. *S. v. Norman*, 606.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 3. Actions

A member of an unincorporated Baptist church had no standing to maintain an action against the church for bodily injuries sustained while in the church. *Williamson v. Wallace*, 370.

ROBBERY

§ 2. Indictment

Variance between the indictment charging robbery and the evidence showing an attempt to rob was not material. *S. v. Cherry*, 599.

The acts of defendant in robbing two people in a store constituted two separate and distinct offenses. *S. v. Gibbs*, 647.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Trial court in an armed robbery case did not err in summarization of the evidence. *S. v. Bobbitt*, 155.

In an armed robbery prosecution wherein the indictment referred to the armed robbery of a grocery store stock clerk, defendant was not prejudiced by the court's instruction that defendant would be guilty if the jury found defendant robbed the stock clerk or a female store employee. *S. v. Martin*, 17.

A defendant, having been convicted of armed robbery, cannot be convicted of the lesser offense of assault with a deadly weapon where both offenses arise out of the same act. *S. v. Graham*, 234.

Trial court's improper instruction on attempted armed robbery was not prejudicial to defendant where the court gave a subsequent correct instruction. *S. v. Cherry*, 599.

Trial court in a prosecution for attempted armed robbery did not err in failing to submit an issue as to defendant's guilt of assault on a female. *S. v. Sanders*, 662.

RULES OF CIVIL PROCEDURE

§ 4. Process

Issuance of a summons is not essential to the validity of service of process by publication upon a party to a civil action whose address, whereabouts, or usual place of abode is unknown. *McCoy v. McCoy*, 109.

RULES OF CIVIL PROCEDURE — Continued

Where the original summons was issued and complaint filed but both were returned unserved as to defendant, the action was discontinued as to him, and plaintiff's effort to serve process by publication 5½ years later did not revive the action. *Byrd v. Watts Hospital*, 564.

§ 8. General Rules of Pleadings

The plea of payment is an affirmative one and the burden of showing payment must be assumed by the party interposing it. *Recreatives, Inc. v. Motorcycles Co.*, 727.

§ 12. Defenses and Objections

Defendant could properly assert statute of limitations in a Rule 12 motion to dismiss. *Travis v. McLaughlin*, 389.

§ 15. Amendment of Pleadings

Trial court did not err in refusing to permit plaintiff to amend her pleadings. *Johnson v. Austin*, 415.

§ 17. Parties Plaintiff and Defendant

A real estate agent can properly bring an action to recover on a check made payable to the agent and which had been given to the agent as earnest money to apply on the purchase price of property the agent was selling for another. *Reeves v. Jurney*, 739.

Trial court erred in refusing to consider a ratification of a real estate agent's action filed by the owners of the property in question after completion of the trial but before judgment. *Ibid.*

§ 41. Dismissal of Action

Plaintiff's post-trial motion for voluntary dismissal and the proceedings thereon constituted an abandonment of plaintiff's appeal from the directed verdict for defendant, and trial court then had authority to grant plaintiff's motion for voluntary dismissal. *Bowen v. Motor Co.*, 463.

§ 50. Motion for Directed Verdict and for Judgment N.O.V.

Trial court erred in directing verdict for plaintiff in an action on a guaranty of credit extended to a corporation. *Lowe's v. Curry*, 229.

Trial court did not err in granting, in the alternative, defendant's motion for a new trial. *Burnette v. Perdue*, 689.

§ 52. Findings by the Court

When the judge of superior court reviews the decision of an administrative agency, the judge is not required to make findings of fact, nor is the judge required to entertain a motion pursuant to Rule 52 to have the court amend its findings, make additional findings or amend its decision and order. *Markham v. Swails*, 205.

§ 54. Judgments

Appeal from judgment adjudicating fewer than all the claims of the parties is premature. *McRae v. Moore*, 507; *Reid v. Reid*, 754.

§ 56. Summary Judgment

In a motion for summary judgment pursuant to Rule 56, the court does not decide facts. *Furst v. Loftin*, 248.

RULES OF CIVIL PROCEDURE — Continued

Trial court did not err in considering defendant's affidavit verifying his answer though it was filed on the date of the summary judgment hearing. *Siders v. Gibbs*, 540.

§ 60. Relief from Judgment or Order

Defendants' motion to set aside summary judgment against them was properly dismissed by the trial court where defendants stated neither the rule upon which they were proceeding nor the specific grounds upon which they sought relief. *Sherman v. Myers*, 29.

Superior court judge had no authority after expiration of both the term of court and his commission to amend an order by reversing it as to court costs and bond forfeiture. *Snell v. Board of Education*, 31.

§ 68.1. Confession of Judgment

Defendant was not entitled to relief from a judgment by confession on the ground that he did not receive written notice of the entry of such judgment. *Rivers v. Rivers*, 172.

SALES

§ 6. Implied Warranties

There is no implied warranty of livability applicable to a commercial structure. *Industries, Inc. v. Construction Co.*, 270.

SCHOOLS

§ 4. General Duties and Authority of Boards of Education

Defendant board of education violated the State open meetings law by constituting itself a committee of the whole and in closed session investigating persons to fill a vacancy on the board and in voting for the person to fill the vacancy by secret ballot. *Publishing Co. v. Board of Education*, 37.

Trial court erred in ordering an election to fill a vacancy on the Gaston County Board of Education. *Fogle v. Board of Education*, 423.

§ 5. Budget and Expenditures

Trial court did not err in ordering a special venire of jurors from another county to hear a dispute between a city board of education and a board of county commissioners as to the amount of capital outlay funds necessary for the board of education. *Bd. of Education v. Bd. of Comrs.*, 554.

§ 11. Liability for Torts

There was no causal connection between the death of a high school football player in a collision with an ineligible player on the opposing team and defendants' negligence in the preparation of an eligibility list and in allowing an ineligible player to participate in the game. *Barrett v. Phillips*, 220.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Officers lawfully conducted a warrantless search of the car in which defendants were riding after removing it to the sheriff's office. *S. v. Johnson*, 534.

SEARCHES AND SEIZURES — Continued

An officer's search of defendant without a warrant did not violate Federal and State Constitutions. *S. v. Johnson,* 698.

§ 2. Consent to Search Without Necessary Warrant

Officers lawfully searched defendant's apartment where another occupant gave them written permission for the search. *S. v. Crawford,* 117.

Warrant was not necessary for search of a truck at the police station where defendant who owned the truck consented to the search. *S. v. Sharratt,* 199.

Trial court did not err in failing to conduct a voir dire to determine the validity of a search of defendant's automobile where the record shows consent. *S. v. Aaron,* 582.

§ 3. Requisites and Validity of Search Warrant

An affidavit was sufficient to support issuance of a warrant to search defendants' premises for THC. *S. v. Oldfield,* 131.

Officer's affidavit based on information received from a confidential informant was sufficient to support the issuance of a search warrant for marijuana. *S. v. Hayes,* 356.

Affidavit based on information received from a confidential informant was sufficient to support issuance of a warrant to search defendants' premises for narcotics. *S. v. Sousa,* 473.

Warrant authorizing a search of defendant's premises for "marijuana and LSD" was not invalid on ground the affidavit showed probable cause only as to the presence of LSD. *Ibid.*

§ 4. Search Under the Warrant

Seizure of marijuana under a warrant to search for THC was proper. *S. v. Oldfield,* 131.

TAXATION

§ 25. Ad Valorem Taxes

The Property Tax Commission properly dismissed appeal by petitioners seeking a percentage reduction of all farm property in the county. *Brock v. Property Tax Comm.,* 324.

A resident and property owner of Pitt County had standing to attack broadly the percentage method of appraisal of household property in Pitt County. *In re Appeal of Bosley,* 468.

The percentage method of appraisal of household personal property in Pitt County does not result in an improper classification of property, satisfies the requirement of appraisal at market value, and does not result in the determination of the value of personal property only every eight years in violation of G.S. 105-285(b). *Ibid.*

TORTS

§ 7. Release From Liability

In an action to recover damages for injuries sustained in an automobile collision, plaintiff's pleading of a settlement and release signed by defendant as a bar to defendant's counterclaim constituted a ratification of the settlement and barred plaintiff's action. *Johnson v. Austin,* 415.

TRIAL

§ 33. Statement of Evidence and Application of Law Thereto

Trial court in an action to recover on an insurance policy erred in failing to declare and explain the law arising on the evidence. *Mozingo v. Insurance Co.*, 352.

§ 36. Expression of Opinion on Evidence in Instructions

Defendants are entitled to a new trial where the trial court stated an opinion in charging the jury that one witness had corroborated the testimony of another witness. *Williford v. Jackson*, 128.

§ 38. Request for Instructions

Trial court's instructions in an action for wrongful death were in essence those requested by plaintiff. *Anderson v. Smith*, 72.

§ 42. Form and Sufficiency of Verdict

Jury's verdict was not inconsistent in finding defendant was indebted to plaintiff for goods and services and that defendant was entitled to recover damages for plaintiff's breach of contract. *Weyerhaeuser Co. v. Supply Co.*, 235.

§ 45. Acceptance or Rejection of Verdict by the Court

Where the jury returned inconsistent answers to damage issues, it was within the court's discretion either to resubmit all issues or to resubmit only issues as to damages. *Bank v. Pocock*, 52.

§ 58. Nonjury Trial — Findings and Judgment

Violation of the parol evidence rule in a nonjury trial was not prejudicial error. *Nybor Corp. v. Restaurants, Inc.*, 642.

TROVER AND CONVERSION

§ 2. Procedure and Damages

Trial court erred in its award of actual and punitive damages for conversion of the player portion of a piano where the court failed to make findings of fact as to its value. *Fagan v. Hazzard*, 618.

UNFAIR COMPETITION

The distance between similar restaurants and their dissimilar names removed as a matter of law any possibility that defendants were palming off their restaurant as one of plantiff's family of restaurants. *Foods Corp. v. Tuesday's*, 519.

UNIFORM COMMERCIAL CODE

§ 13. Form and Formation of Contract

In an action on a contract to purchase motorcycles, trial court did not err in refusing to allow defendant's parol evidence indicating a consignment arrangement between the parties. *Recreatives, Inc. v. Motorcycles Co.*, 727.

§ 29. Signatures

Defendants were personally obligated on a guaranty of a corporation's note signed by defendants in a representative capacity. *Bank v. Pocock*, 52.

UNIFORM COMMERCIAL CODE — Continued

§ 30. Acceptance and Endorsement

The evidence was sufficient to support the court's findings that there was no agreement between two indorsers of a note that they would be jointly and severally liable and that the indorsers were liable in the order in which they indorsed the note. *Wilson v. Turner,* 101.

§ 79. Public Sale of Collateral

A tractor which was collateral for a purchase money security agreement was not disposed of by the secured creditor in a commercially reasonable manner where debtors were not given notice by registered or certified mail. *Hodges v. Norton,* 193.

Where a secured creditor disposes of collateral without giving the debtor proper notice and in a manner that is not commercially reasonable, the debt is to be credited with the amount which should have been obtained through a sale conducted in a reasonably commercial manner. *Ibid.*

UTILITIES COMMISSION

§ 6. Hearings and Orders; Rates

Fossil fuel adjustment clause for an electric utility is valid. *Utilities Comm. v. Edmisten,* 258.

The Utilities Commission had authority to modify an order allowing an interim rate increase by granting an additional interim rate increase without basing such further order on new evidence competent to support a final order in a general rate case. *Utilities Comm. v. Edmisten,* 428.

The Commission did not err in failing to order a power company to refund revenues collected subject to refund during the pendency of a general rate hearing. *Ibid.*

Evidence supported the Commission's judgment that 8.24 percent was a fair rate of return to be allowed on a power company's fair value rate base as determined by the Commission and that 10.44 percent was a fair rate of return on the company's fair value equity. *Ibid.*

The Commission did not err in approving elimination of previously established textile mill, high load factor and military service customer classifications in a power company's rate structure. *Ibid.*

VENUE

§ 2. Residence of Parties

Action by an administrator is properly brought in the county where the administrator resides. *Klass v. Hayes,* 658.

§ 5. Actions Involving Title to or Right to Possession of Property

Administrator's action to rescind a contract of sale of stock on grounds of mental incapacity and breach of fiduciary obligation by defendant was not removable as a matter of right to the county where the stock certificates are located. *Klass v. Hayes,* 658.

WATERS AND WATERCOURSES

§ 1. Surface Waters

Defendant city was not negligent in replacing a culvert with a larger culvert so that larger debris passed through the replacement and blocked plaintiff's smaller culverts. *Tent Co. v. Winston-Salem*, 297.

WILLS

§ 16. Parties

Defendant who had no standing to file a caveat to testator's will was not subsequently estopped to question the validity of the remainder provision of the will because of her failure to file a caveat. *Palmer v. Ketner*, 187.

§ 41. Rule Against Perpetuities

Testator's will violated the rule against perpetuities and his property therefore passed by intestate succession. *Palmer v. Ketner*, 187.

§ 48. Whether Adopted Children Take as Members of Class

Devise of a remainder to the children of testator's daughter included adopted children of the daughter. *Simpson v. Simpson*, 14.

§ 59. Right of Subscribing Witness to Take Under Will

A subscribing witness to a will was not estopped to question the validity of the remainder provision of the will. *Palmer v. Ketner*, 187.

§ 60. Renunciation

Propounders in a caveat proceeding satisfied their burden of showing there was no genuine issue of fact in controversy when they submitted caveator's release and renunciation of his share of testator's estate, and caveator's contention that there was a genuine issue of material fact with respect to adequacy of consideration and obtaining release by false representations or undue influence were without merit. *In re Will of Edgerton*, 60.

WITNESSES

§ 6. Evidence Competent to Impeach or Discredit Witness

Trial court did not err in permitting defense counsel to cross-examine a witness about a statement he had given to an insurance adjuster. *Maness v. Ingram*, 26.

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